NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 15

SPRING SESSION 1972

RALEIGH
1973

CITE THIS VOLUME

15 N.C. App.

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OF
NORTH CAROLINA

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[1]Elected 7 November 1972. Took office 1 January 1973.
[2]Resigned 28 December 1972. Succeeded by D. Marsh McLelland, Burlington, 28 December 1972.
[3]Appointed 1 December 1972 to succeed Walter E. Johnston who died 6 August 1972.
[4]Retired and appointed Emergency Judge 1 December 1972. Succeeded by Julius A. Rousseau, Jr., North Wilkesboro, 8 December 1972.
[5]Appointed 1 December 1972.

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[1]Elected 7 November 1972. Took office 1 December 1972.
[2]Appointed 30 December 1972 to succeed D. Marsh McLelland.
[3]Appointed 4 January 1973 to succeed Joe F. Mull retired 31 December 1972.
[4]Appointed 19 December 1972.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION 1972

STATE OF NORTH CAROLINA v. MICHAEL EDWARD WESTRY

— AND —

STATE OF NORTH CAROLINA v. ALGERNON McCUTCHEON

— AND —

STATE OF NORTH CAROLINA v. WALTER CURTIS MILLER

— AND —

STATE OF NORTH CAROLINA v. FRANKLIN MONROE ABBNEY

No. 7218SC205

(Filed 28 June 1972)

1. **Criminal Law § 168; Robbery § 5— reading of statute to jury — punishment provision — absence of prejudice**

   In this prosecution for armed robbery, any error resulting from the court's reading of the armed robbery statute to the jury, including the provision for the punishment for such crime, was neither material nor prejudicial, although such practice is not approved.

2. **Criminal Law § 111— instructions — aiding and abetting — felonious intent**

   No exact forms or words are required to instruct the jury properly upon "aiding or abetting" or "felonious intent."

3. **Criminal Law § 112— instructions — aiding and abetting — felonious intent**

   The trial court's instructions on aiding and abetting and felonious intent were free from prejudicial error when the charge is considered as a contextual whole.

4. **Criminal Law § 66— in-court identification — prior identification at arrest scene — absence of counsel**

   Robbery victims' in-court identifications of defendants were not tainted or rendered inadmissible by reason of their having viewed

and identified defendants at the scene of defendants' arrest while defendants were unrepresented by counsel, where the victims had ample opportunity to observe defendants during the robbery and the court found that their in-court identifications were based upon these independent observations, the confrontation at the arrest scene occurred only an hour after the robbery, no active cooperation other than their presence was required of defendants, all of the physical evidence and prior descriptions corroborated the identifications, and the trial judge conducted a full and fair *voir dire* hearing and concluded that the victims' identification testimony would not be "tainted" by improper out-of-court identification.

5. Arrest and Bail § 3— arrest without warrant — probable cause — information received by radio

Police officer had probable cause to arrest defendants without a warrant for armed robbery where the officer had received a radio transmission advising him that a robbery had been committed by four Negro males in a 1967 or 1968 Dodge Charger displaying a District of Columbia license plate reading "GWYNN," and defendants and the automobile in which they were riding met the description given to the officer by radio. G.S. 15-41(2).

6. Criminal Law § 87— leading questions

Leading questions are permissible under certain circumstances and, absent an abuse, are within the discretion of the trial judge.

7. Indictment and Warrant § 13— bill of particulars — discretion of court

A motion for a bill of particulars is addressed to the sound discretion of the trial court, and his decision will not be disturbed on appeal in the absence of a demonstrable abuse of discretion.

8. Indictment and Warrant § 13— motion for bill of particulars — denial

The trial court in an armed robbery prosecution did not abuse its discretion in the denial of defendant's motion for a bill of particulars, where the indictment sufficiently apprised defendant of the nature and details of the crime charged, and it has not been shown that any of the State's evidence at the trial was a surprise to defendant or was not within his personal knowledge.

9. Criminal Law § 98— trial in prison clothes

Defendants were not required to stand trial in prison clothes in violation of G.S. 15-176, defendants having objected to being placed on trial "in a gray shirt and gray trousers," where the record shows that the State had offered to return to them the clothes they had on when arrested and had offered them the opportunity to obtain other clothing, and that defendants, through their respective counsel, refused to accept the return of clothing by the State or to obtain other attire.

10. Criminal Law §§ 66, 88— voir dire — cross-examination — refusal to allow by counsel for one defendant

In this consolidated trial of four defendants, the trial court did not err in denying counsel for one defendant the right to cross-examine a State's witness during a *voir dire* hearing to determine

whether the witness' identification testimony was tainted by prior out-of-court identification procedures, where the witness had at no time purported to identify such defendant and did not do so at the trial, and counsel for such defendant was permitted to cross-examine the witness before the jury.

11. Robbery § 4— armed robbery — sufficiency of evidence

The State's evidence in an armed robbery prosecution, including eyewitness testimony and evidence that weapons used in the robbery and fruits of the robbery were found on defendants' persons and in the vehicle in which they were riding, was sufficient for submission to the jury as to the guilt of all four defendants.

APPEAL by defendants from *Seay, Judge,* 9 August 1971 Criminal Session of Superior Court held in GUILFORD County.

The defendants were charged in separate bills of indictment, proper in form, with the felony of armed robbery and the cases were consolidated for trial.

The evidence for the State tended to show the following: About 7:30 p.m. on the evening of 21 June 1971, four Negro men entered the Coburn Finance Company (Coburn) on North Elm Street in Greensboro, North Carolina. Three of Coburn's employees were at the office at the time: Mr. Gary Knight (Knight), the acting manager; Linda Karen Greeson (Greeson), the cashier; and Mr. Walter Snow (Snow), an assistant manager. One of the Negro men, the defendant Miller, produced a gun from underneath a coat that he had draped over his shoulder and told Knight, "This is a holdup." The defendant Abbney also had a gun. The Coburn employees were ordered to a back room, where they were bound by the defendants and interrogated at gunpoint as to the location of a safe. The defendants took $773.19 in cash from Coburn's cash drawer, $240.00 in cash from the person of Knight, $155.00 in cash from the person of Snow and some personal property, including a billfold, watch and ring, from Greeson.

Upon leaving Coburn's premises and while in an alleyway and on Elm Street, the defendants were seen by three men, State's witnesses Williams, Todd and Freeman, who were leaving their work site at the Southeastern Building to return to their office on Greene Street by way of Elm Street. All of these witnesses testified at the trial that they took particular notice of the defendants due to their somewhat unusual appearance and manner. In addition, they also noticed a blue and white

Dodge Charger automobile parked on Greene Street in front of the witnesses' office, and Freeman testified that he saw the four Negro men get into this automobile and depart. Williams testified that the automobile had "a personalized (license) tag on it that was different."

State's witness J. T. Lumen of the Greensboro Police Department testified that about a "quarter to seven" on 21 June 1971, he had seen "several Negro subjects" in a 1968 Dodge Charger automobile bearing a District of Columbia license plate with the word "GWYNN."

After the defendants had left Coburn's office, Knight, Greeson and Snow quickly freed themselves and notified the Greensboro police, who made an investigation at the scene, interviewed witnesses (including Williams, Todd and Freeman) and made a radio "transmission" to other law enforcement officers in the State advising them to be on the lookout for four Negro males in a 1967 or 1968 Dodge Charger displaying a personalized District of Columbia license plate reading "GWYNN."

About 8:15 p.m. on the same evening, State Highway Patrolman D. B. Durham, on routine patrol in Rockingham County, observed an automobile matching the foregoing description traveling toward Reidsville on Highway 29, called for help and was almost immediately joined by a Reidsville Police Department vehicle operated by Sergeant Bill Harvey. In response to the patrolman's blue light and siren, the Dodge automobile stopped by the side of the road. Officer Durham parked behind the Dodge, approached the vehicle with his gun drawn, and instructed the occupants to get out of the automobile and to place their hands above their heads. At one point, the defendant Miller "grabbed for my (the patrolman's) gun." The officers subdued him and then "handcuffed him and placed him in the patrol car." Defendants Abbney, McCutcheon and Westry emerged from the vehicle and stood by the Dodge automobile, and Patrolman Durham made a call to the Greensboro Police Department.

Upon looking into the Dodge automobile, the officers observed a fully loaded, nickel-plated, pearl-handled .38 revolver (State's Exhibit 7) partially underneath the front seat but otherwise in plain view. In addition, two other guns, some money "pushed down between the (back) seat and the side panel" but "sticking up" and visible, other smaller amounts of money in

coin, a green canvas bag, some 38-calibre ammunition, some twine (which was the same in appearance as that used to bind the Coburn employees) and other items were found in the Dodge Charger automobile while it was stopped on Highway 29 and later after it was returned to a garage in Greensboro. It also appeared that the automobile in which the defendants were riding had been stolen, inasmuch as none of the four was its owner.

Members of the Greensboro Police Department, in response to Patrolman Durham's call, quickly arrived (about 8:40 p.m.) at the scene on Highway 29 where the Dodge automobile had been stopped and the defendants detained, bringing with them the victims of the armed robbery, Knight, Greeson and Snow. Each of these victims was asked to observe the four defendants, who were handcuffed and standing beside the Dodge automobile, but to say nothing at that time. Upon learning that the victims recognized the four defendants as being the four men who had robbed them and Coburn Finance Company at gunpoint, Greensboro Detective W. E. McNair advised the defendants that they were under arrest for armed robbery and instructed other Greensboro officers to take the defendants (and the Dodge automobile) back to Greensboro.

Approximately 9:30 p.m. on the same evening, the defendant Westry was searched and a Campbell College class ring with the initials "LKG" inscribed on the inside was found on his person. In open court, Linda Karen Greeson identified this ring as being the one taken from her during the course of the armed robbery of Coburn on 21 June 1971.

In court, Knight, Greeson, Snow, Williams, Todd and Freeman each identified some of the defendants. Although none of these witnesses for the State could identify all four of the defendants, each defendant was identified in court by at least one of the victims, Knight, Greeson or Snow and by at least one of the other State's witnesses, Williams, Todd or Freeman. The defendant Miller was identified by five of these six witnesses for the State, the defendants Abbney and McCutcheon by four each, and the defendant Westry by two. In addition, a latent palm print obtained from surfaces at the Coburn office shortly after the armed robbery were identified by an agent of the Federal Bureau of Investigation as being that of the defendant McCutheon.

The defendants presented no evidence.

The jury returned a verdict of guilty of armed robbery as to each of the defendants, and thereupon, the court imposed judgment that each defendant be imprisoned for a term of not less than twenty-five nor more than thirty years (twenty to thirty years as to the defendant Westry). From the foregoing judgments, each defendant appealed to the Court of Appeals.

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

Public Defenders Wallace C. Harrelson and Dale Shepherd for defendant appellants.

MALLARD, Chief Judge.

In the trial in superior court, the defendant Westry was represented by the Public Defenders for the Eighteenth Judicial District and each of the other defendants individually by appointed counsel. Based upon a total of more than 170 exceptions and 150 assignments of error, these defendants present eleven questions for decision on this appeal. Eight of these questions are common to all of the defendants, one pertains to both defendants Miller and Abbney, one pertains only to the defendant McCutcheon and another pertains only to the defendant Westry. This is the proper and preferred manner of perfecting a joint appeal and is commendable. We shall consider each question separately, with appropriate designation when the question applies to fewer than all of the defendants.

[1] The first question involved in this appeal is whether the court erred "in charging the jury on the punishment that the charged crime carried." The defendants rely primarily upon the case of *State v. Rhodes,* 275 N.C. 584, 169 S.E. 2d 846 (1969), but that case is not controlling under the present circumstances. In *Rhodes,* the jury returned to the courtroom after having begun their deliberations and specifically requested to know the penalty for one of the lesser included offenses of the crime charged, which implied that such information would have a bearing upon their decision of guilt or innocence. Even so, the Supreme Court held that the error committed in informing the jury of the maximum penalty involved was not prejudicial, adding that: "It does not follow, however, that instructions disclosing the punishment authorized by statute will always constitute prejudicial error."

In the case before us, the only mention of "punishment" in Judge Seay's instructions was when the applicable statute, G.S. 14-87, was read verbatim to the jury. Although this practice is not approved in an armed robbery case, we think that in the present case any error resulting from a plain reading of the statute without further comment was neither material nor prejudicial. See *State v. Hill,* 9 N.C. App. 410, 176 S.E. 2d 350 (1970).

[2, 3] The defendants, in questions "II" and "III," also contend that the court erred in its charge to the jury concerning "aiding and abetting" and as to "felonious intent." No exact forms or words are required to properly instruct a jury upon "aiding and abetting" or "felonious intent." See *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572 (1965); *State v. Anderson,* 5 N.C. App. 492, 168 S.E. 2d 444 (1969). When the *entire* "Charge of the Court" as it appears in the record on appeal is considered as a contextual whole, we hold that it is free from prejudicial error.

[4] The defendants' fourth contention is that the court committed error "in refusing to allow the motion to suppress the identification of the defendants made by Linda Greeson, Walter Snow and Gary Knight, and in finding that the identification made by these three witnesses was not tainted by an improper identification procedure." In this regard, we note that the trial judge conducted exhaustive pre-trial voir dire examinations, examinations covering over fifty pages in the record on appeal, to determine the propriety of admitting such identification testimony and found that the in-court identification would not be "tainted by an improper out-of-court identification; that there was no improper out-of-court identification; and that no suggestions were made by any police officers as to the identity of the participants in the alleged robbery."

As previously set out, the four defendants were stopped on Highway 29 near Reidsville by a State highway patrolman as the result of a radio transmission describing the defendants and the automobile in which they were riding. Shortly thereafter (within less than an hour), members of the Greensboro Police Department transported the three victims of the robbery to the point on Highway 29 where the defendants were being detained and the defendants were initially identified at that time. Additionally, the witness Greeson was asked at the time the

defendants were being photographed in Greensboro on the same evening "what each of them that she had identified did during the robbery."

The defendants contend that two points are raised by this procedure: (1) "whether the identification procedure was too suggestive" and (2) "whether the defendants were denied rights to counsel because of the lineup," and rely primarily upon the cases of *United States v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967) and *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967). The effect and application of these two cases, and of other constitutional considerations, have been much discussed and analyzed both by this court and by the North Carolina Supreme Court in a number of subsequent opinions involving similar pre-trial identifications. The following cases have uniformly held that the absence of counsel during such out-of-court identification procedures (contrary to the assertion in defendants' brief, there was no "lineup" in the present case) is not necessarily violative of an accused's constitutional rights and does not require the suppression or exclusion of subsequent in-court identification testimony. *State v. Banner,* 279 N.C. 595, 184 S.E. 2d 257 (1971); *State v. Thompson,* 278 N.C. 277, 179 S.E. 2d 315 (1971); *State v. Murphy,* 10 N.C. App. 11, 177 S.E. 2d 917 (1970), *appeal dismissed,* 277 N.C. 727, *cert. denied,* 278 N.C. 105; *State v. Gatling,* 5 N.C. App. 536, 169 S.E. 2d 60 (1969), *aff'd.,* 275 N.C. 625, and *State v. Bertha,* 4 N.C. App. 422, 167 S.E. 2d 33 (1969). See also, *Russell v. United States,* 408 F. 2d 1280 (D.C. 1969), *cert. denied,* 395 U.S. 928, 23 L.Ed. 2d 245, 89 S.Ct. 1786 (1969); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970), *cert. denied,* 400 U.S. 946; *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968); *State v. Accor* and *State v. Moore,* 13 N.C. App. 10, 185 S.E. 2d 261 (1971), *aff'd.,* 281 N.C. 287 (1972) and *State v. Stamey,* 3 N.C. App. 200, 164 S.E. 2d 547 (1968).

We further note that in the present case the victims of the crime had ample opportunity to observe the defendants during the course of the robbery and that they indicated during the voir dire examinations and the court found that their in-court identification was based upon this independent observation, that the defendants were apprehended within one hour after the commission of the armed robbery and were confronted with the identifying witnesses within a matter of min-

utes thereafter, that no active cooperation (other than their presence) was required of the defendants, that all of the physical evidence and prior descriptions corroborated the identifications and, primarily, that the trial judge conducted full and fair voir dire examinations and concluded that the witnesses' identification testimony of the defendants would not be "tainted" by improper out-of-court identification.

In *State v. Banner, supra,* Justice Higgins made the following observations:

> " * * * Both federal and state cases hold evidence of a prior identification will not invalidate the in-court identification unless the former was fundamentally unfair. The totality of the circumstances surrounding the prior identification will determine its admissibility at the trial. To remove the likelihood of a false identification is the purpose of the exclusionary rule. If the in-court identification is of independent origin, a prior confrontation of a suspect in the custody of the officers will not warrant excluding the identifying testimony. *Foster v. California,* 394 U.S. 440, 22 L.Ed. 2d 402; *State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507, and cases therein cited.
>
> This the officers knew: The defendant was arrested near the time and place of the robbery, attired in a shirt with alternating white and gold stripes around the body, golden orange colored corduroy trousers with a tear on the right hip. Surely this description with other evidence was sufficient to make out the case of robbery. However, to guard against charging one whom the victim might exonerate, the officers requested the witness to look at the defendant. The physical evidence was sufficient to make out the case. Hence the defendant's chance of release depended not on a failure of the witness to identify him, but on her opinion he was not the robber. The confrontation was to guard against holding the wrong man. *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732."

The assignments of error relating to the court's refusal to suppress the identification of the defendants made by witnesses Knight, Greeson and Snow are overruled.

[5] The defendant's fifth contention is that the trial court erred "in failing to find that there was no probable cause for

the arrest of all the defendants and in finding that the arrests were valid." This contention is also without merit. The defendants would have us make the distinction between probable cause and "mere suspicion." Without again setting forth the entire factual situation in the case before us, we think that Patrolman Durham was justified in assuming, based upon the radio "alert" that he had just received, that the four Negro men he observed traveling north from Greensboro in a 1968 blue and white Dodge Charger automobile bearing the District of Columbia license plate "GWYNN" were the same men as those just described to him as the perpetrators of an armed robbery.

G.S. 15-41, in pertinent part, provides: "A peace officer may without a warrant arrest a person: . . . (2) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody." We hold that the officer in the present case had reasonable grounds to stop and take into custody the defendants; indeed we cannot conceive how law enforcement officers would be able to function in such cases were it to be held otherwise. These assignments of error are also overruled. See *State v. Jackson,* 280 N.C. 122, 185 S.E. 2d 202 (1971); *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied,* 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936 (1966), and 1 Strong, N. C. Index 2d, Arrest and Bail, § 3.

The defendant's sixth contention concerns the admission into evidence of a number of items obtained from the search of their persons and the Dodge automobile in which they were riding, and requires no discussion in light of our holding above that probable cause existed for the detention and arrest of the defendants. The assignments of error relating to the admission of this real evidence are overruled.

[6] The next question presented concerns the use of allegedly leading questions by the solicitor. Leading questions are permissible under certain circumstances and, absent an abuse, are within the discretion of the trial judge, but defendants characterize the solicitor's "leading" in the present case as being so "continual (almost continuous)" and "blatent" as to constitute reversible error. We do not agree. We have reviewed with care

those portions of the record on appeal referred to by the defendants and, even conceding that some leading questions were permitted, the evidence was competent and no abuse of discretion is made to appear. See 2 Strong, N. C. Index 2d, Criminal Law, § 87, and cases cited therein.

[7] The next question, denominated "VIII" in the defendant's brief, applies only to the defendant McCutcheon, who contends that the court erred failing to grant his motion for a bill of particulars. Again, this is a matter addressed to the sound discretion of the trial court, and his decision will not be disturbed on appeal in the absence of a demonstrable abuse of discretion. *State v. Vandiver,* 265 N.C. 325, 144 S.E. 2d 54 (1965).

The indictment returned against the defendant McCutcheon reads as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Algernon McCutcheon late of the County of Guilford on the 21st day of June 1971 with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously having in possession and with the use and threatened use of a certain firearm, to wit: a pistol, whereby the lives of Gary Knight, Walter Snow and Linda Karen Greeson were endangered and threatened, did commit an assault upon and put in bodily fear the said Gary Knight, Walter Snow and Linda Karen Greeson and by means aforesaid and by threats of violence and by violence did unlawfully, wilfully and feloniously take, steal and carry away personal property, to wit, $1,148.19 in good and lawful money of the United States from the place of business known as Coburn Finance Corporation of North Carolina where, at said time, the said Gary Knight, Walter Snow and Linda Karen Greeson were in attendance, $240.00 of said money being the property of Gary Knight; $135.00 of said money being the property of Walter Snow; and $773.19 of said money being the property of Coburn Finance Corporation of North Carolina against the form of the statute in such case made and provided and against the peace and dignity of the State."

[8] The foregoing language is sufficient to apprise this defendant of the nature and details of the crime charged. We have

examined the "interrogatories" posed in this defendant's motion, and though much of the information requested might have been pertinent to his defense, we do not think that it appears that the trial judge abused his discretion in denying the motion, and the defendant McCutcheon's assignment of error pertaining thereto is overruled. It has not been shown that any of the evidence adduced at trial by the State was a surprise to the defendant or was not within his personal knowledge; therefore, no abuse of discretion has been shown. See *State v. McCabe* and *State v. Loften*, 1 N.C. App. 461, 162 S.E. 2d 66 (1968).

[9] The ninth question raised in the defendants' brief is stated as follows: "As to defendants Miller and Abbney, did the Court err in forcing the defendants to stand trial in prison clothes?" This question incorporates a misstatement of the facts as disclosed by the record and borders upon being frivolous. These defendants, in their brief, go further and contend:

> "The statute *explicitly* makes it unlawful for a defendant to be tried in prison clothes. G.S. 15-176. Yet the trial judge *forced* these two defendants to stand trial in such clothes. The statute reads in part that 'It shall be unlawful . . . and no person charged with a criminal offense shall be tried in any court while dressed in the uniform or dress of a prisoner or convict . . . . ' This could not be clearer. Failure to comply with this statute submitted the defendants to an ignominious defense and their chances of conviction were greatly increased. They were prejudiced by this action of the trial judge." (Emphasis added.)

We feel it is here appropriate to set out the entire statute, G.S. 15-176, including those portions that the defendants have omitted in their argument:

> *"Prisoner not to be tried in prison uniform.*—It shall be unlawful for any sheriff, jailer or other officer *to require* any person imprisoned in jail to appear in any court for trial dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with shaven or clipped head. And no person charged with a criminal offense shall be tried in any court while dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with head shaven or

clipped *by or under the direction and requirement* of any sheriff, jailer or other officer, unless the head was shaven or clipped while such person was serving a term of imprisonment for the commission of a crime.

Any sheriff, jailer or other officer who violates the provisions of this section shall be guilty of a misdemeanor." (Emphasis added.)

The record discloses that the defendants Miller, Abbney and McCutcheon, through their counsel, each objected to being placed on trial "in a gray shirt and gray trousers." (There is no evidence that a gray shirt and gray trousers are the uniform or dress of a prisoner or that they were anything other than ordinary civilian dress.) The record also shows that the State had offered to return to them the clothes they had on when they were arrested, that the defendants were offered the opportunity to obtain other clothing and that the defendants, through their respective counsel, refused to accept the return of clothing by the State or to obtain other attire. The motions in behalf of the defendants Abbney and Miller were overruled. (The record does not disclose whether the defendant McCutcheon was tried in "prison clothes," but no ruling was made as to his motion and no assignment of error appears in connection therewith.)

We fail to see how the trial judge "forced" these two defendants to stand trial in "prison clothes"; nor does G.S. 15-176 "explicitly" make it "unlawful for a defendant to be tried in prison clothes." If these defendants were each tried in "a gray shirt and gray trousers," it was entirely the result of their own refusal to wear the other clothing offered or to obtain other attire, and if they suffered prejudice as a result, it was entirely of their own making. The assignments of error in this regard are overruled.

[10] The question denominated "X" in the defendants' brief pertains only to the defendant Westry. This defendant contends therein that the trial judge erred in denying his counsel the right to cross-examine State's witness Gary Knight. This denial occurred during the voir dire examination of Knight. This examination was conducted solely to determine if his (and Greeson's and Snow's) testimony as to the identification of the defendants was tainted by prior out-of-court identification procedures and this was its entire scope. Knight had at no

time purported to identify the defendant Westry and did not do so at the trial. Counsel for the defendant Westry *was* permitted to cross-examine Knight *before the jury* and, in fact, did so. We hold that there was no prejudicial error committed when the trial judge sustained the State's objection to the cross-examination of Knight by Westry's counsel at the voir dire examination. It is quite true that Knight testified that four men were involved in the armed robbery, but the voir dire examination was not for the purpose of taking testimony in general but for the purpose of determining whether the witnesses could identify the specific defendants. This assignment of error is overruled. See also, 2 Strong, N. C. Index 2d, Criminal Law, § 88, p. 613, citing the holding in *State v. Hill*, 266 N.C. 103, 145 S.E. 2d 346 (1965), to the effect that no prejudicial error is committed where one defendant's counsel is not permitted to cross-examine a witness if counsel for a co-defendant is permitted full cross-examination inuring to the benefit of each of the defendants, all witnesses are fully examined and all features of the case are fully developed.

[11] The defendants' final contention is that, as to all of them, the trial court erred in failing to allow their motions for nonsuit. This contention is without merit; the evidence of the guilt of these defendants was amply sufficient to warrant presentation of the case to the jury. In fact, the combination of eyewitness testimony, the physical evidence and the introduction into evidence of the weapons and of the fruits of the armed robbery found on the defendants' persons and in the vehicle in which they were riding was little short of overwhelming. We have carefully examined the lengthy record in this case on appeal, and we hold that these defendants received a trial that was full, fair and objective. In the trial in superior court, we find no prejudicial error.

No error.

Judges CAMPBELL and BROCK concur.

CARL A. LINDSTROM AND VIRGINIA K. LINDSTROM, PLAINTIFFS v. WILLIAM J. CHESNUTT, JANE C. CHESNUTT, AND WILLIAM J. CHESNUTT, INC., DEFENDANTS AND THIRD PARTY PLAINTIFFS v. COMFORTEMP AIR CONDITIONERS, INC., THIRD PARTY DEFENDANTS

No. 7214SC281

(Filed 28 June 1972)

1. **Negligence § 29; Sales § 17— negligent installation of furnace — insufficiency of evidence**

In an action to recover damages for defects in a house constructed by corporate defendant, evidence of the original defendants was insufficient to support their claim that the third party defendant was guilty of joint and concurring negligence in improperly installing the furnace system so that it vibrated severely and caused girders to misalign, uneven settling and subsequent seepage of water on the inside of the foundation walls.

2. **Evidence § 47— expert testimony — invasion of province of jury**

In this action to recover damages for defects in a house purchased from defendant builder, testimony by an expert in structural engineering that faulty construction caused sagging of floors and certain cracking in the home did not invade the province of the jury, since the testimony could only have been considered by the jury as a statement of the witness' opinion.

3. **Damages § 13; Negligence § 27; Sales § 14— defects in construction of house — offer to repurchase — irrelevancy**

In an action to recover under theories of negligence and breach of warranty for defects in a house purchased from defendant builder, defendant's evidence of offers to repurchase the property from plaintiffs was irrelevant.

4. **Negligence § 37; Sales § 18— instructions — N. C. Building Code — alternative materials or methods — authority of Building Inspectors**

In an action to recover damages for defects in a house purchased from defendant builder, the trial court properly instructed the jury that the N. C. Residential Building Code does not give Building Inspectors discretion to permit alternative materials or methods of construction where the Code is specific as to the materials or type of construction required, but gives Inspectors discretion to permit materials or methods equivalent to the requirements of the Code only where the Code itself places discretion in the Inspectors or does not specifically set forth the materials or methods to be used.

5. **Negligence § 1— violation of building code**

A violation of the N. C. Building Code is negligence *per se.*

6. **Master and Servant § 22— defects in construction — negligence of subcontractor — independent contractor — liability of prime contractor**

In an action to recover damages for defects in a house purchased from defendant builder, the trial court properly refused to instruct

the jury that the builder-vendor would not be liable for any negligent acts or omissions on the part of subcontractors who were independent contractors.

7. Sales § 17— construction and sale of house — express warranty — breach — sufficiency of evidence

In this action to recover damages for defects in a home purchased from defendant builder, the evidence was sufficient to allow the jury to find an express warranty as to the quality of materials and workmanship and a breach thereof.

APPEAL by defendants William J. Chesnutt and William J. Chesnutt, Inc., from *McKinnon, Judge,* 7 September 1971, Civil Session, Superior Court, DURHAM County.

In August 1967 plaintiffs purchased a house which had been constructed by the corporate defendant upon a lot owned by the individual defendants in the City of Durham. The construction was nearing completion when the plaintiffs agreed to buy the house. After plaintiffs moved in the house certain defects became noticeable. This action was instituted 28 February 1969 asking for damages for breach of warranty or, in the alternative, for rescission of the contract. The defendants filed a third party complaint asking for contribution from Comfortemp Air Conditioners, Inc. The original defendants subsequently filed a motion for summary judgment. As the result of a hearing on the motion, plaintiffs elected to proceed on the theory of damages and abandon the rescission theory. At trial all defendants moved for a directed verdict. The motions were renewed at the end of all the evidence and allowed as to Jane C. Chesnutt and the third party defendant, Comfortemp Air Conditioners, Inc. The jury answered issues as to breach of warranty and negligence in favor of plaintiff and returned a verdict of $13,250. Defendants William J. Chesnutt and William J. Chesnutt, Inc., appealed.

Haywood, Denny and Miller, by George W. Miller, Jr., for plaintiff appellees.

Powe, Porter and Alphin, P.A., by Willis P. Wichard and James G. Billings, for appellants.

Brooks and Brooks, by Eugene C. Brooks III, for third party defendant, Comfortemp Air Conditioners, Inc., appellee.

MORRIS, Judge.

[1] By their sixth assignment of error, appellants challenge

the correctness of the court's allowing third party defendant's motion for directed verdict at the close of all the evidence. The original defendants filed a third party complaint alleging that if the third party plaintiff should be found to be negligent in construction of the house, "the third party defendant was guilty of joint and concurring negligence, which combined with that of the third party plaintiff in proximately causing the plaintiff's injury, in that improper and faulty installation of the furnace system by the third party defendant resulted in severe vibration" which shook the foundation walls causing girders to misalign, uneven settling and subsequent seepage of surface water on the inside of the foundation walls. Third party plaintiff asked for judgment against third party defendant for contribution in the amount of one-half of the damages and costs awarded to the plaintiff.

There was evidence that the furnace was a horizontal warm air flow through gas fired furnace typical of the type used when installation is to be in a crawl space, as this one was. There was also evidence that it was installed upon concrete blocks which were sitting upon the ground and that this was standard procedure in the area. There was also evidence that manufacturer's instructions provided that the recommended procedure when the furnace was to be located in a crawl space was that the installation be on a concrete pad one or two inches thick. The building code did not require installation of such a furnace to be on a concrete pad. The evidence further tended to show that in early September 1967 the furnace came on and the house filled with smoke, and that in early October the furnace "blasted occasionally whenever it lit." Third party defendant was called, and the repairman adjusted the pilot. The blasting continued, and third party defendant continued to respond to calls in an effort to correct the problem. In November, third party defendant replaced the furnace's burner and no further difficulty was experienced. The blasts were not of equal severity. The vibrations from the blasts shook the house, rattled doors and windows, and "the floors were noticeably raised." Plaintiff testified: "All the defective construction I noticed occurred after the furnace blew up."

We find no evidence of negligence on the part of third party defendant in the installation of the furnace. We said in

Jenkins v. Starrett Corp., 13 N.C. App. 437, 444, 186 S.E. 2d 198 (1972):

> "Inasmuch as the burden of establishing negligence is on the plaintiff, evidence which raises only a *conjecture* of negligence may not properly be submitted to the jury. To hold that evidence that a defendant *could have been* negligent is sufficient to go to a jury, in the absence of evidence, direct or circumstantial, that such a defendant *actually was* negligent, is to allow the jury to indulge in speculation and guesswork. (Citations omitted.)"

We agree with the trial tribunal that third party plaintiff failed to prove its claim for relief as alleged in its third party complaint. Assignment of error No. 6 is, therefore, overruled.

[2] Assignment of error No. 1 is directed to the court's refusal to grant defendants' motions to strike certain portions of the testimony of Henry Griset, testifying for plaintiff as an expert.

The testimony is as follows:

"Q. And do you have an opinion as to whether or not the type of construction that you observed as you have already testified to could have caused that cracking?

A. Yes, sir.

(Objection—overruled)

Q. All right, sir, now—

A. I didn't answer that. I said I had an opinion.

Q. What is your opinion?

A. Yes, sir, it did cause it.

(Objection and Motion to Strike—Denied)"

and

"Q. Should the jury find that the house was constructed in a manner that you have indicated, do you have an opinion as to whether or not that type of construction could have caused the sagging floors in the home?

(Objection—overruled)

A. The faults in the construction could have caused them—did cause them—yes, not could, but did.

(Motion to Strike—denied)."

Defendants contend that the witness's answers invaded the province of the jury; that they were statements of evidential facts in issue beyond the knowledge of the witness under the guise of an expert opinion. This witness's testimony consumed some 36 pages of the record. Without objection, he was found to be an expert in the field of structural engineering. He had testified at length about his personal examination of the structure on several occasions, the first of which was on 23 May 1968, at which time plaintiffs had been in the house only nine months. There had already been evidence of defective construction. This same witness had previously testified without objection: "Now, my inspection revealed no place where there were three nails that is required by the Code. The joint (sic) here must be nailed to the plate, too, and also revealed that these joists were spilt here (indicating), and they were not adequately joined together. They were just—just laid there, so that any such force as this *would be transmitted* in deflections here (illustrating on board). Again, if they are mild forces and ordinary forces the result *would be* finish damage. If they were severe enough, a severe windstorm, they *would* result in structural collapse of portions of this." (Emphasis supplied.) And: "Assuming the jury finds that the joists under the floor were humped or dropped down or deflected down, I have an opinion as to whether or not that condition could have caused the floors themselves to have dropped down. My opinion is *that did happen,* the deflection, but also I think some of the misalignment of the floors was built in, that is when the house was built, the prime structure of the floor joists were not perfectly level when the floor was laid on it." This witness had also previously testified that "[t]he materials in this house were poor and so was the workmanship." Assuming that the court's ruling in two instances in this witness's testimony, to which defendants take exception, constitute technical error, we do not perceive that defendants were prejudiced. We think the testimony was a statement of his opinion, and the jury could only have considered it as such. "Some positive statements can, in the nature of things, be only expressions of opinion." *Teague v. Power Co.,* 258 N.C. 759, 765, 129 S.E. 2d 507 (1963). See *Bruce v. Flying Service,* 234 N.C. 79, 66 S.E. 2d 312 (1951), and *Cranston Print Works v. Public Service Co. of N. C.,* 291 F. 2d 638 (4th Cir. 1961), where similar testimony was held admissible. This assignment of error is overruled.

[3] Defendants' third assignment of error is to the court's excluding testimony of defendant William J. Chesnutt with respect to his offers to repurchase the premises from plaintiffs and similar testimony sought to be elicited from plaintiff Carl Lindstrom on cross-examination, included in the record on voir dire examination. While the complaint did contain allegations and a prayer to have the contract and deed rescinded, plaintiffs were required to make an election and elected to proceed to trial on the theory of negligence and breach of warranty for which they sought monetary damages. We fail to see the relevancy of the excluded testimony to this theory. Nor do we find merit in the contention that defendants were prejudiced in that the evidence should have been admitted on the question of damages. Defendant testified as to his opinion of the values of the property and had every opportunity to present the opinion of anyone else as to the market values. His contention that plaintiff had testified that he had requested defendant Chesnutt to take the house back and was refused and defendants should be allowed to use the testimony for purposes of impeachment is also without merit. That request was made prior to the institution of this action, and no further conversation was had between plaintiffs and defendant Chesnutt. The excluded negotiations were between counsel for the parties and occurred some time later. It seems clear that the evidence, if admitted, would have been prejudicial to plaintiffs in the theory of the trial because the purport of the evidence would be that if defendants had made such an offer and it was refused, they should be relieved of further obligation and plaintiffs should not be allowed to recover damages. The evidence was irrelevant and properly excluded.

By their ninth and twelfth assignments of error, defendants contend the court erred (1) in refusing to instruct the jury in accordance with tendered instructions with respect to interpretation of § 33 of the North Carolina Uniform Residential Building Code, which section, in pertinent part, is as follows:

> "In interpreting the requirements or provisions of this Building Code, the decision of the Building Inspector shall be final. An appeal from the decision of the Building Inspector may be taken to the courts as provided by law.

'The Building Inspector shall have the authority to permit the use of materials or methods of construction not specifically set forth within the Code. Provided however, any such alternate materials or methods of construction is proved to the satisfaction of the Building Inspector to be at least the equivalent of the requirements prescribed by this Code for safey, strength, quality and effectiveness including fire resistance.' ";

and (2) in instructing the jury on other sections of the Code.

[4, 5] Defendants' tendered instructions would have interpreted § 33 of the Code as giving "the building inspector discretionary authority to permit the use of alternative materials or alternative methods of construction that are not specifically set forth within the code, so long as the building inspector is of the opinion that the alternative materials or methods are at least equivalent of (sic) the requirements specifically set forth in the code for safety, strength, quality and effectiveness, including fire resistance. Thus, if you find that alternative materials or methods of construction were used which were not specifically set forth within the North Carolina Uniform Residential Building Code, and if you find that the building inspector approved such alternate materials or methods of construction, then there would not be a violation of the North Carolina Uniform Residential Building Code with respect to each alternative use of materials or method of construction so approved by the building inspector."

The court charged the jury as follows:

"This provision of the N. C. Residential Building Code gives the Building Inspector discretionary authority to permit the use of alternative materials or alternative methods of construction that are not specifically set forth in the Code, if he is of the opinion that the alternative methods and materials are at least equivalent of the requirements set forth in the Code for safety, strength, quality and effectiveness.

However, it does not allow him to permit violations of the Building Code where the Code is specific as to the materials or type of construction required. So in areas where the Building Code itself places discretion in the Building Inspector as to what materials are used, or

> methods are not specifically set forth, then his decision and permission to allow alternative materials or methods at least as good as the Building Code would be permitted; but where the Code specifically says certain materials shall be used, he would not have the discretion to permit others to be used."

In support of their position, defendants cite no authority save the testimony of the building, plumbing, and electrical inspectors to the effect that they interpreted the Code as giving them wide latitude. The building inspector testified: "If there was a section that specifically set forth what was to be done, that is not what I required in every case . . . I worked under the assumption that I had the right under the code to base my interpretations on independent judgment." If this be true, Article 9, Chapter 143, General Statutes, authorizing and establishing a Building Code Council empowered and directed to prepare and adopt a North Carolina State Building Code in accordance with legislative directives contained in Article 9, is indeed a completely useless piece of legislation. Both contractors and home owners would be at the mercy of building inspectors, some of whose requirements might overly protect the owner while some might dangerously shield the contractor or builder. We note that the publication of the Code by the N. C. Building Code Council refers to it as being minimum requirements. To give the Code the interpretation proposed by defendants could have the result of abrogating the purposes of adopting the Code; viz, "to establish minimum standards, materials, designs, and construction of buildings for the safety of the occupants, their neighbors, and the public at large." *Walker v. City of Charlotte,* 276 N.C. 166, 170, 171 S.E. 2d 431 (1970). The N. C. Building Code has the force of law, *Drum v. Bisaner,* 252 N.C. 305, 113 S.E. 2d 560 (1960); any person adjudged to have violated the Code shall be guilty of a misdemeanor, G.S., 143-138(h); and a violation thereof is negligence *per se, Jenkins v. Electric Co.,* 254 N.C. 553, 119 S.E. 2d 767 (1961); *Drum v. Bisaner, supra; Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333 (1955). Upon application of these principles to the portions of the charge of the court challenged by these assignments, we conclude that the court properly instructed the jury upon the evidence presented.

[6] Defendants also tendered a requested instruction directing the jury to determine whether the masonry subcontractor, the

plumbing subcontractor, the electrical subcontractor and the heating and air conditioning subcontractor were independent contractors; defining independent contractors; and instructing the jury that if they should find that such a relationship existed, the defendants would not be liable for any negligent acts or omissions of any of their subcontractors. The tendered instruction was refused and this refusal is assigned as error (assignment of error No. 10). The court gave the following instruction:

> "As contractor and seller of the house, Mr. Chesnutt and his company would be responsible for any actions of his subcontractors either in failing to use good quality materials or to construct in a workmanlike manner, or any negligent conduct on their part, if he knew or reasonably should have known as general contractor or builder of the house of those conditions. He is not to be responsible for any such things which a reasonable man in his position as builder and contractor of the house would not have discovered, but the mere fact that work was done by a subcontractor does not relieve the contractor of responsibility if he by the exercise of reasonable care knew or should have known of the existence of those conditions."

Defendants by their answer did not set up a defense based on the liability of independent contractors but simply denied plaintiffs' allegations as to their negligence. In *Gaither Corp. v. Skinner,* 238 N.C. 254, 77 S.E. 2d 659 (1953), plaintiff had entered into a contract with defendant for the construction of a building in accordance with plans and specifications and for an agreed price. Plaintiff subsequently sued defendant alleging faulty and defective materials used by defendant in construction of the roof in breach of the contract, resulting in continued leaking, and demanded damages sufficient to replace the roof with one in accordance with the plans and specifications. Defendant denied the allegations and alleged that the roof construction had been let to a subcontractor and that if the subcontractor had failed to construct it in accordance with the specifications, which was denied, the subcontractor was responsible to plaintiff and to defendant. Defendant asked that the subcontractor be made a party and that if plaintiff recovered damages from defendant, that defendant recover damages over against the subcontractor. In affirming the trial court's dismissal of the subcontractor the Court said:

"The plaintiff has elected to pursue his action against the contractor with whom he contracted in order to recover damages for an alleged breach of that contract, and plaintiff should be permitted to do so without having contested litigation between the contractor and his subcontractor projected into the plaintiff's lawsuit. *Montgomery v. Blades,* 217 N.C. 654, 9 S.E. 2d 397.

The exact question here presented does not seem to have been heretofore decided by this Court. However, in *Board of Education v. Deitrick,* 221 N.C. 38, 18 S.E. 2d 704, where the general contractor, who had been sued for damages for using green and defective lumber in the building, moved to make the lumber dealer from whom he had obtained the material a party, it was held that the motion was properly denied. Under the facts of that case there was no privity between plaintiff and the lumber dealer, nor were the contractor and subcontractor joint tortfeasors."

This assignment of error is overruled.

[7] By assignment of error No. 11, under which defendants group 43 exceptions, defendants contend that the court erred in submitting instructions to the jury on the theory of breach of warranty. We find no merit in defendants' position that the evidence was insufficient to allow this issue to be submitted to the jury. On this question the evidence, taken in the light most favorable to plaintiffs, tends to show the following: When plaintiffs inspected the house, it was about 90% completed. Defendant told them he was "a builder of high quality homes" and that his smaller homes such as the one plaintiffs purchased were of the same quality as the larger ones he built. "He told us that this home was to be a Parade home. This meant to me then that he was a member of National Home Builders Association of which I was familiar, because during Parade of Home Week National Home Builders Association writes articles and extols their membership as highly honest people, that their membership complies with a rigid code of ethics. So I was quite impressed that this was a Parade home. Parade homes are put on display on Parade of Homes week by members of this National Home Builders Association. He told us that this house was intended for display but it had not been finished in time. He also told us at that time that he was licensed to build homes

in North Carolina to $75,000 and went on to tell us that the other builder in the neighborhood was licensed to build homes to $35,000." Defendant offered to and did take plaintiffs to a home in Hope Valley in the $75,000 class. This home had not been completed and was not as far along in construction as the house plaintiffs purchased. Some of the framework was exposed. Defendant told plaintiffs that "the quality of the home in Hope Valley was exactly the same as the quality of the home" they bought "in materials and workmanship." "The lumber was nice and clean, very little knots. These are the things that, of course, I would look for. The saw cuts were very neat, the nails were driven very nicely. He guided us to the kitchen area and pointed out the high quality. It looked high quality to me in the kitchen in the way of the kitchen cabinets and the like. He was very proud of the family room in this home. It had a large fireplace, very wide, very impressive looking and on the side with bookshelves, and the workmen had done an excellent job there. I was satisfied at that time that Mr. Chesnutt was indeed a builder of quality homes of quality material and he took pride in what he was doing." Plaintiff Lindstrom further testified: "The statements and representations which he made influenced our decision to purchase the home." Defendant testified "I may have indicated to them that I was a quality builder and had a good reputation. I don't recall. I can't remember everything I said five years ago. I would like to have sold the house to them, sure."

It appears that many jurisdictions have abolished the concept of caveat emptor and adopted the concept of implied warranty of fitness in the transaction for the sale of a completed house between builder-vendor and buyer. It is certainly true that the purchase of a home is not an everyday transaction for the average family, and, in many instances, is the most important transaction of a lifetime. As early as 1964 the Supreme Court of Colorado stated:

> "We hold that the implied warranty doctrine is extended to include agreements between builders-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied

warranties that the home was built in workmanlike manner and is suitable for habitation." *Carpenter v. Donohoe,* 154 Colo. 78, 83-84, 388 P. 2d 399, 402 (1964).

An excellent discussion of the current trend may be found in *Theis v. Heuer,* ..... Ind. ....., 280 N.E. 2d 300 (1972). We do not reach this problem, however, because we hold that the evidence in this case was sufficient to allow, but not compel, the jury to find an express warranty and a breach thereof.

Finally, by assignments of error Nos. 2, 4, and 7, defendants challenge the rulings of the court in denying defendants' motions for directed verdict at the close of plaintiffs' evidence and again at the close of all the evidence, and in denying defendants' motions for judgment notwithstanding the verdict and for new trial. Defendants make no argument in their brief in support of these assignments. We think it unnecessary to discuss further the questions raised. This case was ably tried and ably argued and presented on appeal. The record consisted of 461 pages, and there were some 150 exhibits introduced. The trial lasted a full week, and the jury apparently had little or no difficulty in reaching a verdict for the plaintiffs. We find nothing in the record before us sufficiently prejudicial to require a new trial.

Affirmed.

Judges VAUGHN and GRAHAM concur.

LEANDER J. HARRISON v. ROBERT LEE LEWIS

No. 7227SC303

(Filed 28 June 1972)

1. **Automobiles §§ 62, 83— striking pedestrian — negligence — contributory negligence**

In an action to recover for personal injuries sustained by plaintiff pedestrian when he was struck by defendant's automobile, the evidence was sufficient to support jury findings of negligence and contributory negligence and that the negligence of each party was a proximate cause of plaintiff's injuries.

2. **Negligence § 10— last clear chance — pleading — burden of proof**

Plaintiff must plead the doctrine of last clear chance in order to invoke such doctrine and has the burden of proof on such issue.

3. Automobiles § 89— submission of last clear chance

The doctrine of last clear chance was properly submitted to the jury in an action by a pedestrian to recover for personal injuries sustained when he was struck by defendant's automobile while attempting to cross the highway, where the evidence would support a jury finding that if defendant had maintained a proper lookout in his direction of travel, he could have observed the plaintiff in the act of crossing the highway at a time when it should have been apparent to him that plaintiff could not save himself, and at which time defendant could have avoided striking plaintiff by merely turning slightly to his left.

4. Automobiles § 46— opinion testimony as to speed — weight

The weight to be given opinion testimony as to the speed of defendant's automobile was for the jury.

APPEAL by defendant from *Thornburg, Judge,* 20 September 1971 Session of Superior Court held in CLEVELAND County.

Plaintiff, Leander J. Harrison, instituted this civil action to recover damages for personal injuries allegedly caused by defendant's negligently striking plaintiff, a pedestrian, with his automobile on 13 April 1969.

In his complaint, plaintiff alleged that defendant was negligent in that he drove at an excessive speed; failed to keep a proper lookout; failed to yield the right of way to plaintiff, and failed to reduce his speed, failed to sound his horn or give other warning to plaintiff, and failed to take any evasive action to avoid striking the plaintiff, when defendant had a clear and unobstructed view of the plaintiff as he was crossing the highway a distance of several hundred feet before reaching the plaintiff. The plaintiff further alleged, "defendant was negligent in that defendant saw or should have seen the plaintiff in the defendant's lane of travel from a distance of several hundred feet; and, that the defendant knew or should have known that the plaintiff could not extricate himself from his position, and although the defendant had a sufficient time and opportunity to avoid striking the plaintiff, he failed to reduce his speed, or give warning, or take evasive action and did strike the plaintiff."

Defendant in his answer denied negligence and pleaded plaintiff's contributory negligence as a bar to any recovery by him. As a further defense, defendant asserted that he was faced with a sudden emergency at the time of the accident, which

was not created by any negligence on his part, and that he did everything he could in the exercise of reasonable care to avoid any injury to the plaintiff.

Both parties introduced evidence. Defendant moved for a directed verdict at the close of all the evidence and this motion was denied. The court submitted issues of (1) negligence, (2) contributory negligence, (3) last clear chance, and (4) damages. The jury answered the first three issues in the affirmative and awarded damages in the sum of $10,000. Whereupon, defendant moved for judgment notwithstanding the verdict or for a new trial; both of these motions were denied. From a judgment in accord with the verdict, defendant appeals.

John D. Church for plaintiff-appellee.

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

BROCK, Judge.

Defendant assigns as error the denial of his motion for judgment notwithstanding the verdict. He argues that the motion should have been granted in view of the jury's finding that plaintiff was contributorily negligent and that the issue of last clear chance does not arise on the evidence in this case. In other words, the question for determination is whether there was sufficient evidence, considered in the light most favorable to plaintiff, to require submission of the issue of last clear chance to the jury. *Clodfelter v. Carroll,* 261 N.C. 630, 135 S.E. 2d 636; *Wade v. Sausage Co.,* 239 N.C. 524, 80 S.E. 2d 150.

The plaintiff's evidence tends to show the following facts:

On 13 April 1969 plaintiff, a man 74 years of age, and his wife went to visit a neighbor Paul Price, who lived across U.S. Highway 74 from plaintiff's house. At approximately 8:30 p.m., the plaintiff and his wife decided to return to their house in order to receive an expected phone call from their son. They had to walk from Mr. Price's house, cross U. S. Highway 74, and then proceed down N. C. Highway 120.

Mrs. Harrison testified that when she and the plaintiff reached the edge of Highway 74, the main traveled route at that time between Forest City and Shelby, "we stopped to see—looked both ways to see if a car was coming and there was one

coming from towards Shelby [their left facing Highway 74] and we stood there until it got past."

"We had a clear vision of Highway 74 to our right [west, towards Forest City] for 150 or 200 yards. Highway 74, from the point where we were standing back to the west towards Forest City, was pretty straight there. It might have been upgrade just a little from where we was there up to the top of the knoll. The top of the knoll . . . is where this car [defendant's] came over the hill. That is 150 yards from the point where we were standing."

"Highway 120 comes into Highway 74 at or near the point at which Mr. Harrison and I were standing. (Highway) 120 comes in at the opposite side from where we was at."

"After we observed a car coming from the east from Shelby which passed the point at which we were standing, I looked both ways and I told him [plaintiff] there wasn't a car in sight, and we would go, and we started across and got about middleways of the highway and I saw the lights of a car coming over the hill above us from Forest City from the west. The lights were about 150 yards away when I saw them. After I observed the lights, I told my husband to 'let's hurry'; that there was a car coming over the hill, and we got going and got a little faster so that we could get across and the car was coming pretty fast too."

"When I stepped off the paved portion of 74, Mr. Harrison was just to my right about a step behind me. The approaching lights just kept coming down the road from the time we were in the center of the road until the time we reached the edge of Highway 74. It didn't blow no horn that I heard or didn't swerve or nothing to keep from hitting him [plaintiff]."

"I observed the car from the time it came over the hill until it hit him. This was 2 or 3 seconds."

Mrs. Harrison further testified that in her opinion the defendant's car would be "making at least 60 m.p.h." and that there was "plenty of light from those lights on the poles to go across the road."

Mrs. Harrison also related, in part, "The vehicle I observed approaching from the west just kept coming until it hit him [plaintiff]. I couldn't tell that it made any decrease in speed.

When we were about in the middle of the road and I said 'hurry up' . . . . I was trying to get across and he [plaintiff] was right behind me . . . coming on behind me. I quickened my pace. Mr. Harrison kept . . . got a little faster too when he saw the car."

"Mr. Harrison was struck above the intersection with Highway 120 on the west side. Three or four feet above it. . . ."

"It just looked like the car picked up Mr. Harrison and laid him down on the pavement. His head was towards the west, towards Forest City, and his feet right straight down the highway towards Shelby. After the car struck him, his body was lying right there on the edge of the pavement."

As a result of the accident, Mr. Harrison suffered a concussion and leg injuries. The physical condition of the plaintiff before the accident took place on 13 April 1969 was good; "he could walk good." His memory and mental faculties prior to the collision were good. He had one eye (right), but he had good vision from that eye and his ability to hear before the accident was good. Since the accident, Mr. Harrison "doesn't walk good and he don't remember."

The testimony of Mrs. Harrison further disclosed that her husband had on green pants and a light green shirt at the time of the accident. "My husband's shirt was long sleeved and he didn't have on no coat." She was wearing "kind of a light dress with a pink sweater."

Defendant's evidence is to this effect: At the time and place in question, he was driving from Union Mills, after completing his Sunday church work, to Raleigh, North Carolina.

The scene of the accident was on U. S. Highway 74 approximately 1 and ½ miles west of the center of Mooresboro on U. S. 74 at its intersection with N. C. 120. Highway 74 is 22 feet wide.

Defendant narrated the events, in part, as follows:

"On the evening of April 13, 1969, I was operating a small 1961 Cadillac which I own. I was driving the car on Highway 74 at the time of the wreck. . . . I was driving on the right-hand side of the road.

"As I approached the scene of this accident, I drove over the rise of a hill. I was operating the car approximately 55

m.p.h. When I came over the rise, I saw two other . . . met two other automobiles. They were headed in the opposite direction, going towards Rutherfordton, with reference to the way I was headed. I was going toward Shelby. My lights were on dim at the time I came over the hill. They were dim when I came across the hill because the autotmatic eye on my car had dimmed them when I was meeting this other traffic. Both these two cars I was meeting at the hillcrest were close together and they passed me.

"After they passed me, I noticed the next automobile. It was close enough for my lights not to brighten up . . . near the intersection of 120 there. I noticed something unusual about the lights from that car, it looked like they were bobbing and weaving. I immediately taken my foot off the accelerator. The other car passed me.

"Whenever the last car passed me, immediately after he passed, my lights brightened back up. At this point, I saw something ahead of me. I saw the bottom part of a woman's dress. This figure before me was in approximately the middle of my lane. When I saw the figure of the woman on the road or the bottom part of a woman's figure on the road, I began to pull to the middle of the highway. Then I saw her get off on the dirt part of the highway and I felt a rub up against the side of the car. The rub felt like it was on the back, behind the back door on the right-hand side of the car. My car was straddling the center line when I felt this rub."

"I was about 50 paces from the point where this wreck occurred whenever my lights flashed on and I was able to see this figure of the woman."

"At this point, I had never seen more than one person on the road."

The defendant then pulled his car off the road across the intersection and parked. After walking back to the scene of the collision, he was "surprised" when he saw Mr. Harrison. Later defendant found "one little mark on the very back fender" of his car.

Highway Patrolman J. R. Reid testified that he was not aware of any lighting extending over the area of the intersection from any lights at the scene. He stated, "There was no lighting there that had any bearing as far as lighting the high-

way was concerned in my opinion." He further testified that Mr. Harrison had on a dark coat and a dark pair of pants; that he did not find any marks or indications on the pavement of tires or anything else; and that no visible damage or unusual condition was found on defendant's 1961 Cadillac.

[1] There appears to be ample evidence to support the findings of the jury that the defendant was negligent, that the plaintiff was contributorily negligent, and that each of the parties' negligence was a proximate cause of plaintiff's injury. Therefore, unless there was error by the trial judge in submitting the issue of the last clear chance to the jury, the judgment should be affirmed.

Defendant contends that the evidence, when considered in the light most favorable to the plaintiff, will not invoke the doctrine of last clear chance on behalf of the plaintiff; we do not agree.

[2] It is true that to invoke the doctrine of the last clear chance the plaintiff must plead it and the burden of proof is upon him. *Exum v. Boyles,* 272 N.C. 567, 158 S.E. 2d 845. In the present case the submission of the issue of the last clear chance was supported by the pleadings and by competent evidence introduced by plaintiff, even though evidence to the contrary was introduced by the defendant. Clearly, the contradictions were for jury determination.

In *Clodfelter v. Carroll, supra,* our Supreme Court restated the necessary elements of the doctrine of last clear chance, as follows:

"Where an injured pedestrian who has been guilty of contributory negligence invokes the last clear chance . . . doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous posi-

tion and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him." In *Exum v. Boyles, supra,* the North Carolina Supreme Court stated, ". . . 'original negligence' of the defendant is sufficient to bring the doctrine of the last clear chance into play if the other elements of that doctrine are proved."

Defendant argues that plaintiff was an able-bodied man and had time to move from the middle of the road to the shoulder, a distance of 10 or 11 feet, while the defendant's car traveled 150 yards. However, this argument ignores the fact that plaintiff's evidence, if considered true, tends to show that, when Mrs. Harrison saw the defendant's lights while they were in the middle of the road, "we got going and got a little faster." Mrs. Harrison further testified that the time in which she saw the car coming until it hit her husband, the plaintiff, was 2 or 3 seconds. From this testimony, it appears that, after plaintiff became aware of the approaching car, he had very limited time within which to extricate himself from the pavement and to safety. The plaintiff's evidence also tends to show that defendant's lane of travel on U. S. 74 was straight, that the highway was lighted, that he must or should have seen the plaintiff and his wife in the middle of the road for a distance of 150 or more yards, that he had time to apply his brakes, and that he had room to turn to his left to avoid striking plaintiff.

Further, plaintiff's evidence, if considered true, renders defendant liable on "original" negligence by his failure to maintain a proper lookout, failure to reduce speed, and failure to turn aside from his straight line of travel in order to avoid striking the plaintiff when the defendant should have seen the plaintiff, if the defendant was maintaining a proper lookout from a distance of several hundred feet. "The approaching lights just kept coming down the road from the time we were in the center of the road until the time we reached the edge of Highway 74. It didn't blow no horn that I heard or didn't swerve or nothing to keep from hitting him."

[3] The defendant owed the plaintiff, and all other persons using the highway, the duty to maintain a lookout in the direction of the defendant's travel. Assuming the evidence to be true, had the defendant maintained such a lookout, he could have

observed the plaintiff in the act of crossing the highway, at a time when it should have been apparent to the defendant that plaintiff could not save himself, but at which time the defendant would have avoided striking Harrison by merely turning slightly to his left (plaintiff was only 2 or 3 feet from edge of the pavement). This is sufficient to bring the doctrine of the last clear chance into operation. It was a question for the jury whether these were or were not the facts of the case. The jury has resolved the disputed facts in favor of the plaintiff.

[4] Defendant assigns as error that plaintiff's wife was allowed to relate her opinion of the speed of defendant's vehicle. We consider that defendant's argument on this question is addressed primarily to the weight to be given the testimony. The argument, however, is for the jury and we feel certain defendant availed himself of that opportunity. This assignment of error is overruled.

Defendant assigns as error numerous portions of the judge's charge to the jury. We do not deem it necessary to discuss these seriatim. We have examined the charge as a whole and conclude that it contains no prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

LUCY GOARD v. CHARLIE BRANSCOM, ED SMITH AND HAROLD HEATH, TRUSTEES FOR THE WHITE PLAINS BAPTIST CHURCH, AND WHITE PLAINS BAPTIST CHURCH

No. 7217SC432

(Filed 28 June 1972)

1. **Religious Societies and Corporations § 1— member of unincorporated church — tort committed by another member — recovery from church**

A member of an unincorporated church or denomination, religious society or congregation (a *quasi* corporation) is engaged in a joint enterprise and may not recover from the *quasi* corporation for damages sustained through the tortious conduct of another member thereof.

2. **Religious Societies and Corporations § 3— negligence of church — oil on driveway — parking in driveway**

In an action brought by plaintiff against a church of which she was a member to recover for injuries received when she slipped and fell on oil and grease which had leaked onto the church driveway from

parked cars, neither the fact that oil may have been on the driveway nor the fact that cars were allowed to park on the driveway constituted negligence.

3. Religious Societies and Corporations § 1— church member — licensees — invitees — joint enterprise

A member of an unincorporated Baptist church was not a licensee or an invitee of the church, but was engaged in a joint enterprise with other members.

APPEAL by plaintiff from *Exum, Judge,* 15 November 1971 Session of Superior Court held in SURRY County.

Plaintiff alleged that she had been a member of the congregation of the White Plains Baptist Church for a period of twelve years. On 1 November 1969, she and her husband had planned to attend religious services being held at the church building. They were going from the place where her husband parked his car down a driveway to the front entrance of the church building when plaintiff slipped on some oil and grease and fell, resulting in bodily injury.

Plaintiff alleged that defendants were negligent in failing to keep the area adjacent to the church in a reasonably safe condition, in that they allowed persons to park their automobiles along the driveway and that large amounts of oil and grease, which defendants failed to remove, leaked from these automobiles onto the driveway, thereby creating a hidden danger. In their answer defendants denied negligence but admitted "(t)hat at the time of the accident described herein the church parking lot and driveway was owned by the defendant, White Plains Baptist Church, and was used in connection with the church activities at the time of the accident herein described and on the date when the plaintiff's accident occurred, the defendants, Harold Heath, Charlie Branscom and Ed Smith, were the Trustees of the White Plains Baptist Church and as such were charged with the duty of looking after and caring for the church and church grounds and on the 1st day of November, 1969, they were engaged and carrying on the business of operating the church and were acting within the course and scope of such employment as the employees and agents of the defendant, White Plains Baptist Church."

Defendants also alleged that plaintiff fell while walking on the sidewalk between the old church building and the new church building while going from the old building to the new

building, that this fall was an unavoidable accident, that the plaintiff was contributorily negligent and that plaintiff was a licensee, not an invitee.

Defendants moved for summary judgment under Rule 56 on the grounds that the plaintiff was neither a customer nor a servant, nor a trespasser, but was a mere licensee attending the services at the church for her own spiritual and social gratification, that the defendants owed to the plaintiff only the duty to refrain from wilful or wanton negligence, that the plaintiff did not allege that the defendants were guilty of wanton negligence or wilful misconduct, and that the defendants were not actively negligent in fact.

The motion for summary judgment was heard upon affidavits offered by the parties and answers to interrogatories by the plaintiff, and the court held "that there is no genuine issue as to any material fact, in that the plaintiff was going to the defendant church at the time of her alleged fall as a licensee, for the purpose of attending a religious service; that there is an absence of allegation or proof that plaintiff's fall was occasioned by wilful or wanton acts or affirmative and active negligence on the part of the defendants; and that the defendants are entitled to judgment as a matter of law." The court thereupon allowed the defendants' motion for summary judgment and dismissed the action. Plaintiff appealed to the Court of Appeals.

Franklin Smith for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by William F. Womble, Jr., and Allan R. Gitter for defendant appellees.

MALLARD, Chief Judge.

Plaintiff states that the only question involved on this appeal is "(w)hether the plaintiff, Lucy Goard, was an invitee or a licensee on the premises of the defendant church at the time that she slipped, fell and was injured on November 1, 1969, as alleged in the plaintiff's complaint?"

Some religious organizations in North Carolina are corporations.

There is no allegation, stipulation or proof that the defendants, trustees of the White Plains Baptist Church, or the White

Plains Baptist Church, are separate corporate entities (and their names would not so indicate [G.S. 55-12]), and there is no allegation, stipulation or proof that they were formed as a religious, educational or charitable organization prior to 1 January 1894 [G.S. 55A-88]. We, therefore, indulge in the presumption that the defendant trustees of the White Plains Baptist Church were properly appointed by the White Plains Baptist Church, a religious society or congregation (a *quasi* corporation), and that both the appointment and conduct of the said trustees was pursuant to the provisions of Chapter 61 of the General Statutes of North Carolina.

In *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114 (1954), it is said: "It is known to all that from the beginning Baptist churches have retained, and refused to give up their independence."

Under the provisions of G.S. 39-24, a voluntary association of individuals organized for religious purposes is authorized to acquire and hold real estate and may be sued in its common name concerning the real estate so held. See also G.S. 1-69.1.

In *Way v. Ramsey,* 192 N.C. 549, 135 S.E. 454 (1926), a Methodist church was involved in a dispute about the payment of a pastor's salary, and it was stated that:

> "Under our statute law an organized body of men constituting a religious congregation is a *quasi* corporation with power to appoint and remove its duly constituted officers and agents. The acts of such officers and agents performed within the scope of delegated authority are usually treated as the acts of the congregation or society. * * * "

See also, *Lord v. Hardie,* 82 N.C. 241 (1880), where a Baptist church was held to be a *quasi* corporation.

The general rule seems to be that "(t)he right of action by or against religious societies and questions of parties and procedure in such actions are governed in the case of religious corporations by the rules governing actions by or against corporations generally, and in case of *unincorporated ecclesiastical bodies,* by the principles applicable in the case of other voluntary societies and associations." (Emphasis added.) 45 Am. Jur., Religious Societies, § 91, p. 795.

In 6 Am. Jur. 2d, Associations and Clubs, § 31, it is said:

> "The general rule deducible from the cases which have passed on the question is that the members of an unincorporated association are engaged in a joint enterprise, and the negligence or fault of each member in the prosecution of that enterprise is imputable to each and every other member, so that the member who has suffered damages to his person, property, or reputation through the tortious conduct of another member of the association may not recover from the association for such damage, although he may recover individually from the member actually guilty of the tort. * * * "

However, in North Carolina, the Supreme Court has held in *Lord v. Hardie, supra,* and *Way v. Ramsey, supra,* that a religious congregation was a *quasi* corporation but the Court did not define a *quasi* corporation or set out the intrinsic and material differences between such a *quasi* corporation and a true corporation. The question of whether a member of the congregation of a Baptist church can recover from such church for a tort committed by the agents, employees or another member thereof, seems to be one of first impression in North Carolina.

Under G.S. 61-2, it is provided that: "The trustees and their successors have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation; and they may sue or be sued in all proper actions, for or on account of the donations and property so held or claimed by them, and for and on account of *any matters relating thereto.* * * * " (Emphasis added.) This action for negligence is a matter relating to the use of real property within the intent and meaning of the statute, but G.S. 61-2 does not, and we have found no other statute which does, authorize a member of a church or denomination, religious society or congregation (a *quasi* corporation) to recover of the *quasi* corporation for the negligence of an agent, employee or another member thereof. The parties have not cited, and our research has not revealed any case in North Carolina relating to the right of a member to recover of a church or denomination, religious society or congregation (a *quasi* corporation) for the negligence of its members, agents or employees.

In Black's Law Dictionary (4th Ed.), the word *"quasi"* is defined as follows:

> "Lat. As if; almost as it were; analogous to. This term is used in legal phraseology to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are intrinsic and material differences between them. *Bicknell v. Garrett,* 1 Wash. 2d 564, 96 P. 2d 592, 595, 126 A.L.R. 258; *Cannon v. Miller,* 22 Wash. 2d 227, 155 P. 2d 500, 503, 507, 157 A.L.R. 530. *Marker v. State,* 25 Ala. App. 91, 142 So. 105, 106. It is often prefixed to English words implying mere appearance or want of reality. *State v. Jeffrey,* 188 Minn. 476, 247 N.W. 692, 693."

The term *"quasi* corporations" is defined as follows:

> "Organizations resembling corporations, municipal societies or similar bodies which, though not true corporations in all respects, are yet recognized, by statutes or immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained, by suits at law. They may be considered *quasi* corporations, with limited powers, co-extensive with the duties imposed upon them by statute or usage, but restrained from a general use of the authority which belongs to those metaphysical persons by the common law." Black's Law Dictionary (4th Ed.)

[1] A stockholder may sue a corporation for negligence. We think, however, that one of the material differences between a church or denomination, religious society or congregation (a *quasi* corporation) in North Carolina and a real corporation organized or existing pursuant to statutory law, is that a member of such a *quasi* corporation is engaged in a joint enterprise and may not recover from the *quasi* corporation damages sustained through the tortious conduct of another member thereof.

[2] In this case the fact that oil may have been on the driveway does not constitute negligence, nor does the fact that automobiles were parked on the driveway constitute negligence. It is common knowledge that paved driveways maintained by religious bodies on their grounds are often used for the purpose of parking as well as ingress and egress, and that oil and

grease often leaks from automobiles, whether they are parked or moving. The record is silent as to how long the oil or grease that plaintiff stepped on had been there. We are of the opinion that no actionable negligence has been shown in this case and that there is no genuine issue as to any material fact germane to the cause of action.

In 6 Strong, N. C. Index 2d, Negligence, § 52, it is said:

> " * * * (A)n invitee is a person who goes upon the premises for the mutual benefit of himself and *the person in possession,* while a licensee is one who goes upon the premises for his own interest, convenience, or gratification, with the consent of *the person in possession.* * * * " (Emphasis added.)

[3] The plaintiff, as a member of the White Plains Baptist Church, was one of the persons in possession of the premises involved and for that reason could not be a licensee or an invitee. Therefore, the plaintiff was not a licensee, or invitee, but was a member of the congregation of the White Plains Baptist Church, where each member had a specific function and obligation consistent with his own "gifts" (I Corinthians 12:4) and all were working together unto the same Spirit (I Corinthians 12:13). [See also the definition of a church in Harper's Bible Dictionary, 7th Ed.] In other words, each member of the congregation was engaged in the joint enterprise of worshipping Almighty God in fellowship together according to the dictates of his own conscience.

We take note, however, of the fact that many churches, denominations, religious societies and congregations *(quasi* corporations) have purchased liability insurance. If such insurance is intended to be for the benefit of the members, it should be specifically provided for in the contract.

For the reasons hereinabove stated, we hold that the trial judge did not commit error in allowing defendants' motion for summary judgment.

Affirmed.

Judges CAMPBELL and BROCK concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; ROBERT MORGAN, ATTORNEY GENERAL; SECRETARY OF DEFENSE OF UNITED STATES; AND NORTH CAROLINA MERCHANTS ASSOCIATION v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

No. 7210UC183

(Filed 28 June 1972)

1. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rate case — failure to find replacement cost**

In this telephone rate case, the Utilities Commission erred in failing to make and set forth in its order a finding as to the replacement cost of the utility's property used and useful in providing service to the public within this State.

2. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rate case — factors prescribed by statute — findings**

The mere recital by the Utilities Commission that it has considered all of the factors prescribed by G.S. 62-133 in arriving at its ascertainment of "fair value" does not preclude the reviewing court from setting aside the finding of "fair value" where the record discloses that the Commission in fact failed to do so.

3. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— replacement cost — weight**

Once the Utilities Commission makes its factual finding as to replacement cost, it is for the Commission, not the courts, to determine the relative weight to be given to that figure when the Commission considers it, together with all other relevant factors, in ascertaining the "fair value" rate base.

4. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— original cost — exclusion of land acquired for future use**

In arriving at its finding as to original cost less depreciation of a telephone company's property, the Utilities Commission did not err in excluding the cost of land acquired by the telephone company for future use for new central offices or expansion of existing central offices, and for future construction of microwave towers.

5. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate base — exclusion of property held for future use — confiscation**

The exclusion from the rate base of the value of property held by a public utility for future use does not amount to confiscation of the utility's property.

6. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— working capital — federal tax accruals**

In this telephone rate case, there was competent, material and substantial evidence to support a finding by the Utilities Commission

that the utility had $2,842,739 of federal tax accruals available for use as working capital, and the Commission properly deducted such amount in its determination of the utility's cash working capital requirement.

7. **Telephone and Telegraph Companies § 1; Utilities Commission § 6—reasonable requirement for materials and supplies**

Finding by the Utilities Commission that a telephone company's reasonable requirement for materials and supplies for its intrastate operations was $2,038,998 was *prima facie* just and reasonable, G.S. 62-94(e), and the evidence in the record did not overcome such statutory presumption.

APPEAL by Southern Bell Telephone and Telegraph Company from order of the North Carolina Utilities Commission in Docket No. P-55, Sub 650, dated 2 August 1971.

On 27 November 1970 Southern Bell Telephone and Telegraph Company (Southern Bell) filed application with the North Carolina Utilities Commission (Commission) seeking adjustments in its rates and charges for North Carolina intrastate service designed to produce $23,100,000 of additional annual gross revenue based on a test year ending 30 June 1970. On 11 December 1970 the Commission entered an order declaring the proceeding to be a general rate case under G.S. 62-133, suspending the effective date of the proposed rates, and setting the matter for hearing. On 23 February 1971 the Attorney General, pursuant to G.S. 62-20, filed notice of intervention on behalf of the using and consuming public. The North Carolina Merchants Association and the Department of Defense and all other Executive Agencies of the United States also appeared through counsel as protestant-intervenors. Public hearings were held in Raleigh on 25 May 1971 through 9 June 1971, at which witnesses presented by Southtern Bell, the Commission Staff, and the Attorney General were examined. On 2 August 1971 the Commission entered its order authorizing Southern Bell to increase its North Carolina intrastate telephone rates and charges to produce additional annual gross revenue not exceeding $13,295,087, based upon stations and operations as of the end of the test period, and approved specific rates and charges calculated by the Commission to produce such additional revenue. From this order, Southern Bell appealed, assigning errors.

Joyner & Howison, by Robert C. Howison, Jr., John F. Beasley, and Harvey L. Cosper, with Drury B. Thompson and Jefferson Davis of Counsel, for Southern Bell Telephone and Telegraph Company, appellant.

Attorney General Robert Morgan by Assistant Attorney General I. Beverly Lake, Jr., 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.

[1] Appellant challenges the Commission's determination of the fair value of its property used and useful as of the end of the test period in providing telephone service to the public within this State. In this connection, Southern Bell presented evidence to show the original cost of such property less that portion of the cost which had been consumed by previous use recovered by depreciation expense, and in addition presented evidence to show the replacement cost of the property determined by trending depreciated original costs to current cost levels. The Commission made specific findings of fact as to original cost less depreciation, and found that this figure, when combined with the net working capital requirement as found by the Commission, was $321,068,542. However, the Commission made no finding as to replacement cost. In this it committed error.

[2] G.S. 62-133(b) requires the Commission, in the process of fixing rates fair both to the public utility and to the consumer, to commence by ascertaining the "fair value" of the public utility's property used and useful in providing service to the public within this State. In doing so, the statute directs the Commission to *consider* (1) "the reasonable original cost of the property" less depreciation, (2) the "replacement cost," which may be determined by trending such reasonable depreciated cost to current cost levels or by any other reasonable method, and (3) any other factors relevant to the present fair value of the property. In the present case the Commission found the "fair value" of appellant's property to be $353,000,000, a figure which was apparently arrived at by simply adding approximately 10% to $321,068,542, which the Commission had found to be the original cost less depreciation combined with net

working capital requirement. In its order, the Commission recited that it arrived at its finding of fair value, "considering the original cost less depreciation and considering replacement cost by trending original cost to current cost levels." However, the mere recital by the Commission that it has considered all of the factors prescribed by G.S. 62-133 in arriving at its ascertainment of "fair value" does not preclude the reviewing court from setting aside the finding of "fair value" where, as here, the record discloses that the Commission in fact failed to do so. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705. In that case, Justice Lake, speaking for the Court, said:

> "It seems inescapable that the Commission cannot 'consider' or 'weigh' an element until it first determines what that element, itself, is. No doubt, the Commission, in the present case, formed an opinion satisfactory to itself, as to the amount of the 'replacement cost,' depreciated, of the properties included in its determination of the 'reasonable original cost,' since it said it had given consideration thereto. Unfortunately, though it set forth its finding of the 'net investment' [i.e., the reasonable original cost, less depreciation], it failed to set forth its finding of the 'replacement cost,' depreciated. . . . While the consideration or weight to be given 'replacement cost,' depreciated, in ascertaining 'fair value' rests in the sound discretion of the Commission, the reviewing court cannot satisfactorily determine whether the Commission considered or weighed this element at all, or merely gave it 'minimal consideration,' unless the Commission sets forth what it found this element to be. Though perhaps not indispensable to the validity of such finding, it would be proper, and certainly helpful to the reviewing court and to the parties, for the Commission to state, at least in summary, its reasons for not acquiescing in the figures suggested for this element by the respective expert witnesses.
>
> "Original cost, less depreciation, and replacement cost, less depreciation, are not ultimate facts but evidential facts only. The ultimate fact, in this segment of a rate case, is 'fair value.' However, G.S. 62-133 requires that these evidential facts be considered or weighed by the Commission in determining this ultimate fact. This is not to say that in no case may the Commission fix rates to be charged by a utility for its service without a determination of 'replace-

ment cost,' less depreciation. The utility, with the Commission's acquiescence, may offer evidence of original cost less depreciation, as its only evidence of 'fair value.' Proof of 'replacement cost' is exceedingly costly, and may be unduly burdensome, especially to a small utility company. However, where, as here, such evidence is introduced, the statute seems clearly to require that the Commission make, and set forth in its order, its findings as to both of these evidential facts, along with any 'other facts' considered by it. G.S. 62-79 requires that all orders of the Commission shall include findings upon all 'material issues of fact, law, or discretion presented in the record.' (Citations omitted.)

"We hold, therefore, that, when the record before the Commission presents the questions of the original cost, less depreciation, and the replacement cost, less depreciation, these are 'material issues of fact,' upon each of which the Commission must make its finding. When it does so, those findings are conclusive, if supported by substantial evidence in the record and not affected by an error of law. Having made such findings, so supported, it is for the Commission, not the reviewing court, to determine, in its expert discretion and by the use of 'balanced scales,' the relative weights to be given these several factors in ascertaining the ultimate fact of 'fair value.' "

In the present case, Southern Bell presented witnesses, qualified as experts, who testified that the replacement cost of its property used and useful in furnishing telephone service in North Carolina was $444,657,650. This figure was arrived at by trending depreciated original costs to current cost levels, and extensive data was furnished to support the computations. The record contains no other evidence as to replacement cost. The Commission's order referred to the testimony of Southern Bell's witnesses, but the mere recital of such testimony falls short of constituting a finding by the Commission that it accepted the witnesses' conclusion as to replacement cost as being a fact which it considered in ascertaining fair value. This seems all the more apparent in view of the contention made by the Commission's own attorneys in their brief on this appeal that Southern Bell's witnesses failed to follow statutory requirements in the method which they employed in trending original costs to current cost levels, and that this asserted

failure "is grounds for consideration in evaluating the weight to be given to Southern Bell's evidence of replacement cost based on such trended cost." Perhaps so, but this is all the more reason why the Commission should have made its own findings from the evidence as to replacement cost. Only then could it properly "consider" such cost, along with the other evidential facts which G.S. 62-133 requires it to consider, in finally making its determination as to "fair value." On the evidence in this record, it was error for the Commission to fail to make, and to set forth in its order, its finding as to replacement cost.

[3] In their brief Southern Bell's counsel contend that under the facts of this case replacement cost should be given great weight and depreciated original cost should be given relatively little weight in the process of finally arriving at the "fair value" rate base. They point to the evidence of continuing inflation in our economy, which quickly makes original cost a figure of no more than historical interest, and stress that on the present record there are no factors of a negative nature, such as imprudent investment, functional obsolescence unaccounted for in the replacement cost, or a deteriorating or declining market for Southern Bell's property, which would tend to reduce the weight to be given replacement cost. While we find these arguments persuasive, they would be more properly addressed to the Commission than to a reviewing court. Once the Commission makes its factual finding as to replacement cost, it will be for the Commission, not for the courts, to determine the relative weight to be given that figure when the Commission considers it, together with all other relevant factors, in ascertaining the "fair value" rate base. While the Commission has the duty to weigh these evidences of "fair value" fairly and in "balanced scales," the Legislature designated the Commission, not the courts, to do the weighing of these elements, "and the reviewing court may not set aside the Commission's determination of 'fair value' merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different 'fair value.'" *Utilities Comm. v. Telephone Co., supra.*

[4] In arriving at its finding as to original cost less depreciation, the Commission excluded $347,622, being the cost of land acquired by Southern Bell for future use. This land consisted of twelve tracts owned by Southern Bell in North Carolina on

30 June 1970, seven of which had been purchased for new central offices or for space for expansion of existing central offices, and five of which had been purchased for construction of microwave towers. While it may have been entirely prudent for the utility's management to acquire these tracts prior to the time they were actually needed, and while savings in purchase price may have resulted thereby, we find no error in the Commission's exclusion of this item in its process of finding original cost. G.S. 62-133(b)(1) clearly specifies that the rate base is to be "the fair value of the public utility's property *used and useful in providing the service rendered to the public* within this State," and G.S. 62-133(c) directs that "[t]he 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.) The statute clearly contemplates that only that property of the utility which is devoted to the public use for which the utility has been granted a franchise is to be considered, both in arriving at the fair value rate base and in projecting probable future revenues and expenses. *Utilities Comm. v. Morgan, Attorney General,* 278 N.C. 235, 179 S.E. 2d 419.

[5] We find no merit in appellant's contention that exclusion from the rate base of the value of property held by a public utility for future use amounts to confiscation of its property, as we know of no constitutional principle which requires a holding that a public utility be entitled to a return on that portion of its property not yet devoted to public use, nor do we perceive why present rate payers should be required to pay any part of the costs of the utility incurred solely for the benefit of future generations of rate payers. "In fact, the general doctrine is that the rate base is made up of values used in furnishing the service." *St. Joseph Stockyards Co. v. United States,* 11 F. Supp. 322, 329 (W.D. Mo.), affirmed, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033. Neither do we perceive any unfairness in this, since, assuming Southern Bell's contention is correct that earlier acquisitions of land result in economies in purchase price, any increment in value of lands so acquired occurring up to the time the land is placed in actual use by the utility would properly become includable in the "fair value" rate base at that time.

[6] The Commission's order found as a fact, in Finding of Fact No. 5, "that there was available at the end of the test period $2,842,739 of Federal tax accruals available for use as working capital," and accordingly deducted this amount in its determination of Southern Bell's cash working capital requirement. Southern Bell attacks this finding as being unsupported by competent, material or substantial evidence in the record. However, on examination of the record we find that the testimony of the Commission's witness Peele, and particularly his exhibit filed as Schedule I, reveals that for the twelve-months period ending 30 June 1970 Southern Bell's books disclosed it had average Federal income tax accruals of $5,280,257 of which Schedule I showed $3,858,812 to be the intrastate portion. After making certain accounting and pro forma adjustments, this figure became $3,138,342, before giving effect to any increase in rates sought in this proceeding. In their brief, counsel for Southern Bell stated:

> "The tax accruals here in question are the monies set aside by the Company for payment of income taxes. Those monies are collected when bills are paid by the Company's subscribers and are not paid over to the government until the pertinent tax bill is due. *There is, of course, no prohibition against an interim use of these funds, and they are in fact used.*" (Emphasis added.)

We find in the testimony of the Commission's witness, Peele, particularly when viewed in the light of the admission contained in the brief of Southern Bell's counsel as above quoted, ample "competent, material and substantial evidence" to support the Commission's finding that Southern Bell did have $2,842,739 of tax accruals available for use as working capital. The fact that on cross-examination witness Peele admitted there were "items which the company has to pay in advance of receipt of revenue," and that in reaching his conclusions he "did not give any consideration to any items which the company must pay in advance of receipt of revenues," did not render his testimony incompetent but merely went to the weight to be accorded it by the Commission. It would appear that the Commission did take into account the matters brought out on cross-examination, since it found the amount available for working capital purposes on account of the tax accruals to be substantially less than witness Peele's testimony and exhibits would indicate. The Commission's finding, being supported by

competent, material and substantial evidence in view of the entire record as submitted, is conclusive and binding on this appeal, G.S. 62-94(b)(5), *Utilities Commission v. Coach Co.*, 269 N.C. 717, 153 S.E. 2d 461, and the funds resulting from the tax accruals here in question were properly held to be available to Southern Bell for use by it as working capital.

"When, in fixing rates which will produce a fair return on the investment of a utility, it is made to appear it has on hand continuously a large sum of money it is using as working capital and to pay current bills for materials and supplies, that is a fact which must be taken into consideration." *Utilities Com. v. State* and *Utilities Com. v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133. "The rate base should include working capital supplied by the company but not funds supplied by its customers." *Utilities Comm. v. Morgan, Attorney General*, 277 N.C. 255, 177 S.E. 2d 405.

[7] In its Finding of Fact No. 5 the Commission also found that Southern Bell's "reasonable materials and supplies requirement for the operation of intrastate business in North Carolina" was $2,038,998. In this, we find no error. True, Southern Bell's witness, Pickle, its Division Accounting Manager for North Carolina, did testify that actual investment in the intrastate portion of materials and supplies at the end of the test period was $2,535,951, and that "[t]his stock of material and supplies is necessary in order that good service may be continued and impairment and interruption of service minimized." However, the Commission was not bound to accept the opinion of the company's witness as to the amount of materials and supplies necessary in order to maintain good service, but was free to make its own determination as to the amount reasonably required for that purpose. Witness Peele testified that the Commission Staff had determined that "the average amount of money invested in materials and supplies (in terms of 1970 dollars) per station in service . . . between June 30, 1967, and June 30, 1970, was $2.141," while "the average investment per station during the test period was $2.35," and that the Commission Staff maintained that "the difference between the $2.141 and $2.35 represents investment per station in excess of a normal year." The Commission's determination as to the amount of materials and supplies reasonably required must be considered on this appeal to be "prima facie just and reason-

able," G.S. 62-94(e), and the evidence in this record does not overcome that statutory presumption.

The exclusion of the value of property held for future use, the inclusion of tax accruals as available for working capital, and the determination of the amount reasonably required for materials and supplies, above discussed, are material in this case only as bearing upon the Commission's factual findings as to the original cost less depreciation of Southern Bell's property and its net working capital requirement. The resulting combined figure, which the Commission found to be $321,068,542, is itself no more than an evidentiary fact to be considered by the Commission in finding the "fair value" rate base, which is the ultimate fact to be found by the Commission at this stage of a general rate case. We find no error in the process by which the Commission determined this evidential figure to be $321,068,542. However, for the failure above noted to find the additional evidential figure of replacement cost, this proceeding must be remanded.

Southern Bell also contends that the rate of return of 7.4% fixed by the Commission on its finding of fair value of Southern Bell's property was arbitrary and capricious and resulted in an unconstitutional taking of its property. In view of the fact that the appropriate rate of return can be determined only after the fair value rate base is correctly ascertained, we do not on this appeal pass on the merits of Southern Bell's contentions that the Commission committed error in fixing the rate of return at 7.4%.

The order of the Utilities Commission is reversed and this matter is remanded to the Commission for further consideration in accordance with the principles set forth above and in accordance with applicable guidelines set forth in the opinion of our Supreme Court in the recently decided case of *Utilities Comm. v. Telephone Co., supra.* Such further consideration shall be either upon the present record or after such further hearing as the Commission shall deem proper.

Reversed and remanded.

Chief Judge MALLARD and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. HAYWARD HARRY HEGLER, JR.

No. 7222SC433

(Filed 28 June 1972)

1. **Criminal Law § 162— necessity for objection to evidence**

Defendant cannot complain of the admission of evidence where he made no objection thereto.

2. **Criminal Law §§ 23, 84— legality of search — guilty plea**

Defendant's properly entered plea of guilty waived all right to question the legality of a search without a warrant.

3. **Criminal Law § 138— sentence — evidence of alcoholism**

There is no merit in defendant's contention that the trial judge abused his discretion by showing an indisposition to consider defendant's evidence of alcoholism as a mitigating circumstance in this second degree murder case, where the judge heard all evidence defendant wished to offer, and the minimum sentence imposed by the judge was considerably less than it might have been.

4. **Criminal Law § 138— sentence — evidence of prior record**

The trial court, in hearing evidence after defendant entered a plea of guilty of second degree murder, did not err in the admission of evidence of defendant's prior record.

5. **Criminal Law § 138— admission of hearsay — consent at trial**

Defendant cannot object on appeal to the admission of hearsay testimony where defendant consented to the admission of such testimony at the trial.

6. **Criminal Law § 23— guilty plea — second degree murder**

There is no merit in defendant's contention that his plea of guilty of second degree murder was invalid because the indictment under which he entered his plea was based upon a statute involving the death penalty, which constitutes cruel and unusual punishment.

APPEAL by defendant from *Gambill, Judge,* 13 December 1971 Session of Superior Court held in IREDELL County.

Defendant was charged in a bill of indictment, proper in form, with the capital felony of murder of Virginia Drye White. Defendant tendered a plea of guilty to the lesser included felony of murder in the second degree. After full inquiry by the trial judge, the plea was determined to be freely, understandingly and voluntarily tendered, and the trial judge ordered that the said plea be accepted and entered on the record.

The evidence in the case tends to establish the following:

Defendant was separated from his wife and lived alone in Salisbury. Virginia Drye White (Jenny) was separated from her husband and lived in Kannapolis. Defendant and Jenny spent a lot of time together during the eight to ten months preceding the events involved in this case.

Defendant has suffered from alcoholism since prior to 1960; he was first committed to the Veteran's Administration Hospital in Salisbury as an alcoholic addict during that year. He was last admitted to the Veteran's Hospital as an alcoholic addict in 1971. On this last admission he was found to be oriented to time, place, and person, and was cooperative. From certain tests administered by Dr. Leighton E. Harrell, Jr., clinical psychologist at the hospital, defendant was found to have some degree of damage to the brain in the motor area.

On Friday, 2 July 1971, defendant and Jenny went to the beach together for the fourth of July weekend. They registered as man and wife at a beach motel (presumably a beach in the Wilmington area). They returned to defendant's home in Salisbury late Monday night, 5 July 1971, and spent the night together there.

During the July 4th weekend at the beach, defendant and Jenny did not drink any alcoholic beverages. However, on Monday afternoon, 5 July 1971, they stopped in Wilmington while on their way home and purchased a quantity of beer which they placed in the ice chest in the car. They started drinking the beer on the way home and continued to drink beer over the next several days, while increasingly including whiskey as a part of their drinking diet.

The evidence does not disclose what defendant and Jenny did on Tuesday, but on Wednesday, 7 July 1971, defendant worked at his regular job and then drove from Salisbury to Kannapolis where he met with Jenny. They visited the home of Jenny's parents in Kannapolis, where an argument developed, and Jenny's parents asked defendant to leave. Jenny left with defendant and at this time they were traveling in Jenny's 1961 Buick automobile (apparently defendant's automobile was left where he parked upon arriving in Kannapolis—the evidence indicates that Jenny's automobile was used at all times thereafter).

The evidence does not disclose where defendant and Jenny went for the remainder of Wednesday, nor where they spent Wednesday night. At some time on Thursday, 8 July 1971, defendant and Jenny went to Happy's Lake and then back to defendant's house in Salisbury. They then went to the lake cottage of one Charles K. Linker, a friend of Jenny, on Lake Norman.

Defendant and Jenny arrived at the cottage of Charles K. Linker (Linker) on Lake Norman in Jenny's 1961 Buick with a supply of beer and whiskey on Thursday, 8 July 1971, after dark. At that time Jenny's left jaw was swelling but she indicated she did not want to talk about it. With the permission of Linker and Linker's female companion, defendant and Jenny spent the night on Linker's porch. The next day, Friday, 9 July 1971, when Linker and his female companion left to go to work, defendant and Jenny stayed at the cottage to "get some sun." Jenny cooked some sausage for breakfast which she and defendant ate while they drank beer.

About four o'clock in the afternoon on Friday, 9 July 1971, defendant partially carried and partially dragged Jenny out of Linker's cottage and down to the lake. When they got into the water, defendant started pushing Jenny around and holding her head under the water. Each time Jenny would try to get up, defendant pushed her back down. Defendant slapped Jenny several times, picked her up, and threw her headfirst into the water. Defendant then left the lake and returned to Linker's cottage, where he drank some more beer. Jenny staggered from the water to the steps of the cottage and sat down. Defendant grabbed Jenny by the hair, threw her off the steps, and kicked her in the back. Defendant then lifted her head from the ground by her hair, hit her with his fist, and kicked her. He then poured beer on her head and dragged her down the walk towards Linker's pier. Defendant then straddled Jenny's motionless body and began hitting her in the face.

A young man who observed defendant from across a portion of the lake began to shoot firecrackers in order to scare and stop defendant from beating Jenny. Defendant then picked Jenny up under his arm, carried her to Linker's cottage, and dropped her in a corner of the porch.

Defendant continued to drink beer and to walk around inside and outside of Linker's cottage. Finally, defendant picked

Jenny up from the porch, threw her over his shoulder, and carried her to her car. At approximately this time, Linker and his companion returned to his cottage. They saw only the defendant and he told them that he had to run to the store and would be back in a few minutes. Defendant drove away "pretty fast" in Jenny's car. Linker and his companion looked around for Jenny. After not finding her, they became worried and went to the nearby store. They learned that defendant had not stopped there, and they returned to Linker's cottage.

When defendant left Linker's cottage, Jenny was lying either in the back seat or on the back floor of the car. He did not stop at the nearby store but instead went to Charlotte to get some beer. At about 9:30 p.m., Friday, 9 July 1971, defendant registered for two persons at the Sheraton Motel Inn in Florence, South Carolina. He was wearing old clothes and acted as if he had too much to drink. The evidence does not disclose the reason, but apparently defendant did not stop long in Florence, South Carolina, because shortly after midnight (early morning of Saturday, 10 July 1971) defendant registered for two persons at a motel in Manning, South Carolina. Defendant was "drunk or doped up." He stayed about five minutes and left. Later, during the morning of Saturday, 10 July 1971, defendant registered for two persons at the Holiday Inn in Santee, South Carolina. None of the personnel at the Holiday Inn ever saw anyone with defendant and only one of the two beds in his room was disturbed. He checked out on Sunday morning, 11 July 1971, purchased gas with Jenny's Esso credit card, and obtained directions to Charlotte, North Carolina. Defendant arrived in Salisbury on Sunday afternoon, 11 July 1971; when he drove up to his house, the officers drove up behind him.

Defendant and Jenny's car were taken to the Salisbury Police Department. The trunk of Jenny's car was opened by the police and her body was found in the trunk. The body was wrapped in a bedspread and tied with a yellow nylon rope.

An autopsy was performed by Dr. Warga in Salisbury on Sunday, 11 July 1971, and he reported as follows:

> "This patient apparently died as a result of a subdural hematoma involving the left cerebral hemisphere. A subdural hematoma almost invariable is due to some form of trauma. This is probably the best explanation for the dis-

ease found in this individual. The gross finding of multiple contusions and abrasions suggests this was due to a beating. The characteristics of the bruises did not suggest that any physical object was used in the beating, more closely resembling bruises seen with fist or kicking types of injuries. Lacerations on the inner surface of the lip as well as absence of two incisor teeth and the upper jaw with a bloody socket strongly suggest that this was a beating with the fist. The body was markedly decomposed, putrefaction of blood, presence of tissue gases, advanced postmortem autolysis. Changes such as these usually do not occur in less than 36-48 hours, although the conditions under which the body was found suggests accelerated decomposition probably took place."

Defendant offered evidence which tended to establish that he was an alcoholic addict. His evidence further tended to show that he suffered periods of amnesia or "black outs" when he was drinking. His evidence tended to show that defendant has a low frustration tolerance which he was able to control when he was sober. However, when he was drinking, he was unable to control his aggressive impulses. He was not psychotic, but personality tests showed mild defensiveness, rebelliousness, and strong anti-social behavior, particularly toward women. There was evidence that defendant had hit Jenny before the occasion here under review.

Defendant was sentenced to a term of not less than twenty nor more than thirty years imprisonment. He has appealed.

Attorney General Morgan, by Associate Attorney Speas, for the State.

Graham M. Carlton for defendant.

BROCK, Judge.

[1, 2] Defendant assigns as error that the trial judge admitted evidence of finding the body of Virginia Drye White in the trunk of her car. He argues that this was an illegal search because he told the officers not to open the trunk and because the search was not incident to a lawful arrest. If we assume, arguendo, that the search without a warrant was illegal, nevertheless defendant may not now complain that the evidence was admitted. One reason why defendant may not now complain

is that he made no objection to any of the testimony or to the photograph. Another reason is that his properly entered plea of guilty waived all right to question the legality of the search. *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591. This assignment of error is without merit and is overruled.

[3] Defendant assigns as error that the trial judge abused his discretion by showing an indisposition to consider defendant's evidence of his alcoholic addiction as a mitigating circumstance. We find no abuse of discretion. The record on appeal contains twenty-eight pages of testimony from witnesses offered by defendant; this is opposed to only seventeen pages of testimony from witnesses offered by the State. Obviously, the trial judge heard all evidence defendant wished to offer. Suffice it to say, the minimum sentence imposed by the trial judge is considerably less than it might have been. This assignment of error is without merit and is overruled.

[4] Defendant assigns as error that the trial judge admitted evidence of defendant's prior record. A trial judge "may inquire into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced." *State v. Stewart,* 4 N.C. App. 249, 166 S.E. 2d 458. This assignment of error is without merit and is overruled.

[5] Defendant assigns as error that the trial judge admitted hearsay evidence. One of the investigating officers gave the testimony of an absent witness for the State. When the officer began to recite the hearsay testimony, the following appears in the record on appeal:

"Mr. Carlton: Excuse me, your Honor. The man he is quoting is not here?

"Mr. Zimmerman: No, he is not here.

"Mr. Carlton: All right."

No objection was made to the testimony. Had defendant objected, the State would have had an opportunity to present the witness in person. It would not be fair to allow the defendant to consent at trial and then object on appeal. This assignment of error is without merit and is overruled.

[6] Defendant assigns as error that the indictment under which he entered his plea of guilty is illegal because it is based

upon a statute involving the death penalty, which constitutes cruel and unusual punishment. This assignment of error is without merit and is overruled. The entire record supports the finding that defendant's plea of guilty was freely, voluntarily and understandingly entered. That defendant would not have pleaded guilty except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice. *North Carolina v. Alford,* 400 U.S. 25, 27 L.E. 2d 162, 91 S.Ct. 160. Obviously, since his plea of guilty to second degree murder was freely, voluntarily, and understandingly entered, it can make no difference whether the imposition of the death penalty for first degree murder constitutes cruel and unusual punishment or not.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

RUSSELL PAYSEUR, BY HIS GUARDIAN AD LITEM, AILEEN PAYSEUR, v. KENNETH DWIGHT RUDISILL, FRANCES WALLACE RUDISILL, BRADY JONAS HOFFMAN, III, AND B. J. HOFFMAN, JR.

No. 7227SC92

(Filed 28 June 1972)

1. **Torts § 7— release — covenant not to sue — discharge of other tortfeasors**

Where a release or a covenant not to sue is given to one or more persons liable in tort for the same injury, it does not discharge any other tortfeasor from liability unless its terms so provide. G.S. 1B-4.

2. **Infants § 1— settlement of minor's tort claim — approval of court**

The settlement of a minor's tort claim becomes effective and binding upon him only upon judicial examination and adjudication.

3. **Torts § 6— minor plaintiff — release of one tortfeasor — approval of court — judgment**

The execution of a release of one tortfeasor by the guardian *ad litem* of a minor injured in an automobile accident, an order entered by a superior court judge approving the release, and the payment of the agreed sum into the office of the Clerk of Superior Court, *held* not to constitute a recovery and satisfaction of judgment within the meaning of the statute providing that the satisfaction of a judgment against one tortfeasor discharges other tortfeasors from liability to the claimant for the same injury, G.S. 1B-3(e), notwithstanding

the court's order provided that plaintiff "have and recover" of the released tortfeasor, and the settlement was entered on the judgment docket and marked paid and satisfied.

Judge BROCK concurs in the result.

APPEAL by plaintiff from *Seay, Judge,* 20 September 1971 Civil Session of Superior Court held in LINCOLN County.

This is an action to recover damages for personal injuries sustained by plaintiff, a minor appearing by guardian ad litem, as a result of an accident which occurred when a vehicle in which he was a passenger and which was being operated by Hoffman collided with a vehicle being operated by Rudisill. Plaintiff alleged that his spinal cord was severed in the collision causing plaintiff to be paralyzed and that he had incurred medical expenses in excess of $14,000. Plaintiff alleged that his injuries were approximately caused by the negligence of Rudisill and Hoffman.

While the case against the said defendants was pending, plaintiff's guardian ad litem filed a petition directed to the resident judge of the twenty-seventh judicial district. The petitioner requested that she be authorized to execute a release agreement with the Hoffmans under the provisions of the Uniform Contribution among Tort-Feasors Act and asked the court to order the disbursement of the funds so received for the payment of specified expenses.

On the same day the petition was filed, the following order was entered:

"This matter coming on to be heard and being heard before his Honor John R. Friday, Resident Judge of the 27th Judicial District, on the petition of Aileen Payseur, Guardian ad Litem of Russell Payseur, and it appearing to the Court and the Court finding as a fact,

THAT Russell Payseur was injured in an automobile collision on the 19th day of September, 1969, in an accident between a vehicle being driven by Kenneth Dwight Rudisill and a vehicle being driven by Brady Jonas Hoffman, III, at the intersection of Rural Paved Road Number 1242 and Rural Paved Road Number 1243 in Lincoln County, North Carolina; and

THAT as a result of said collision Russell Payseur's spinal cord was severed at the 11th dorsal level causing the said Russell Payseur to be paralyzed and permanently crippled;

THAT there is now a lawsuit pending in the Superior Court of Lincoln County with Russell Payseur as plaintiff by his guardian ad litem Aileen Payseur and the defendants are Kenneth Dwight Rudisill, Frances Wallace Rudisill, Brady Jonas Hoffman, III, and B. J. Hoffman, Jr.

THAT the attorney for the defendants Brady Jonas Hoffman, III, and B. J. Hoffman, Jr., has offered to settle the claim of the plaintiff against his clients for the sum of Ten Thousand and no/100 Dollars ($10,000.00) under the provisions of the Uniform Contribution Among Tortfeasors Act; and

THAT the medical expenses of the plaintiff due the Charlotte Memorial Hospital in the sum of One Thousand Two Hundred Thirty-Eight and 52/100 ($1,238.52) have been paid; and

THAT the medical expenses of the plaintiff due to Drs. Roper and Price, Randolph Medical Center, Charlotte, N. C., in the sum of One Thousand, Seven Hundred Forty and no/100 Dollars ($1,740.00) have been paid; and

THAT the medical expenses of the plaintiff due to Dr. George C. Culbreth of 225 Hawthorne Lane, Charlotte, N. C., in the sum of Five Hundred and no/100 Dollars ($500.00) have been paid; and

THAT Aileen Payseur, mother of the plaintiff, since the accident in which her son was injured on the 19th day of September, 1969, has incurred loss of time from work and has sustained wage losses in the sum of $2,000.00; and that the said Aileen Payseur has been reimbursed the sum of $5,478.75 for said wage losses; and above medical expenses; and

THAT it is the opinion of the Court that it would be in the best interest of the minor plaintiff, Russell Payseur, to settle his suit against Brady Jonas Hoffman, III, and B. J. Hoffman, Jr., for the sum of Ten Thousand and no/100 Dollars ($10,000.00); and

THAT Thomas J. Wilson, attorney, has rendered valuable services to the plaintiff in investigating the facts surrounding the circumstances of the plaintiff's injury and subsequently filing a lawsuit in the matter,

AND, it further appearing to the court and the court finding as a fact that Brady Jonas Hoffman, III, and B. J. Hoffman, Jr., have already paid to Aileen Payseur, mother, and guardian ad litem, the sum of $5,478.52 in payment of medical expenses incurred by minor plaintiff in this action, and to reimburse said mother for loss of wages during the time he was recuperating from injuries sustained in this accident;

AND, it further appearing the defendants B. J. Hoffman, III, and B. J. Hoffman, Jr., have offered to pay to the minor plaintiff and his mother the additional sum of $4,521.48 and the costs of this action in full and complete settlement of all injuries and damages and expenses incurred by the plaintiff and his mother;

AND, that the plaintiff now eighteen years of age and his guardian ad litem his mother after consulting with their attorney have agreed to accept the proposed settlement;

AND, the court after having reviewed the medical evidence and the manner in which this alleged accident occurred and hearing the statements of the minor plaintiff, after further due investigation by the court, the proposed settlement and payment to the minor plaintiff is found by the court to be just and reasonable and to the best interest of the minor plaintiff:

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

1. Aileen Payseur, mother of the plaintiff and guardian ad litem is authorized and directed to execute a release on behalf of Russell Payseur, releasing Brady Jonas Hoffman, III, and B. J. Hoffman, Jr., on the payment of Ten Thousand and no/100 ($10,000.00) from any and all liability, present or future, arising out of the automobile accident which occurred on the 19th day of September, 1969, as a result of a collision between a vehicle being driven by

Brady Jonas Hoffman, III, and an automobile being operated by Kenneth Dwight Rudisill; and

2. That the plaintiff have and recover from the defendants, B. J. Hoffman, III, and B. J. Hoffman, Jr., the additional sum of $4,521.48 in full, and complete settlement of all his injuries and damages sustained in said accident or in anywise growing out of said action, and that the costs of this action to be taxed by the Clerk and paid by the said defendants; and

3. That the Clerk of the Superior Court of Lincoln County is authorized and directed to pay to Thomas J. Wilson, attorney of the Lincolnton, North Carolina Bar, the sum of $1,500.00 for professional services rendered the plaintiff in this matter."

Plaintiff's guardian ad litem then executed a release to the Hoffman defendants for the stated consideration of $10,000.00. The release, among other things, contains the following:

"It is further agreed by the undersigned Russell Payseur, and by his guardian ad litem Aileen Payseur, and Aileen Payseur, divorced, as the parent having the custody of Russell Payseur, that the right to recover damages from Kenneth Dwight Rudisill and Frances Wallace Rudisill, be, and by the terms of G.S. 1B-4 be reduced by the sum of Ten Thousand and no/100 Dollars ($10,000.00), being the amount of the damages of the undersigned which they received from Brady Jonas Hoffman, III, and Brady Jonas Hoffman, Jr.

It is further understood and agreed that this release is given and taken pursuant to the provisions of the Uniform Contribution Among Tortfeasors Act being Sections 1B-1 through 1B-6 of the Statutes of the State of North Carolina and that it is the intention of the undersigned not only to release any and all claims against Brady Jonas Hoffman, III, and Brady Jonas Hoffman, Jr., on account of the accident hereinabove described but also to relieve the said Brady Jonas Hoffman, Jr., and Brady Jonas Hoffman, III, from any liability to make contribution to Kenneth Dwight Rudisill and Frances Wallace Rudisill on account of said accident or on account of the pending litiga-

tion between the undersigned as plaintiff and Brady Jonas Hoffman, III, Brady Jonas Hoffman, Jr., Kenneth Dwight Rudisill and Frances Wallace Rudisill as defendants."

The following entries appear on page 297 of Judgment Book 1 in the office of the Clerk of Superior Court:

"JUDGMENT DOCKET

Abstract of Judgments, Liens, Lis Pendens, etc.

CASE: Russell Payseur, Plaintiff
vs.
Brady Jonas Hoffman, III, and B. J. Hoffman, Jr., Defendants

Docketed at: 11:00 A.M., January 12, 1971

ABSTRACT OF DOCUMENT:

NORTH CAROLINA
COUNTY OF LINCOLN

The liability of Brady Jonas Hoffman, III, and B. J. Hoffman, Jr., to Aileen Payseur, Guardian ad litem for Russell Payseur, for $4,521.48 Dollars plus interest at _____ on $_____ from the _____ day of _____ 19____, and costs, was established by John R. Friday, Resident Judge by Consent of parties, dated the 12 day of January, 1971.

$4,521.48 TOTAL PRINCIPAL INTEREST FROM DATE — $36.00 COSTS

NORTH CAROLINA

COUNTY OF LINCOLN

No. 297

'Paid and satisfied in full This 22nd day of January, 1971. /S/ Thomas J. Wilson, Atty.' "

The Rudisill defendants moved for summary judgment on the grounds that any claim against them was barred by G.S. 1B-3(e). The motion was allowed and judgment was entered dismissing plaintiff's action. Plaintiff appealed.

Thomas J. Wilson for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by John G. Golding for defendant appellees.

VAUGHN, Judge.

[1] Where a release or a covenant not to sue is given to one or more persons liable in tort for the same injury it does not discharge any other tort-feasor from liability unless its terms so provide. G.S. 1B-4.

[2] The release in the present case clearly preserved the right to proceed against other tort-feasors. Here, however, the injured party is a minor. The settlement of a minor's tort claim becomes effective and binding upon him only upon judicial examination and adjudication. *Sell v. Hotchkiss* and *Collier v. Hotchkiss* and *Hotchkiss v. Hotchkiss,* 264 N.C. 185, 141 S.E. 2d 259. It was therefore necessary for the minor's guardian ad litem to submit the proposed release agreement to the court. An agreement, not a dispute, was before Judge Friday. The court approved the release agreement and entered the order hereinbefore set out. The terms of the release have now been complied with by the parties thereto.

On motion of the remaining tort feasors, Judge Seay dismissed the minor's claim against them on the ground that the same was barred by G.S. 1B-3(e) which is as follows:

> "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."

[3] We hold that the order entered by Judge Friday, the execution of the release agreement which it approved and the payment of the agreed sum into the office of the Clerk of the Superior Court did not constitute a recovery and satisfaction of judgment within the meaning of G.S. 1B-3(e).

In its consideration of the proposed release agreement the court's function was " . . . to lend its wisdom, experience, and circumspection to the infant, who legally wants these faculties and is therefore a likely victim of overreaching." 8 A.L.R. 2d 460, 462. The release agreement executed pursuant to the order is the controlling factor. *McNair v. Goodwin,* 262 N.C. 1, 136 S.E. 2d 218. In this case, the infant plaintiff, having ob-

tained the court's approval of his release agreement, is entitled to the same status as an adult executing a release under the provisions of G.S. 1B-4.

We are not unmindful of the language in Judge Friday's order that plaintiff "have and recover" of the defendants or of the entries on the Judgment Docket. It suffices to say that we hold that they shall not deprive this minor of the rights to which he would have been entitled had he been an adult and thus not required to seek the court's approval of the release agreement. To hold otherwise would hardly be consistent with the duty of the courts, as the guardians of all infants, to exercise their equitable powers to protect the personal and property rights of infants.

For the reasons stated, the judgment from which plaintiff appealed is reversed.

Reversed.

Judge HEDRICK concurs.

Judge BROCK concurs in the result.

FRUIT & PRODUCE PACKAGING COMPANY, DIVISON OF INLAND CONTAINER CORPORATION v. LEON STEPP

No. 7229DC171

(Filed 28 June 1972)

1. Accord and Satisfaction § 1— insufficiency of pleading

In this action to recover for merchandise sold and delivered, defendant's answer was insufficient to plead the defense of accord and satisfaction where it alleged only that he was obligated to plaintiff for an open account, that the account has been fully paid and satisfied, and that no amount is owed.

2. Accord and Satisfaction § 1— requisites of pleading

In pleading the affirmative defense of accord and satisfaction, defendant's answer should set forth and aver execution of the accord, or that there was a new promise, based on a consideration which was accepted in satisfaction.

3. Accord and Satisfaction § 1— notation on accepted check

Plaintiff's acceptance of defendant's check containing a notation that, by endorsement, the check when paid is accepted in full payment of defendant's account did not constitute an accord and satisfaction, where defendant had not communicated to plaintiff that he disputed the amount of the account, and there was no negotiation or agreement between plaintiff and defendant concerning payment or acceptance of less than the full amount of the account.

APPEAL by defendant from *Carnes, District Judge,* 1 November 1971 Session of the District Court held in HENDERSON County.

On 15 March 1971, the plaintiff-appellee, Fruit & Produce Packaging Company which is a division of Inland Container Corporation, instituted this action against the defendant-appellant, Leon Stepp, seeking to recover the sum of $13,787.99 for merchandise sold and delivered to defendant, plus interest and court costs.

In his answer to plaintiff's complaint, defendant alleged, "[t]hat the defendant admits that he was obligated to the plaintiff for an open account, but defendant alleges that said account has been fully paid and satisfied and no amount whatever is now due and owing to the plaintiff by the defendant on account of said account."

After evidentiary hearing, the District Court, sitting without a jury, made the following findings, among others:

"3. That during the period beginning February 1970 and ending October 31, 1970 plaintiff sold to the defendant and the defendant purchased from plaintiff items of merchandise having an aggravate (sic) invoice value of $22,280.32.

"4. That during the month of December, 1970, Mr. Robert A. Wilcox, credit manager of the plaintiff, called upon defendant relative to the account, at which time the defendant informed Mr. Wilcox that there was a problem involving bruised apples, and that the defendant would get in touch with the plaintiff about it.

"5. That on or about December 31, 1970 plaintiff received and deposited to its account a check from the

defendant in the sum of $8432.58, which check bore on its face the following statement:

'Your invoice from 2/13/70 thru 10/31/70

	$24,272.98'
'Less: Inferior Bags	4,310.65'
Damage to apples by round trays	11,470.00'
Credit Memo # 405	59.75'
'Amount of check	8,432.58'

"6. That printed on the face of the check is the following:

'By indorsement this check when paid is accepted in full payment of the following account'

"7. That immediately following said printed statement was the itemized statement hereinbefore set forth.

"8. That after said check was deposited plaintiff communicated by registered mail to the defendant informing the defendant that said check had been accepted as part payment of the account."

Based on the foregoing findings, the District Court concluded that the defendant was indebted to the plaintiff in the sum of $13,787.99 and that defendant, by failing to plead accord and satisfaction, was not entitled to assert that theory as a defense.

The court entered judgment that plaintiff recover of defendant Stepp the sum of $13,787.99 with interest. Defendant Stepp appealed, assigning error.

Redden, Redden & Redden, by Monroe M. Redden, Jr., for plaintiff-appellee.

Francis M. Coiner for defendant-appellant.

BROCK, Judge.

Defendant assigns as error that the court concluded that defendant failed to plead a defense of accord and satisfaction. We think that the trial judge was correct.

G.S. 1A-1, Rule 8(c) states in pertinent part: "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction . . . and any other matter constituting an avoidance or affirmative defense. Such pleading shall contain a short and plain statement of any matter constituting an . . . affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved."

[1] Defendant's answer, quoted in the facts of this case, fails to comply with the above conditions of G.S. 1A-1, Rule 8(c). Although defendant contends that his defense of accord and satisfaction is couched in the phraseology of his answer, we find, even with a liberal view, that the defendant only alleged that he was obligated to the plaintiff for an open account, that the account has been fully paid and satisfied, and no amount is owed. This clearly is not sufficient to give the court or the plaintiff notice of any transactions, occurrences, or series of transactions or occurrences intended to prove accord and satisfaction. The defendant-pleader failed to state with sufficient particularity the substantive elements of his affirmative defense—accord and satisfaction. *See* 1 McIntosh, N. C. Practice & Procedure, 2d, § 970.65 (Supp. 1970).

In 1 Strong, N. C. Index 2d, Accord and Satisfaction, § 1, it is said:

> "A compromise and settlement must be based upon a disputed claim; an accord and satisfaction may be based on an undisputed or liquidated claim.
>
> An accord and satisfaction is compounded of two elements: An accord, which is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim, liquidated or in dispute, something other than or different from what he is or considers himself entitled to; and a satisfaction, which is the execution or performance of such agreement."

[2] In pleading the affirmative defense of accord and satisfaction, the defendant's answer should set forth and aver execution of the accord, or that there was a new promise, based on a consideration which was accepted in satisfaction. The fact that the defendant pleads payment does not permit him, under that plea, to assert the defense of accord and satisfaction. 1 Am.

Jur. 2d, Accord and Satisfaction, § 53. Defendant's answer, even when construed liberally, fails to state or give notice of the basic element, an accord or new promise.

Nevertheless, the District Court permitted the defendant to introduce into evidence the accepted check, with the previously mentioned notation. The notation on the check is the basis for defendant's contention that there was a discharge of the indebtedness by an accord and satisfaction.

[3] In this case there was no evidence or allegation of communication between plaintiff and defendant concerning a dispute over the account. Nor was there evidence or allegation of negotiation or agreement between plaintiff and defendant concerning payment or acceptance of less than the full amount of the account.

> "The fact that a remittance by check purporting to be 'in full' is accepted and used does not result in an accord and satisfaction if the claim involved is liquidated and undisputed, under the generally accepted rule that an accord and satisfaction does not result from the part payment of a liquidated and undisputed claim. The creditor is justified in treating the transaction as merely the act of an honest debtor remitting less than is due under a mistake as to the nature of the contract." 1 Am. Jur. 2d, Accord and Satisfaction, § 18, p. 317.

Defendant also assigns as error that the Court concluded that defendant is indebted to the plaintiff in the sum of $13,787.99. Defendant's only properly asserted defense is that the account has been fully paid. The evidence clearly supports the trial court's findings relating to the amount of the account. There is no evidence tending to support a payment or credit which was not properly computed by the trial court in reducing the amount of the original account to the amount it found to be due. All of the evidence supports the court's findings of fact and the facts so found support the conclusions of law and the judgment.

For reasons stated above, all of defendant's assignments of error are overruled and the judgment of the District Court is

Affirmed.

Judges HEDRICK and VAUGHN concur.

THOMAS B. McNAIR v. EDWARD LEE BOYETTE AND OSCAR LEE HALL

No. 7210SC298

(Filed 28 June 1972)

1. **Rules of Civil Procedure § 56— summary judgment — negligence case**

While summary judgment will not be as feasible in negligence cases, where the standard of the prudent man must be applied, as it would be in other cases, it is proper in negligence cases where it appears that there can be no recovery even if the facts as claimed by plaintiff are true.

2. **Negligence § 28— facts established — question of law**

When the facts are admitted or established, negligence is a question of law.

3. **Negligence § 26— negligence and proximate cause**

In order to support a recovery against a defendant based on negligence, it must be shown that defendant was negligent and that his negligence was a proximate cause of plaintiff's injury.

4. **Negligence § 8— proximate cause**

Proximate cause is a cause which in natural sequence, unbroken by any new and independent cause, produced the injury, and without which the injury would have not occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the existing facts.

5. **Negligence § 10— intervening negligence**

If there is more than one proximate cause, that which is new and entirely independent breaks the sequence of events and insulates the original or primary negligence.

6. **Negligence § 10— intervening negligence — test**

The test by which negligent conduct of one is insulated as a matter of law by the independent negligent act of another is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury.

7. **Automobiles § 87; Negligence § 36— automobile collision — injury while directing traffic — proximate cause**

Automobile driver's negligence in causing a collision with another automobile was not a proximate cause of injuries suffered by plaintiff when he was struck by a third vehicle while directing traffic at the scene of the collision.

Judge BRITT dissents.

APPEAL by plaintiff from *Braswell, Judge,* at the Second November 1971 Civil Session of WAKE Superior Court.

Plaintiff instituted this civil action to recover damages alleged to have been caused by the negligence of defendants. Defendants Hall and Boyette answered the complaint and each cross claimed against the other.

Defendant Boyette moved the court for summary judgment. The motion was heard on the pleadings, affidavits, depositions and oral arguments. The trial court, upon consideration of the evidence presented, ruled that there was no genuine issue of fact to be determined and entered summary judgment against the plaintiff in favor of defendant Boyette.

The evidence presented at the hearing may be summarized as follows:

On the night of 24 December 1969, plaintiff was driving east on the Raleigh Beltline between Highway 70 and Six Forks Road. He noticed an automobile approaching from the rear at a high rate of speed. The automobile, driven by defendant Boyette, passed plaintiff and continued down the road at a high rate of speed. As Boyette attempted to pass another car, he was involved in a collision with that car. This occurred while the Boyette car was still in sight of plaintiff. Plaintiff arrived at the scene approximately 30 seconds after the collision. The two cars involved in the collision were blocking one eastbound lane and partially blocking the other eastbound lane. Plaintiff pulled his automobile off the road to the median on the left and used a two-way ham radio in his car to call for the police. He told the other radio operator to hold on while he ascertained if there were any injuries. He then went to the automobiles involved in the collision to determine if an ambulance would be necessary and thereupon found there were no injuries and no ambulance was needed. He returned to his automobile and so reported to the other radio operator. Plaintiff then noticed that traffic was approaching the scene of the accident. He stopped several cars by waving his arms and observed several cars pull on the median and pass the wreck with difficulty. He then crossed the highway to get a flashlight from one of the cars that had stopped on the right shoulder. After getting the flashlight, the plaintiff testified:

> " . . . I was just starting back to keep easing traffic around the cars so there wouldn't be an accident and I turned just in time to see him. I did look to the left before I

stepped out onto the highway. As to why I didn't see Mr. Hall's car, he was on me. He was there, come right up out of nowhere. It was just a short time before he struck me that I turned and saw him. Before I turned and saw him I was looking back straight across the highway. As to what protective action I took for my own safety before I stepped out into the highway, I was looking for a flashlight. That is what I was doing over there on that side; I went to get the flashlight. As to what protective action I took after I got the flashlight before I stepped out into the highway, for my own protection and for my own safety before I stepped out into the highway, I had the flashlight on; I thought that was enough. I saw Mr. Hall whenever—just as he hit me. When I stepped on the highway after getting the flashlight, I was facing the median. . . . "

Plaintiff was knocked some 35 feet in the air by the Hall automobile and sustained injuries.

From the summary judgment of the trial court, plaintiff appeals.

Twiggs & McCain by Howard F. Twiggs and Grover C. McCain, Jr.; Yarborough, Blanchard, Tucker & Denson by Charles F. Blanchard and James E. Cline for plaintiff appellant.

Maupin, Taylor & Ellis by Armistead J. Maupin for defendant appellee, Edward Lee Boyette.

CAMPBELL, Judge.

Plaintiff assigns as error the trial court's entry of summary judgment in favor of defendant Boyette.

[1, 2] While it is conceded that summary judgment will not be as feasible in negligence cases, where the standard of the prudent man must be applied, as it would in other cases, summary judgment is proper where it appears that there can be no recovery even if the facts as claimed by plaintiff are true. *Pridgen v. Hughes,* 9 N.C. App. 635, 177 S.E. 2d 425 (1970). When the facts are admitted or established, negligence is a question of law and the court must say whether it does or does not exist and this rule extends to the question of proximate cause. *Hudson v. Transit Co.,* 250 N.C. 435, 108 S.E. 2d 900 (1959).

Was plaintiff barred as a matter of law from recovery against defendant Boyette?

[3-6] In order for there to be a recovery against a defendant, the defendant must be shown to be negligent and his negligence must be the proximate cause of plaintiff's injury. *Clarke v. Holman,* 274 N.C. 425, 163 S.E. 2d 783 (1968). Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the injury and without which the injury would not have occurred, and from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result was probable under the facts as they existed. *Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854 (1958); *Grimes v. Gilbert,* 6 N.C. App. 304, 170 S.E. 2d 65 (1969). If there is more than one proximate cause, that which is new and entirely independent breaks the sequence of events and insulates the original or primary negligence, and the test by which negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808 (1940).

> "The decisions are all to the effect that liability exists for the natural and probable consequences of negligent acts or omissions, proximately flowing therefrom. The intervening negligence of a third person will not excuse the first wrongdoer, if such intervention ought to have been foreseen. In such case, the original negligence still remains active and a contributing cause of the injury. The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently arising. *Lane v. Atlantic Works,* 111 Mass., 136." *Butner v. Spease, supra.*

In *Butner,* Chief Justice Stacy quoted the following from *R. R. v. Kellogg,* 94 U.S. 469:

> " 'We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case

> the resort of the sufferer must be to the originator of the immediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.' "

Plaintiff alleges that defendant Hall was negligent in that he failed to keep a proper lookout, failed to reduce his speed where a special hazard existed on the highway, failed to stop his vehicle when he saw or should have seen plaintiff with a flashlight warning motorists, failed to stop his automobile within the radius of its headlights and operated his automobile at a speed greater than was reasonable and prudent under the conditions then existing.

[7] Does the negligence of Hall constitute an independent negligent act which was the proximate cause of the injuries to plaintiff? It is our opinion it does.

Hall's alleged negligence was independent of Boyette's alleged negligence; it caused an injury which would not otherwise have occurred and it resulted in injury to plaintiff after the alleged negligence of Boyette had ceased to operate. Boyette could not foresee Hall's negligent act. Plaintiff was not engaged in rescuing Boyette as he had already ascertained that Boyette was not injured and needed no help. Plaintiff was engaged in directing traffic when he was injured by the alleged negligence of Hall.

Plaintiff alleges, in substance, that Hall should have seen the hazardous situation on the highway and taken proper action to avoid striking plaintiff.

> " 'Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. . . . ' " *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88 (1938). Likewise, see *Loving v. Whitton,* 241 N.C. 273, 84 S.E. 2d 919 (1954).

The condition created by Boyette was merely a circumstance and not the proximate cause of plaintiff's injury.

In a factually similar case, the Virginia Supreme Court of Appeals ruled in favor of the defendant originally negligent when several people, including plaintiff, got out of their automobiles following a collision with said defendant and were struck down by a second negligent driver. *Wallace v. Jones,* 168 Va. 38, 190 S.E. 82 (1937).

For the above reasons we hold that the trial court was correct in entering summary judgment in favor of defendant Boyette.

Affirmed.

Chief Judge MALLARD concurs.

Judge BRITT dissents.

STATE OF NORTH CAROLINA v. JEROME PHILLIPS

No. 723SC74

(Filed 28 June 1972)

1. **Criminal Law § 42— identification of items admitted in evidence**

In this prosecution for breaking and entering a store and larceny of property therefrom, a television set and vacuum cleaner allegedly stolen from the store and a toaster found on the floor of the store were sufficiently identified for admission in evidence, where an employee of the store identified all three items as belonging to the store, identified the television set on *voir dire* by model number, and stated that the store still had the box for the vacuum cleaner, a deputy sheriff identified the television by comparing its serial number with the number on a bill of sale to the store, and testified that he saw the vacuum cleaner box and stated its model number, and the toaster did not leave the premises of the store.

2. **Criminal Law § 75— exculpatory statement — absence of written waiver of counsel**

In a prosecution for breaking and entering a store and larceny of property therefrom, defendant's statement to a deputy sheriff that he had never been in the store was an exculpatory statement, not an admission, and testimony of the statement was properly admitted even though defendant had not executed a written waiver of counsel as required by former statute.

State v. Phillips

3. Burglary and Unlawful Breakings § 5; Criminal Law § 60; Larceny § 7— sufficiency of fingerprint evidence

In this prosecution for breaking and entering a store and larceny of property therefrom, evidence that defendant's fingerprints were found on a toaster which had been in a showcase the previous day and which was on the floor of the store after the break-in *is held* sufficient to take the case to the jury, where there was evidence that defendant walked by the store on two occasions the afternoon before the break-in but did not enter the store, a window of the store was broken and there was blood about the premises, one of the fingerprints found on the toaster was made in blood, and there was no evidence to explain a cut on defendant's hand.

APPEAL by defendant from *Rouse, Judge,* at the August 1971 Criminal Session of PITT Superior Court.

Defendant was tried on a bill of indictment charging him with felonious breaking and entering and felonious larceny.

At the trial the State introduced evidence which tended to show the following:

On 17 March 1971 Jerome Flemming was an employee of City Electric Company, an appliance store, in Ayden, North Carolina. When he reported for work on the morning of 17 March, he found that a window at the store had been broken and there was blood about the premises.

An examination of the interior of the store revealed that a television and a vacuum cleaner were missing from the front of the store. A toaster, which had been in the showcase the previous day, was found on the floor with blood on it. An identification expert from the City-County Bureau of Identification was called to examine the toaster. The expert took latent fingerprints from the toaster, and they were identical with defendant's fingerprints. One of the fingerprints taken was in blood.

There was testimony that defendant had walked past the store twice on the day prior to the break-in and glanced in the window. No one saw the defendant enter the store at that time.

There was also testimony by a police officer that defendant stated after his arrest that he had never been in the City Electric Company.

On the date he made this statement, 17 March 1971, defendant was observed to have a cut about ¼ inch long on his right hand.

The television and the vacuum cleaner were later recovered from the residence of one Jones.

The jury returned a verdict of guilty on the charge of felonious breaking and entering and a verdict of not guilty on the charge of felonious larceny.

Judgment was entered on the verdict imposing a prison sentence.

From the verdict and judgment, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Rafford E. Jones for the State.

Owens and Browning by Robert R. Browning for defendant appellant.

CAMPBELL, Judge.

[1] Defendant first assigns as error the introduction into evidence of the television and vacuum cleaner alleged to have been taken from the City Electric Co. and the toaster found on the floor of the store. Defendant concedes that these items were relevant and material, but it is contended that they were not properly identified and therefore should not have been admitted into evidence.

The witness Flemming, an employee of the store, identified the television, the vacuum cleaner and the toaster as belonging to the City Electric Co. He testified that they had the box for the vacuum cleaner. On voir dire he also identified the television by model number. The witness Martin, a deputy sheriff, identified the television by comparing its serial number with the number he had copied from the bill of sale to City Electric Co. He also testified that he saw the vacuum cleaner box and stated its model number. It is noted that the toaster in question did not leave the premises of the store.

We are of the opinion that the items introduced into evidence were properly identified. Furthermore, the defendant was acquitted of the charge of felonious larceny and could not

have been prejudiced by the introduction of items alleged to have been stolen from the store. While the toaster was used in proving the charge of felonious breaking and entering, it never left the premises and has been properly identified. This assignment of error is overruled.

[2] Defendant's next assignment of error is to the admission of defendant's statement to Deputy Martin that he (defendant) had never been in the City Electric Co. in Ayden. Defendant contends that he was an indigent and that any statement made by him while in custody was inadmissible unless he had executed written waiver of counsel. Defendant relies on the case of *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971).

The *Lynch* case is clearly distinguishable from the case at hand. *Lynch* forbids introduction of admissions made during in-custody interrogation when there has been no written waiver of counsel. In this case the defendant told the deputy that he had never been in the City Electric Co. store. This is not an admission; it is a denial. It is an exculpatory statement. " 'Exculpatory statements, denying guilt, cannot be confessions. This ought to be plain enough, if legal terms are to have any meaning and if the spirit of the general principle is to be obeyed. This necessary limitation of the term "confession" is generally conceded.' III Wigmore on Evidence, 240." *State v. Butler,* 269 N.C. 483, 153 S.E. 2d 70 (1967). A denial of guilt or a claim of innocence is not a confession of guilt and exculpatory statements are not within the common law and statutory rules relating to confessions. 23 C.J.S. Criminal Law, § 816(b).

In this case the defendant's statement was a denial, not an admission, and its introduction into evidence was not controlled by the rules relating to confessions. It was proper to allow the deputy to testify to the statement made by defendant. This assignment of error is overruled.

[3] Defendant's final assignment of error is to the denial of his motion for nonsuit at the close of the State's evidence. Defendant contends that the evidence placing him inside of the City Electric Co. consisted of the fingerprints found on the toaster. It is argued that the toaster was readily available to any person entering the building and that the fingerprints found on the toaster, standing alone, should have no probative force and therefore there was insufficient evidence to be sub-

mitted to the jury. The defendant relies upon the case of *State v. Minton,* 228 N.C. 518, 46 S.E. 2d 296 (1948).

In the *Minton* case, defendant's fingerprints were found on a piece of glass which was broken out of the door through which entry had been obtained to an establishment called the Coastal Lunch. The piece of glass was from a pane located near the doorknob of the front door of the Coastal Lunch. The front door was used by customers of the Coastal Lunch and defendant had entered the premises as a customer earlier during the evening of the break-in.

In *Minton,* the Supreme Court was concerned that the fingerprints in question could have been made when defendant entered the Coastal Lunch as a customer and there was also an explanation for cuts found on defendant's hand. *State v. Pittman,* 10 N.C. App. 508, 179 S.E. 2d 198 (1971).

In the case before us there is testimony that defendant walked by the store on two occasions the afternoon before the break-in, but he did not enter the store on these occasions. The toaster from which the fingerprints were taken was found on the floor after the break-in. One of the fingerprints found on the toaster was made in blood. There was no evidence to explain the cut on defendant's hand. The *Minton* case is clearly distinguishable from the case before us.

The circumstances under which defendant's fingerprints were found lead us to the conclusion that the defendant's fingerprints could have been impressed only at the time the crime was committed, and this is sufficient to support a conviction. *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969). There is competent evidence to support the allegations in the indictment, and a motion for nonsuit was properly denied. *State v. Reid,* 230 N.C. 561, 53 S.E. 2d 849 (1949).

In this trial we find,

No error.

Chief Judge MALLARD and Judge BROCK concur.

SUE B. ATKINS v. THE GREAT AMERICAN INSURANCE COMPANY

No. 7210DC292

(Filed 28 June 1972)

1. **Insurance § 68— medical payments coverage — when expenses are "incurred"**

Expenses are "incurred" within the meaning of a medical payments provision of an automobile policy when one has paid or become legally obligated to pay such expenses.

2. **Insurance § 68— medical payments coverage — dental expenses — when incurred**

Plaintiff had not "incurred" dental expenses within a year after an accident within the meaning of a medical payments provision of an automobile policy, where plaintiff and a dentist had agreed that certain dental work would be performed in the future at a time when it was appropriate from a dental standpoint, but plaintiff did not specifically agree that such dentist would perform the work or that she would pay him his proposed fee of $946.00, plaintiff not being legally obligated to pay the dentist.

APPEAL by plaintiff from *Preston, District Judge,* January 1972 Session of District Court held in WAKE County.

The matter was heard by Judge Preston without a jury upon an agreed statement of facts. The nature of the action and the facts are set forth therein and are as follows:

> "This action was brought by plaintiff to recover from defendant the sum of $946.00 in alleged dental expenses under the terms and provisions of the medical payments coverage provided by an insurance policy issued by defendant.
>
> Defendant contends that plaintiff is not entitled to recover such sum inasmuch as the coverage involved covers only reasonable expenses 'incurred within one year from the date of accident,' and such dental work has not been accomplished, such sum of money has not been paid by plaintiff, and plaintiff would not incur an obligation to pay such sum until and unless such dental work is accomplished. Since more than one year has now elapsed since the date of the accident, defendant contends that the sum sued for is not covered under the provisions of its medical payments insurance coverage.

Plaintiff contends that despite this the sum represents 'reasonable expenses incurred within one year from the date of accident' and that plaintiff is therefore entitled to recover such sum.

The parties stipulate and agree that defendant has already paid to or on behalf of plaintiff the sum of $1,084.39, and inasmuch as the medical payments insurance provision is limited to the total sum of $2,000.00, in any event the most plaintiff would be entitled to recover in this action would be $915.61, which represents the total amount of medical payments coverage available in this case.

By consent of both plaintiff and defendant, through their respective counsel of record, it is agreed that a trial by jury in this case is hereby waived in all respects and that this controversy shall be submitted to the presiding judge of Wake County District Court upon the foregoing stipulation and the following agreed statement of facts, in order that this court may rule as a matter of law whether or not plaintiff is entitled to recover the sum of $915.61 under the terms of defendant's insurance policy as hereinafter set forth. Such agreed statement of facts is as follows:

1. On July 21, 1969, defendant issued to Rudolph Hart Hodge its automobile insurance policy No. 3-60-76-48, a copy of which is attached hereto and incorporated by a reference to this agreed statement of facts.

2. On August 30, 1969, at which time the aforementioned policy was in full force and effect, plaintiff Sue B. Atkins was occupying the automobile insured by such policy as a passenger when such automobile was involved in a motor vehicle accident as the result of which Sue B. Atkins sustained oral injuries requiring extensive dental work.

3. Under the terms and provisions of the medical payments coverage contained in the aforementioned insurance policy, defendant has paid to, or in behalf of, Sue B. Atkins, the sum of $1,084.39 for medical or dental bills in connection with medical or dental treatment received by Sue B. Atkins.

4. On July 29, 1970, Sue B. Atkins was examined by Dr. David W. Seifert, Jr., a dentist, and was advised that

in the future she would lose all six lower anterior teeth and he recommended to her that these teeth be extracted at a future date and replaced with a fixed bridge, and on such date plaintiff and Dr. Seifert agreed that such work would be performed in the future at a time when it was appropriate from a dental standpoint. He stated to her that his fee for extracting the teeth and replacing them with the bridge would be $946.00, $900.00 of which represented the charge for the bridge and $46.00 of which represented the charge for extracting the six teeth and x-rays. In Dr. Seifert's opinion the need for such treatment was wholly occasioned by the impact and laceration received in the automobile accident of August 30, 1969.

5. As of the date upon which this agreed statement of facts is executed none of the treatment so advised by Dr. Seifert (referred to in stipulation No. 4) has been performed and no portion of the $946.00 which Dr. Seifert says will be his fee for performing such work has been paid by plaintiff to Dr. Seifert."

Based upon the agreed facts the judge found and concluded as a matter of law that the charges for the extraction of plaintiff's six teeth and their replacement with a bridge was not incurred by the plaintiff within one year from the date of the accident causing plaintiffs' injuries, and that plaintiff was not entitled to recover. From the judgment entered, plaintiff appealed.

Sanford, Cannon, Adams & McCullough by Richard G. Singer for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Grady S. Patterson, Jr., for defendant appellee.

MALLARD, Chief Judge.

Plaintiff contends that under the agreed statement of facts the trial judge committed error in failing to conclude as a matter of law that the plaintiff had obligated herself within one year after the accident to pay for the dental services to be performed in the future at a time when it was appropriate from a dental standpoint, and that this entitled her to recover of the defendant the sum of $915.61 under the terms of its automobile insurance policy issued to Rudolph Hart Hodge. The per-

tinent provisions of the policy read: "To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices . . . . "

The question presented involves the proper definition of the word "incurred."

> "Where the contract of insurance provides for the payment of medical expenses 'incurred' within a specified time period, it is by definition not necessary that payment be made in the specified time, but there is coverage when the liability to pay becomes fixed by contract within the specified time period.
>
> So it has been held under the provision of an automobile policy for payment of medical expenses of a passenger 'incurred within one year' from the date of an accident, that if the doctor was engaged and his services were contracted for within the year, and if the plaintiff was bound to pay or did pay a certain sum within the year, and the doctor afterward complied with the contract and performed the services after one year, then the plaintiff would have incurred such expenses within the year, and the insurer would be liable therefor, but if payment was made after one year, such expenses would not have been incurred within the year." Couch on Insurance 2d, § 48:72.

In the case of *Graham v. Insurance Co.*, 274 N.C. 115, 161 S.E. 2d 485 (1968), it is said:

> "Webster's Third International Dictionary—Unabridged (1961) defines *incur:* 'to meet or fall in with (as an inconvenience); become liable or subject to: bring down upon oneself (incurred large debts to educate his children) (fully deserving the penalty he incurred).' This definition was quoted with approval by this Court in *Czarnecki v. Indemnity Co.*, 259 N.C. 718, 720, 131 S.E. 2d 347, 349. See also *Reliance Mutual Life Insurance Co. of Ill. v. Booher,* 166 So. 2d 222 (Fla. Dist. App.); 42 C.J.S. 552 (1944).
>
> In considering the meaning of *incurred* as used identically in a policy issued by this same defendant, the Supreme Court of Mississippi in *Reserve Life Insurance Co. v.*

Coke, 254 Miss. 936, 943, 183 So. 2d 490, 493, adopted the following definition from *Irby v. Government Employees Insurance Co.,* 175 So. 2d 9 (La. App.) :

> '" As used in the policy in suit the word 'incurred' emphasizes the idea of liability and the definition of 'incur' is: 'To have liabilities (or a liability) thrust upon one by act or operation of law'; a thing for which there exists no obligation to pay, either express or implied, cannot in law constitute an 'incurred expense'; a debt or expense has been incurred only when liability attaches. *Drearr v. Connecticut General Life Insurance Co.,* La. App., 119 So. 2d 149; *United States v. St. Paul Mercury Indemnity Co.,* 8 Cir., 238 F. 2d 594; see also *Stuyvesant Insurance Co. of New York v. Nardelli,* 5 Cir., 286 F. 2d 600, 603," 175 So. 2d at 10.' *Accord, Maryland Casualty Co. v. Thomas,* 289 S.W. 2d 652 (Tex. Civ. App.) ; *Hermitage Health and Life Insurance Co. v. Cagle,* 420 S.W. 2d 591 (Tenn. App.)"

[1] We hold that expenses are incurred within the medical payment coverage hereinabove quoted when one has paid, or become legally obligated to pay such expenses within one year from the date of the accident. *Graham v. Insurance Co., supra.*

[2] In the case of *Maryland Casualty Co. v. Thomas,* 289 S.W. 2d 652, cited by plaintiff, the appellee had already paid the dentist for the dental work to be thereafter performed on a child. In the case before us the plaintiff (presumably an adult) had not paid within one year from the accident for the dental work, which the dentist had "advised" would be necessary at some time "appropriate from a dental standpoint," nor had she become obligated to pay therefor. It is noted that the accident occurred on 30 August 1969 and when the agreed statement of facts was filed on 8 December 1971, the treatment so "advised" by the dentist had not been performed or paid for. Although the plaintiff and the dentist had "agreed that such work would be performed in the future," the plaintiff did not specifically agree that the dentist in question would perform the work or that she would pay him his proposed fee of $946.00. We are of the opinion and so hold that upon the agreed statement of facts neither the plaintiff nor her estate, in the event of her death, was legally obligated to pay the dentist, and therefore, that

Judge Preston correctly held that the plaintiff was not entitled to recover.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. JOSEPH NATHANIEL DAMERON, JR.

No. 7215SC471

(Filed 28 June 1972)

1. **Criminal Law § 91— motion for continuance — review — constitutional right**

A motion for continuance is ordinarily addressed to the discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion; if, however, the motion is based on a constitutional right, the motion presents a question of law and the order of the court is reviewable.

2. **Criminal Law § 91— denial of continuance — disclosure of State's witnesses — violation of pretrial order**

The trial court in this homicide prosecution did not abuse its discretion or violate defendant's constitutional right to a reasonable time to prepare his defense when it denied defendant's motion for continuance made on the second day of trial on the ground that the State had violated a pretrial order by failing to arrange for defendant to examine three of the State's expert witnesses before trial, and by failing to inform defendant before trial of three witnesses who would testify that defendant had threatened the life of decedent, where the solicitor advised defendant before the trial began that the State proposed to call the three expert witnesses but defendant waited until the second day of the trial to complain that the State had not complied with the pretrial order, and the solicitor acted in good faith and promptly gave defendant information about the other three witnesses as soon as he himself learned of the witnesses.

3. **Homicide § 30— failure to submit involuntary manslaughter**

The trial court in a homicide prosecution did not err in failing to submit an issue of involuntary manslaughter to the jury, where all the evidence tended to show that defendant intentionally shot decedent, and there was no evidence tending to show that decedent's death was caused by culpable negligence or misadventure.

APPEAL by defendant from *Hobgood, Judge,* 6 December 1971 Session of Superior Court held in ORANGE County.

State v. Dameron

The defendant, Joseph Nathaniel Dameron, Jr., was charged in a bill of indictment, proper in form, with the murder of William (Billy) Lee. Upon the defendant's plea of not guilty, the State offered evidence tending to show that on 14 September 1971 at about 7:00 p.m. Billy Lee (deceased) returned to his trailer where he lived with one James Allen Jones and found his wife's parents "in the kitchen packing up dishes and stuff. Mr. Taylor told Billy that they had come after some of Bonnie's stuff." Deceased and his wife, Bonnie, were separated, but she would come to the trailer and stay a week or two at a time. After reporting to the police that people were stealing things from his trailer, Billy Lee went into the living room where he found his wife and the defendant. The deceased and the defendant immediately started fighting. Dameron got away from Lee and ran into a hall. Lee pursued the defendant, and the fight continued. The defendant shot Billy Lee and ran out the front door carrying a pistol. The defendant was arrested about 8:15 p.m. about a half mile from the trailer. He gave the officers a .22 caliber pistol which was identified as being the gun which fired the bullet which caused Lee's death. The defendant offered no evidence.

The jury found the defendant guilty of manslaughter. From a judgment imposing prison sentence of 12 years, the defendant appealed.

Attorney General Robert Morgan and Associate Attorney Thomas W. Earnhardt for the State.

Winston, Coleman & Bernholz by Alonzo Brown Coleman, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the Court's refusal to continue the case or to exclude the testimony of challenged witnesses. The record discloses that on 22 November 1971 on motion of the defendant the Court entered an order in pertinent part as follows:

> "It is Ordered that the State furnish to the defendant the following information:
>
> . . . .
>
> 3. The names and all statements to be used by the State of North Carolina in the trial of the above listed cases

which were made by any witnesses concerning the crime alleged against the various defendants.

. . . .

7. Counsel for the accused shall be permitted to examine before the Clerk of Superior Court of Wake and/or Orange County, or their designate, any expert witnesses to be used by the State of North Carolina in the trial of these cases regarding the proposed testimony of such expert witness, on a date prior to the Session of Court wherein said cases are called for trial. The Solicitor shall arrange for the date and place of said examination."

On the second day of his trial, after seven jurors had been passed on by the defendant and the State, the defendant moved that the case be continued on the grounds that the State had not complied with the quoted portions of the Order entered 22 November 1971 in that the solicitor had not arranged for the defendant to examine three expert witnesses the State proposed to call and that the defendant was not given the names of three other witnesses the State proposed to call until the morning of the second day of the trial. In response to the defendant's motion, the solicitor stated that he advised the defendant's counsel before the selection of the jury began that the State would call two firearms experts from the State Bureau of Investigation and Dr. Harry L. Taylor, the medical examiner. The solicitor further stated that at the close of the first day's proceedings he first learned of three witnesses who would testify that the defendant had made statements threatening the life of Billy Lee. Defendant's counsel stated that the solicitor gave him the names of these witnesses and what would be the substance of their testimony on the morning of the second day of defendant's trial.

The defendant contends the Court in denying his motion for a continuance abused its discretion and denied his constitutional right to a reasonable time and opportunity to investigate and produce competent evidence in defense of the crime which he stands charged and to confront his accusers with other testimony.

[1] A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion. If, however,

the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the Court is reviewable. *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970); *State v. Crutchfield,* 5 N.C. App. 586, 169 S.E. 2d 43 (1969); *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617 (1968); *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593 (1966); *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386 (1964).

[2] We cannot say the trial judge abused his discretion in denying the motion to continue made on the second day of the trial after seven jurors had been seated, *State v. Stinson, supra;* nor can we say the defendant was not given ample opportunity to prepare his defense and confront his accusers. The defendant was advised by the solicitor before the jury selection began that the State proposed to call the medical examiner and two firearms experts as witnesses; yet the defendant waited until the second day of the trial to complain that the State had not complied with the order with respect to a pretrial examination of expert witnesses. We do not perceive that a defendant under indictment for first degree murder, represented by competent counsel, would be taken by surprise that the State proposed to use the medical examiner and two firearms experts as witnesses; nor would he be surprised by the fact that the State proposed to call three witnesses who would testify that the defendant had made statements threatening the life of the deceased. With respect to the latter, the record is clear that the solicitor acted in good faith and promptly gave the information to defendant's counsel as soon as he himself learned of the witnesses. The defendant was given ample opportunity to confront and cross-examine all of the State's witnesses. There is nothing in this record to indicate that the defendant was in any way prejudiced by the Court's failure to allow his motion to continue. As was said in *State v. Moses, supra:*

> "Whether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice."

In this case defendant has done neither.

[3] Finally, the defendant contends the Court committed prejudicial error in not submitting the question of his guilt or innocence of involuntary manslaughter to the jury.

"Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty." 4 Strong, N.C. Index 2d, Homicide, § 6, p. 198; *State v. Lawson,* 6 N.C. App. 1, 169 S.E. 2d 265 (1969).

There is no evidence in the record tending to show that the death of the deceased was caused by culpable negligence or was the result of misadventure. The fight between the defendant and the deceased in the living room and the hall, the direct testimony of the witnesses that the defendant shot the deceased, the defendant's flight out of the trailer with a gun in his hand, evidence that the deceased had no weapon, and Billy Lee's dying declaration that the defendant shot him, all tend reasonably to show an intentional shooting of the deceased by the defendant. Considering the evidence in this case, the Court did not commit prejudicial error in not instructing the jury that it could convict the defendant of involuntary manslaughter. *State v. Lawson, supra; State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954).

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

No error.

Judges BRITT and PARKER concur.

MAYBELLINE R. CHOATE v. BILLY CARROLL CHOATE

No. 7223DC469

(Filed 28 June 1972)

1. **Divorce and Alimony § 22; Infants § 9— children age 18 or older — custody and support**

The trial court erred in finding that the children of the parties, both of whom have attained the age of eighteen years or older, were either minor or dependent children of defendant husband in the absence of any finding that such children were insolvent, unmarried and physically or mentally incapable of earning a livelihood, although one child is a high school student and the other is a college student; consequently, portions of the court's order relating to custody and support of the children *pendente lite* must be stricken.

2. **Appeal and Error § 39— failure to docket record in apt time — treatment as petition for certiorari**

Although an appeal was subject to dismissal for failure to docket the record on appeal within the time allowed by Rule 5, the appeal was treated as a petition for *certiorari* and considered on its merits where error was apparent on the face of the record.

APPEAL by defendant from *Osborne, District Judge,* 18 January 1972 Session of District Court for ALLEGHANY County.

In this civil action for alimony, custody and child support and counsel fees pendente lite, the defendant appealed from the following order, which contains among other things the following:

"1. The Plaintiff and the Defendant are husband and wife, having been lawfully married to each other on the 16th day of June, 1948.

2. The Plaintiff and the Defendant are the parents of three children: LYNN CHOATE, age 21, presently a Junior at Appalachian State University; MRS. DEBBIE HAMM, age 19, married and now emancipated; and HOLLY CHOATE, age 18, a high school Senior.

3. The Defendant is a dairy farmer and businessman with a gross monthly income in the sum of approximately $3,000.00 per month; and the Plaintiff is a school teacher with a net monthly income of $650.00 per month during ten months of each year.

* * *

9. Defendant stopped living in the home of the parties on August 22, 1971, and since said date has been living in his house trailer. During all of 1971, Defendant provided Plaintiff with approximately $600.00 for the support of Plaintiff and their minor children. In 1971, Plaintiff borrowed approximately $700.00 from her father to pay household expenses. Plaintiff has no cash or other assets (except her salary) which might be utilized for support.

10. Defendant has abandoned the Plaintiff without provocation on the part of the Plaintiff and without lawful excuse. The Plaintiff is a dependent spouse substantially in need of support from the Defendant, who is capable of making reasonable alimony and child support payments to the Plaintiff.

11. Lynn Choate, daughter of the parties, is a student in good standing in the Junior Class at Appalachian State University and still a dependent of the Defendant and the Plaintiff because of her status as a student. Her quarterly tuition, which includes room, board and tuition (but not books and other expenses), is approximately $450.00.

12. Holly Choate, age 18, daughter of the parties, is a Senior in high school and desires to attend college beginning in autumn, 1972.

13. Plaintiff is a fit and proper person to have custody of the minor child of the parties, Holly Choate, and of the dependent child, Lynn Choate.

14. The Plaintiff does not have sufficient means whereon to subsist during the prosecution of this action and to defray the necessary expenses thereof. She is unable to pay her counsel and has not made any payment to him for his services in this action.

15. Defendant is an excessive user of alcohol, as a result of which the condition of the Plaintiff has been rendered intolerable and her life burdensome.

16. Defendant has willfully failed to provide the Plaintiff with necessary subsistence according to his means and condition, so as to render the condition of the Plaintiff intolerable and her life burdensome.

CONCLUSIONS

From the above facts found, together with all of the evidence presented at the hearing, the Court makes the following conclusions:

The Plaintiff is a dependent spouse who is actually substantially dependent upon the Defendant for her maintenance and support and is substantially in need of maintenance and support from the Defendant. The Defendant is a supporting spouse upon whom the Plaintiff is actually substantially dependent and from whom she is substantially in need of maintenance and support. The Plaintiff is entitled to an Order for alimony pendente lite because the Defendant has abandoned her; and because the Defendant is an excessive user of alcohol, which has rendered the condition of the Plaintiff intolerable and her life burdensome; and because Defendant has willfully failed to provide the Plaintiff with necessary subsistence according to his means and condition, which has rendered the condition of the Plaintiff intolerable and her life burdensome. The Plaintiff is entitled to alimony pendente lite because it has been made to appear to the Court from the evidence presented that the Plaintiff is entitled to the relief demanded in this action in which she has applied for alimony pendente lite, and the Plaintiff does not have sufficient means whereon to subsist during the prosecution of this action and to defray the necessary expenses thereof. In addition, the Plaintiff has applied for counsel fees pendente lite in this action, and the Plaintiff is a dependent spouse who is entitled to alimony pendente lite, and this Court is authorized to enter an order for reasonable counsel fees for her benefit.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. Defendant shall pay in to the Clerk of Superior Court of Alleghany County alimony pendente lite, to be disbursed to the Plaintiff, in the sum of $100.00 per month, beginning on the 10th day of February, 1972, and continuing on or before the 10th day of each month thereafter until the further Orders of this Court.

2. In addition, Plaintiff is to have possession of the home house presently occupied by her and situated upon the premises owned by the parties by the entireties, together with all its contents, and the Defendant is hereby Ordered not to enter said house without permission of the Plaintiff, and not to molest, harass or intimidate the Plaintiff in any manner whatsoever. Likewise, Plaintiff is not to molest or bother or interfere with Defendant in his occupancy of the trailer on the entireties' premises, nor his operation of the dairy farm on the entireties' property.

3. As a further part of the alimony herein ordered, Defendant shall pay all taxes and maintain and pay for adequate fire insurance on said home house, pay for and provide all utilities, including electric power, telephone, water, and heating oil, and provide all needed minor repairs thereon, and maintain same in reasonable condition, including grass mowing and removal of snow from driveway when needed. Defendant shall maintain for the possession and use of Plaintiff the 1970 Mercury automobile, together with all registration and insurance.

4. Defendant shall make all mortgage payments to The Federal Land Bank of Columbia when they shall become due.

5. Plaintiff is hereby awarded custody of Lynn Choate and Holly Choate. Defendant shall have reasonable visitation rights to be arranged between him and said children at the children's own choosing, but not to interfere with their normal schooling and educational activities.

6. Defendant shall pay in to the Clerk of Superior Court of Alleghany County for the support of said minor child and said dependent child the sum of $200.00 per month, to be disbursed to the Plaintiff for the use and benefit of said children, the first payment to be made on the 10th day of February, 1972, and continuing on or before the 10th day of each month thereafter until the further Orders of this Court. It is specifically provided that in the event both of said children shall be college students at the same time, this Order shall be modified and increased as may be required to provide sufficient funds to pay tuition and college expenses for said children.

7. Defendant shall provide and maintain in force adequate medical insurance policies on the Plaintiff and the minor child and the dependent child of the parties.

8. Defendant is hereby ordered to pay in to the Clerk of Superior Court of Alleghany County on the 10th day of February, 1972, the sum of $500.00 to be disbursed to Plaintiff's counsel for his services on behalf of Plaintiff to date."

Edmund I. Adams for plaintiff appellee.

Arnold L. Young and R. Lewis Alexander for defendant appellant.

MALLARD, Chief Judge.

[1] The trial court erred in its finding that the children of the parties, Lynn and Holly Choate, both of whom have attained the age of eighteen years or older, were either minor or dependent children of the defendant in the absence of any finding that such children were "insolvent, unmarried *and* physically or mentally incapable of earning a livelihood." *Crouch v. Crouch,* 14 N.C. App. 49, 187 S.E. 2d 348 (1972). See also Chapter 48A of the General Statutes. Therefore, paragraphs 5 and 6 of Judge Osborne's order, awarding plaintiff "custody" of Lynn Choate, 21 years of age, and Holly Choate, 18 years of age, and ordering defendant to make payments for their use and benefit and that portion of paragraph 7 of said order reading "and the minor child and the dependent child of the parties," and any other references relating to the custody and support of said children in Judge Osborne's order of 23 January 1972 must be and are hereby stricken.

[2] We note that the record on appeal was not docketed in this court until more than ninety days from the date of the judgment appealed from. Inasmuch as no extension of time to docket appears in the record, this appeal is subject to dismissal under our rules. See Rule 5 and Rule 48 of the Rules of Practice in the Court of Appeals. Due to the fact that error was apparent on the face of the record, however, we have elected to treat this appeal as a petition for a writ of certiorari, to allow it and to consider the matter presented on its merits.

We have examined appellant's other assignments of error and find no other prejudicial error, and as modified herein, the judgment appealed from is affirmed.

Modified and affirmed.

Judges CAMPBELL and BROCK concur.

SAMUEL HOWARD KEITH v. G. D. REDDICK, INC.

No. 7218SC240

(Filed 28 June 1972)

1. **Rules of Civil Procedure § 56— summary judgment — immaterial question of fact**

A question of fact which is immaterial does not preclude summary judgment. G.S. 1A-1, Rule 56.

2. **Trial § 18— effect of undisputed facts — question of law**

Where the parties were in agreement as to the facts, the effect of the undisputed facts was a question of law for determination by the court.

3. **Negligence § 53— warehouse operator — duties to invitees**

The operator of a warehouse had the duty to exercise ordinary care to keep the premises an invitee was expected to use in a reasonably safe condition in order not to expose him to danger unnecessarily, and to warn the invitee of hidden conditions and dangers of which he had knowledge or in the exercise of reasonable supervision and inspection should have had knowledge and of which the invitee had less or no knowledge.

4. **Negligence § 57— warehouse operator — duty to truck driver — access to loading dock — wooden pallet — contributory negligence**

The operator of a warehouse breached no duty it owed to the driver of a truck delivering merchandise to the warehouse when a wooden pallet the driver was using to gain access to the loading dock fell from under him, and the truck driver was contributorily negligent as a matter of law in failing to use the steps provided by the warehouse operator and in failing to determine whether he could safely use the pallet, where the driver noticed no defect in the pallet at the time of the accident, did not know what happened to the pallet or what caused him to fall, and was aware that there were some steps 100 to 150 feet away but chose to use the pallet because after reaching the steps he would have had a 150-foot walk back to his truck.

APPEAL by plaintiff from *McConnell, Judge,* 18 November 1971 Session, Superior Court, GUILFORD County.

Plaintiff seeks to recover damages for personal injuries sustained in a fall while an invitee on defendant's premises. Defendant operated a warehouse in Greensboro. The warehouse fronts the loading area with a wall which is interspaced with loading docks approximately five feet in elevation which recede into the building. Plaintiff, a truck driver, had come upon defendant's premises to deliver some merchandise. He had backed his truck into the loading area and up to the dock, had gotten out of his truck, and proceeded to mount the platform or dock by way of a wooden crate, known as a pallet, which had been placed beside the dock. He alleges that as he reached the top of the pallet, "said pallet fell from under the plaintiff causing him to fall down between the platform and vehicle, thereby seriously injuring his back, legs and thighs."

He alleges that defendant was negligent in that

> ". . . it and its duly authorized servants, agents and employees: failed and neglected to erect and maintain appropriate stairways for the use and benefit of those persons using the warehouse in the due course of their business, when they knew or should have known that such failure to provide reasonable means of access to the high platforms would likely endanger persons using same; they provided wooden pallets and permitted the continued use of said wooden pallets by visiting drivers, for the purpose of obtaining access to the 5-foot platforms, when they should have known that the providing and permitting the continued use of said pallets would endanger the safety of those persons who must use them; that the defendant failed to provide a safe place for visiting truckers to work, and did permit and encourage the use of improper wooden pallets as stairs to mount the platforms when they knew or should have known that the same endangered the life of the plaintiff and other truckers."

Defendant answered denying negligence and pleading sole negligence of plaintiff and contributory negligence of plaintiff.

Defendant filed a written motion for summary judgment which motion was heard upon the plaintiff's answers to defendant's interrogatories, plaintiff's deposition, affidavit of the

vice-president of defendant, all presented by defendant; and affidavit of plaintiff presented by plaintiff.

The court granted defendant's motion and plaintiff appealed.

David P. Mast, Jr., for plaintiff appellant.

Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter and W. F. Womble, Jr., for defendant appellee.

MORRIS, Judge.

[1] G.S. 1A-1, Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The standard fixed by the rule does not contemplate that the court is to decide an issue of fact, but rather it impels the court to determine whether a real issue of fact exists. A question of fact which is immaterial does not preclude summary judgment. 3 Barron and Holtzoff, Federal Practice and Procedure, § 1234 (Wright Ed. 1958).

Uncontradicted testimony from answers to interrogatories, deposition and affidavits reveals the following: The pallet was approximately three to four feet in width and approximately five to six feet in length. It was made out of two-by-fours with boards interspaced and nailed to the two-by-fours on both sides and was leaning against the wall just to the side of the platform opening. Plaintiff had been to defendant's warehouse about five or six times before the accident and on those occasions had used a similar type crate to get up on the dock into the receiving doors. ". . . I climbed up on this, as I had before, and when I started over in between the wall and the truck something happened to this pallet. It either slipped or broke down, and I went down between the truck and this board like thing against the wall on my left side . . . I don't know whether it broke down, slipped, turned over or what." "At the time I climbed up on the pallet, I couldn't see anything wrong with the pallets at all—I mean as far as being defective, I couldn't see that." Plaintiff did not examine the pallet after his fall.

The easternmost portion of the warehouse where the accident occurred was used for receiving merchandise. There are five loading doors on the northern wall of the receiving section of the warehouse. In the westernmost portion of the warehouse, steps are provided for the use of truckers in unloading. If a trucker unloading at the eastern section of the warehouse did not climb up and into the sliding door provided for the unloading of trucks, he would have to walk approximately 100 feet from the centermost doorway to the area where permanent steps are provided as an entrance to the warehouse. The pallets had not been placed there by defendant or any of its employees, nor did the pallets belong to defendant. Plaintiff testified by affidavit that even if he had traveled some 150 feet to the first door with steps, he would still have approximately another 150 feet to travel through the office and warehouse area to reach his unloading dock but that he was not permitted by his employer to pass through warehouse areas to reach the unloading area.

[2] We are of the opinion that the parties were in agreement as to all the factual particulars. The effect of the undisputed facts was a question of law for the court to determine. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

[3] Plaintiff was an invitee. It was, therefore, defendant's duty to exercise ordinary care to keep the premises plaintiff was expected to use in a reasonably safe condition in order not to expose him to danger unnecessarily; and to warn plaintiff of hidden conditions and dangers of which he had knowledge or in the exercise of reasonable supervision and inspection should have had knowledge and of which plaintiff had less or no knowledge. *Quinn v. Supermarket, Inc.*, 6 N.C. App. 696, 171 S.E. 2d 70 (1969), cert. denied 276 N.C. 184 (1970).

[4] The undisputed facts reveal that plaintiff had used similar pallets before, at the time of the accident noticed no defect in the pallet used, did not know what happened to the pallet or what caused him to fall; was aware that there were steps some 100 to 150 feet away from where he fell but chose to use the pallet instead because after reaching the steps he would have had a some 150-foot walk back to his truck. Of course, the fact that plaintiff's employer had told him not to go into the warehouse area when unloading is immaterial on the question of defendant's negligence. It appears to us, and we so hold, that

defendant has breached no duty it owed to plaintiff and that plaintiff was contributorily negligent as a matter of law in failing to use the steps or in failing to determine whether he could safely use the alternate method; to wit, the pallet.

Affirmed.

Judges VAUGHN and GRAHAM concur.

MRS. CAROLYN A. LASSITER, WIDOW, WINFRED CECELIA LASSITER, WILLIAM CECIL LASSITER, III, AND ENO FRANK LASSITER, CHILDREN BY THEIR GUARDIAN AD LITEM, MRS. CAROLYN A. LASSITER: OF W. C. LASSITER, JR., DECEASED EMPLOYEE, PLAINTIFFS v. TOWN OF CHAPEL HILL, EMPLOYER

— AND —

NATIONWIDE MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. 7215IC440

(Filed 28 June 1972)

1. **Master and Servant § 57— workmen's compensation — intoxication of employee — cause of death — findings**

In a proceeding to recover workmen's compensation benefits for the death of a municipal employee whose body was crushed by the packing mechanism of a sanitation truck, there was sufficient evidence to support a finding by the Industrial Commission that decedent's death was not occasioned by intoxication even though decedent had sufficient alcohol in his blood at the time of his death to be intoxicated, where claimant presented evidence tending to show that decedent had drunk no alcoholic beverage on the morning of his accident, that he had no odor of alcohol about him and that his appearance and actions on the morning of his death were normal.

2. **Master and Servant § 57— workmen's compensation — intoxication of employee**

G.S. 97-12 does not require the Industrial Commission to determine whether or not an employee was intoxicated as a matter of law, and does not provide for the forfeiture of benefits if an employee was intoxicated at the time of his injury, but only if the injury was occasioned by the intoxication.

APPEAL by defendants from an award by the Industrial Commission filed 6 December 1971.

Commissioner Forrest H. Shuford II, after hearing, made findings of fact and conclusions of law and awarded compensation to plaintiffs. The Commissioner found that W. C. Lassiter, Jr., deceased, was an employee of the defendant Town of Chapel Hill and was injured on 29 December 1969 by accident arising out of and in the course of his employment which resulted in his death and that such injury was not occasioned by the intoxication of deceased. Upon appeal, the Full Commission overruled defendants' exceptions to the findings of fact and affirmed the award of compensation. Defendants Town of Chapel Hill, employer, and Nationwide Mutual Insurance Co., carrier, appealed to the Court of Appeals.

Everett, Everett & Creech, by Robinson O. Everett and James B. Craven III, for claimant-appellees.

I. Weisner Farmer for defendant-appellants.

BROCK, Judge.

[1] The appellants contend that the Hearing Commissioner committed error in making certain findings of fact and conclusions of law which appellants maintain were not supported by competent evidence. The thrust of defendants' argument is that at the hearing they denied liability for compensation on the grounds that deceased employee was intoxicated at the time of the accident which came within the provisions of exemptions and forfeiture in G.S. 97-12. Therefore, they argue that their plea raised the issue of intoxication which required the Commissioner to find as a fact and conclude as a matter of law whether deceased employee was intoxicated at the time of injury; that their tendered evidence established the employee's intoxication at the time of his injury and death; and that the Commissioner's finding, "even though deceased had sufficient alcohol in his blood at the time of his death to be intoxicated, the death of deceased was not occasioned by intoxication," was error. For the above reasons, defendants urge that the case be returned to the Commission for proper findings of fact and the entry of a judgment denying the right to compensation. We do not agree.

The facts of the case in part are as follows: On 29 December 1969, William C. Lassiter, Jr., an employee of the Town of Chapel Hill, was fatally injured while working with a trash

collection crew near 405 Landerwood Drive, Chapel Hill, North Carolina. His body was crushed by the packing mechanism of the Sanitation Department truck.

At the hearing, defendants presented evidence through the testimony of two expert witnesses, a pathologist and a toxicologist, that a blood sample had been taken from the deceased employee soon after his death. According to an analysis performed under the supervision of one of these witnesses, a blood alcohol content of .27 per cent was determined.

The claimants' evidence was contrary to the defendants' contention that Lassiter was intoxicated at the time of the accident or that his death was occasioned by intoxication. The deceased's mother, Mrs. Mayola Lassiter, testified that she had seen him at 5:00 a.m. on the day of his death and that she observed no odor of alcohol, nor did he drink any alcohol at that time. Zeb Evans, Jr., a co-worker, who was with deceased or near him from early morning until the time the accident occurred, testified that he did not observe anything unusual about deceased's actions or appearance and that he did not see Lassiter drink anything or notice any intoxication on Lassiter's part. Other people who had had contact with Lassiter during the morning of the accident testified that they had noticed nothing unusual about Lassiter, who appeared to be acting normal. Even after the accident, when Russell Edwards, the driver of the sanitation truck, and Zeb Evans gave artificial respiration to the deceased employee, neither of them either smelled or tasted any alcohol.

With respect to the circumstances of the accident itself, appellees' evidence tended to show that Lassiter was not a regular crew member on the sanitation truck; that Zeb Evans dumped his barrel first and got off the truck; and that Lassiter stepped up to dump his barrel when the accident occurred. The truck driver saw that the men were clear and started the packing machinery; he looked in the truck's mirror and saw Lassiter caught in the packing mechanism of the trash-collecting truck.

As mentioned above, the paramount issue which defendants raise on this appeal is whether there was sufficient evidence to sustain the Commissioner's finding that the deceased's death was not occasioned by intoxication. We are of the opinion and so decide that there was ample competent evidence for the Com-

missioner to find as a fact and conclude that the death of William C. Lassiter, Jr., was not occasioned by intoxication, even though deceased had sufficient alcohol in his blood at the time of his death to be intoxicated.

[2] By the questions raised in appellants' brief, it appears that they also contend that the Commissioner committed error in failing to find that the injuries resulting in the death of William C. Lassiter, Jr., were occasioned by his intoxication or that he was or was not intoxicated as a matter of law at the time of the accident. G.S. 97-12 states in part, "No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee. . . ." G.S. 97-12 also states that the burden of proof shall be upon him who claims an exemption or forfeiture under this section. Clearly, G.S. 97-12 does not require the Commissioner to find whether the employee was intoxicated or not as a matter of law. This statute does not provide for forfeiture of benefits if an employee was intoxicated at the time of the injury, but only if the injury or death "was occasioned by the intoxication." The Commissioner made the required finding for compensation in finding No. 10, which as stated above was supported by ample competent evidence. There was no need to make any further finding by the Commission.

Although there was contradictory evidence, the Commissioner found that the injuries and death of Lassiter "was not occasioned by intoxication." The principle was succinctly stated by Chief Judge Mallard in *Yates v. Hajoca Corp.*, 1 N.C. App. 553, 162 S.E. 2d 119, as follows: "By making an award in this case, the Commission has found that the defendants failed to carry the burden of proof that the plaintiff's injury was caused by his intoxication, and we are bound by such finding."

The other exceptions brought forth by the defendants to the findings and conclusions are without merit, because each of these findings was supported by competent evidence.

Affirmed.

Judges MORRIS and HEDRICK concur.

VERNICE VANHOY AND ORVILLE VANHOY, ADMINISTRATORS OF THE ESTATE OF WILLIAM SHERRILL VANHOY, DECEASED v. GARY WAYNE PHILLIPS AND MAGALINE PHILLIPS SAWYER

No. 7223SC377

(Filed 28 June 1972)

1. **Evidence § 19— competency of evidence to show prior existence of same state of affairs**

Whether evidence of the existence of a particular state of affairs at one time is competent as evidence of the same state of affairs at another time depends upon the length of time intervening, the showing, if any, as to whether in the meantime conditions had changed, the probability of change and whether in view of the nature of the subject matter the condition would not ordinarily exist at the time referred to unless it had also existed at the prior time in question.

2. **Evidence § 19— observations at accident scene — day after accident — competency**

The trial court did not err in the exclusion of testimony by defendant's witness that he went to the accident scene the day after the accident and observed glass all over the place and spots of blood around the white line, where testimony by the investigating highway patrolman that he didn't find any glass on the pavement indicates that there had been a change in conditions at the accident scene between the time of the accident and the witness' observation of the scene, and the witness did not specify whether he observed blood spots near the broken white line in the center of the road or the white line on the outer edge of the road.

APPEAL by defendants from *Crissman, Judge,* 15 November 1971 Session of Superior Court held in YADKIN County.

Suit by plaintiffs to recover damages for the alleged wrongful death of their intestate, William Sherrill Vanhoy (Vanhoy), who died as a result of being struck by an automobile owned by Magaline Phillips Sawyer (Sawyer) and operated at the time by Gary Wayne Phillips (Phillips).

The parties stipulated, among other things:

"1. That William Sherrill Vanhoy died on the 3rd day of October, 1970, from injuries sustained as a result of a collision with a 1967 Pontiac automobile being operated by Gary Wayne Phillips, and owned by Magaline Phillips Sawyer.

2. That on the 29th day of October, 1970, Vernice Vanhoy and Orville Vanhoy were duly qualified, appointed and

have continuously since that date served as administrators of the Estate of William Sherrill Vanhoy, Deceased.

3. That, at the point where William Sherrill Vanhoy was struck by said 1967 Pontiac automobile, North Carolina Highway 18 at said point approximately 7.1 miles south of Moravian Falls, North Carolina, extends in a general east-west direction and is generally straight for more than .3 mile (3/10 mile) in each direction from the point where said deceased was hit.

4. That Gary Wayne Phillips, at the time and on the occasion complained of was operating said Pontiac in his capacity as agent, servant and employee of Magaline Phillips Sawyer and while in the course and scope of his employment of by Magaline Phillips Sawyer.

5. That on the 3rd day of October, 1970, the date of death of William Sherrill Vanhoy, he was 41 years of age and had a life expectancy under Mortality Table of North Carolina General Statutes, Section 8-46, of 30.69 more years.

6. That William Sherrill Vanhoy, at the time of his death, was employed by R. J. Reynolds Tobbaco Company earning an average of $175.00 per week."

Plaintiffs' evidence, taken in its most favorable light to them, tended to show that Vanhoy, together with four other persons, were using one automobile to tow another automobile from Lenoir toward Wilkesboro on the night of 3 October 1970. In order to make repairs to the tow bar, both the towing automobile (a Comet) and the automobile being towed (a 1957 "Chevy") were parked off of the paved portion of Highway 18 with the left side of the automobiles a distance of from three to six feet from the payment. While thus stopped, the lights were repaired so that those on the back of the towed vehicle would burn. The lights on the parked vehicles were left on, with flashing lights on the towing automobile. The deceased was on the shoulder and not the paved portion of the road at the time he was struck and killed by the automobile operated by Phillips.

Defendants' evidence tended to show that the investigating highway patrolman found no tire marks on the shoulder of the road near where the parked automobiles had been. Phillips had

been traveling toward Lenoir behind an automobile operated by Janet Walker (Walker) at a speed of between 45 and 50 miles per hour. Phillips testified:

> "* * * I was following Janet and Sam. I couldn't say the definite speed I was running. I didn't see any people on or about the highway standing around the cars down there. Prior to passing Janet Walker's car, I looked to see if any cars were coming up the road. I blinked my lights, pulled out to pass. Yes, I blinked my lights. As I began passing Janet Walker's vehicle, as I got beside them, as I started by, I got beside her car and I heard this flapping sound, so I went on up the road and stopped and run back there. When I ran back there, I observed two hurt people laying in back of the '57 Chevy, behind the Chevy.
>
> At no time did I ever see Mr. Vanhoy. At no time did my automobile ever leave the pavement.
>
> I saw parking lights on the vehicles parked on the left side of the road. * * *"

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiffs. From judgment on the verdict, the defendants appealed.

Walter Zachary and R. Lewis Alexander for plaintiff appellees.

Smathers & Ferrell by Forrest A. Ferrell for defendant appellants.

MALLARD, Chief Judge.

Defendants assign as error the failure of the trial judge to permit Steve Trivette (Trivette), one of defendants' witnesses who would have testified that "the next day, or the day after," he went back to the scene near where the "Chevy" was parked and that "around the white line there was some spots of blood there. There was glass all over the place."

[1] The rule is that whether evidence of the existence of a particular state of affairs at one time is competent as evidence of the same state of affairs at another time depends upon the length of time intervening, the showing, if any, as to whether in the meantime conditions had changed, the probability of

change and whether in view of the nature of the subject matter the condition would not ordinarily exist at the time referred to unless it had also existed at the prior time in question. *Jenkins v. Hawthorne,* 269 N.C. 672, 153 S.E. 2d 339 (1967); *Miller v. Lucas,* 267 N.C. 1, 147 S.E. 2d 537 (1966). "The question is one of the materiality or remoteness of the evidence in the particular case, and the matter rests largely in the discretion of the trial court." Stansbury, N. C. Evidence 2d, § 90.

[2] Defendants used the investigating State Highway Patrolman as a witness, and this witness testified that he arrived on the scene just after Vanhoy had been placed in an ambulance. On cross-examination, he testified: "I didn't find any glass on the pavement, there could have been some, but I didn't find it. I didn't find any glass anywhere but in the car." This would indicate that if there were glass "all over the place," there must have been a change in the conditions existing at the scene between the time of the accident and the time Trivette made his belated examination thereof a day or two later. Furthermore, the fact that the witness Trivette would have testified that "(a)round the white line there was some spots of blood there" would have been of little, if any, substantial material value because it was stipulated that Vanhoy died as a result of a collision with the automobile being operated by Phillips, and defendant's exhibit number 1 is a color photograph that indicates there were broken white lines in the center of the road, and a white line on the outer edge of each side of the paved portion. Trivette did not specify on what white line the spots of blood were when he saw them a day or two later. We hold that the trial judge did not abuse his discretion and did not commit prejudicial error in failing to allow this testimony in evidence.

We hold that there was ample evidence to require submission of the case to the jury and that the trial judge properly submitted it on the three issues of negligence, contributory negligence, and damages. We have considered all of the appellants' assignments of error and are of the opinion that the defendants have had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and BROCK concur.

MARGARET E. HAYNES v. TRENT BUSBY AND WIFE, LOIS MILES BUSBY

No. 7219SC273

(Filed 28 June 1972)

1. **Automobiles § 56— striking stopped vehicle — negligence**

The evidence was sufficient for submission to the jury on the issue of defendant's negligence where it tended to show that defendant had just passed an intersection at 10 mph when a cake beside her started slipping from the seat, that defendant reached over to get the cake, and that she did not see plaintiff's vehicle stop ahead of her and ran into the rear of it.

2. **Automobiles § 90— instructions on reckless driving — insufficiency of evidence**

The trial court erred in instructing the jury on careless and reckless driving where the evidence tended to show only that, while traveling 10 mph, defendant was distracted when a cake beside her started slipping from the seat and that she struck the rear of plaintiff's vehicle which had stopped ahead of her, since the failure to keep a reasonable lookout does not constitute reckless driving unless accompanied by dangerous speed or perilous operation.

APPEAL by defendants from *Collier, Judge,* September 1971 Civil Session of ROWAN Superior Court.

Plaintiff seeks damages for personal injuries allegedly suffered as the result of an automobile accident on 9 March 1967 when a vehicle operated by the feme defendant (Mrs. Busby) collided with the rear of an automobile operated by plaintiff. Following a trial, jury verdict and judgment for $22,500 in favor of plaintiff, defendants appealed.

Burke & Donaldson by George L. Burke, Jr., for plaintiff appellee.

Woodson, Hudson, Busby & Sayers by Donald D. Sayers for defendant appellants.

BRITT, Judge.

[1] Defendants assign as error the failure of the court to grant their motions for directed verdict, judgment *non obstante veredicto* or for a new trial on the grounds that all the evidence fails to show that defendants were negligent.

Plaintiff's evidence tended to show: Plaintiff was driving north on Fulton Street in Salisbury, N. C.; there was a continual flow of traffic in both lanes; plaintiff stopped at the intersection of Fulton and West Innes Streets for a stoplight; when the light changed plaintiff proceeded across the intersection then slowed, signaled and stopped because the car in front of her had stopped. The car driven by Mrs. Busby collided with the rear of plaintiff's car. Plaintiff stated she could not have reached a speed of over ten miles per hour.

Mrs. Busby stated to the investigating officer that she was driving about 10 m.p.h. as she passed through the intersection of Fulton and West Innes Streets; that as she traveled just north of the intersection a cake that she had beside her was slipping from the seat and she reached over to get the cake to pull it back on the seat; that she did not see the vehicle in front of her slow down or stop and she ran into the rear of it. She did not have time to apply her brakes.

At a pretrial conference defendants admitted that Mrs. Busby was charged by the Salisbury Police Department with "failing to reduce speed to avoid an accident" and that she pleaded guilty to the charge.

Defendants' evidence was to the effect that the cake started slipping; that it distracted Mrs. Busby for an instant; that when she looked forward again plaintiff had slowed down and Mrs. Busby was unable to apply the brakes of her vehicle fast enough to keep from hitting the rear of plaintiff's vehicle. At the time of impact Mrs. Busby had attained a speed of no more than 10 m.p.h., after having stopped for the traffic light at the intersection.

We hold that when the above evidence is considered in the light most favorable to plaintiff it is plenary to warrant submission of the issue of negligence to the jury and the court did not err in denying defendants' motions for directed verdict, judgment n.o.v. or for a new trial based on insufficient evidence of negligence. See *Sawyer v. Shackleford,* 8 N.C. App. 631, 175 S.E. 2d 305 (1970), cert. den. 277 N.C. 112 (1970); *Musgrave v. Savings & Loan Assoc.,* 8 N.C. App, 385, 174 S.E. 2d 820 (1970).

[2] Defendants contend that the trial court erred in instructing the jury on the question of careless and reckless driving in

violation of G.S. 20-140 as the instruction is not supported by the evidence. This assignment of error is well taken.

In *Ingle v. Transfer Corp.*, 271 N.C. 276, 156 S.E. 2d 265 (1967) the court held: " 'Mere failure to keep a reasonable lookout does not constitute reckless driving. To this must be added dangerous speed or perilous operation.' (Citation) Neither the intentional nor the unintentional violation of a traffic law *without more* constitutes reckless driving." (Citations) "The intentional, wilful or wanton violation of a safety statute or ordinance which proximately results in injury is culpable negligence; an unintentional violation, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable provision, is not." (Citation) A new trial was awarded in *Ingle* for failure to charge correctly on reckless driving. See the following cases in which the court held the evidence failed to support jury instructions on reckless driving: *Roberts v. Freight Carriers,* 273 N.C. 600, 160 S.E. 2d 712 (1968); *Williams v. Boulerice,* 269 N.C. 499, 153 S.E. 2d 95 (1967); *Wilder v. Edwards,* 7 N.C. App. 513, 173 S.E. 2d 72 (1970); *Ford v. Jones,* 6 N.C. App. 722, 171 S.E. 2d 103 (1969); *Nance v. Williams,* 2 N.C. App. 345, 163 S.E. 2d 47 (1968).

In *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62 (1962), the court held it was error to charge on reckless driving on the evidence in that case. The court stated: "A person may violate the reckless driving statute by either one of the two courses of conduct defined in subsections (a) and (b), or in both respects. (Citation) The language of each subsection constitutes culpable negligence. (Citation) Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequence or heedless indifference to the safety and rights of others." (Citation) In the Dunlap case, both cars were traveling between 35 and 40 miles per hour. "The impact was relatively slight." The court went on to say, "(d)efendant's testimony permits the inference that he was not keeping a reasonable lookout. There is no direct evidence in the record of excessive speed or that defendant was following too closely; the direct evidence is to the contrary. The evidence does not support the allegation of reckless driving." We think the evidence of reckless driving was stronger in *Dunlap* than the evidence presented in the case at bar,

therefore, we hold that the jury instruction on reckless driving was erroneous entitling defendants to a new trial.

Defendants brought forward and argued several other assignments of error but since they probably will not arise upon a new trial, they will not be discussed.

For the reasons stated we order a

New trial.

Judges PARKER and HEDRICK concur.

J. T. POWELL AND WIFE, ESSIE POWELL v. COUNTY OF HAYWOOD

No. 7230SC263

(Filed 28 June 1972)

1. **Mortgages and Deeds of Trust § 2; Taxation § 25— purchase money deed of trust — instantaneous seizin — property taxes — equity of redemption**

The doctrine of instantaneous seizin under a purchase money deed of trust does not override a statutory provision that the owner of the equity of redemption is considered the owner of the real estate for the purpose of assessing taxes. Former G.S. 105-301(b), now G.S. 105-302(c)(1).

2. **Taxation §§ 25, 33— purchase money deed of trust — lien for taxes on personalty — purchase at foreclosure sale**

By statute, the lien for taxes on the personal property of a corporation attached to real property of which the corporation owned the equity of redemption under a purchase money deed of trust, and when the *cestuis* purchased said real property at a foreclosure sale, they purchased it subject to the lien for personal property taxes. Former G.S. 105-301(b), 105-302(d), 105-340(a), and 105-376(a), now G.S. 105-302(c)(1), 105-304, 105-355(a), and 105-356.

APPEAL by plaintiffs from *Ervin, Judge,* 3 January 1972 Session of Superior Court held in HAYWOOD County.

By this action plaintiffs seek to recover certain taxes for the year 1970 paid under protest by them to the County of Haywood. The relevant factual situation is set forth in the following excerpts from plaintiffs' complaint.

"By deed dated January 7, 1965, the plaintiffs conveyed to Murphy Chevrolet, Inc., a two-thirds undivided interest in certain real property described therein and located in Beaverdam Township, Haywood County, North Carolina . . . .

"To secure the payment of the balance of the purchase money due by Murphy Chevrolet, Inc., to the plaintiffs upon the purchase price of said real property . . . , Murphy Chevrolet, Inc., executed a deed of trust dated January 7, 1965, to . . . Trustee for the plaintiffs . . . .

"Default having occurred in the payment of the balance of the purchase money due the plaintiffs under said deed of trust. . . . Trustee sold said real property described in said deed of trust pursuant to said deed of trust on the 19th day of May, 1970, and the plaintiffs became the last and highest bidder at said sale. Thereafter, . . . Trustee executed a deed to the plaintiffs for said lands described in said deed of trust . . . .

"When the plaintiffs undertook to pay to the defendant the real property taxes due the defendant on said real estate for the year 1970, the defendant insisted and demanded that the plaintiffs pay to the defendant an additional amount of $409.94, being personal property taxes assessed against Murphy Chevrolet, Inc., for the year 1970.

"The plaintiffs objected to payment of said personal property taxes assessed against Murphy Chevrolet, Inc., for the year 1970 but finally paid the same under written protest . . . .

"On July 10, 1971, the plaintiffs made written demand upon the Treasurer of the defendant for refund of said personal property tax so paid by the plaintiffs to the defendant under protest, said demand having been made by a letter written pursuant to G.S. 105-267 . . . .

"The personal property upon which said personal property tax was levied was owned by Murphy Chevrolet, Inc., a North Carolina corporation, and was not personal property owned by the plaintiffs."

Before time for answering expired, defendant filed a motion to dismiss under G.S. 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted. Defendant's motion was allowed and plaintiffs appealed.

Roberts & Cogburn, by Max O. Cogburn, for plaintiffs.

Morgan, Ward & Brown, by David J. Haynes, for defendant.

BROCK, Judge.

The facts in this case are so nearly identical to those in *J. T. Powell and wife, Essie Powell v. Town of Canton* (No. 7230SC264) that the same principles of law are applicable to both cases. The *Town of Canton* case was argued jointly with this case and an opinion therein, reaching the same result, is being filed contemporaneously with the filing of this opinion.

Plaintiffs contend that the trial judge erred in ruling that the complaint failed to state a claim upon which relief can be granted. A complaint may be dismissed on motion filed under Rule 12(b)(6) where it pleads facts which will necessarily defeat the claim. *Hodges v. Wellons,* 9 N.C. App. 152, 175 S.E. 2d 690.

The tax assessment involved in this case was for the year 1970; therefore, the applicable statutes are those in existence prior to the extensive revision of Chapter 105 by the 1971 General Assembly. Each of the statutes hereinafter referred to are as numbered and worded prior to the 1971 revision. The disposition of this appeal is largely determined by the provisions of former Chapter 105, Subchapter II, entitled "Assessment, Listing and Collection of Taxes," particularly G.S. 105-301(b), G.S. 105-302(d), G.S. 105-340(a), and G.S. 105-376(a).

> "For purposes of tax listing and assessing, the owner of the equity of redemption in any property which is subject to a mortgage or deed of trust shall be considered the owner of such real estate." G.S. 105-301(b).
>
> " . . . [T]angible personal property shall be listed in the township in which such property is situated . . . if the owner . . . occupies a . . . place for the sale of property . . . therein for use in connection with such property." G.S. 105-302(d).

"The lien of taxes levied on property and polls listed pursuant to this subchapter shall attach to all real property of the taxpayer in the taxing unit as of the day as of which property is listed . . . ." G.S. 105-340(a).

"The lien of taxes shall attach to real property at the time hereinbefore in this subchapter prescribed." G.S. 105-376(a)(1).

"The liens of taxes of all taxing units shall be of equal dignity and shall be superior to all other assessments, charges, rights, liens, and claims of any and every kind in and to said property, regardless of by whom claimed and regardless of whether acquired prior or subsequent to the attachment of said lien for taxes: . . . . " G.S. 105-376(a)(2).

"The priority of the lien shall not be affected by transfer of title to the real property after the lien has attached, ... " G.S. 105-376(a)(3).

The wording of the foregoing quoted sections are now substantially contained in G.S. 105-302(c)(1), G.S. 105-304, G.S. 105-355(a), and G.S. 105-356.

Plaintiffs argue that their position is different from that of a purchaser at a foreclosure sale of real estate mortgaged by the owner thereof to secure a loan. It is plaintiffs' argument that they sold the two-thirds interest in the property to Murphy Chevrolet, Inc., and took a note secured by deed of trust to secure the purchase price. They argue that this was a purchase money mortgage and that seizin in Murphy Chevrolet, Inc., was only instantaneous. Therefore, they argue that Murphy Chevrolet, Inc., was never the owner of the property so as to allow a lien for taxes on its personal property to attach.

[1] Undoubtedly the doctrine of "instantaneous seizin" under a purchase money mortgage is firmly rooted in North Carolina law. It was recently recognized in *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E. 2d 481, and in *Pegram-West, Inc. v. Homes, Inc.*, 12 N.C. App. 519, 184 S.E. 2d 65. However, the doctrine does not serve to override a clear statutory provision that the owner of the equity of redemption is considered the owner of the real estate for the purpose of assessing taxes. G.S. 105-301(b), prior to 1971. Words of equal import are contained in G.S. 105-302(c)(1) as it currently appears.

[2] We hold that, by statute, the lien for taxes on the personal property of Murphy Chevrolet, Inc., attached to the real estate of which Murphy Chevrolet, Inc., was the owner of the equity of redemption under a purchase money deed of trust. The plaintiff, as purchaser of the said real estate at the foreclosure sale, purchased the same subject to the lien for the said personal property taxes.

In view of what has been said, it is clear that the complaint alleged facts which necessarily defeated the claim. Therefore, the trial judge was correct in dismissing the action for failure to state a claim upon which relief can be granted.

Affirmed.

Judges HEDRICK and VAUGHN concur.

J. T. POWELL AND WIFE, ESSIE POWELL v. TOWN OF CANTON

No. 7230SC264

(Filed 28 June 1972)

Taxation §§ 25, 33— purchase money deed of trust — lien for taxes on personalty — purchaser at foreclosure sale

The lien for taxes on the personal property of a corporation attached to real property of which the corporation owned the equity of redemption under a purchase money deed of trust, and when the *cestuis* purchased said real property at a foreclosure sale, they purchased it subject to the lien for personal property taxes. G.S. 105-302(c)(1), formerly G.S. 105-301(b).

Judge BROCK concurs in the result.

APPEAL by plaintiffs from *Ervin, Judge,* January 1972 Session of Superior Court held in HAYWOOD County.

This is a civil action wherein plaintiffs seek to recover, pursuant to G.S. 105-267, personal property taxes for the year 1970 assessed by the defendant against Murphy Chevrolet, Inc., and paid by the plaintiffs under protest. The plaintiffs in their complaint in pertinent part allege:

"By deed dated January 7, 1965, the plaintiffs conveyed to Murphy Chevrolet, Inc. a two-thirds undivided interest

in certain real property described therein and located in Beaverdam Township, Haywood County, North Carolina, * * *

To secure the payment of the balance of the purchase money due by Murphy Chevrolet, Inc., to the plaintiffs upon the purchase price of said real property . . . Murphy Chevrolet, Inc., executed a deed of trust dated January 7, 1965, to Sidney L. Truesdale, Trustee for the plaintiffs, * * *

* * *

Default having occurred in the payment of the balance of the purchase money due the plaintiffs under said deed of trust . . . George W. Sutton, Jr., as substitute Trustee, sold said real property . . . on the 19th day of May, 1970, and the plaintiffs became the last and highest bidder at said sale. Thereafter, George W. Sutton, Jr., acting as substitute Trustee, executed a deed to the plaintiffs for said lands described in said deed of trust, said deed being dated the 9th day of June, 1970, * * *

When the plaintiffs undertook to pay to the defendant the real property taxes due the defendant on said real estate for the year 1970 the defendant insisted and demanded that the plaintiffs pay to the defendant an additional amount of $341.41, being personal property taxes assessed against Murphy Chevrolet, Inc., for the year 1970.

The plaintiffs objected to the payment of said personal property taxes assessed against Murphy Chevrolet, Inc., for the year 1970 but finally paid the same under written protest to the Tax Collector of the Town of Canton on the 8th day of July, 1971. * * *

On July 10, 1971, the plaintiffs made written demand upon the Treasurer of the defendant for refund of said personal property tax so paid by the plaintiffs to the defendant under protest, said demand having been made by a letter written pursuant to G.S. 105-267. * * *

The personal property upon which said personal property tax was levied was owned by Murphy Chevrolet, Inc., a North Carolina corporation, and was not personal property owned by the plaintiffs. * * * "

The defendant filed answer admitting the factual allegations of the complaint but denied that the plaintiffs were entitled to a refund of the personal property taxes paid under protest. The defendant moved that the action be dismissed for failure of the complaint to state a claim upon which relief can be granted. Thereafter the plaintiffs moved for judgment on the pleadings. From an order denying plaintiffs' motion for judgment on the pleadings and dismissing the action for failure of the plaintiffs to state a claim upon which relief can be granted against the defendant, the plaintiffs appealed.

Max O. Cogburn for plaintiff appellants.

Walter C. Clark for defendant appellee.

HEDRICK, Judge.

Plaintiffs contend the Court erred in allowing defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted. "If the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim it will be dismissed." *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970).

Our decision rests on G.S. 105-302(c)(1), formerly G.S. 105-301(b), which provides:

> "For purposes of this Subchapter: . . . The owner of the equity of redemption in real property subject to a mortgage or deed of trust shall be considered the owner of the property, and such real property shall be listed in the name of the owner of the equity of redemption."

The allegations in plaintiffs' complaint establish that when the lien for personal property taxes for 1970 owed by Murphy Chevrolet, Inc., attached, Murphy Chevrolet was the owner of the equity of redemption in the real property subject to the deed of trust given by Murphy Chevrolet, Inc., to secure its indebtedness to plaintiffs.

Thus, we think plaintiffs in their complaint have alleged facts which deny their right to the relief claimed, and the able trial judge properly allowed the defendant's motion to dismiss.

Affirmed.

Judge VAUGHN concurs.

Judge BROCK concurs in the result.

STATE OF NORTH CAROLINA v. ELTARO McCOY BARR

No. 7221SC398

(Filed 28 June 1972)

Homicide § 21— second-degree murder — self-defense — sufficiency of evidence

The State's evidence in this homicide prosecution did not reveal that defendant acted in self-defense as a matter of law, and was sufficient to require submission of the case to the jury on the charge of second-degree murder and the lesser included offense of voluntary manslaughter, where it tended to show that defendant, a 39-year-old male, and decedent, a 52-year-old female, engaged in a fight, that decedent was hitting defendant with a shoe, and that defendant pulled out his gun and shot decedent.

APPEAL by defendant from *Kivett, Judge,* 25 October 1971 Session of Superior Court held in FORSYTH County.

Defendant was tried upon a bill of indictment, proper in form, charging him with murder in the first degree. The evidence for the State tended to show that on 3 September 1971, Louvnia (Louvenia) Pittman (hereinafter referred to as the deceased) and one Davette Levette Robbins (Davette), who was living with deceased, went to the apartment at 1825 North Trade Street in Winston-Salem where Davette's mother, Viola R. Hairston (Hairston), lived. (Hairston was defendant's "girl friend.") The defendant lived near the deceased, and prior to 3 September 1971, had had some disagreement with her. Davette and deceased had been at Hairston's a short time when Eltaro McCoy Barr (defendant) came into the bedroom of the apartment where all three of them were. At the time the defendant entered, the three of them were talking about him. Defendant made some remark to them and walked out but returned shortly thereafter. Deceased asked him what was wrong and the defendant told her not to talk to him. Deceased and defendant continued to talk to each other—deceased mentioned some-

thing about "some lies," and defendant said that something "was not true." Defendant then went to the door and was shaking his finger at deceased. He turned around at the door and Davette testified that the following occurred:

> "At this time she was standing at the dresser. She was standing here. Yes, he walked from here up to her there, in her direction. He was walking and talking. He was talking to her. He was still talking to her. The tone of his voice was angry-like. He was talking to her, pointing his finger. And she said, 'I tell you, don't point your finger in my face.' * * *
>
> —(W)hile he was walking towards her, I mean towards the direction, and said, 'I told you not to point your finger at me'; and he was still pointing it, talking to her, arguing at her, and she hit him with the shoe, and he hit her back, and you know, he started back at her. He just started right then, after she hit him. He used his fist. I think he had one, his left hand, grabbing hold of her, and was using his right. He hit her in the face. And they was beating each other on, you know, each other like that. She was still hitting him, and he was still hitting her. And I was over there at the door then because I had done got out of the way, and he was—well, I told him to stop hitting her because she was too old for him to hit on, and stuff like that; and he didn't hear me, I don't guess. He just kept on hitting, and she was still hitting. So he started trying to get his gun out of his pocket, and my mother jumped up and says, 'Quit, Coy,' you know, 'Quit!' And he says, he says, 'No! No!' He says. 'She's trying to kill me,' something like that. Eltaro said that.
>
> And he was bleeding real bad. And so, he was trying to get the gun out, and they struggled on over to by the closet opening, and they was still hitting each other the same way, hitting each other. And my mother saw him trying to get his gun out, and she tried to stop him, but she couldn't stop him, and he got it out. Eltaro got the gun out of his pocket and he shot. I only heard one shot. After that, they were still hitting each other. I mean she was still hitting him, you know, and her hits was getting fainter.
>
> * * *

He had his left hand about her blouse, up at the top, I think, up in the top, when he shot the deceased. With his right hand he was getting his gun out of his pocket. Yes, at the time this weapon went off his left hand was holding her blouse. * * * "

The Medical Examiner of Forsyth County, a physician and surgeon, testified that he had examined the body of the deceased on the evening of 3 September 1971, that she was dead at that time, that she had a bullet wound in the heart and that as a result thereof, had bled to death.

The defendant's evidence tended to show that on 3 September 1971, he had gone to Hairston's apartment to talk to her about some business, and when he walked in, the deceased started arguing with him. Deceased then took her shoe off and began to beat him in the head, and while she was beating him, he pulled the gun out and shot her. Defendant testified that he and deceased had not had any difficulties before, but that he had observed deceased assault other persons with weapons and that he was afraid of her. (He, the defendant, was 39 years old, weighed about 140 pounds and is "five-six or five-seven," and the deceased, who was 52 years old, was taller than he, weighed about 200 pounds, and was "muscle-built.") The defendant was "dazed" and bleeding and could not think because of the blows the deceased had struck before he shot her. Defendant's evidence also tended to show that he was not holding the deceased's blouse with his left hand when he shot her.

At the close of the State's evidence and upon defendant's motion for judgment as of nonsuit, the trial judge ruled that he would not submit the case to the jury on the charge of first-degree murder but would submit it to the jury on second-degree murder or a lesser included offense.

The jury returned a verdict of guilty of voluntary manslaughter. From a judgment of imprisonment for not less than seven years and not more than twelve years, the defendant appealed to the Court of Appeals, assigning error.

Attorney General Morgan and Associate Attorney Speas for the State.

R. Lewis Ray for defendant appellant.

MALLARD, Chief Judge.

The defendant assigns as error the denial of his motions for judgment as of nonsuit. He argues and contends that all of the evidence for the State and for the defendant revealed that the defendant acted in self-defense. We do not agree. There was some evidence of self-defense, and the judge properly submitted the question of self-defense to the jury upon instructions to which there are no exceptions. When the evidence is taken in the light most favorable to the State, it was sufficient to require submission of the case to the jury on the charge of second-degree murder and the lesser included offense of voluntary manslaughter. The judge did not commit error in denying defendant's motion for nonsuit made at the close of all the evidence. G.S. 15-173.

The defendant argues and contends that the judge abused his discretion in failing to set aside the verdict as contrary to the weight of the evidence. We do not agree. No abuse of discretion is shown on this record, and absent an abuse of discretion, the denial of a motion to set aside a verdict as being against the greater weight of the evidence will not be disturbed on appeal. *State v. Massey,* 273 N.C. 721, 161 S.E. 2d 103 (1968).

We have considered all of the defendant's assignments of error that have been properly presented and no prejudicial error is made to appear. In the trial we find no error.

No error.

Judges CAMPBELL and BROCK concur.

ENGINES & EQUIPMENT, INC. v. JOE LIPSCOMB

No. 7210DC327

(Filed 28 June 1972)

1. **Appeal and Error § 45— abandonment of assignments of error**

Exceptions and assignments of error not supported in the brief by reason, argument or authority are deemed abandoned. Court of Appeals Rule 28.

2. **Appeal and Error § 16— motion after appeal taken — authority of trial court**

The trial court was without authority to consider defendant's motion to set aside a default judgment filed after notice of appeal had been given and appeal entries had been entered.

3. **Judgments § 24— excusable neglect — question of law**

Whether excusable neglect has been shown is a question of law, not a question of fact.

4. **Judgments § 25; Rules of Civil Procedure § 60— excusable neglect — delivery of suit papers to employer — employer's representation that answer had been filed**

Defendant was not entitled to have a default judgment against him set aside on the ground of excusable neglect where defendant delivered the summons and complaint to an official of his employer, who agreed to deliver them to an attorney who would defend the action for defendant, the official thereafter advised defendant that the suit papers had been delivered to an attorney and that answer denying the material allegations of the complaint had been filed, but the representation the official made to defendant was false and no answer was filed on defendant's behalf.

5. **Judgments § 25— attention to defense — excusable neglect**

Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable.

APPEAL by defendant from *Preston, District Judge,* 30 November 1971 Civil Session of WAKE District Court.

On 17 March 1971 plaintiff instituted this action seeking to recover judgment against defendant for $1,686.75 plus interest, allegedly due plaintiff for labor and parts furnished in repairing defendant's equipment. No defense pleading having been filed, on 21 April 1971 at the request of plaintiff the Assistant Clerk of Wake Superior Court entered a default judgment against defendant. On 5 August 1971 Judge Preston

signed an order granting defendant's motion (filed 5 August 1971) to set aside the default judgment on the grounds of excusable neglect under G.S. 1A-1, Rule 60(b)(1) and allowing him fifteen days to file answer. On 11 August 1971 plaintiff moved to vacate the 5 August 1971 order, alleging that plaintiff had no notice of defendant's motion to set aside the default judgment until 8 August 1971. Pursuant to G.S. 1A-1, Rule 60(b)(1) on 21 October 1971 Judge Preston, on the ground of surprise, vacated his order of 5 August 1971 but ordered execution of the judgment stayed pending a final determination of the cause. On 30 November 1971 Judge Preston entered an order concluding that defendant's actions following the service of summons and complaint on him did not constitute excusable neglect and denied the motion to set aside the default judgment. Defendant gave notice of appeal from this order and appeal entries were made on 30 November 1971.

After the appeal was taken on 30 November 1971 defendant on 6 December 1971 moved the court to set aside the default judgment on the grounds that plaintiff's cause of action is not in a sum certain as contemplated by G.S. 1A-1, Rule 55(b)(1). This motion was heard on 6 January 1972 and on 11 January 1972 Judge Preston entered an order denying the motion to which order defendant also noted an appeal.

Thompson and Lynn by Dan Lynn for plaintiff appellee.

Philip O. Redwine for defendant appellant.

BRITT, Judge.

[1, 2] Defendant's exceptions and assignments of error 2, 3, 4 and 5, relating to the order entered on 11 January 1972, are not supported in his brief by reason, argument or authority, therefore, said exceptions and assignments of error are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Furthermore, since notice of appeal was given and appeal entries made on 30 November 1971, the trial court was without authority to consider defendant's motion filed on 6 December 1971. *Wiggins v. Bunch,* 280 N.C. 106, 184 S.E. 2d 879 (1971).

The sole question before us is whether the trial court erred in concluding that defendant failed to show excusable neglect and in denying defendant's motion to set aside the default judgment.

[3] Whether excusable neglect has been shown is a question of law, not a question of fact. " 'Upon the facts found the court determines, as a matter of law, whether or not they constitute excusable neglect, ...' McIntosh, N. C. Practice 2d, § 1717." *Ellison v. White,* 3 N.C. App. 235, 240-241, 164 S.E. 2d 511, 515 (1968), cert. den. 275 N.C. 137 (1969).

[4] In the case at bar, the court's findings of fact included the following (summarized): On or about 18 March 1971 defendant's wife was served with summons and complaint in this cause. Defendant was a long distance truck driver and between 18 March 1971 and 28 March 1971 was transporting materials from North Carolina to California. On or about 5 April 1971 defendant delivered his copy of the summons and complaint to an official of his employer who agreed to deliver the same to an attorney who would defend the action for defendant. Said official thereafter advised defendant that the suit papers had been delivered to an attorney and that an answer denying the material allegations of the complaint had been filed. The representation the official made to defendant was false and no answer was filed on behalf of defendant.

We hold that as a matter of law the facts found by the trial judge do not constitute excusable neglect under G.S. 1A-1, Rule 60(b)(1).

This case is analogous to *Rawleigh, Moses & Co. v. Furniture, Inc.,* 9 N.C. App. 640, 642-643, 177 S.E. 2d 332, 333 (1970), a case that resulted in a finding of no excusable neglect, in which we said: "A review of appellee's motion and affidavit impels us to conclude that appellee did not make out a case of excusable neglect any stronger than, if as strong as, the defendant made out in *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67 (1945). In that case, our Supreme Court upheld a default judgment rendered against the defendant, a medical doctor, which judgment was rendered when the defendant was under the pressure of adverse circumstances and unending demands for his professional services. We quote from the opinion as follows: 'While his inattention and neglect are attributed to the similarity in the title of this case to a former action, and to his preoccupation in the duties of his profession, commendable and highly important though they were, we do not think this should be held in law to constitute such excusable neglect as would relieve an intelligent and active businessman from the

consequences of his inattention, as against diligent suitors proceeding in accordance with the provisions of the statute.' "

[5] Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable. 5 Strong, N.C. Index 2d, Judgments, § 25, pp. 46-47. We agree with the trial court's conclusion that defendant herein did not meet this test.

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

SUZANNE SIMMONS SAVAGE v. WILLIAM McDONALD SAVAGE

No. 726DC117

(Filed 28 June 1972)

1. **Divorce and Alimony § 24— custody order — sufficiency of findings**
   Trial court's findings were sufficient to support the award of custody of minor children to their mother.

2. **Divorce and Alimony § 24— child custody — indiscretion of the mother**
   A finding that plaintiff mother had been guilty of an indiscretion did not deprive the trial judge of his discretion in determining what arrangements would best promote the interest and welfare of the minor children of the parties.

APPEAL by defendant from *Gay, Judge,* 26 August 1971 Session of District Court held in HALIFAX County.

This is a civil action for absolute divorce heard to determine the custody of Roderick Brooks Savage, age 6 years, and William Matthew Savage, age 4 years, born of the marriage union between the plaintiff and defendant.

Subsequent to the entry of the judgment of divorce on 13 April 1971 the Court entered an order with the consent of the parties that the matter of the custody of the children be held in abeyance until the Department of Social Services of Mecklenburg and Halifax Counties could make an investigation of the homes and living conditions of the plaintiff and the defendant

"for the purpose of enlightening the Court at sometime on or about August 15, 1971, as to what custodial arrangement would best promote the interest and welfare of said minor children."

After a hearing the Court made the following pertinent findings:

"That plaintiff mother admitted that for several months in 1969 she committed adultery on several occasions with one man; * * *

That while the children are living with the mother in Charlotte the younger child will be in the Church Day School where plaintiff mother will be teaching while the older child is enrolled in the public elementary schools in Charlotte; that the hours of employment of the plaintiff mother will permit her to take said older child to and from school so that it will not be necessary that a maid or baby-sitter be employed at any time.

That according to several witnesses including neighbors and mothers of good character, the relationship between the children and their mother has been and is excellent and the court finds this to be a fact.

That defendant father's job as a pharmacist and his other interest outside the home keeps him away from home until 9:30 or 10 p.m. almost daily, thus leaving the care and control of the children with a maid and aging parents of defendant father.

That defendant father has been and will continue to be away from home a great deal in pursuit of his outside interest in sports and other civic matters, and that he has shown much immaturity and lack of financial stability by giving of many worthless checks and forging the name of his wife and brother-in-law to notes at banks and other lending institutions.

* * *

That neither defendant father, his parents, nor their maid testified as to the type home and supervision and living arrangement that would be afforded for the children if they were in the custody of the father, nor did defendant offer any evidence that plaintiff mother had ever been neglectful of the children, except her admission that for a period of time, she had had an affair with one man."

The Court made the following conclusions:

"1. That this matter is properly before the undersigned judge, this court having jurisdiction of the parties and causes.

2. That plaintiff mother is a fit and suitable person to have primary custody, care and control of the two minor children with the defendant father having reasonable visitation rights.

3. That plaintiff mother has been a good mother to her children, attentive to their health and needs, and taken them to Sunday School regularly, and has not been neglectful of their care.

4. That the best interest and welfare of the minor children will be served by placing them in the primary custody and control of their mother and by giving the father partial custody and visitation rights."

From an order entered on 3 September 1971 awarding custody of the children to the plaintiff with visitation privileges to the defendant, the defendant appealed.

W. Lunsford Crew for plaintiff appellee.

Blackwell M. Brogden, H. Vinson Bridgers, C. D. Clark, Jr., for defendant appellant.

HEDRICK, Judge.

The one assignment of error brought forward and argued in defendant's brief, based on an exception to the order appealed from, challenges the Court's action in awarding the custody of the children to the plaintiff. The one question thus presented is whether the Court made sufficient findings to support its order and whether error of law appears on the face of the record. *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879 (1957); *Stancil v. Stancil,* 255 N.C. 507, 121 S.E. 2d 882 (1961); *Prince v. Prince,* 7 N.C. App. 638, 173 S.E. 2d 567 (1970).

[1, 2] The legal principles regarding child custody were succinctly stated by Judge Britt in *In Re Moore,* 8 N.C. App. 251, 174 S.E. 2d 135 (1970) as follows:

"1. The welfare of the child in controversies involving custody is the polar star by which the courts must be guided

in awarding custody. *Chriscoe v. Chriscoe,* 268 N.C. 554, 151 S.E. 2d 33 (1966).

2. While the welfare of a child is always to be treated as the paramount consideration, the courts recognize that wide discretionary power is necessarily vested in the trial courts in reaching decisions in particular cases. *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967).

3. The decision to award custody of a child 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 be upset on appeal absent a clear showing of abuse of discretion. *In Re Custody of Pitts,* 2 N.C. App. 211, 162 S.E. 2d 524 (1968).

4. The findings of the trial court in regard to the custody of a child are conclusive when supported by competent evidence. *Swicegood v. Swicegood, supra.*

5. When 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. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967)."

We think the trial judge made sufficient findings and conclusions to support the order appealed from, and the findings show clearly why His Honor felt that the interest and welfare of the children would be promoted by awarding their primary custody to the plaintiff. The finding that the plaintiff had been guilty of an indiscretion did not deprive the trial judge of his discretion in determining what arrangements would promote their interest and welfare. *In Re McCraw Children,* 3 N.C. App. 390, 165 S.E. 2d 1 (1969). There is nothing in this record to indicate that the judge abused his discretion, nor does error appear on the face of the record. The order appealed from is

Affirmed.

Judges BRITT and PARKER concur.

UNITED STATES FIDELITY AND GUARANTY COMPANY v. DAVIS MECHANICAL CONTRACTORS, INC.

No. 7228DC221

(Filed 28 June 1972)

1. **Subrogation— indemnity contract — claim by insurer of indemnitee**

Claim by a contractor's insurer against a subcontractor under an indemnity clause in a contract between the contractor and subcontractor for counsel fees expended by the insurer in defending a wrongful death action against the contractor and subcontractor was the same as, but no greater than, that of the contractor.

2. **Indemnity § 2— agreement by subcontractor — action against contractor and subcontractor — attorneys' fees of contractor**

Agreement in which a subcontractor covenanted to indemnify a contractor from liability for bodily injury arising out of the work undertaken by the subcontractor was not sufficiently comprehensive to include fees of attorneys employed by the contractor to defend a wrongful death action brought against the contractor and subcontractor which the subcontractor had refused to defend.

Judge BROCK concurs in the result.

APPEAL by plaintiff from *Israel, District Judge,* 9 December 1971 Session of District Court held in BUNCOMBE County.

This is a civil action wherein plaintiff United States Fidelity and Guaranty Company (Guaranty Company) seeks to recover from the defendant Davis Mechanical Contractors, Inc., counsel fees in the amount of $1,444.86 expended by plaintiff in defending a wrongful death action instituted against the defendant and Daniel Construction Company (Daniel), plaintiff's insured. In its complaint the plaintiff alleged that Daniel subcontracted certain work on a construction project to the defendant and that the contract contained an indemnity clause "whereby the defendant covenanted to indemnify and save harmless Daniel Construction Company from all liability claims and demands for bodily injury and property damage arising out of the work undertaken by the defendant, its employees, agents or its subcontractors." On 16 August 1968 the administrator of Thad Hardin, who was killed on the job site, instituted an action for damages for wrongful death against the defendant and Daniel. The defendant refused Daniel's request that it defend the wrongful death action pursuant to the "indemnity agreement." Thereafter, as Daniel's liability insurance carrier, the plaintiff, incurring legal expenses in the amount of $1,444.86,

employed counsel who successfully defended the suit and obtained a dismissal thereof.

From an order allowing the defendant's motion to dismiss for failure of the complaint to state a claim upon which relief could be granted, plaintiff appealed.

Van Winkle, Buck, Wall, Starnes and Hyde by Emerson D. Wall for plaintiff appellant.

Roberts and Cogburn by Landon Roberts for defendant appellee.

HEDRICK, Judge.

For the purpose of our opinion, we assume, without deciding, that the defendant, subcontractor, agreed to indemnify the contractor, Daniel, in the following language:

> "*Indemnity Agreement.* The Subcontractor covenants to indemnify and save harmless and exonerate the Contractor and the Owner of and from all liability, claims and demands for bodily injury and property damage arising out of the work undertaken by the Subcontractor, its employees, agents or its Subcontractors, and arising out of any other operation no matter by whom performed for and on behalf of the Subcontractor, whether or not due in whole or in part to conditions, acts or omissions done or permitted by the Contractor or Owner."

[1] Plaintiff's claim against the defendant under the indemnity clause in the contract between Daniel and the defendant is the same as, but no greater than, that of Daniel. 7 Strong, N. C. Index 2d, Subrogation, pp. 88-89; *Insurance Co. v. Faulkner,* 259 N.C. 317, 130 S.E. 2d 645 (1963); *Montsinger v. White,* 240 N.C. 441, 82 S.E. 2d 362 (1954). Therefore, before we can determine whether the trial court erred in dismissing plaintiff's action for failure to state a claim upon which relief could be granted, we must first determine whether Daniel could have maintained an action under the indemnity clause of the contract against the defendant to recover legal expenses incurred in defending the wrongful death suit which the defendant, indemnitor, refused to defend. The answer is no.

In *Coach Co. v. Coach Co.,* 229 N.C. 534, 50 S.E. 2d 288 (1948) where the plaintiff sought to recover under the in-

demnity clause in a contract between the two coach companies whereby the defendant Coach Company was given authority to operate motor buses over certain franchise routes of the plaintiff Coach Company, with provision in the contract that defendant should indemnify and save harmless the plaintiff from any and all damages or loss occasioned by the operation of defendant's motor vehicles over these franchise routes, our Supreme Court held that in the absence of an express agreement the indemnitor could not be held liable for legal expenses incurred by the indemnitee in defending suits brought against both the indemnitor and the indemnitee. In the *Coach Co.* case, in affirming the trial court's order sustaining the defendant's demurrer to the complaint, the Supreme Court said:

> "The language in which the contract of indemnity is couched, as set out in the complaint, affords ground for recovery for damages or loss occasioned plaintiff by the operation of defendant's buses over plaintiff's franchise routes, but is not sufficiently comprehensive to include reimbursement for the fees of attorneys employed by plaintiff to defend suits brought against the defendant or both defendant and plaintiff. There is no allegation that any damages or costs were adjudged against or paid by the plaintiff, or that loss was occasioned by the operation of defendant's buses, or that plaintiff was called upon or required to defend, or that defendant failed to pay all damages and costs growing out of the suits referred to. * * * In the absence of an express agreement therefor this would not include amounts paid for attorneys' fees. (Citations omitted.) Nor is the expense of employing attorneys in the successful defense of a suit for damages for tort allowable as part of the costs or recoverable in the absence of an express agreement therefor. (Citations omitted.) Expense unnecessarily incurred for attorneys' fees may not be recovered. (Citations omitted.)"

[2] Thus, the language in the contract of indemnity in the present case affords grounds for recovery for damages and loss occasioned Daniel by work undertaken by the subcontractor, but is not sufficiently comprehensive to include reimbursement for the fees of attorneys employed by Daniel to defend the wrongful death action brought against the defendant and Daniel. In the present case, as in *Coach Co.*, there is no allegation in the complaint that any damages were adjudged against or paid by

Daniel, or that loss was occasioned by the performance of the work under the contract by the defendant, or that Daniel was called upon or required to defend the wrongful death suit. The allegations in the present complaint show affirmatively that the wrongful death action was successfully defended and dismissed at no loss or expense to Daniel.

Therefore, we hold that since the indemnitee, Daniel, would not have had a claim against the indemnitor to recover attorneys' fees incurred in defending the wrongful death action, the plaintiff, Guaranty Company, as subrogee, would have no claim. The plaintiff, Guaranty Company, as subrogee, has failed to state a claim against defendant upon which relief can be granted, and the Court correctly allowed the motion to dismiss.

Affirmed.

Judge VAUGHN concurs.

Judge BROCK concurs in the result.

THOMAS WYCHE, CLIFTON WOODS, QUINTON F. BOULWARE, MOSES S. BELTON, BACKMON R. RICHARDSON, DANIEL O. HENNIGAN, AND EZRA J. MOORE, TRUSTEES OF CATAWBA PRESBYTERY, UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, AND CATAWBA PRESBYTERY v. CHARLES ALEXANDER, SR., MRS. ELISE O. JAMES, JOHN MORRIS, HARRY BOST, SAMUEL WAGONER, EARL N. WHITMIRE, CHARLES ALEXANDER, JR., J. FURMAN BOST, AND MRS. CHRISTINE HEMPHILL, FORMERLY TRUSTEES OF WESTMINSTER UNITED PRESBYTERIAN CHURCH, UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, AND HAROLD L. WATKINS, JAMES HENRY ALEXANDER, CHARLES ALEXANDER, SR., CHARLES ALEXANDER, JR., AND FREDERICK N. BOST

No. 7219SC391

(Filed 28 June 1972)

1. Religious Societies and Corporations § 2— church property — trust in favor of parent organization — question of law

The question of whether a trust was imposed upon a local church's property in favor of the parent church organization by the parent organization's constitution and the deed to the local church was a question of law and not a question of fact.

2. Constitutional Law § 22; Religious Societies and Corporations § 2— dispute over church property — freedom of religion

The trial court's determination that a local church had been dissolved and that the title to its real property had vested in the parent church organization under a provision of the parent organization's constitution as set forth in its book of order did not violate the provisions of the First Amendment relating to religious freedom, since no controversy over religious doctrine was involved in the dispute over the property in question.

APPEAL by defendants from *Johnston, Judge,* 1 November 1971 Session of Superior Court held in CABARRUS County.

Plaintiffs—Catawba Presbytery, an official body of the United Presbyterian Church in the United States of America, and individuals who were appointed and acting trustees of Catawba Presbytery—instituted this civil action against defendants, who were members and/or former trustees of Westminster United Presbyterian Church, United Presbyterian Church in the United States of America (Westminster), prior to 18 February 1969. Plaintiffs prayed that they be adjudged the legal owners and entitled to the possession of the real and personal property of Westminster in trust, because Westminster was dissolved by the Presbytery of Catawba on 18 February 1969 and the trustees of Catawba Presbytery were directed to take over Westminster's property due to the dissolution. Plaintiffs allege that this action of dissolution of Westminster was sustained by the Synod of Catawba and then by the General Assembly of the United Presbyterian Church in the United States of America.

In response, the defendants denied plaintiffs' title and right to possession, alleging title in themselves, as trustees of Westminster Presbyterian Church of Concord, North Carolina, by record conveyances and continuing possession and use of the property for church purposes.

After both plaintiffs and defendants presented their evidence before the judge and a jury, each party moved for a directed verdict in his favor.

Upon examining the pleadings, evidence, and stipulations, the trial judge granted plaintiffs' motion for a directed verdict and denied defendants' motion for a directed verdict.

Based on its findings and conclusions, the trial judge ordered title to the property in controversy be vested in the

trustees of the Presbytery of Catawba and their successors for the purposes of the trust defined in the Constitution of the United Presbyterian Church in the United States of America, and enjoined and restrained defendants from interfering with and disturbing the lawful possession of Westminster's property by plaintiffs.

Defendants appealed.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and Jos. W. Grier, Jr., for plaintiff-appellees.

Williams, Willeford & Boger, by John R. Boger, Jr., for defendant-appellants.

BROCK, Judge.

The first argument presented by defendants on appeal is whether the trial court erred in granting the plaintiffs' motion for a directed verdict without submitting to the jury any of the issues tendered by the defendants.

The defendants argue that there were issues raised for jury determination of whether the Book of Order was followed in attempting to dissolve Westminster, whether there was fair play and substantial justice done, or whether there was justification for the alleged resolution of the Catawba Presbytery. Therefore, defendants contend that the trial court erred, because Rule 50 of the North Carolina Rules of Civil Procedure does not confer upon the trial judge the power to direct a verdict in favor of the party having the burden of proof. They rely upon *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297. We do not agree.

The trial court found that "there is no issue of fact for submission to the jury." The evidence of plaintiffs and defendants is in agreement that the Presbytery of Catawba dissolved Westminster and that the judgment of the General Assembly, the highest judicatory of the United Presbyterian Church, dated 20 May 1970, affirmed the dissolution of Westminster by the Presbytery. The evidence of both parties is in agreement that Westminster is now extinct and the property formerly used by that church is now controlled by defendants as Westminster Presbyterian Church of Concord, North Carolina, for the use of a different denomination. The real contention of the

defendants is not that Westminster is not extinct, but that no trust was imposed on Westminster's property in favor of the parent church organization. This is a question of law and not a question of fact.

[1] The controlling documents necessary to decision were stipulated and admitted by agreement of the parties. The Constitution in the Book of Order created the office of trustee held by defendants and required these trustees to hold the property subject to that constitution. The church property was deeded to the Westminster trustees, defendants' predecessors in interest, in 1892 for a nominal consideration for the benefit of the parent church by a seminary (Scotia Seminary—the predecessor in interest to Barber-Scotia College) operated by the parent denomination. We hold that the construction of these stipulated documents is a question of law for the Court and not a question of fact for the jury.

In the present case, the trial court did not err in directing the verdict for the plaintiffs because the question had become one of law exclusively. The preliminary question for the judge was whether there was a "genuine issue of fact." Clearly the pleadings, evidence, and stipulations show that there was no "genuine issue of fact" for jury consideration, and the trial judge correctly found this to be the case. *Cutts v. Casey, supra,* is distinguishable because in *Cutts* the credibility of evidence was involved.

[2] Defendants' second argument is as follows: the trial court erred in its judgment in holding that Westminster was dissolved and that upon its dissolution the title to the property of the church vested in the Catawba Presbytery of the United Presbyterian Church in the United States of America under a provision of the Book of Order of said denomination rather than in the trustees of Westminster Presbyterian Church of Concord, North Carolina, under the provisions of the deeds and applicable state property law.

The thrust of defendants' argument is that the trial court was limited to the consideration of deeds to Westminster and State law in making its determination of ownership of the church property, and that the trial court could not inquire into the Book of Order, as this was church dogma and policy and not "neutral principles of law developed for use of all property disputes." As

the basis of this argument, defendants cite *Presbyterian Church v. Hull Church,* 393 U.S. 440, 21 L.Ed. 2d 658, 89 S.Ct. 601.

Clearly the principles enunciated in *Presbyterian Church v. Hull Church, supra,* do not apply to the case before us. In *Hull* the church property title dispute arose when two local churches withdrew from the the hierarchical general church organization due to doctrinal disputes. The question presented in *Hull* was whether the restraints of the First Amendment, as applied to the States through the Fourteenth Amendment, permitted a civil court to determine ownership of church property on the basis of the interpretation and significance the civil court assigned to aspects of church doctrine.

The title dispute presently before us, does not involve interpretation of church doctrine or related ecclesiastical questions. Here the trial court was only asked to resolve a title dispute and there was no controversy over church doctrine or request to terminate an implied trust because of departures from doctrine. Thus, on the basis of *Hull,* we find defendants' argument without merit. The trial court did not err in inquiring into the Book of Order and such inquiry was not "establishing" churches.

The trial court found and there was no disagreement that the United Presbyterian Church in the United States is an association of Presbyterian churches governed by a hierarchy; that Westminster prior to 18 February 1969 was a local Presbyterian Church governed by the hierarchy and the Book of Order of the United Presbyterian Church in the United States of America; that on 18 February 1969 the Presbytery of Catawba dissolved Westminster; and that the General Assembly affirmed the dissolution of Westminster. The trial court further found that title to Westminster's real estate was conveyed to the trustees of Westminster for the purposes of a trust defined by the provisions of the Constitution of the United Presbyterian Church in the United States of America, wherein their offices and duties were created, as found in the Book of Order, and that, upon dissolution of Westminster, title to the church property passed to the parent organization in furtherance of the purposes of the trust. The trial court did not have to inquire whether the governing body of the church had power under religious law to control the property in making its findings and conclusions as these were agreed to by the parties. The only question presented was whether title to the Westminster

property had passed in accordance with the trust in the Book of Order. The trial court held that it had and we agree.

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

BLANCHE F. SHORT v. CITY OF GREENSBORO

No. 7218DC361

(Filed 28 June 1972)

1. **Rules of Civil Procedure § 56— motion for summary judgment — affidavits — unsworn letter**

An unsworn letter does not meet the requirements of an affidavit and should not be considered by the court in ruling on a motion for summary judgment.

2. **Municipal Corporations § 42— action against city — notice — city charter**

Sufficiency of notice of a claim against a municipality, before bringing an action for damages, may be determined by the city charter.

3. **Municipal Corporations § 42— action against city — notice to city council — letter to city attorney**

Letter from plaintiff's attorney to the assistant city attorney expressing an intention to file a claim for damages against the city on behalf of his client as soon as his client was released from further medical treatment, *held* insufficient to comply with a city charter requirement that, prior to the institution of a personal injury action against the city, written notice be given to the city council within six months after the accident of the date and place of injury, the manner of infliction, the character of the injury, and the amount of damage claimed.

4. **Municipal Corporations § 42— action against city — notice — condition precedent**

Compliance with a city charter requirement that notice of any claim for damages for personal injury be given the governing body of the city within a specified time is a condition precedent to the right to institute action against the city to recover such damages.

APPEAL by plaintiff from *Alexander, District Judge,* 18 October 1971 Session of District Court held in GUILFORD County.

This is a civil action wherein plaintiff Blanche F. Short seeks to recover damages for injury to person and property

allegedly resulting from a collision between an automobile owned and operated by plaintiff and a police car owned by the defendant City of Greensboro and operated by one of its policemen. The defendant filed answer denying the material allegations of plaintiff's complaint, pleaded contributory negligence, alleged a counterclaim against the plaintiff for damage to its police car and pleaded in bar of plaintiff's claim that the plaintiff had failed to give notice of her claim to the defendant within six months of the date of the happening of the injury complained of as provided in sections 7.01 and 7.02 of the Charter of the City of Greensboro. The defendant moved for summary judgment in its favor as to plaintiff's claim on the ground that the defendant had failed to give notice of her claim within six months of the happening of the injury complained of as provided by the Charter of the City of Greensboro. On 29 December 1971, after finding that there was no genuine issue as to any material fact and that the defendant was entitled to judgment as a matter of law as to plaintiff's claim, the Court entered summary judgment for defendant as to plaintiff's claim and the plaintiff appealed.

Walker, Short & Alexander by W. Marcus Short for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill by G. Marlin Evans for defendant appellee.

HEDRICK, Judge.

The one question presented on this appeal is whether the pleadings and affidavits show that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law as to plaintiff's alleged claim.

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." Rule 56(e). *Robinson v. McMahan,* 11 N.C. App. 275, 181 S.E. 2d 147 (1971).

Defendant alleged, and plaintiff denied, that the plaintiff had not given notice of her claim to the City Council in accord-

ance with section 7.02(a) of the Municipal Charter, which in pertinent part provides:

> " . . . (N)o action for damages of any character whatever, to either person or property, shall be instituted against the city unless, within six months after the happening of infliction of the injury complained of, the complainant, his executor, administrator, guardian, or next friend shall have given notice in writing to the Council of the injury, stating in the notice the date and place of the injury, the manner of infliction, the character of the injury, and the amount of damage claimed."

Plaintiff contends (1) that since the City carried liability insurance, its governmental immunity was waived, and the notice prescribed by the charter was not required to the extent of the liability insurance; and (2) that even if notice was required, there had been substantial compliance with the provisions of the charter by the plaintiff's attorney's letter to the Assistant Attorney for the defendant City dated 28 June 1968. We do not agree.

Defendant's motion for summary judgment was supported by an affidavit of the Clerk of the defendant City stating that she had examined the records and minutes of her office and of the City Council and that the plaintiff had not given notice of her claim as provided by the charter. The plaintiff filed no affidavits in response to defendant's motion. However, the plaintiff did present at a hearing on the motion a letter dated 28 June 1968 from her attorney to the Assistant City Attorney stating in pertinent part:

> "As soon as the doctor releases my mother from further treatment, then I propose to make claim against the City or its insurance company, St. Paul Insurance Companies, for the amount of her damages."

[1-3] With respect to the form of affidavits to be considered by the Court in determining a motion for summary judgment, Rule 56(e) in pertinent part 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."

The unsworn letter in question does not meet the requirements of the rule as a supporting or opposing affidavit and ought not to have been considered by the Court in its ruling on the motion. *Lineberger v. Insurance,* 12 N.C. App. 135, 182 S.E. 2d 643 (1971) ; *Ogburn v. Sterchi Brothers Stores, Inc.,* 218 N.C. 507, 11 S.E. 2d 460 (1940). Nevertheless, even if the letter was competent, we do not think it was sufficient compliance with the requirements of the charter. Sufficiency of a notice of claim against a municipality, before bringing an action for damages, may be determined by the city charter. *Webster v. Charlotte,* 222 N.C. 321, 22 S.E. 2d 900 (1942). This letter is nothing more than an expression of plaintiff's attorney's intention to file a claim for damages against the City on behalf of his client sometime subsequent to 28 June 1968. This letter is not notice in writing to the Council of the injury, the date and place of the injury, the manner of infliction, the character of the injury, and the amount of damage claimed.

[4] Plaintiff cites *Bowling v. Oxford,* 267 N.C. 552, 148 S.E. 2d 624, in support of his contention that the notice prescribed by the charter was not required in this case. Suffice to say the cited case does not support his contention. Compliance with the city charter requirements that notice be given the governing body of the municipality within a specified time, of any claim for damages for personal injury, is a condition precedent to the right to institute action against the municipality to recover such damages. 5 Strong, N.C. Index 2d, Municipal Corporations § 42, p. 718. We hold the pleadings and affidavits disclose that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law. The judgment appealed from is

Affirmed.

Judges BRITT and PARKER concur.

ISAAC B. MARKHAM v. WILBUR JOHNSON AND WIFE, CLAUDINE C. JOHNSON

No. 7214SC371

(Filed 28 June 1972)

1. **Pleadings § 37— agency of husband for wife — admissions in answer**

Where answer signed and sworn to by the wife admitted that she was a party to the grading contract with the plaintiff which gave rise to the lawsuit, the husband's authority to act as agent for the wife in entering the contract with plaintiff will be deemed established.

2. **Rules of Civil Procedure § 15— motion to amend to conform to evidence — discretion**

No abuse of discretion has been shown in the trial judge's denial of defendants' motion to amend their answer to conform to the evidence under G.S. 1A-1, Rule 15(b).

3. **Appeal and Error § 24— necessity for exceptions**

An assignment of error must be supported by an exception previously noted.

4. **Trial § 34— statement of contentions**

There is no merit in defendants' contention that the trial court de-emphasized their contentions and over-emphasized plaintiff's contentions, where the court's statement of contentions comprises only eighteen lines of the record on appeal and twelve of those lines are devoted to defendants' contentions.

APPEAL by defendants from *Lee, District Judge,* 19 October 1971 Session of DURHAM District Court.

Plaintiff, a Durham grading contractor, instituted this action against Wilbur Johnson and wife, Claudine C. Johnson, alleging that the defendants entered into an express oral contract with the plaintiff, whereby the plaintiff agreed to clear brush, push up stumps, and clear approximately 15 acres of defendants' land; that the defendants agreed to pay the plaintiff the sum of $135.00 per acre for said clearing, pushing up stumps and piling brush. Plaintiff further alleged that he cleared the land, pushed up stumps, and piled brush pursuant to the terms of the contract with defendants; that the total amount the defendants owed the plaintiff for the above work was $2,025; that defendants paid him the sum of $700, leaving a balance due of $1,325 on the original contract price. Based on the foregoing allegations, plaintiff sought a judgment against defendants in the amount of $1,325, plus interest, and a declaration that the judgment constitute a lien on the defendants' real

estate. Plaintiff had previously filed a Notice of Lien in December 1969 under the provisions of Chap. 44 of the General Statutes of North Carolina.

In their answer, defendants admit that on or about 15 August 1969 they entered into an express oral contract with the plaintiff, whereby defendants agreed to pay the plaintiff the sum of $135 per acre to clear brush, push up stumps, and clear approximately fifteen acres of defendants' land. However, defendants denied that they became indebted to plaintiff for payment of $2,025 or that there was a balance due of $1,325 on the original contract price.

In the District Court before a jury, the plaintiff introduced evidence in support of his allegations. Defendants' evidence tended to show that Wilbur Johnson paid the plaintiff first $700 by check and on two other separate occasions paid plaintiff $500 in cash each time, making a total of $1,700 paid to plaintiff, who was to give Wilbur Johnson the receipts for the cash later. However, no receipts were ever issued to the defendants. The defendants' testimony further disclosed that the plaintiff stopped and never finished the work contracted; thus, defendants claimed they owed the plaintiff nothing. At the close of the evidence the court submitted issues to the jury which were answered as follows:

"(1) Are the defendants indebted to the plaintiff for work done and performed by the plaintiff?

"Answer: Yes.

"(2) If so, in what amount?

"Answer: $1,325"

From judgment that plaintiff recover $1,325 and that the judgment shall be a lien upon the defendants' property described in the "Notice of Lien," defendants appealed.

Bryant, Lipton, Bryant & Battle, by Richard M. Drew, for plaintiff-appellee.

W. G. Pearson II, for defendant-appellants.

BROCK, Judge.

[1] The defendants first assign as error that the trial judge denied defendants' motion for a directed verdict and for judg-

ment notwithstanding the verdict as to the defendant Claudine C. Johnson. Defendants argue that this motion should have been granted, because the evidence does not disclose that Claudine C. Johnson was a party to the contract with plaintiff and that there was no evidence of ratification by Mrs. Johnson or that Mr. Johnson was acting as an agent for his wife when he alone entered into the said contract with plaintiff. Therefore, Claudine C. Johnson is not liable jointly or severally to the plaintiff in the sum of $1,325.

Although we find this argument of defendants resourceful, it is, nevertheless, without merit. The issue, which defendants are now attempting to raise, that there was a lack of any agency relationship on behalf of Claudine C. Johnson was not raised by the pleadings filed in the case. In fact, by admission contained in the answer which Mrs. Johnson signed and swore to, she and her husband admitted she was a party to the contract with the plaintiff which gave rise to the lawsuit. The defendants' admission went to the material fact that there was a contract between plaintiff and the defendants. "Where a material fact is alleged in the complaint and admitted in the answer, it will, for the purpose of the trial, be taken as true and beyond the range of questioning." *Johnson v. Johnson,* 7 N.C. App. 310, 172 S.E. 2d 264.

[2] The defendants next assign as error the trial judge's denial of defendants' motion to amend paragraph 3 of their answer in order to conform with the evidence as offered during the trial in accordance with G.S. 1A-1, Rule 15(b). This motion was not made until after defendants' motion for judgment notwithstanding the verdict was denied.

The defendants' motion was addressed to the sound discretion of the trial judge. The trial court has broad discretion in permitting or denying amendments. *Gifts, Inc. v. Duncan,* 9 N.C. App. 653, 177 S.E. 2d 428. The defendants have not argued or shown any abuse of discretion by the trial court in denying their motion to amend their answer; therefore, this assignment of error is overruled.

The defendants' last assignment of error brought forward on appeal is that the trial court erred in over-emphasizing the plaintiff's contentions and de-emphasizing the contentions of the defendants in its charge to the jury.

[3, 4] The exception referred to in this assignment of error is Exception No. 5. Exception No. 5 was taken to the brief explanation given by the trial judge of the law applicable to the two issues. There was no exception to the statement of contentions. An assignment of error must be supported by an exception previously noted. In any event the statement by the trial judge of the contentions of the parties takes only eighteen lines in the printed record on appeal; twelve of these lines are devoted to stating defendants' contentions. This assignment of error is overruled.

No error.

Judges MORRIS and HEDRICK concur.

WILLIAM E. TOMLINSON v. KIDD BREWER AND WIFE, MARY FRANCES LINNEY BREWER

No. 7210SC354

(Filed 28 June 1972)

1. **Appeal and Error § 42— summary judgment — consideration of affidavits and exhibits — failure to include affidavits and exhibits in record on appeal**

   The appellate court cannot consider plaintiff's contention that the trial court erred in considering certain affidavits and exhibits in ruling on defendants' motion for summary judgment on their counterclaim where the affidavits and exhibits were not made a part of the record on appeal.

2. **Landlord and Tenant § 19— counterclaim for rent — summary judgment**

   The trial court erred in the entry of summary judgment in favor of defendants on their counterclaim for rents allegedly due, where summary judgment was based on the pleadings, and the amount of plaintiff's indebtedness to defendants, if any, cannot be determined from the pleadings.

APPEAL by plaintiff from *Brewer, Judge,* 6 December 1971 Session of Superior Court held in WAKE County.

This is a civil action wherein plaintiff seeks to impress a parol trust in his favor on land claimed by the defendants. The defendants filed answer denying the material allegations of plaintiff's complaint with respect to the alleged parol trust

and filed a counterclaim seeking to recover from the plaintiff rent for the use of the said property in the amount of $9,979.77 due to 19 October 1971 and thereafter at the rate of $300 per month. The plaintiff filed a reply admitting in part and denying in part the allegations of the counterclaim. On 9 December 1971 on motion of the defendants, the Court entered a summary judgment that the defendants recover from the plaintiff on their counterclaim $10,644.01. The plaintiff appealed.

Early & Chandler by Walter J. Early for plaintiff appellant.

Wolff & Harrell by Bernard A. Harrell for defendant appellees.

HEDRICK, Judge.

Appellant contends the Court erred in considering certain affidavits and exhibits in ruling on the defendants' motion for summary judgment on the counterclaim. In response to this contention appellee in his brief states:

> "Even conceding arguendo, that the admission of the affidavits and the letters at the hearing was erroneous, such error was not prejudicial. The trial court based its ruling and its judgment not upon the affidavits or letters, but upon the pleadings and admissions of counsel."

[1] The affidavits or exhibits filed in support of defendants' motion, including some not challenged by this exception, were not made a part of the record on appeal. Therefore, we are unable to review this exception. In the light of appellees' statement that the trial judge based his ruling and judgment on the pleadings and admission of counsel, we have not exercised our authority under Rule 19 of the Rules of Practice in this Court to order the affidavits and exhibits sent up and added to the record on appeal.

The question thus presented is whether the pleadings reveal that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law on their counterclaim. In their counterclaim, defendants in substance alleged that they and the plaintiff entered into an oral agreement whereby the defendants were to obtain a loan in the amount of $40,000 to purchase a certain parcel of land in Wake County and that plaintiff for the use of said property would

make monthly payments of rent in an amount equal to the interest on the said $40,000 loan, plus Wake County ad valorem taxes and expenses. The defendants further alleged:

> "That the plaintiff made sporadic payment of rents to the defendants but defaulted in the payment of rents beginning in September, 1968; that the last rents received from plaintiff was in March of 1969 and since such time, plaintiff has paid no rent for use of the said land.
>
> That the rent due and owing for the occupation and use of the premises now stands at $9,979.77 to October 19, 1971; . . . ."

Defendants prayed:

> "That the defendants have and recover on their counterclaim the sum of $9,979.77 as rent due to October 19, 1971 and thereafter at a rate of $300.00 per month."

In his reply to defendants' counterclaim, the plaintiff admitted that there was an oral agreement between plaintiff and defendants, a part of which was that the plaintiff would make monthly payments equal in amount to the interest which the defendants were to pay on the loan secured by defendants, and that he ceased making the "so called rental payments" in March, 1969. In his reply, plaintiff admitted:

> " . . . that there are certain sums due to or for the use and benefit of the defendant and that the defendant has made a demand therefor and that the plaintiff has refused to pay said sums."

[2] We think the pleadings show clearly there are genuine triable issues as to material facts regarding defendants' counterclaim. The most that can be said is that the pleadings show that the plaintiff agreed to pay the defendants for the use of the premises monthly installments of "rent or cost" in an amount equal to the interest on defendants' $40,000 loan, plus expenses and Wake County ad valorem taxes. From the pleadings, we cannot determine the rate of interest charged on defendants' loan, the amount of the expenses, or the amount of the Wake County taxes. We cannot determine whether the payments were current in March 1971 or the rate at which the payments accrued thereafter until 19 October 1971. Although the defendants alleged that rent "due and owing" as of 19 October

1971 was $9,979.77, the plaintiff only admitted in his reply that there were "certain sums" due. Although the defendants sought to recover rent at the rate of $300 per month after 19 October 1971, there is nothing in the pleadings to show that the plaintiff in fact ever agreed to such a rate. In short, the amount of plaintiff's indebtedness to defendants, if any, simply cannot be calculated from the pleadings.

It seems clear that the able trial judge based his ruling, at least in part, on the admissions of counsel and on the affidavits and exhibits, which were omitted from the record on appeal. Our holding, however, is based on the pleadings alone which will not support a judgment for defendants on their counterclaim in the amount of $10,644.01. The judgment appealed from is

Reversed.

Judges BROCK and MORRIS concur.

THE MUNCHAK CORPORATION AND RDG CORPORATION, A JOINT VENTURE, D/B/A THE CAROLINA COUGARS v. JAMES R. McDANIELS

No. 7218SC419

(Filed 28 June 1972)

Appeal and Error § 6— appeal from oral expression of opinion

Defendant cannot appeal from the mere oral expression of opinion by the trial court that it had jurisdiction to rule on a show cause order after the cause had been removed to a federal district court, the trial court having entered no written order, judgment or decree.

APPEAL by defendant from *Exum, Judge,* at the 14 February 1972 Regular Civil Session of GUILFORD Superior Court.

Plaintiff, a joint venture known as The Carolina Cougars, instituted this action for breach of contract by defendant James R. McDaniels, a basketball player. The Complaint alleged that defendant's contract with plaintiff called for him to play for The Carolina Cougars; that it prohibited defendant from playing for any other team; that defendant has breached the contract by repudiating it and agreeing to play for another basketball team, the Seattle Supersonics; and that plaintiff has

no adequate remedy at law. Plaintiff asked for a temporary restraining order enjoining defendant from playing for any basketball team other than plaintiff and ultimately for a permanent injunction to same effect.

An *ex parte* temporary restraining order was issued by Judge Exum on 18 February 1972.

On 22 February 1972 plaintiff, by affidavits and exhibits, entered a motion for an order to defendant to show cause why he should not be held in contempt of court for violation of the temporary restraining order. The affidavits and exhibits tended to show that the contents of the temporary restraining order had been wired to defendant's attorney; that defendant had actual knowledge of the temporary restraining order; and that defendant had played basketball for the Seattle Supersonics on 20 February 1972 in violation of the temporary restraining order. An order for the defendant to show cause why he should not be held in contempt of court for violating the restraining order was issued on 22 February 1972, returnable 28 February 1972.

On 25 February 1972 defendant filed a petition in the United States District Court for the Middle District of North Carolina for removal of the cause to that court on the grounds of diversity of citizenship. Bond was posted and plaintiff was notified of the petition. A copy of the petition for removal was filed in the Superior Court of Guilford County thereby effecting removal.

Several other motions were then filed in the United States District Court for the Middle District of North Carolina and the Superior Court of Kings County, Washington. These motions are not relevant to this appeal.

With regard to service of process and jurisdiction over the person of the defendant the following appears:

> "Subsequent to the signing of Entries of Appeal on March 2, 1972, defendant, through counsel and by letter to the Honorable Carmon J. Stuart, Clerk United States District Court for the Middle District of North Carolina, conceded that the North Carolina Court obtained jurisdiction over defendant as of approximately 10:00 p.m. PST on Wednesday, February 23, 1972, when he was personally

served with suit papers in Seattle, Washington, in the North Carolina action."

The record proper is silent as to what transpired in the Guilford Superior Court after the removal petition was filed. The statement of case on appeal indicates that the return of the show cause order was to be heard before Exum, Judge, on 28 February 1972. Upon being informed of the removal petition and the jurisdictional question it created, Judge Exum postponed the hearing until 2:00 p.m. that afternoon. The hearing was conducted and, after arguments by counsel, Judge Exum concluded that he still had jurisdiction to determine if there had been a violation of the temporary restraining order. No order, judgment or written decree to that effect was entered. The hearing was continued to 2 March 1972.

At the hearing on 2 March 1972 Judge Exum stated that, in his opinion, he still had jurisdiction but no order or judgment was entered. Appeal entries were then entered and the case was brought before this Court.

Forman & Zuckerman, P.A., by William Zuckerman for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter by Bynum M. Hunter and Ben F. Tennille for defendant appellant.

CAMPBELL, Judge.

Defendant's sole assignment of error is to the trial court's decision that it had jurisdiction to rule on the show cause order. Defendant makes a number of arguments on the jurisdiction issue created by the petition for removal to the United States District Court.

It is not necessary for us to reach defendant's arguments. In determining that it had jurisdiction, the trial court entered no written order, judgment or decree. The determination of jurisdiction was merely an oral expression of the trial court's opinion. Nothing affecting the defendant has been done. Defendant is attempting to appeal from that expression of opinion. Can an appeal lie from the oral expression of an opinion by the trial court? We hold it cannot.

The general rule is that, "the mere ruling, decision, or opinion of the court, no judgment or final order being entered

in accordance therewith, does not have the effect of a judgment, and is not reviewable by appeal or writ of error." 4 C.J.S., Appeal and Error, § 153(c) at p. 517.

As to oral opinions it is said that, "[a] mere oral order or decision which has never been expressed in a written order or judgment cannot, under most authorities, support an appeal or writ of error." 4 C.J.S., Appeal and Error, § 153(c) at p. 520.

There is case authority in North Carolina for this rule. In *Taylor v. Bostic,* 93 N.C. 415 (1885) the trial court entered a written statement of his opinion, but no order or judgment was entered. The North Carolina Supreme Court held that the appeal was premature, there being no judgment and "therefore no question of law presented" from which appeal could be taken.

Defendant cannot appeal from the mere oral expression of opinion by the trial court. We therefore dismiss this appeal, *ex mero motu.*

Appeal dismissed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. REBECCA HOWARD

No. 7212SC306

(Filed 28 June 1972)

Criminal Law § 99— questions by trial court — expression of opinion — clarification

Where an eyewitness' only explanation of how the prosecuting witness was injured by a solution of hot water, kitchen lye and Drano was that "the hot water splashed in her face" while she was scuffling with the defendant, the trial court did not express an opinion on the credibility of the witness by asking the witness questions as to how the prosecuting witness received burns on her right side and shoulder if defendant had the hot water solution in her right hand while scuffling with the prosecuting witness, the court's questions being for the purpose of clarifying the witness' testimony.

APPEAL by defendant from *Clark, Judge,* Criminal Session, Superior Court, CUMBERLAND County.

Defendant was tried upon an indictment charging that she wilfully and maliciously threw a corrosive acid and alkali solu-

tion of hot water, kitchen lye and Drano upon the prosecuting witness "with the intent to murder, maim and disfigure and and did inflict serious injury to" the prosecuting witness. The jury found her guilty as charged, and from judgment imposing a prison sentence, defendant appealed.

Attorney General Morgan, by Associate Attorney Conely, for the State.

James Godwin Taylor, Assistant Public Defender, for defendant appellant.

MORRIS, Judge.

The only assignment of error which appellant brings forward is that by his questioning of one of defendant's witnesses, the judge invaded the province of the prosecution and tended to discredit the witness in the eyes of the jury, thereby committing reversible error.

The evidence for the State tended to show that the prosecuting witness, Elizabeth Averitte, and defendant worked in the kitchen at Tropical Restaurant in Fayetteville. On the morning the injury occurred, the two got into an argument. Defendant went to the sink and put some Drano in a pot of hot water. Defendant threw the solution on Elizabeth's shoulder, chest, and face. Defendant then held her down and cut her on the neck with a cleaver.

Defendant's first witness was Edgar Hossler. He testified with respect to the argument and said that Elizabeth asked defendant to go outside with her to settle the argument, but defendant refused to go. According to his testimony, Elizabeth had a long butcher knife in her right hand and started toward defendant, whereupon defendant reached in the sink and got a container. Elizabeth met her and they "started tangling" and during the "tangle" Elizabeth got cut on the right side of her neck with the knife she held in her right hand, and "the hot water splashed in her face." This was the witness's only explanation of how the injury was received, both during direct and cross-examination. After cross-examination the court asked the following questions:

"Q. Were they scuffling and tied up when she threw the water on her?

A. Yes, sir.

Q. They were scuffling at that time, face to face with each other?

A. Yes, sir.

Q. And the defendant had the hot water in her right hand?

A. Which one you referring to?

Q. Rebecca had the hot water in her right hand?

A. Yes, sir.

Q. Did you observe Elizabeth after she was hurt? Did you observe the burned area where she was hurt?

A. Yes, sir.

Q. Wasn't most of it on the right hand, on the right side and shoulder?

A. Right.

Q. The right side of her face and shoulder?

A. Yes, sir.

Q. How did Rebecca get the water on the right side? Wasn't her left side to Mrs. Averitte's right? Rebecca had the water in her right hand, wasn't it?

A. She got that on her face during the scuffle.

Q. What?

A. During the scuffle, she got the water dashed on her face during the scuffle.

Q. Do you still work there?

A. Yes, I still do.

Q. Does Rebecca still work there?

A. No, she don't work there.

Q. When did she quit?

A. After this incident happened."

It is this questioning which defendant says constitutes reversible error. We do not agree. The trial judge may examine

witnesses tendered by either side whenever, in his discretion, he sees fit to do so. *State v. Horne,* 171 N.C. 787, 88 S.E. 433 (1916). In this examination he must be careful to avoid prejudice to either party and may not impeach the witness or cast doubt on his credibility. *State v. Peters,* 253 N.C. 331, 116 S.E. 2d 787 (1960). Here, however, the court was seeking clarification. The witness had testified he observed the occurrence, but his only explanation of how the solution got on Elizabeth was that "Elizabeth got . . . the hot water splashed in her face." We think the words of Justice Huskins in *State v. Colson,* 274 N.C. 295, 308, 163 S.E. 2d 376 (1968), cert. denied 393 U.S. 1087, 21 L.Ed. 2d 780, 89 S.Ct. 876 (1969), are appropriate:

> " . . . 'Judges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness so that the "truth, the whole truth, and nothing but the truth" be laid before the jury.' *Eekhout v. Cole,* 135 N.C. 583, 47 S.E. 655. We have examined the questions by the judge to which exception was taken, and in our opinion no prejudice resulted from them. The questions served only to clarify and promote a proper understanding of the testimony of the witnesses and did not amount to an expression of opinion by the judge. *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9; *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1."

No error.

Judges VAUGHN and GRAHAM concur.

NELL G. WHITNEY v. WILLIAM W. WHITNEY

No. 7226DC211

(Filed 28 June 1972)

Divorce and Alimony § 18— alimony pendente lite — findings — right to relief demanded

The trial court erred in awarding alimony *pendente lite* to the wife absent a finding that the wife is entitled to the relief demanded in the action in which the application for alimony *pendente lite* was made.

Whitney v. Whitney

APPEAL by defendant from *Griffin, District Judge,* 16 August 1971 Session of District Court held in MECKLENBURG County.

This is a civil action for alimony without divorce heard on plaintiff's application for alimony *pendente lite* and counsel fees. After hearing, the Court made the following pertinent findings of fact:

"1. The Court takes the complaint of the plaintiff as an affidavit and incorporates the facts of said complaint into this order for the purposes of this hearing.

2. The defendant has filed answer to the complaint and has admitted that the plaintiff and defendant were married as alleged in the complaint and has also admitted that he left the home of himself and the plaintiff on or about the first day of June, 1971, and has since made no payments to the plaintiff for her support.

3. The defendant also admits in his answer that he is an able-bodied man in good health who is employed by Ralph Whitehead and Associates as an engineer; that he receives a salary from his employment of in excess of $10,000.00 per year and that he receives compensation or reimbursement for his travel, lodging and board while out of town on behalf of his employer.

* * *

5. The defendant further admits in his answer that the plaintiff and defendant own a home and the land on which it stands at 2227 Hassell Place, Charlotte, North Carolina, as tenants by the entirety and that he, the defendant, has moved out of the home and is living in an apartment.

6. The Court further finds as a fact from the evidence of the plaintiff and the defendant that the defendant has furnished no support for the plaintiff since approximately June of 1968 with the exception of letting her use an automobile, a gasoline credit card and paid the automobile insurance.

* * *

8. The Court further finds from the evidence that the defendant receives more than $10,000.00 per year salary plus other fringe benefits from his employer and that the

plaintiff receives $2,500.00 per year plus fringe benefits from her employer; that the plaintiff is employed on a year-to-year basis and that her job is insecure as opposed to the defendant's position as an engineer with Ralph Whitehead and Associates; that there is no evidence that the defendant's job is insecure but on the contrary there is evidence that his job is secure; that the defendant's employer is presently considering other benefits including a profit-sharing plan and a pension plan and that the evidence shows that the defendant would be eligible under such plans.

* * *

10. The Court also finds as a fact that Samuel M. Millette, Attorney for the plaintiff, has rendered valuable legal services to the plaintiff and that the plaintiff is not able to pay said legal fees."

Based upon the above findings the Court made the following conclusions of law:

"1. The Court finds as a matter of law that the plaintiff is the dependent spouse and that she is actually substantially dependent upon the defendant for her maintenance and support and that she is substantially in need of maintenance and support from the defendant and is entitled to such support pendente lite.

2. That based on the above findings of fact the Court concludes as a matter of law that the defendant is the supporting spouse.

3. The Court also finds from the above-setout facts and concludes as a matter of law that the dependent spouse, the plaintiff, has not sufficient means whereon to subsist during the prosecution of her suit and to defray the necessary expenses thereof."

From an order awarding plaintiff alimony *pendente lite* at the rate of $400 a month and counsel fees in the amount of $500, the defendant appealed to the Court of Appeals.

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

Hamel & Cannon by Thomas R. Cannon for defendant appellant.

HEDRICK, Judge.

Under G.S. 50-16.3(a) a dependent spouse who is a party to an action for divorce, 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."

If it can be said that the trial judge sufficiently found that the plaintiff was a dependent spouse, and that she did not have sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof, and that these findings are supported by the evidence, the order as entered, nevertheless, must be vacated for it does not contain a sufficient finding that such dependent spouse is entitled to the relief demanded in the action in which the application for alimony *pendente lite* was made. Such a finding is essential. As was said by Chief Judge Mallard in *Peoples v. Peoples,* 10 N.C. App. 402, 179 S.E. 2d 138 (1971):

> " * * * 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."

For the reasons stated, the order appealed from is vacated and the case is remanded for a new hearing on plaintiff's motion for alimony *pendente lite* and counsel fees.

Vacated and remanded.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. MALLIE ROBINSON

No. 7214SC412

(Filed 28 June 1972)

Arrest and Bail § 3; Criminal Law § 84; Searches and Seizures § 1— unlawful arrest without warrant — misdemeanor — search at arrest scene

The arrest of defendant for the misdemeanor of assault on a female not committed in the presence of an arresting officer by officers who knew that a warrant had been issued but who did not have the warrant in their possession was unlawful; consequently, a search of defendant at the arrest scene was unlawful, and defendant's motion to suppress all evidence obtained by the search should have been allowed. G.S. 15-41.

APPEAL by defendant from *Cooper, Judge,* 10 January 1972 Session of Superior Court held in Durham County.

Defendant was indicted for illegal possession of the narcotic drug heroin. He pleaded not guilty, was found guilty by the jury, and from judgment imposing prison sentence, appealed.

Attorney General Robert Morgan by Staff Attorney Donald A. Davis for the State.

Loflin, Anderson & Loflin by Thomas F. Loflin III for defendant appellant.

PARKER, Judge.

This appeal questions the validity of the search of defendant's person which resulted in discovery of heroin in his jacket pocket. On the afternoon of 7 October 1971 two City of Durham police officers in a patrol car observed defendant riding as a passenger in a car being driven on a city street by one Johnson, for whom the officers held arrest warrants. When the car stopped at a filling station, the officers pulled in behind it. About that time two additional police officers arrived and Johnson was placed under arrest. Officer Thompson testified that the officers also had an arrest warrant for the defendant Robinson and that the purpose of the officers in stopping Johnson and Robinson was to serve the warrants on them. The officers placed defendant under arrest, "warned him of his rights," searched him, and found the heroin in his jacket pocket. Officer Thompson's testimony revealed that at the time this occurred defendant was cooperative with the officers and that

no weapons were found on defendant's person or in the car in which he had been riding with Johnson.

Defendant moved to suppress all evidence obtained by the search, whereupon the trial judge conducted a *voir dire* examination in which the officers testified to the following: On 17 July 1971 a warrant had been issued on complaint of defendant's wife charging him with assault on a female. This offense had not been committed in the presence of any officer. When the officers arrested and searched defendant at the filling station, they knew about this warrant but did not have it with them. At that time the warrant was at the police station. It was subsequently served on the defendant at the detective bureau after he was brought there following his arrest and search at the filling station.

Defendant's motion to suppress all evidence obtained by the search should have been allowed. Initially, it should be noted that nothing in the record suggests, and the State does not contend, that the police in this case were making "a reasonable investigatory stop" or that they had reason to believe that defendant was armed and dangerous, so as to make a "limited protective search for concealed weapons" lawful under the decisions in *Terry v. Ohio,* 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868, or *Adams v. Williams,* 407 U.S. 143 (decided 12 June 1972). Therefore, absent a search warrant, search of defendant's person in this case was lawful only if made incident to a lawful arrest.

On the facts disclosed by this record, defendant's arrest at the filling station was not lawful. Defendant had been charged with assault on a female, a misdemeanor. G.S. 14-33. Admittedly, this offense had not been committed in the presence of an arresting officer and no arresting officer professed to have reasonable ground to believe that defendant had committed in his presence any felony or misdemeanor. Therefore, the provisions of G.S. 15-41, which authorize a peace officer to arrest without a warrant in certain cases, were not applicable. There was no evidence of any "riot, rout, affray or other breach of the peace," such as to bring G.S. 15-39 into play. Thus, defendant's arrest can be held lawful only if it was lawfully made under the warrant which charged him with a misdemeanor not committed in the presence of an arresting officer. For an arrest under that warrant to be valid, it was necessary that the warrant be in possession of the arresting officer, or of someone

present and assisting him, at the time and place the arrest was made. *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470. Such was not the case.

Appellant's remaining assignment of error, directed to the trial court's ruling that the State's witness, Evans, was an expert in the field of forensic chemistry, we find without merit. However, for error in overruling defendant's motion to suppress evidence obtained by the unlawful search and admitting such evidence over defendant's objection, defendant is entitled to a

New trial.

Judges BRITT and HEDRICK concur.

HELEN BENNETT LANGDON, EXECUTRIX OF THE ESTATE OF DR. BENJAMIN BRUCE LANGDON, DECEASED v. DR. THOMAS GRAY HURDLE AND DR. CHARLES A. HOFFMAN, JR.

No. 7212DC310

(Filed 28 June 1972)

1. **Declaratory Judgment Act § 2— complaint — absence of reference to the Act**

It is not error if an action instituted under the Declaratory Judgment Act fails to make specific reference to the Act in the complaint, since the facts alleged determine the nature of the relief to be granted.

2. **Declaratory Judgment Act § 2— authority to enter declaratory judgment**

In an action brought by the executrix of a deceased partner seeking to recover certain sums allegedly due under a partnership agreement and an adjudication of her rights under the agreement, the trial court had authority to enter judgment that defendants are personally liable to the executrix under the partnership agreement without the assets of the partnership first being exhausted, which in effect is a declaratory judgment.

3. **Partnership § 8— settlement of deceased partner's interest — partnership agreement**

When articles of partnership in force at the death of any partner provide for the settlement of the deceased partner's interest in the partnership and for a disposition thereof different from that provided for in G.S. Ch. 59, the interest of the deceased partner in the partnership shall be settled and disposed of in accordance with the articles of partnership. G.S. 59-84.

4. **Contracts § 1— right to contract**

Persons *sui juris* have a right to make any contract not contrary to law or public policy.

5. **Partnership § 8— partnership agreement — death of partner — personal liability of surviving partners**

Where a partnership agreement provided that upon the death of a partner the estate of the deceased partner shall be paid one year's income as defined in the agreement, with such sum being paid in five annual installments, and the surviving partners have terminated the partnership, the trial court properly determined that the surviving partners are personally liable to the estate of the deceased partner for the payments required by the partnership agreement without the partnership assets first having been exhausted.

APPEAL by defendant Hoffman from *Herring, District Judge,* 20 December 1971 Civil Session of CUMBERLAND District Court.

Plaintiff executrix instituted this action on 20 August 1971 seeking to recover certain sums from defendants and an adjudication of her rights against defendants. Pertinent allegations of the complaint admitted by appellant are summarized as follows:

On or about 1 August 1966 plaintiff's testate and defendants, all three being medical doctors, entered into a written partnership agreement, the full text of the agreement being made a part of the complaint. The partnership, engaged in the practice of urology, became operative on 1 August 1966 and continued in full force and effect until 4 April 1970 when testate died. Article 11 of the partnership agreement provides as follows:

> "In the event of retirement or death of a partner, all partnership equipment, supplies, accounts receivable, good will, and all other partnership assets shall become the property of the remaining partners. Such retiring partner or the estate of a deceased partner shall be paid one year's income which shall be an amount equal to the average net income of such retiring or deceased partner's last five full years from the partnership, such sum to be paid in five equal annual installments, the first installment to be paid within sixty (60) days of such retirement or death and the four other annual installments to be paid on the next four anniversary dates of such retirement or death with no interest. Such payments shall be considered as expense for the partnership and income for the retiring partner or the estate of the deceased partner."

Following testate's death accountants determined that the amount owing testate's estate was $70,456.20. Plaintiff and defendants agreed on said amount and further agreed, at defendants' request, that the amount would be paid in sixty equal consecutive monthly installments of $1,174.27 commencing in June 1970, rather than in five annual installments as provided by the partnership agreement. The partnership composed of defendants made fourteen monthly payments as agreed beginning with June 1970 and continuing through July 1971.

Beginning 2 August 1971 defendants ceased practicing medicine as partners. Early that month $587.14 was deposited to plaintiff's account, said funds coming from defendant

Hurdle's office. Defendant Hurdle has refused to make any further payment to plaintiff for the month of August 1971 and defendant Hoffman refuses to make any payment to plaintiff for the month of August 1971. Plaintiff asked the court to adjudicate that defendants are jointly and severally liable to her for the monthly payments of $1,174.27 for the months June 1970 through May 1975 and award judgment for all delinquent payments, plus interest, outstanding as of the date of trial.

Defendants filed separate answers. In his answer appellant admitted that defendants are jointly and severally liable to plaintiff for the monthly payments aforesaid but alleged "that the obligation due to the plaintiff and other creditors . . . are to be paid from the assets of the said partnership until said assets . . . are exhausted." Defendant Hoffman alleged a cross action against defendant Hurdle and asked for dissolution of the partnership.

Defendants filed separate motions for summary judgment and plaintiff moved for summary judgment. Following a hearing the court denied defendants' motions, allowed plaintiff's motion and adjudged that defendants are jointly and severally liable to plaintiff for the monthly payments of $1,174.27 for the remaining months of January 1972 through May 1975, it being stipulated at the hearing that payments had been made through December 1971.

Defendant Hoffman appealed.

J. Duane Gilliam for plaintiff appellee.

Williford, Person & Canady by N. H. Person for defendant appellant.

BRITT, Judge.

Appellant contends that the court erred in granting summary judgment for plaintiff that defendants are personally liable to plaintiff before there has been an adjudication that the assets of the partnership of which plaintiff is a creditor are exhausted. We hold that the court did not err.

[1, 2] First, we consider the authority of the trial court to make the adjudication set forth in the judgment which, in effect, is a declaratory judgment. G.S. 1A-1, Rule 2, provides that there shall be in this State but one form of action for the en-

forcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action. G.S. 1-254 (a part of the Declaratory Judgment Act) provides that "(a)ny person interested under a . . . written contract . . . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder." It is not error if an action instituted under the act fails to make specific reference to the statute in the complaint; the facts alleged determine the nature of the relief to be granted. *Little v. Trust Co.*, 252 N.C. 229, 113 S.E. 2d 689 (1960). All pleadings shall be so construed as to do substantial justice. G.S. 1A-1, Rule 8(f). We think the court had authority to make the adjudication challenged.

[3] Although the partnership formed between plaintiff's testate and defendants is involved in this action, we are dealing primarily with the partnership agreement entered into between the three original parties, as modified by plaintiff and defendants. When the original articles of partnership in force at the death of any partner make provision for the settlement of the deceased partner's interest in the partnership, and for a disposition thereof different from that provided for in Chapter 59 of our General Statutes, the interest of such deceased partner in the partnership shall be settled and disposed of in accordance with the provisions of the articles of partnership. G.S. 59-84. Therefore, in this case we look primarily to the partnership agreement for the answer to the question posed.

[4] Persons *sui juris* have a right to make any contract not contrary to law or public policy. 2 Strong, N. C. Index 2d, Contracts, § 1, p. 292.

[5] We do not think Article 11 of the partnership agreement quoted above contemplated a dissolution of the partnership as to all parties on the death or retirement of one of them. To the contrary it appears to contemplate that the two surviving partners would "carry on," vested with complete title to partnership assets, but with the obligation to pay the retiring partner or the estate of the deceased partner a determinable amount. We think the actions of defendants following the death of plaintiff's testate support the interpretation stated. Not only did the defendants, as surviving partners, proceed to continue the partnership for some fifteen months following testate's death,

but soon after his death they agreed with plaintiff that she was entitled to receive from them the sum of $70,456.20. Plaintiff's position is made stronger by the fact that defendants requested, and she agreed, that they be allowed to pay said amount in sixty equal *monthly* installments, *commencing* in June 1970 rather than in five annual installments as provided by the agreement, and also the fact that defendants made the monthly payments until they severed professional relations.

In the affidavit of appellant's attorney presented at the hearing on the motions for summary judgment we find: "That the defendant Hoffman admits that he and his codefendant Hurdle are jointly and severally liable as the surviving partners of the partnership known as Drs. Langdon, Hurdle and Hoffman payable in 60 consecutive monthly installments of $1,174.24 commencing June 1, 1970. . . ." After specifically agreeing that they were jointly and severally liable, and agreeing to pay plaintiff "in 60 consecutive monthly installments of $1,174.24 commencing June 1, 1970," how can defendants or either of them now contend that plaintiff's receipt of said payments are subject to a dissolution of the partnership between defendants, a marshaling of assets of the partnership and the exhausting of said assets?

After agreeing to pay plaintiff a specified amount monthly, *commencing* June 1, 1970, we do not think there is any merit in appellant's contention that plaintiff's receipt of the sums due her shall be delayed or otherwise affected while differences between defendants are determined.

The judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

State v. Richards and State v. Gamble

STATE OF NORTH CAROLINA v. KENNETH ERNEST RICHARDS

STATE OF NORTH CAROLINA v. WILLIAM CECIL GAMBLE

No. 7223SC317

(Filed 28 June 1972)

1. **Criminal Law § 168— construction of charge**

The charge of the court will be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from any prejudice to defendant.

2. **Criminal Law § 168— charge on alibi — erroneous reference to State's witness**

Trial court's mistaken reference to the State's witness when charging about one defendant and his alibi was not prejudicial error where the mistake was called to the court's attention and corrected.

3. **Criminal Law §§ 89, 95— prior criminal record — admission generally — instructions**

The trial court did not err in including defendant's prior criminal record in its instructions without instructing the jury to consider it only for the specific purpose of impeachment, where testimony regarding defendant's criminal record was admitted generally without objection or request that the purpose of its admission be restricted.

4. **Criminal Law § 168; Robbery § 5— instructions — omission of element of crime — harmless error**

Trial court's omission of one element of the crime of armed robbery in one paragraph of the charge was not prejudicial error where all of the elements of the crime were fully set forth in a preceding paragraph of the charge.

APPEAL by defendants from *Crissman, Judge,* 13 December 1971 Session of WILKES Superior Court.

Defendants, Kenneth Ernest Richards and William Cecil Gamble, were indicted for armed robbery. The cases were consolidated for trial and both defendants pleaded not guilty.

The State's evidence tended to show: On the night of 16 September 1971 at about 10:15 p.m. defendants, riding together in a yellow and black Dodge, stopped at the store of Allen Winebarger and went in. Defendant Richards pulled a gun and told Winebarger to put his hands over his head and back away from the counter; defendant Gamble also drew a gun. Winebarger was taken to the back of the store where defendants searched him and took his "personal belongings" including pocketbook and knife. Richards took money and checks from

the cash drawer totaling approximately $2500. Gamble ordered Winebarger to go to the stockroom where Gamble made him lie down on his stomach and tied Winebarger's hands.

Defendant Richards offered testimony of Annie Sue Swaim that he was with her from 8:00 or 9:00 o'clock on the night of 16 September 1971 until the following morning. Defendant Gamble testified in his own behalf and denied his participation in the alleged robbery.

The jury returned verdicts of guilty of armed robbery as to each defendant and the court entered judgments sentencing Richards to prison for not less than 15 nor more than 20 years and Gamble to prison for not less than 12 nor more than 15 years. From these judgments, defendants appealed.

Attorney General Robert Morgan by Assistant Attorney General William F. Briley for the State.

T. R. Bryan, Sr., and Eric Davis for defendants appellants.

BRITT, Judge.

[1] All of defendants' assignments of error relate to the court's charge to the jury. It is a well established principle of law in this State that the charge of the court will be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from any prejudice to the defendant. *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971); *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971); *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966); *State v. Gatling,* 5 N.C. App. 536, 169 S.E. 2d 60 (1969), affirmed 275 N.C. 625, 170 S.E. 2d 593 (1969).

[2] By their first assignment of error defendants contend that the court failed to correctly charge the jury as to which defendant claimed an alibi. At one point in the charge the court mistakenly referred to Winebarger, the State's witness, when charging about Richards and his alibi, but this mistake was called to the court's attention and corrected. In other parts of the charge the court correctly stated the evidence concerning Richards and the alibi and in summarizing Gamble's testimony made no mention of any alibi contention on Gamble's behalf. The assignment of error is overruled.

[3] Defendant Gamble contends the court erred in including his prior criminal record in its instructions to the jury without instructing the jury to consider it only for the specific purpose of impeachment. Nothing in the record shows an objection to testimony regarding Gamble's prior criminal record or a request to restrict the purpose for which the evidence was received. In *State v. Teasley,* 9 N.C. App. 477, 176 S.E. 2d 838 (1970), cert. den., appeal dismissed, 277 N.C. 459 (1970), the court stated that Rule 21 of the Rules of Practice in the Supreme Court provides that "where evidence admissible for some purposes, but not for all, is admitted generally, its admission will not be held for error unless the appellant requested at the time of its admission that its purpose be restricted." (Citations.) Since the evidence was admitted generally this assignment of error is without merit.

[4] By his assignment of error #4, based on exception #6, defendant Gamble contends that with respect to him the court failed to properly instruct the jury as to the elements of the crime of robbery with a firearm. The portion of the charge covered by this exception consists of two paragraphs separated by another paragraph. We agree that the second paragraph excepted to, standing alone, is error as it did not charge obtaining the property by endangering or threatening the life of the victim with a firearm as an element of robbery with a firearm. In the first paragraph covered by the exception, however, the court fully set forth all elements of the offense; when the charge is considered contextually as a whole we do not think defendant Gamble was prejudiced. The assignment of error is overruled.

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

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. STEVE CHANEY

No. 7217SC203

(Filed 28 June 1972)

1. **Criminal Law § 11; Larceny § 7— accessory after fact to larceny — sufficiency of evidence**

The State's evidence was sufficient to sustain defendant's conviction of being an accessory after the fact of larceny by aiding and assisting the principal felon in the transportation, concealment and disposition of stolen copper wire with intent to aid and assist the principal felon to conceal his identity and avoid arrest when defendant knew the principal felon had stolen the copper wire.

2. **Criminal Law § 112— instructions — reasonable doubt — possibility of innocence**

Instruction in which "reasonable doubt" was compared with "a possibility of innocence" did not constitute error, although such instruction is not commended.

3. **Criminal Law § 99— questions by trial court — clarification**

Trial court's questions to a witness come within the rule of clarification and were therefore proper and not prejudicial to defendant.

4. **Criminal Law § 102— argument of solicitor — urging jury to disbelieve part of testimony of State's witness**

In a prosecution of defendant for being an accessory after the fact to the crime of felonious larceny of copper wire, it was not error for the solicitor to urge the jury to believe a part of the testimony of the State's main witness, the alleged principal felon, and to disbelieve his testimony that defendant did not know that the copper wire had been stolen.

APPEAL by defendant from *Exum, Judge,* 16 August 1971 Criminal Session, ROCKINGHAM County Superior Court.

Defendant was charged in a bill of indictment with being an accessory after the fact of larceny by aiding and assisting the principal felon, Joe Lee Brimm, in the transportation, concealment and disposition of copper wire with intent to aid and assist the said Brimm to conceal his identity and avoid arrest in connection with the larceny of copper wire from Lee Telephone Company when the defendant knew that Brimm had feloniously stolen the copper wire.

To this charge the defendant entered a plea of not guilty.

The evidence for the State tends to show that on 26 April 1970 Brimm and a fifteen-year-old juvenile, Jesse Hadyn, about midnight, went to a fenced-in enclosure belonging to Lee Tele-

phone Company. Hadyn climbed the fence and broke into the building which was inside the fence. Hadyn then rolled some eight 100-pound rolls of copper wire out of the building to the fence. Hadyn and Brimm together then rolled the wire some 400 feet away from the fence to a point on the side of the road. Hadyn and Brimm then went some seven miles to the home of the defendant, arriving about 1:45 a.m. They woke the defendant and arranged for him to get his automobile and take Hadyn home. Brimm told the defendant that he had bought some copper wire from Hadyn and wanted the defendant go with him to get the wire and then assist him in selling the wire. Brimm told Hadyn, in the presence of defendant, that he would give him $100 for his interest in the wire and told defendant that he and the defendant would then split what the wire was sold for after paying Hadyn the $100. After taking Hadyn home, the defendant and Brimm went to the place where the wire had been left and loaded it into the defendant's automobile. It was then carried to a point about 700 feet from the defendant's house and there was placed in some weeds about 25 feet off the road where it would not be seen.

The next day about 5:00 p.m. the defendant and Brimm loaded the wire on the defendant's automobile and drove to Danville, Virginia, where it was sold at a junk yard for approximately $430. They returned to North Carolina that night and gave Hadyn $100 and divided the rest of the money between themselves.

The defendant offered no evidence.

Attorney General Robert Morgan by Associate Attorney Charles A. Lloyd for the State.

Gwyn, Gwyn and Morgan by Melzer A. Morgan, Jr., court-appointed attorneys for defendant appellant.

CAMPBELL, Judge.

[1] Defendant asserts that the evidence was insufficient to sustain his conviction and that his motion for judgment as of nonsuit should have been sustained. In this regard defendant maintains that the State failed to prove that he had had any knowledge of the felonious larceny by Brimm and the assistance he rendered Brimm in disposing of the copper wire was not for the purpose of enabling Brimm to escape detection and arrest.

There was ample evidence to show that Brimm participated with Hadyn in the felonious larceny of the copper wire. The activities of the defendant from the time Brimm and Hadyn woke him up at 1:45 a.m. and he got his automobile and took the wire to the place where it was then hidden in the weeds some 700 feet from his home, and then the next day accompanied Brimm with the wire to Virginia where the defendant arranged for the sale and the subsequent division of the money with the defendant and Brimm, taking $300 and giving Hadyn only $100, presented sufficient circumstantial evidence to go to the jury. This evidence would support a jury finding that defendant knew Brimm had not purchased the wire from Hadyn and that the wire had been stolen. Defendant's later conduct in hiding the wire and then taking it to Virginia and selling it would tend to show that defendant was assisting Brimm with the intention and for the purpose of enabling Brimm to escape detection and arrest for larceny. The case was properly submitted to the jury.

[2] The defendant, in his second assignment of error, asserts error in the refusal to give the defendant's request for a charge defining "reasonable doubt," and instead the court instructed the jury using the charge taken from the North Carolina Pattern Instructions, N.C.P.I., Criminal, § 101.10, wherein "reasonable doubt" was compared with "a possibility of innocence." We do not commend this Pattern Jury Instruction. "Reasonable doubt" has been explained and thoroughly defined in the case of *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954). Nothing needs to be added to what has already been said in the *Hammonds* case. While we do not commend the instruction given in the instant case, we do not find any prejudicial error to the defendant.

[3] The defendant next assigns as error certain questions asked of the witness Brimm by the trial judge. We have reviewed those questions and think they come within the rule of clarification and were therefore proper and not prejudicial to the defendant.

[4] The defendant next assigns as error that portion of the solicitor's argument in which he urged the jury to believe a part of the testimony of the witness Brimm and to disbelieve a part of it. Brimm had testified that he did not know the copper wire was stolen and that he had told the defendant that the

wire was not stolen. The solicitor, in his argument to the jury, merely pointed out that the facts were such that the defendant was bound to have known that the wire was stolen. We find that the solicitor's argument was within the bounds of propriety. The cases relied upon by the defendant are distinguishable. We find no merit in this assignment of error.

The defendant also assigns as error the sufficiency of the bill of indictment. We have considered this assignment of error and we find the bill of indictment sufficient.

We conclude that the defendant has had a fair trial free of prejudicial error.

No error.

Chief Judge MALLARD and Judge BROCK concur.

GEORGE BERGOS, T/A STAR RESTAURANT v. BOARD OF ALCOHOLIC CONTROL, STATE OF NORTH CAROLINA

No. 7210SC285

(Filed 28 June 1972)

1. **Intoxicating Liquor § 2— findings of ABC Board — review**

The findings of the Board of Alcoholic Control, after proper hearing, are conclusive if supported by competent, material and substantial evidence.

2. **Intoxicating Liquor § 2— beer license — allowing intoxicated person to consume beer on premises**

The evidence in a license revocation proceeding was sufficient to support a finding by the Board of Alcoholic Control that the licensee allowed a person in an intoxicated condition to consume beer on the licensed premises.

APPEAL by petitioner from *Brewer, Judge,* at the 29 November 1971 Session of WAKE County Superior Court.

This action was a license revocation proceeding conducted before a hearing officer of the North Carolina Board of Alcoholic Control on allegations that petitioner had allowed "Jack Preston Duncan, person in an intoxicated condition, to loiter, consume beer and to use loud, profane and indecent language on

your retail licensed premise on or about July 13, 1971, 2:20 p.m. to 2:35 p.m. in violation of Board of Alcoholic Control Regulation No. 30(1), (2) and (8)."

At the hearing the State called as its witness Donald Holmes, a State A.B.C. Officer. Holmes testified that on 13 July 1971 he went to petitioner's place of business, the Star Restaurant, to deliver a warning. Holmes testified that while he was explaining the warning to Mr. Sam Saleh, the manager, he heard a man later identified as Jack Duncan talking in a loud and profane manner and demanding another beer. Duncan continued to demand another beer but the waitress refused to give him one. At that time he was drinking a beer. Holmes asked Duncan to stand and Duncan nearly fell as he got off the bar stool. Holmes then arrested Duncan for public drunkenness. Holmes testified that from his observation of Duncan he formed an opinion that Duncan was intoxicated. A warrant and judgment entitled *State v. Jack Preston Duncan* was entered into evidence. Holmes testified that no one asked Duncan to leave the premises.

The petitioner put on evidence, through several witnesses, that Duncan had walked into the Star Restaurant and had been refused service and asked to leave. Duncan asked to use the bathroom and Mr. Saleh gave him permission to do so. Mr. Holmes then entered the restaurant and began talking to Mr. Saleh. At that time a Mr. Tharp was drinking a bear at the bar. He got up to use the telephone and at the same time Duncan came out of the restroom and sat down in front of Tharp's beer. He drank Tharp's beer and then demanded another. Holmes then noticed Duncan and arrested him. Mr. Saleh testified that he knew Duncan, but that he did not serve him beer. He testified that Duncan acted "crazy" most of the time. Mr. Tharp and another witness corroborated Mr. Saleh's testimony.

The hearing officer found as a fact that petitioner had "permitted and allowed Jack Preston Duncan, a person in an intoxicated condition, to consume beer on his retail licensed premise on or about July 13, 1971 in violation of Board of Alcoholic Control Regulation Number 30(2)."

On recommendation of the hearing officer, the Board of Alcoholic Control suspended petitioner's beer license for thirty days.

Petitioner appealed to the Superior Court. The court entered judgment affirming the decision of the Board.

From this judgment, petitioner appealed.

Attorney General Robert Morgan by Assistant Attorney General (Mrs.) Christine Y. Denson for the State.

Broughton, Broughton, McConnell & Boxley by Charles P. Wilkins for petitioner appellant.

CAMPBELL, Judge.

The question presented by this appeal is whether there was competent evidence to support the findings of fact of the hearing officer.

[1] The findings of the Board of Alcoholic Control, after proper hearing, are conclusive if supported by competent, material and substantial evidence. *C'est Bon, Inc. v. Board of Alcoholic Control,* 279 N.C. 140, 181 S.E. 2d 448 (1971); *Keg, Inc. v. Board of Alcoholic Control,* 277 N.C. 450, 177 S.E. 2d 861 (1970); and *Freeman v. Board of Alcoholic Control,* 264 N.C. 320, 141 S.E. 2d 499 (1965).

[2] There is substantial evidence in this case, derived from the testimony of Officer Holmes, that petitioner allowed a person in an intoxicated condition to consume beer on the premises of the Star Restaurant. It is true that this evidence was directly controverted by the testimony of petitioner's witnesses, but this merely raises the question of the credibility of the witnesses. The credibility of the witnesses was for the hearing officer to determine.

The testimony of the State's witness, if believed, provides substantial evidence of the violation charged against petitioner. The hearing officer elected to believe the State's witness. The evidence was sufficient to show that petitioner had ample opportunity to observe and know what Duncan was doing and no effort was made to stop or deter him. This case is distinguishable from *Underwood v. Board of Alcoholic Control,* 278 N.C. 623, 181 S.E. 2d 1 (1971).

We will not review the hearing officer's judgment as to the credibility of the witnesses.

Petitioner was given a full and fair hearing. We find

No error.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. DOROTHY GRIER CROUCH

No. 7219SC406

(Filed 28 June 1972)

1. **Narcotics § 4— constructive possession**

An accused's possession of narcotics may be actual or constructive; constructive possession exists when there is no actual personal dominion over the material, but there is an intent and capability to maintain control and dominion over it.

2. **Narcotics § 4— possession — close juxtaposition to narcotics**

The State's evidence was sufficient to support a finding that defendant was in possession of heroin and hypodermic needles and syringes found in a bathroom where it tended to show that defendant, the only person in the house, flushed the commode in the bathroom in which the contraband was found while officers were at the door of the house, the evidence having placed defendant in such close juxtaposition to the contraband as to justify the jury in concluding that the same was in her possession.

3. **Narcotics § 4— control of premises — inference of possession**

Evidence that defendant was the only person in a house when officers arrived and conducted a search, that she had a key to the house and that medicine prescribed to her was in the house is sufficient to support a finding that defendant was in control of the premises when the search was conducted, notwithstanding defendant neither owned nor lived in the house permanently; and defendant's control of the premises gives rise to an inference of knowledge and possession of narcotics found on the premises which may be sufficient to carry the case to the jury on a charge of unlawful possession.

4. **Narcotics § 4— hypodermic needles and syringes — possession for administering drugs — sufficiency of evidence**

Evidence that hypodermic needles and syringes were found in a bathroom in close proximity to glassine papers containing heroin residue was sufficient to support a finding that they were possessed for the purpose of administering habit-forming drugs.

APPEAL by defendant from *Johnston, Judge,* 4 January 1972 Session of Superior Court held in CABARRUS County.

Defendant entered pleas of not guilty to three separate charges. She was charged in separate bills of indictment, proper in form, with the unlawful possession of heroin and the unlawful possession of hypodermic syringes adapted for the use of habit-forming drugs by subcutaneous injections. A warrant, also proper in form, charged her with the possession of nine capsules of Sandoptal, a barbiturate drug.

The State presented evidence tending to show the following:

On 2 July 1971, two agents of the State Bureau of Investigation and two police officers went to a house at 227 James Street in Kannapolis. While they were outside the house they heard a commode flush inside. After four or five minutes defendant came to the door. The officers read her a search warrant which they had obtained earlier that day and entered the house. A fill tank in one of the bathroom commodes was still refilling. The officers searched that bathroom. Several glassine papers were removed from a waste basket. The papers contained residue of substances later determined to be heroin and quinine. Six hypodermic needles and six syringes were found between towels in a cabinet under the sink. The only entrance to this bathroom is through an adjoining bedroom.

The officers also searched the adjoining bedroom and closet. The closet contained only ladies clothing. Two bottles were found on a dresser. One of the bottles contained Sandoptal capsules. The other was labeled and the label indicated it contained medicine that had been prescribed for defendant by a physician.

The house and lot at 227 James Street are listed for taxes in the name of defendant's nephew, Marshall Greene. Greene testified for the State and stated that he purchased the lot from defendant for about $10.00. He built the house at a cost of $14,000.00 or $15,000.00 but has not paid for it yet. Greene could not recall the full name of the contractor who built the house but remembered that his last name is Simpson and that he lives in Texas. No one lived in the house on 2 July 1971. Parties had been held there and "there were a lot of people coming in and out." Defendant and several other persons had keys to the house. Greene stated that the clothes found in the bedroom closet belonged to defendant or another of Greene's aunts.

Defendant did not testify or offer other evidence.

The jury returned verdicts of guilty on all charges and defendant appeals from judgments of imprisonment imposed upon the verdicts.

Attorney General Morgan by Associate Attorney Boylan for the State.

Williams, Willeford & Boger by Thomas M. Grady for defendant appellant.

GRAHAM, Judge.

Defendant assigns as error the failure of the court to allow her motion for nonsuit, contending that the State's evidence will not support a finding that she was in possession of any of the items referred to in the warrant or bills of indictment.

[1] "An accused's possession of narcotics may be actual or constructive." *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706. Constructive possession of contraband material exists when there is no actual personal dominion over the material, but when there is an intent and capability to maintain control and dominion over it. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779.

We find the evidence sufficient to take the case to the jury on the question of possession.

[2] The commode in the bathroom where the heroin and needles and syringes were found was flushed while the officers were outside the house. Defendant was the only person in the house and the inference is inescapable that while the officers were waiting outside the door, defendant was in the bathroom where the heroin residue and the needles and syringes were found. The State may overcome a motion for nonsuit by presenting evidence which places the accused "within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his prossession." *State v. Allen,* 279 N.C. 406, 411, 183 S.E. 2d 680, 684. Also see *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49.

[3] Furthermore, when narcotics are found on premises under the control of an accused, this fact alone gives rise to an inference of knowledge and possession which may be sufficient

to carry the case to the jury on a charge of unlawful possession. *State v. Harvey, supra.* The fact defendant neither owned the house nor lived in it permanently is not controlling. She had a key to the house and was the only one there when the officers arrived. Medicine prescribed to her was in the house. This evidence is sufficient to support a finding that defendant was in control of the premises when the search was conducted. See *State v. Blaylock,* 13 N.C. App. 134, 184 S.E. 2d 890.

[4] Defendant also argues that the evidence is insufficient to show that the hypodermic needles and syringes were possessed for the purpose of administering habit-forming drugs. The fact they were found in the bathroom in close proximity to the heroin residue is sufficient to take the case to the jury on this question.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOE HENRY BANDY, JR.

No. 7210SC410

(Filed 28 June 1972)

Searches and Seizures § 3— affidavit for search warrant — time of occurrence of facts relied on

Portion of affidavit for search warrant stating that defendant "is selling heroin from 1467 Sawyers Lane and transporting it on his 1971 auto," and that this information was received on the night of 20 May 1971, constituted a sufficient statement as to the time of the occurrence of the material and essential facts relied upon to support a finding of probable cause for issuance of a warrant to search for narcotics on 21 May 1971.

APPEAL by defendant from *Canaday, Judge,* 10 January 1972 Session of Superior Court held in WAKE County.

Defendant was tried upon a bill of indictment, proper in form, charging him with the felony of the unlawful possession of the narcotic drug heroin. From a verdict of guilty as charged and judgment of imprisonment, the defendant appealed.

Attorney General Morgan and Associate Attorneys Byrd and Haskell for the State.

Robert P. Gruber for defendant appellant.

MALLARD, Chief Judge.

The only question presented on this appeal is whether the court erred in failing to suppress the evidence obtained as a result of the search warrant used in this case. The defendant contends that the affidavit in support of the search warrant does not provide probable cause for the issuance of the warrant. The affidavit was duly sworn to on 21 May 1971 by C. J. Williams and reads as follows:

"Det. Sgt. C. J. Williams, Raleigh P.D. being duly sworn and examined under oath, says under oath that he has probable cause to believe that Joe Henry Bandy has on his premises and in his vehicle certain property, to wit: Heroin and other narcotics, the possession of which is a crime, to wit: Illegal possession of narcotics at 1467 Sawyers Lane, Apt. 5B on 5-24-71. The property described above is located on the premises and in the vehicle described as follows: A 1971 Chev. 2 Dr. (71) N. C. Lic. RB 8382 and an apartment located in an apartment complex and known as Apt. 5B, 1467 Sawyers La. The facts which establish probable cause for the issuance of a search warrant are as follows: On the 6th day of May 1971 Joe Bandy sold to S.B.I. Agent John Burns a quantity of heroin and told him that he had more that he would sell. Other persons present during the sale informed Agent Burns that Joe Bandy was a big dealer in heroin and cocaine. In addition to that information this affiant has received information from a person that has given information to me on at least 10 occasions in the past three years that proved to be true and led to arrest for narcotic and other violations *that Joe Bandy is selling heroin from 1467 Saywers (sic) Lane and transporting it on his 1971 auto.* Informant has made purchases from Joe Bandy on other occasions and also stated that Joe Bandy was a big dealer in narcotics. Joe Bandy has been arrested by this affiant on one occasion for the possession of heroin and cocaine. I have received information from other sources that have purchased heroin from Joe Bandy and have been told by some of these persons that Joe Bandy makes a trip to New York and returns with a large supply of drugs to resell. Joe Bandy is known by other members of the RPD Vice Squad as a dealer in heroin and is known by members of the SBI for drug

activities. The above information was received on the night of 5-20-71 and on prior occasions." (Emphasis added.)

The defendant contends that the affidavit portion of the search warrant does not contain an express statement as to the time of the occurrence of the facts relied upon as supporting a finding of probable cause. The contention is without merit. That portion of the affidavit stating that "Joe Bandy *is* selling heroin from 1467 Saywers (sic) Lane and transporting it on his 1971 auto" (emphasis added) and that this information was received on the night of 20 May 1971, is an express statement as to the time of some of the material and essential facts relied upon to support the finding of probable cause.

In *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881 (1972), it is said:

> It is not necessary that the affidavit contain all the evidence properly presented to the magistrate. *State v. Elder,* 217 N.C. 111, 6 S.E. 2d 840. G.S. 15-26(b) requires only that the affidavit indicate the basis for the finding of probable cause. We do not interpret this portion of the statute to impose a requirement upon the magistrate to transcribe all the evidence before him supporting probable cause. Such an interpretation would impose an undue and unnecessary burden upon the process of law enforcement."

See also *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972).

We hold that the affidavit and search warrant in this case meets all legal requirements in that (1) the person, premises, and contraband for which the search was to be made were accurately described in the affidavit, (2) the affidavit was signed under oath and contains the material and essential facts and underlying circumstances indicating the basis for a proper finding of probable cause and was a part of and attached to the warrant, and (3) the search warrant was signed and bears the date and hour of its issuance above the signature of the issuing official. See *State v. Hood,* 13 N.C. App. 170, 184 S.E. 2d 916 (1971); *State v. Spencer,* 13 N.C. App. 112, 185 S.E. 2d 1 (1971); *State v. Flowers,* 12 N.C. App. 487, 183 S.E. 2d 820 (1971), *cert. denied,* 279 N.C. 728; *State v. Bush,* 10 N.C. App. 247, 178 S.E. 2d 313 (1970), *appeal dismissed,* 277 N.C. 726; *State v. Milton,* 7 N.C. App. 425, 173 S.E. 2d 60 (1970); and *State v. Staley,* 7 N.C. App. 345, 172 S.E. 2d 293 (1970). It

was conceded on oral argument that the date on which the search warrant was actually issued was 21 May 1971 and that the date "4 day of May, 1971" appearing as the issue date on page 10 of the record on appeal was a typographical error.

In the trial we find no prejudicial error.

No error.

Judges CAMPBELL and BROCK concur.

PENNIE LANIER BARFIELD, INDIVIDUALLY, AND EDDIE BARFIELD, JESSIE CAROLYN BARFIELD, AND HELEN LANIER (MINORS), BY AND THROUGH THEIR GUARDIAN AD LITEM, PENNIE LANIER BARFIELD v. LANCE CORPORAL PAUL LESLIE FORTINE

No. 728SC261

(Filed 28 June 1972)

1. **Trial § 52— setting aside verdict — inadequate award**

Trial court did not abuse its discretion in refusing to set aside a verdict awarding minor plaintiffs the amounts of their medical expenses.

2. **Automobiles § 80— turning vehicle — contributory negligence**

Issue of plaintiff's contributory negligence was properly submitted to the jury where there was evidence tending to show that the accident occurred while defendant was attempting to pass plaintiff's vehicle, and that the front of plaintiff's vehicle was in the left lane at the time of impact, and plaintiff testified that she first saw defendant's car when it was some 300 yards behind her, that she turned on her signal lights and reduced her speed to make a turn, and that the next time she saw defendant's car was when she struck it.

APPEAL by plaintiffs from *Tillery, Judge*, 4 October 1971 Civil Session, Superior Court, GREENE County.

All plaintiffs were occupants of an automobile owned and driven by Pennie Lanier Barfield. All of them except Pennie Barfield were minors. Pennie Barfield individually and as guardian ad litem brought this action to recover damages to her automobile and damages for personal injuries to her and the minor plaintiffs, allegedly sustained as the result of the negligent operation of his automobile by defendant. Defendant denied negligence, pleaded the contributory negligence of Pen-

nie Barfield, counterclaimed for the damages to his automobile, and by way of cross action against Pennie Barfield asked that she be made an additional party defendant for contribution. As to the cross action for contribution, Pennie Barfield moved for summary judgment alleging that the minor plaintiffs Jessie Carolyn Barfield and Helen Lanier were her daughters and could not maintain an action against their parent to recover for negligent injury. The motion was allowed and no exception was taken. When the matter came on for trial, Eddie Barfield, stepson of Pennie Barfield, moved to amend the pleadings to show that he was not a minor and was capable of bringing his action in his own name. The motion was allowed, and, by stipulation, the cause of action of Eddie Barfield was severed for trial from the other plaintiffs because of the existence of the cross action over and against the additional defendant Pennie Barfield. The matter proceeded to trial upon the claim of Pennie Barfield and the minor plaintiffs and the counterclaim of defendant. At the conclusion of all the evidence, plaintiff Pennie Barfield moved for a directed verdict on defendant's counterclaim, and the motion was allowed. Defendant did not except. The jury answered the issues of defendant's negligence and Pennie Barfield's contributory negligence in the affirmative and awarded Helen Lanier $11 as damages for her personal injuries and Jessie Carolyn Barfield $13 as damages for her personal injuries. In each instance the amount awarded was the total medical bill. Plaintiffs appealed.

Turner and Harrison, by Fred W. Harrison, for plaintiff appellants.

Wallace, Langley, Barwick and Llewellyn, by P. C. Barwick, Jr., for defendant appellee.

MORRIS. Judge.

[1] Plaintiffs first assign as error the failure of the court to set the verdict aside as being contrary to law and against the weight of the evidence. Appellants concede that this motion is addressed to the discretion of the court. They direct us to nothing indicating abuse of discretion nor do we find any in the record. The minor plaintiffs showed no damages other than their medical bills. This assignment of error is overruled.

Assignments of error Nos. 2, 3, 5 and 6 are directed to certain portions of the charge of the court. The exceptions do

not give us any indication of what the appellants contend the court should have charged, nor does the brief cite any authority to support appellants' position. Nevertheless, we have carefully examined the charge and find no error sufficiently prejudicial to warrant a new trial.

[2] Appellants' remaining assignments of error raise the question of whether an issue on Pennie Barfield's contributory negligence should have been submitted to the jury. The collision occurred as the two cars were approaching the intersection of U. S. Highway 258 and Rural Paved Road 1101. Both cars were proceeding in a northerly direction and each was being operated within the speed limit. The collision occurred as defendant was attempting to pass Pennie Barfield. There were solid yellow lines in the right lane of traffic at the area, but there is no evidence clearly indicating exactly where the collision occurred with respect to the solid line. There was evidence that at the time of impact the front of the Barfield car was in the left lane of traffic, and the defendant was in the left lane passing. Pennie Barfield testified that she first saw defendant's car when it was some 300 yards behind her, that she turned on her signal lights and reduced her speed to make a turn, and that "[t]he next time I saw his car was when I struck him." We think this evidence is sufficient to allow, but not compel, the jury to find that Pennie Barfield was contributorily negligent. The issue was properly submitted to the jury.

No error.

Judges VAUGHN and GRAHAM concur.

PRISCILLA SMITH v. ALBERT N. SMITH, JR.

No. 7219DC320

(Filed 28 June 1972)

1. Divorce and Alimony § 16— alimony — dependent spouse — ability to make payments

The trial court erred in awarding permanent alimony to the wife without making sufficient findings as to the dependency of the wife and the ability of the husband to make the alimony payments imposed.

2. **Divorce and Alimony § 22— custody and support order — modification**

Where, in the wife's action for alimony without divorce and child custody and support, an order had been entered awarding the wife alimony *pendente lite* and child custody and support, only the question of permanent alimony was before the court when the action for alimony without divorce came on for trial, and the trial court could not modify the previous child custody and support order absent a motion for modification and a showing of changed circumstances.

3. **Divorce and Alimony § 16— counsel fees — dependent spouse — insufficiency of findings**

The trial court erred in ordering the husband to pay counsel fees of the wife absent sufficient findings that the wife is the dependent spouse and the husband is the supporting spouse.

APPEAL by defendant from *Hammond, District Judge,* 14 October 1971 Session of RANDOLPH District Court.

In this civil action, instituted on 4 December 1970, plaintiff seeks (1) alimony without divorce and (2) custody of and support for the four children of the parties.

Pursuant to notice a hearing was held before District Judge Warren on plaintiff's motion for alimony *pendente lite* and custody of and support for the children. Following the hearing Judge Warren entered an order providing for: (1) plaintiff to have custody of the children with specified visitation privileges in defendant; (2) defendant to pay $200 per month for the support of the children; (3) plaintiff to have possession of the home and furnishings previously occupied and used by the parties and defendant to make mortgage payments thereon; (4) defendant to pay taxes and insurance premiums on the home and provide adequate hospitalization insurance for plaintiff and the children; (5) plaintiff to have possession of a 1969 Ford station wagon and defendant to make monthly payments and pay insurance premiums thereon; (6) defendant pay plaintiff $150 per month alimony *pendente lite;* and (7) defendant pay plaintiff's attorneys $750.

On 27 May 1971, pursuant to notice and a hearing, District Judge Sapp entered an order reducing the total monthly payments by $100 for a period of four months.

The cause came on for trial before District Judge Hammond, sitting without a jury. Following the trial at which evidence was introduced by plaintiff and defendant, the court entered judgment (1) making substantially the same provisions

for custody of and support for the children as made by Judge Warren, (2) requiring defendant to pay plaintiff permanent alimony in the amount of $150 per month and (3) requiring defendant to pay plaintiff's attorneys $300. Defendant appealed from the judgment.

Bell, Ogburn & Redding by J. Howard Redding for plaintiff appellee.

Emanuel and Thompson by W. Hugh Thompson for defendant appellant.

BRITT, Judge.

Defendant contends that the trial court did not make sufficient findings of fact to support his conclusions of law and judgment awarding plaintiff permanent alimony. The contention has merit.

G.S. 1A-1, Rule 52(a)(1) provides: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

[1] Among other things the trial court made insufficent findings as to plaintiff being a dependent spouse and the ability of defendant to make the alimony payments imposed. In previous decisions this court has fully discussed the sufficiency of findings of fact and further discussion or repetition here would serve no useful purpose. See *Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971); *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971); and *Hatcher v. Hatcher*, 7 N.C. App. 562, 173 S.E. 2d 33 (1970).

[2] Defendant contends that the trial court erred in modifying the previous order as to custody of and support for the children in the absence of a motion for modification and absent any showing of changed circumstances. Although the slight modification made in the previous order was hardly prejudicial to defendant, we agree that the contention has merit.

In this cause plaintiff joined her action for custody and support of the minor children with her action for alimony without divorce as provided by G.S. 50-13.5. One of the effects of Judge Warren's order dated 14 December 1970 was to ad-

judicate plaintiff's action for custody and support of the children, subject to orders thereafter made pursuant to motion and showing of change of circumstances. When plaintiff's action for alimony without divorce came on for trial before Judge Hammond, the question of permanent alimony was the only question before him and any modification of Judge Warren's order pertaining to child custody and support was error.

[3] Defendant contends that the trial court erred in ordering defendant to pay $300 fees to plaintiff's attorneys. This contention also has merit in view of the fact that the court did not make sufficient findings as to plaintiff being a dependent spouse and defendant being the supporting spouse. G.S. 50-16.4.

For the reasons stated the judgment appealed from is vacated and this cause is remanded for a new trial.

New trial.

Judges PARKER and HEDRICK concur.

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

No. 7210SC291

(Filed 28 June 1972)

1. **Banks and Banking § 1— establishment of branch bank — prerequisites**

G.S. 53-62(b) does not require that an applicant bank establish the existence of specific, unmet banking needs as a prerequisite to the establishment of a branch bank.

2. **Banks and Banking § 1— approval of branch bank — sufficiency of evidence**

There was sufficient evidence to support the findings and conclusions of the Banking Commission in approving an application to establish a branch bank, and approval of the application was not arbitrary, capricious and in excess of statutory authority.

APPEAL by defendants from *Bailey, Judge,* in chambers in Raleigh, N. C., on 12 November 1971.

Plaintiff First-Citizens Bank & Trust Company, a state chartered bank (First-Citizens), applied to the Commissioner of Banks (Commissioner) and the State Banking Commission (Commission) for authority to establish a branch bank in Albemarle, North Carolina. The commissioner recommended that the branch be approved and the commission approved the application. Cabarrus Bank & Trust Company and First National Bank of Albemarle, the protestant banks, appealed the case to superior court. Following a hearing the superior court affirmed the decision of the commission approving the application and the protestant banks appealed.

Ward, Tucker, Ward & Smith by David L. Ward, Jr., and J. Troy Smith, Jr., for plaintiff appellee, First-Citizens Bank & Trust Company.

Sanford, Cannon, Adams & McCullough by Hugh Cannon and E. D. Gaskins, Jr., for defendant appellants.

BRITT, Judge.

[1] Appellants contend that G.S. 53-62(b) requires that an applicant bank establish the existence of specific, unmet banking needs as a prerequisite to the establishment of a branch bank. We do not agree with this contention.

Appellants' contention relates to the "meet the needs and promote the convenience of the community" proviso of G.S. 53-62(b). This contention was expressly disavowed by this court in the recent decision rendered in *Banking Comm. v. Bank,* 14 N.C. App. 283, 188 S.E. 2d 9 (1972), and the reasoning applied in that case applies equally to this case. In that case the court said: "With respect to banking, what will serve the needs of the community is also, to a substantial degree, an administrative question involving a multiplicity of factors which cannot be given inflexible consideration."

Our decisions find support in the case of *First-Citizens Bank & Trust Company v. Camp,* 409 F. 2d 1086 (1969). In that case the court held, *inter alia,* that the Comptroller of the Currency in authorizing branch offices of national banks in North Carolina is bound by the "need and convenience" and "solvency of the branch" criteria of North Carolina law, G.S. 53-62(b). With respect to applying "need and convenience," the court said, page 1091: "In considering whether the Comp-

troller properly construed and applied North Carolina's 'need and convenience' and 'solvency of the branch' criteria, we note at the outset the absence of any definitive State interpretation of these nebulous concepts." The court continued at 1093: ". . . (W)e underscore that neither the North Carolina statute nor any decided cases provides any degree of specificity as to the factors, proof of which would show the presence or absence of 'need and convenience' for a new branch bank. . . . Nor do we find error in the Comptroller's failure to make definitive specific findings with regard to the service area, economic feasibility, public needs, and quality and quantity of existing service."

[2] Appellants contend that there is insufficient evidence to support the findings and conclusions of the commission and that the approval of the application was arbitrary, capricious and in excess of statutory authority. These same contentions were rejected by this court in *Banking Comm. v. Bank*, 12 N.C. App. 112, 182 S.E. 2d 625 (1971) and no useful purpose would be served in restating the reasoning set forth there. We find nothing in the case at bar to distinguish it from the other cases in which this court upheld the commission's approval for branch banks. See *First-Citizens Bank & Trust Company v. Camp, supra; Banking Comm. v. Bank*, 14 N.C. App. 283, 188 S.E. 2d 9 (1972); *Banking Comm. v. Bank*, 12 N.C. App. 232, 182 S.E. 2d 854 (1971), reversed and remanded, 281 N.C. 108, 187 S.E. 2d 747 (1972) for failure to consider two branches of same bank separately; *Banking Comm. v. Bank*, 12 N.C. App. 112, 182 S.E. 2d 625 (1971).

We have carefully considered the other contentions asserted by appellants but likewise find them to be without merit. Our thorough review of the record impels the conclusion that the findings of the commission are supported by competent, material and substantial evidence, which findings fully support the conclusions of law.

The judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

FIRST CITIZENS BANK AND TRUST COMPANY
v. ACADEMIC ARCHIVES, INC.

— AND —

FIRST CITIZENS BANK AND TRUST COMPANY
v. MICROPRESS, INC.

No. 7210SC321

(Filed 28 June 1972)

Attorney and Client § 7; Receivers § 12— receivership — priority of liens — attorney fees

An attorney who rendered legal services to a corporation which is now insolvent was an independent contractor and not a regular employee of the corporation within the meaning of G.S. 44-5.1; consequently, his claim for such services was not entitled to priority status.

APPEAL by claimant from *Brewer, Judge,* at the November 1971 Civil Session of WAKE Superior Court.

This case is an appeal from the report of a receiver denying a priority to the claim of Thomas F. East against the insolvent corporation, Academic Archives, Inc. After insolvency proceedings had been instituted against Academic Archives, Inc., and a receiver appointed, East, an attorney, presented a claim for $2,000 against the corporation and contended that his claim should be given priority. The receiver disallowed the claim as a priority claim, but allowed it as a general claim.

Claimant filed exception to the report of the receiver and appealed to the Superior Court.

At the hearing, claimant introduced evidence that he had been elected Treasurer of the corporation and had also been given a power of attorney to conduct certain of the operations of the corporation. Claimant also introduced an itemized statement for legal services rendered to the corporation.

From this evidence the trial court found as a fact that claimant was an independent attorney rendering professional services on an hourly basis.

The trial court concluded as a matter of law that claimant was not a regular employee under G.S. 44-5.1 and his claim was therefore not entitled to priority status.

From the order of the trial court affirming the report of the receiver, claimant appeals.

Thomas F. East, in propria persona.

Hatch, Little, Bunn, Jones & Few by William P. Few for receiver appellee.

CAMPBELL, Judge.

The sole question presented by this appeal is whether the trial court was correct in ruling that claimant was not a regular employee within the meaning of G.S. 44-5.1 and therefore his claim was not entitled to priority status. It is our opinion that the ruling of the trial court was correct.

The statute in question in providing for wage liens states the following:

> "*Wages for two months' lien on assets.*—In case of the insolvency of a corporation, partnership or individual, all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, partnership or individual, which lien is prior to all other liens that can be acquired against such assets: . . ." G.S. 44-5.1.

We note that this claim is not based on any services claimant rendered as Treasurer or as Attorney-in-Fact of the corporation, but it is based on legal services rendered in a number of actions involving the corporation. We do not therefore decide whether one claiming as a Treasurer or Attorney-in-Fact would be entitled to a priority claim.

It is clear from both the unambiguous words of the statute and the decisions of the Supreme Court that G.S. 44-5.1 grants a priority lien for the *wages* paid *regular employees* and that such priority does not extend to those who are independent contractors and not regular employees. *Iron Co. v. Bridge Co.*, 169 N.C. 512, 86 S.E. 184 (1915).

An independent contractor has been defined as one who,

> ". . . (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the

work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time. . . ." *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137 (1944).

"The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details." *Hayes v. Elon College, supra.*

It is obvious that a practicing attorney rendering professional services to a client is an independent contractor within the above definition. As such his claim is not entitled to a priority under G.S. 44-5.1.

The order of the trial court was correct.

Affirmed.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JOE HENRY BANDY, JR.

No. 7210SC411

(Filed 28 June 1972)

1. **Criminal Law § 86— prior convictions — impeachment**

A defendant who testifies in his own behalf may be impeached by cross-examination as to prior convictions.

2. **Criminal Law § 86— conviction — guilty verdict — absence of judgment**

A verdict of guilty constitutes a "conviction" for purposes of impeachment even though judgment has not been entered on such verdict.

APPEAL by defendant from *Canaday, Judge,* at the January 1972 Session of WAKE Superior Court.

Defendant was tried on two bills of indictment, proper in form, charging him with the possession and sale of heroin.

The State produced evidence that the defendant sold a substance represented as heroin to an S.B.I. undercover agent. An S.B.I. chemist testified that he had analyzed the substance and found it to be heroin.

Defendant testified that he was attempting to "con" the buyer and had actually sold him plain sugar.

On cross-examination and over defendant's objection, the solicitor questioned defendant about his conviction in a drug case tried the week before the present case. In the earlier case the jury had returned a verdict of guilty against defendant but the trial court had continued prayer for judgment until the present case was disposed of.

The case was submitted to the jury and a verdict of guilty on both charges was returned. Judgment was entered imposing a prison sentence.

From the verdict and judgment, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Ralf F. Haskell for the State.

Robert P. Gruber for defendant appellant.

CAMPBELL, Judge.

Defendant's sole assignment of error is to the cross-examination of defendant by the solicitor concerning his conviction in the earlier drug case in which no judgment had been entered. Defendant contends that until a judgment had been entered on the earlier verdict it was not a conviction, and the solicitor's questions were therefore improper.

[1, 2] A defendant who testifies in his own behalf may be impeached by cross-examination as to prior convictions. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971). The question presented here is whether the verdict of guilty in the case before us constitutes a conviction for purposes of impeachment. We are of the opinion that it does.

In *Williams,* the Supreme Court reversed a long line of decisions allowing impeachment by cross-examination as to prior indictment and held that cross-examination as to prior criminal actions should be limited to convictions.

In *Williams,* the court reasoned that the function of the Grand Jury is not to determine guilt or innocence but merely to determine if there is sufficient evidence to justify placing the defendant on trial. Return of an indictment does not alter the presumption of innocence. An indictment is not inconsistent with innocence.

These reasons do not apply to a verdict rendered by a petit jury. The verdict was based on competent evidence introduced within the procedural and constitutional rules afforded for defendant's protection. The guilty verdict of a petit jury is not a mere accusation. It is a determination that the defendant has committed the offense. It is inconsistent with innocence.

We are aware that the word "conviction" may mean a verdict or may refer to a verdict upon which judgment has been entered depending upon the context in which it is used. 21 Am. Jur. 2d, Criminal Law, § 618.

The reasons for protecting a witness from impeachment based on mere accusation do not apply to verdicts returned by a petit jury. We therefore hold that a verdict of guilty constitutes a "conviction" for purposes of impeachment.

The solicitor's questions were not prejudicial, and in this trial we find.

No error.

Chief Judge MALLARD and Judge BROCK concur.

LESTER E. HUDSON, EMPLOYEE v. J. P. STEVENS AND COMPANY, EMPLOYER; AND LIBERTY MUTUAL INSURANCE CO., CARRIER

No. 7218IC397

(Filed 28 June 1972)

Master and Servant § 66— acid burns on left foot — amputation of right foot — cause

In this proceeding to recover workmen's compensation benefits for the loss of plaintiff's right foot, the evidence was sufficient to support findings by the Industrial Commission that plaintiff's right foot was not injured in an accident in which he received acid burns on his left foot, that the accident did not aggravate or accelerate

a pre-existing condition of the right foot so as to necessitate its amputation, and that the accident did not bring about additional weight-bearing on the right foot so as to contribute to the condition for which the foot was amputated.

APPEAL by employee from a decision of the North Carolina Industrial Commission filed 1 February 1972.

This proceeding has previously been before this Court and is reported in 12 N.C. App. 366, 183 S.E. 2d 296 (1971). On the previous occasion the matter was remanded to the Industrial Commission to make findings of fact determinative of all questions at issue.

Pursuant to that mandate the North Carolina Industrial Commission has made the following findings of fact:

"1. Lester E. Hudson (hereinafter 'the employee') on March 3, 1969, was forty-two years old and was working for this employer as a mechanic. As a part of his duties, the employee did general servicing of trucks and trailers, including the changing of tires and batteries. This employee had been working in the employment of J. P. Stevens & Company for some two to three weeks.

2. On March 3, 1969 the employee was filling a battery in a truck when some acid spilled from the battery and entered his left shoe, burning his left foot. No acid was spilled on his right foot or leg and his right foot was not injured in this accident. The employee immediately reported the incident to his superior, but continued to work the balance of the shift.

3. On March 8, 1969, Dr. Hugh T. Wallace saw and examined the employee at the High Point Memorial Hospital with a history that he stepped in some acid on March 3, 1969 while at work and burned his left foot. Examination at that time disclosed plaintiff was a diabetic and had first and second degree burns of the left foot. He made no complaint of trouble with the right foot and for this reason, the right foot was not examined.

4. Dr. T. L. Canipe, an expert in general and thoracic surgery, saw and examined the employee for the first time on March 24, 1969 when he was referred to him by Dr. Wallace. The employee gave Dr. Canipe a history that a

battery had burst and acid had burned his left foot. This physician removed some of the dead tissue on the left foot and instructed him in home soaks and advised him to return to work on May 1, 1969. Dr. Canipe did not treat the employee's right foot, since he was not complaining of that foot and gave him no history of the right foot involvement.

5. The employee on June 2, 1969 was seen and examined by Dr. Robert Ruscoe, IV, an expert podiatrist. At that time he was complaining of painful infected areas on the bottom of both feet with ulceration and cellulitis of the right foot. The employee gave this physician a history of acid burns on the left foot, diabetes, and difficulty with the right foot which he had had for some time which would not heal. The right foot had a congenital type of high arch which exerted pressure on the ulcerated areas.

6. On March 17, 1970 the employee returned to Dr. Canipe's office, complaining of pain in his right foot with a history of diabetes. Examination of the right foot at that time revealed a congenital deformity of same with deep infection, and Dr. Canipe referred him to an orthopedist.

7. Dr. Fred M. Wood, an orthopedic surgeon of High Point, first saw and examined plaintiff on March 17, 1970 by referral from Dr. Canipe. Dr. Wood made a diagnosis of large ulceration of the sole of the right foot beneath the big toe. On March 31, 1970, blisters had formed on the right foot and Dr. Wood hospitalized him from March 31, 1970 to April 22, 1970, during which time he amputated the right foot just above the ankle. Pathological examination showed nothing caused by acid burns.

8. In the accident on March 3, 1969, the employee injured only his left foot. This caused temporary total disability for 8 6/7 weeks beginning March 3, 1969, for which defendants have already paid the employee compensation and medical expenses.

9. The injury by accident giving rise hereto in no way injured or affected the employee's right foot. Said accident did not aggravate or accelerate a pre-existing condition so as to cause the foot amputation and disability and medical expenses incident thereto. The accident in question

did not bring about additional weight-bearing on the right foot so as to in any fashion contribute to the condition for which amputation was necessitated."

Based upon the above findings of fact, the Commission denied any additional benefits to the employee.

From the denial of any award, the employee appealed.

Harold I. Spainhour for employee appellant.

Lovelace and Hardin by Edward R. Hardin for employer and insurance carrier, appellees.

CAMPBELL, Judge.

The only question presented is whether 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. If they are, we must accept such findings as final truth and merely determine whether or not they justify the legal conclusions and decision of the Commission. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952).

In the instant case there was competent evidence before the Commission to support the findings of fact made by the Commission, and those findings justify the legal conclusions and decision.

Affirmed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. EDDIE LEE WOOTEN

No. 726SC120

(Filed 28 June 1972)

1. **Criminal Law § 99— court's questions to defendant — clarification**

Questions which the trial court asked defendant were proper for clarification of the testimony and did not constitute prejudicial error.

2. **Criminal Law § 128— denial of mistrial**

The trial court did not err in the denial of defendant's motion for a mistrial.

3. **Constitutional Law § 32— motion to dismiss appointed counsel — denial**

The trial court did not err in the denial of defendant's motion, made at the close of all the evidence, to dismiss his court-appointed counsel.

4. **Criminal Law § 113— recapitulation of evidence — inadvertence — necessity for objection**

An inadvertence in recapitulating the evidence must be called to the trial court's attention in time for correction.

5. **Criminal Law § 117— accomplice testimony — instructions**

Absent a request, the trial court is not required to charge on the weight and credibility to be given the testimony of an accomplice.

APPEAL by defendant from *Parker, Judge,* 13 September 1971 Criminal Term of Superior Court held in BERTIE County.

Defendant was charged in two indictments with (1) larceny of a truck belonging to Stackhouse, Inc., and, (2) breaking and entering and larceny. The cases were consolidated for trial. Defendant represented by court-appointed counsel, pleaded not guilty. Upon a verdict of guilty in each case and the entry of judgments thereon, defendant appealed.

Attorney General Robert Morgan by Christine A. Witcover, Associate Attorney, for the State.

John H. Harmon for defendant appellant.

VAUGHN, Judge.

[1] Defendant first assigns as error the asking of certain questions of the defendant by the trial judge which questions, defendant contends, were prejudicial to defendant and in violation of G.S. 1-180. "It is well settled in this State that the trial judge can 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; see also, *State v. Blalock,* 9 N.C. App. 94, 175 S.E. 2d 716. It has also been stated, in *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774, that, "The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." Viewing the questions here complained of in light of the circumstances at trial, we hold that the questions were proper for

clarification of the testimony and did not constitute prejudicial error. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376; *State v. Strickland, supra.*

[2] Defendant contends that the trial court committed prejudicial error in denying defendant's motion for a mistrial. "Motions for a mistrial or a new trial based on misconduct affecting the jury are addressed to the discretion of the trial court. [Citation omitted.] Unless its rulings thereon are clearly erroneous or amount to a manifest abuse of discretion, they will not be disturbed." *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190. The record discloses no reason why the judge should have granted defendant's motion. This assignment of error is overruled.

[3] Defendant contends that the trial court erred in failing to grant defendant's motion, made at the close of all the evidence, to dismiss his court-appointed counsel. There is nothing in the record to indicate that defendant desired to conduct the remainder of his own defense. "In the absence of any substantial reason for replacement of court-appointed counsel, an indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense." *State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667. It has also been stated, in *State v. Moore,* 6 N.C. App. 596, 170 S.E. 2d 568, that, "An expression by a defendant of an unfounded dissatisfaction with his court-appointed counsel does not entitle him to the services of another court-appointed attorney." Defendant's assignment of error directed to the trial judge's failure to dismiss court-appointed counsel is without merit.

[4] Defendant's fourth assignment of error is that the trial court fundamentally misstated the testimony of a defense witness. "We have repeatedly held that an inadvertence in stating contentions or in recapitulating the evidence must be called to the attention of the court in time for correction. After verdict, the objection comes too late." *State v. Cornelius,* 265 N.C. 452, 144 S.E. 2d 203. The alleged inadvertence was not called to the trial judge's attention in this case.

[5] Defendant assigns as error that the trial court erred in failing to charge on the law regarding accomplice testimony. This assignment of error is overruled. No such request was made at trial and, absent a request, the court is not required to charge on the weight and credibility to be given the testimony

of an accomplice. Moreover, the fact is that the court did, without request, properly instruct the jury as to the credibility of interested witnesses, whether for the prosecution or the defense.

In the trial from which defendant appealed, we find no error.

No error.

Judges MORRIS and GRAHAM concur.

ALICE LUCILLE CRAVEN BRITT AND HUSBAND, OSSIE GERMAN BRITT, AND IDA LEOLA CRAVEN BRISTOW v. GARLAND W. ALLEN

No. 7219SC403

(Filed 28 June 1972)

Judgments § 40; Limitation of Actions § 12— failure to pay costs of prior action — same claim — dismissal of action

Although two actions brought by plaintiffs against defendant arose out of the same foreclosure sale, the second suit was not based upon the same claim as the first within the meaning of former G.S. 1-25 where the first action was to set aside a deed of trust on the ground that defendant and others acting in conspiracy and concert attempted to deprive plaintiffs of real property, and the second action was based on an alleged promise by defendant that he would purchase a portion of the realty to be sold at a foreclosure sale and that he would bid for plaintiffs at the foreclosure sale and prevent them from losing their homeplace; consequently, the trial court erred in dismissing the second action on the ground that plaintiffs had not paid the costs of the prior action at the time the second action was commenced.

APPEAL by plaintiffs from *McConnell, Judge,* 10 January 1972 Session of Superior Court held in RANDOLPH County.

For the events and proceedings that led to the present appeal by plaintiffs, see *Britt v. Smith,* 6 N.C. App. 117, 169 S.E. 2d 482 (1969) and *Britt v. Allen,* 12 N.C. App. 399, 183 S.E. 2d 303 (1971). In the case entitled *Britt v. Smith, supra* (which civil action was designated A 38478 in the office of the Clerk of Superior Court of Randolph County), the parties plaintiff were the same as in the present case and Garland W. Allen was a party defendant; however, in a judgment dated 29 April 1968 and signed by Judge Robert M. Martin, the plaintiffs were

"nonsuited" and the action was dismissed as to the defendant Allen. The present civil action was instituted against the defendant Allen on 25 April 1969. On 7 December 1971, defendant moved for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure on the grounds that the costs of the prior action (A 38478) had not been paid prior to institution of the second action.

After due notice to plaintiffs, a hearing was had upon this motion, and in a judgment dated 10 January 1972, Judge McConnell made the following findings, conclusions and order:

"And the defendant upon this evidence having moved for summary judgment in open court before the undersigned Judge Presiding; and

The plaintiffs being duly represented by their counsel of record, Ottway Burton, Esquire, having offered oral testimony and having offered argument opposing said motion for summary judgment and all parties having been duly heard in open court before the undersigned Judge Presiding, this Court finds from the evidence presented the following facts and conclusions of law:

1. This civil action and the civil action designated A 38478 constitute the same cause of action insofar as the defendant Garland W. Allen is concerned.

2. At the time this civil action was commenced on the 25th day of April, 1969, a judgment of nonsuit had been entered before the Honorable Robert M. Martin, Judge Presiding at the April 29, 1968 Session of Superior Court of Randolph County, as to the defendant Garland W. Allen.

3. At the time this civil action was commenced, the costs in the civil action designated A 38478 were unpaid, and said costs were not paid until September 20, 1971, as appears from Exhibit 6 as offered by the defendant.

This civil action should be dismissed for nonpayment of costs in accordance with Section 1-25 of the General Statutes of North Carolina.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this civil action be, and the same is hereby dismissed with prejudice and that the plaintiffs be taxed with the costs of this civil action as charged by the Clerk."

From the foregoing judgment, the plaintiffs appealed to the Court of Appeals.

Ottway Burton for plaintiff appellants.

Moser & Moser by Thad T. Moser for defendant appellee.

MALLARD, Chief Judge.

The judgment appealed from must be reversed. The civil action designated A 38478 and reported in 6 N.C. App. 117 appears to have been an action to set aside a deed of trust on the grounds that the defendant Allen and others "acting in conspiracy and concert" attempted to deprive the plaintiffs of the real property involved in these lawsuits. In the complaint filed 25 April 1969, it is alleged that the defendant Allen "promised" the plaintiffs that he would purchase a portion of the realty to be sold at foreclosure sale, that he would bid for them at said foreclosure sale and prevent them from losing their "homeplace," and that he made other statements causing the plaintiffs to rely upon the defendant's "promise" to their detriment, causing them damage in the amount of $30,000.

Despite the fact that the two suits by these plaintiffs against the defendant Allen grew out of the same foreclosure sale, we hold that the second action is not based upon the same claim as the first, within the meaning of the applicable statute. Therefore, the judgment in the superior court is reversed.

Reversed.

Judges CAMPBELL and BROCK concur.

STATE OF NORTH CAROLINA v. EDDIE LEE MELTON

No. 7227SC233

(Filed 28 June 1972)

1. Constitutional Law § 30— speedy trial — abandonment on prior appeal — waiver

Defendant waived his right to assert that he had been denied a speedy trial by reason of the time lapse between his arrest and first trial when he abandoned his assignment of error to the denial of his motion to quash the indictment upon his appeal from the first trial.

2. Constitutional Law § 30— speedy trial — inference of denial

There is no inference of denial of a speedy trial by the delay between an April 1971 appellate court opinion granting defendant a new trial and his trial in November 1971.

3. Burglary and Unlawful Breakings § 7— acquittal of larceny — failure to submit non-felonious breaking and entering

The fact that defendant was acquitted of larceny in a prosecution for felonious breaking and entering and felonious larceny does not show that the lesser offense of non-felonious breaking and entering should have been submitted to the jury, since there need only be an intent to commit larceny to sustain a conviction of felonious breaking and entering.

APPEAL by defendant from *Thornburg, Judge,* 4 October 1971 Session of Superior Court held in GASTON County.

Defendant was charged in a bill of indictment with felonious breaking and entering and felonious larceny. Upon his plea of not guilty, he was tried by jury.

The State's evidence tends to show that defendant broke and entered the premises of Mrs. Ida Carter at 815 West Walnut Street in Gastonia, N. C., on or about 15 November 1968 and removed therefrom a quantity of coins. The jury found defendant not guilty of felonious larceny; however, it found him guilty of felonious breaking or entering. Judgment of imprisonment for a period of not less than eight nor more than ten years was entered. The judgment further ordered that defendant be given credit for the time spent in custody upon these charges prior to entry of the judgment. Defendant appealed.

Attorney General Morgan, by Assistant Attorney General Jones, for the State.

Max L. Childers for the defendant.

BROCK, Judge.

Defendant was first tried upon these charges at the 25 November 1970 Session of Superior Court held in Gaston County. At that trial he was found guilty on both counts in the indictment. He appealed and was awarded a new trial because of errors in the charge. *State v. Melton,* 11 N.C. App. 180, 180 S.E. 2d 476 (No. 7127 SC 278, Spring Session 1971, filed 28 April 1971).

[1, 2] Defendant now assigns as error that the trial judge denied his motion to quash which was based upon the grounds

that he was not afforded a speedy trial. He does not make it clear whether he refers to the time lapse between his arrest on 30 May 1969 and his first trial in November 1970, or to the time lapse between the opinion of this Court in April 1971 and his second trial in November 1971. If he refers to the former, it seems he has waived his right to raise the question with respect to the first trial, because upon his first appeal he abandoned his assignment of error to the denial of his motion to quash the indictment (assignment of error No. 1, Rp 69, exception No. 1, Rp 11, of record on appeal in No. 7127SC278, Spring Session 1971). If he refers to the latter, it seems there is no inference of denial of a speedy trial by the delay from April to November. In either event, defendant has not offered to show that he requested a trial, that the State unnecessarily delayed the trial, or in what way defendant has been prejudiced. This assignment of error is overruled.

Defendant assigns as error that the trial judge failed to submit to the jury the lesser included offense of non-felonious breaking and entering. "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. Cox*, 11 N.C. App. 377, 181 S.E. 2d 205. Defendant offered evidence of an alibi. Therefore, the only evidence of breaking and entering was the evidence of a felonious breaking and entering offered by the State.

[3] Nevertheless, defendant argues that because he was acquitted of the felonious larceny charge it follows that the question of a non-felonious breaking and entering should have been submitted to the jury. It is immaterial that defendant was acquitted of larceny. To sustain a conviction of felonious breaking and entering there need be only the *intent* to commit larceny at the time of the breaking and entering. G.S. 14-54. This assignment of error is overruled.

We have examined defendant's assignments of error to the charge of the court and find them to be without merit. In our opinion, defendant had a fair trial, free from prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

WILSON ELECTRIC CO., INC. v. DR. JAMES E. ROBINSON AND HIS WIFE, VERA S. ROBINSON

No. 7221SC249

(Filed 28 June 1972)

1. **Appeal and Error § 50— instructions — harmless error**

Error, if any, in portions of a jury charge relating to issues answered in favor of the party asserting the error is harmless.

2. **Appeal and Error § 7— dismissal of claim — party against whom asserted — aggrieved party**

Where a claim has been dismissed, based upon a jury verdict, the party against whom the claim was asserted is not aggrieved and may not contend on appeal that the court erred in permitting the jury to consider issues relating to the claim.

3. **Laborers' and Materialmen's Liens § 8— enforcement against owner — absence of contract**

In an action to enforce a lien for electrical material and services furnished in the construction of a house on a lot owned by defendants, the trial court did not err in refusing to order a new trial and in entering judgment on the verdict in favor of defendants, where much of the evidence offered by plaintiffs and all the evidence offered by defendants tended to show that plaintiff's contract was with the general contractor employed to build the house, and not with defendants. G.S. 44A-8.

APPEAL by plaintiff from *Kivett, Judge,* 4 October 1971 Session of Superior Court held in FORSYTH County.

Civil action instituted 21 May 1970 to perfect a lien in the sum of $2,959.48 for electrical material furnished and labor performed in the construction of a house on a lot owned by defendants. Notice of claim of lien was filed 6 April 1970.

Plaintiff alleged that material was furnished and labor performed pursuant to a specific contract with defendants. Defendants answered, denied that they had entered a contract with plaintiff, and counterclaimed for actual and punitive damages on the theory plaintiff slandered the title to their property by unlawfully filing the notice of lien.

The jury found, upon appropriate issues, that the materials were not furnished and the labor was not performed pursuant to a contract with defendants. The jury further found that plaintiff did not slander "the title of the Robinsons in filing its Notice and Claim of Lien as alleged in the Answer and Counterclaim." Judgment was entered upon the verdict dismissing the

claims of both parties and cancelling the notice of lien. Only plaintiff appealed.

Ralph E. Goodale by Gregory W. Schiro for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by Norwood Robinson and George L. Little, Jr., for defendant appellees.

GRAHAM, Judge.

Through its first seven assignments of error, plaintiff contends that the court erred in (1) denying plaintiff's motion for summary judgment on defendants' claim for slander of title, (2) refusing to direct a verdict for plaintiff on the issues relating to that claim, and (3) erroneously charging the jury in several respects as to these issues. These assignments of error are overruled.

[1, 2] All issues having to do with defendants' counterclaim for slander of title were answered in plaintiff's favor. Error, if any, in portions of a jury charge relating to issues answered in favor of the party asserting the error 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; *Prevette v. Bullis,* 12 N.C. App. 552, 183 S.E. 2d 810. Moreover, the judgment, based upon the jury's verdict, dismisses defendants' counterclaim. Where a claim has been dismissed, based upon a jury verdict, the party against whom the claim was asserted is not aggrieved and may not contend upon appeal that the court committed error in permitting the jury to consider the issues relating to the claim. *Hughes v. Vestal,* 264 N.C. 500, 142 S.E. 2d 361.

Plaintiff next contends that the court abused its discretion in refusing to order a new trial and in entering judgment on the verdict.

[3] Plaintiff had the burden of showing, not only that it performed labor or furnished materials for the making of an improvement on defendants' property, but also that the labor was performed or the materials were furnished "pursuant to a contract, either express or implied," with defendants. G.S. 44A-8. Much of the evidence offered by plaintiff and all of the evidence offered by defendants tended to show that plaintiff's contract was with the general contractor employed to build the house, and

not with defendants. Under these circumstances the trial court acted properly in accepting the verdict of the jury and entering judgment thereon.

No error.

Judges MORRIS and VAUGHN concur.

RONALD LEE HUDGENS, BY HIS NEXT FRIEND NELL HUDGENS v. KAY GOINS AND DELMAR GOINS

No. 7219DC215

(Filed 28 June 1972)

Automobiles § 58— turning — striking passing vehicle — negligence

In an action arising out of a collision which occurred when defendant made a left turn while plaintiff was attempting to pass her vehicle, defendant's evidence would support a finding that she was negligent in turning from a direct line without first seeing that the movement could be made in safety, but would not compel such a finding where it would also support a reasonable inference that when defendant was 100 feet from an intersection she looked and saw plaintiff's car one or two car lengths behind her, that she signaled her intention to turn as required by statutes, and that plaintiff pulled into the left lane and started to pass only after defendant started her turn and moved into the left lane, since it could not be said as a matter of law that under such circumstances defendant could or should have foreseen the movement of plaintiff's car before she began turning to the left. G.S. 20-154(a).

APPEAL by plaintiff from *Walker, District Judge*, 26 October 1971 Session of District Court held in CABARRUS County.

Negligence action instituted by plaintiff 2 May 1968 to recover $275.00 for damages to his 1967 Pontiac automobile. Plaintiff alleged that his car was damaged 7 October 1967 in a collision with a 1960 Volkswagen owned by defendant Delmar Goins and being operated by his wife, defendant Kay Goins. Defendants answered, denied negligence on their part, and conterclaimed for damages to the Volkswagen and personal injuries sustained by Mrs. Goins.

Planitiff's evidence consisted entirely of his own testimony. He stated that at about 8:40 or 8:50 p.m. on the date of the accident, he was driving south on South Ridge Avenue, an 18-foot wide, two-lane road near Kannapolis. Defendants'

Volkswagen was proceeding in the same direction in front of plaintiff. It was dark and the weather was overcast with misting rain. The lights on both cars were on. Plaintiff pulled in the left lane to pass the Volkswagen which was traveling very slowly. He stated: "I pulled out to pass the car, blew my horn, and, as I got into the other lane, the Volkswagen turned to the left in my lane. I slammed on my brakes and I hit the sanitary district pipeline which was crossing the road, which caused my brakes to lock and I slid into the car. . . . I was about one and a half car-lengths behind the Volkswagen when it began turning into my lane. I did not see a signal light. There was no hand signal given." The right front fender of plaintiff's car struck the left door of the Volkswagen. A depression about a yard wide and covered with dirt crossed the road where a sanitary pipeline had been laid. Dirt from the depression had been scattered by crossing cars, and according to plaintiff, the dirt caused his car to "slide." The speed limit was 35 miles an hour and plaintiff estimates his speed immediately before the collision as 30 to 35 miles an hour.

Mrs. Goins testified that plaintiff's car had pulled behind her from a road intersecting Ridge Avenue about one block north of the point of the collision. Mrs. Goins turned on her mechanical turn signal, indicating a left turn, when she was 100 feet from the intersection with Eddleman Road. She estimated that plaintiff's car was one or two car lengths behind her at that time. She stated: "As I started into my turn, then I noticed a flashing of lights from the car that was behind me and it seemed to appear to be it was coming around." She stated that at that time, "I was in the midst of my turn . . . I was crossing the lane on South Ridge Avenue, turning east, into Eddleman Road . . . then I was struck by the car, into my door. . . . " She further testified that she heard no sound and saw no blinking of lights prior to the accident.

Mr. Goins testified that the signal lights on the Volkswagen were working on the day of the accident.

The jury answered all issues in favor of defendants and awarded damages on their counterclaim.

Hartsell, Hartsell & Mills by W. Erwin Spainhour for plaintiff appellant.

Watson and Dobbin by Richard B. Dobbin for defendant appellees.

GRAHAM, Judge.

Plaintiff's only contention on appeal is that the court erred in denying his motion for a directed verdict on the issue of defendants' negligence. Thus the question becomes: Does defendants' evidence, taken in the light most favorable to them, so clearly establish their negligence as a proximate cause of their injury and damage that no other reasonable conclusion can be drawn therefrom? *Galloway v. Hartman,* 271 N.C. 372, 156 S.E. 2d 727; *Bledsoe v. Gaddy,* 10 N.C. App. 470, 179 S.E. 2d 167.

Defendants' evidence would certainly support a finding by the jury that Mrs. Goins turned from a direct line without first seeing that the movement could be made in safety. G.S. 20-154(a). It would not, however, compel such a finding. A reasonable inference could also be drawn that when Mrs. Goins was 100 feet from the intersection she looked and saw plaintiff's car one or two car lengths behind her; that she signaled her intention to turn as required by statutes; and that plaintiff pulled into the left lane and started to pass only after Mrs. Goins started her turn and moved into the left lane. Under such circumstances, it could not be said, as a matter of law, that in the exercise of reasonable care Mrs. Goins could or should have foreseen the movement of plaintiff's car before she started turning to the left. "A motorist is not required to ascertain that a turning motion is absolutely free from danger." *Cowan v. Transfer Co.* and *Carr v. Transfer Co.,* 262 N.C. 550, 553, 138 S.E. 2d 228, 230. See also *McNamara v. Outlaw,* 262 N.C. 612, 138 S.E. 2d 287; *Odell v. Lipscomb,* 12 N.C. App. 318, 183 S.E. 2d 299.

We hold that the question of defendants' negligence was for the jury.

No error.

Judges MORRIS and VAUGHN concur.

MRS. SUE W. BASS, WIDOW, ELIZABETH I. NANCE, MOTHER, HORACE G. BASS, FATHER, CARL LEE BASS, DECEASED, EMPLOYEE v. MOORESVILLE MILLS, EMPLOYER, LIBERTY MUTUAL INSURANCE CO., CARRIER

No. 7222IC257

(Filed 28 June 1972)

1. **Appeal and Error § 68— law of the case**

Decision on former appeal is the law of the case upon the facts then presented both upon a subsequent hearing and subsequent appeal.

2. **Master and Servant § 79— workmen's compensation — rescinding of separation agreement — living apart for justifiable cause**

There was sufficient evidence to support a determination by the Industrial Commission that a separation agreement between the deceased employee and his wife had been rescinded by their resumption of marital relations and that at the time of the husband's death they were living separate and apart for justifiable cause.

APPEAL by Elizabeth I. Nance from North Carolina Industrial Commission, opinion and award of 10 November 1971.

Hugh M. McAulay and J. C. Sedberry for plaintiff appellee (Mrs. Sue Wright Bass, Widow).

Collier, Harris & Homesley by Walter H. Jones, Jr., for petitioner appellant (Elizabeth I. Nance, Mother).

HEDRICK, Judge.

This matter was before this Court at the Spring Session 1971 as case number 7122IC234. For a more detailed recital of the facts and law in this case, see *Bass v. Mooresville Mills,* 11 N.C. App. 631, 182 S.E. 2d 246 (1971), where Judge Graham, speaking for the Court, said:

> "For the reasons set forth, the opinion and award of the Commission cannot be sustained. However, there was evidence before the Commission which if found to be true would entitle the wife to the benefits claimed. The case must therefore be remanded for consideration of this evidence and a determination of the crucial issues which it raises."

Upon further consideration, pursuant to the directions of this Court, the Commission made the following pertinent findings and conclusions:

"After the entering of the separation agreement, deceased started visiting his wife who was living with her child by a previous marriage and with a female roommate, Beth Jones. Deceased and his wife resumed marital relations. The separation agreement, at least to the future, was thus rescinded. They were intending to resume living together as husband and wife. However, such resumption of living together was delayed by the fact that Beth Jones, the roommate of the wife, was living in the home. Beth Jones intended to move out of the home on the weekend following 23 November 1969 at which time the resumption of deceased and his wife living together was to occur. The only reason deceased and his wife were not living together on 26 November 1969 was because of the wife having a roommate and merely reasons of convenience. This constituted justifiable cause for deceased and his wife to be living separate and apart at the time of the death of deceased on 26 November 1969.

* * *

Deceased employee was survived by no actual whole dependents. He was survived by his widow, Mrs. Sue W. Bass, who was living apart from deceased employee for justifiable cause at the time of his death, a separation agreement between deceased and his widow having been rescinded by their resuming marital relations. Such widow is conclusively presumed to be wholly dependent upon deceased employee for support and is thus entitled to compensation at the rate of $50.00 per week for a period of 350 weeks, commencing 27 November 1969. G.S. 97-2(14); G.S. 97-38; G.S. 97-39."

[1, 2] Appellant contends the Commission erred in finding and concluding that the separation agreement between the deceased and his wife had been rescinded by their resuming marital relations and that at the time of the death of the husband they were living separate and apart for justifiable cause. The decision on a former appeal is the law of the case upon the facts then presented both upon the subsequent hearing and upon subsequent appeal. 1 Strong, N.C. Index 2d, Appeal and Error § 68, pp. 244-5. This Court held on the former appeal that the wife's evidence, if found to be true, would support a conclusion that the parties were living apart for

justifiable cause. The decision of this Court reported in the former appeal is the law of this case. We hold there is sufficient competent evidence in the record to support the Commission's findings and conclusions which in turn support the opinion and award dated 10 November 1971 which is

Affirmed.

Judges BRITT and PARKER concur.

MIRIAM GAITHER THOMPSON, RUTH LITAKER HAYDEN, SALLY M. LITAKER, AND HELEN BAILEY v. HAROLD L. WATKINS, SR., EXECUTOR OF THE ESTATE OF ANNA L. LITAKER; HAROLD L. WATKINS, SR., INDIVIDUALLY AND WIFE JUANITA WATKINS; SADIE W. CARR AND HUSBAND FRANK CARR; MILDRED W. BOST BLACK AND HUSBAND FLORENCE BLACK, AND WALTER C. LITAKER, INCOMPETENT

No. 7219SC212

(Filed 28 June 1972)

Mortgages and Deeds of Trust § 28; Estates § 4— life estate — foreclosure sale — purchase by life tenant

Plaintiffs' allegations that they are the remaindermen of property under the terms of a will, that the life tenant permitted a deed of trust on the property to be foreclosed and then purchased the property at the foreclosure sale and that the life tenant died and attempted to devise the property, *held* sufficient to state a claim for relief in plaintiffs' action that they be adjudged owners of the property, since a life tenant who allows property to be sold to satisfy an encumbrance cannot acquire title adverse to the remaindermen by purchasing at the foreclosure sale, but is deemed to have made the purchase for the benefit of himself and the remaindermen.

APPEAL by plaintiffs from *Johnston, Judge,* 2 November 1971 Session of Superior Court held in CABARRUS County.

Plaintiffs filed the following complaint on 24 April 1970:

"Plaintiffs, complaining of the defendants, allege:

1. That plaintiffs and Walter C. Litaker are the owners of a house and lot on the East side of Tournament Street in the City of Concord under the Will of Walter R. Litaker which is recorded in Will Book 9, page 253, Cabarrus County Registry, said property having been conveyed to Walter R. Litaker in Deed Book 77, page 236.

2. That in said Will, Walter R. Litaker devised his property to his wife, Anna L. Litaker, for her lifetime with the remainder to plaintiffs and defendant Walter C. Litaker, who was declared incompetent on June 4, 1928, and Edgar Litaker, who died without issue, never having married.

3. That at the death of Walter R. Litaker the said property was subject to a deed of trust to G. H. Hendrix, Trustee, and the life tenant, Anna L. Litaker, permitted said deed of trust to be foreclosed and she purchased said land at said foreclosure sale; that the said Anna L. Litaker as life tenant held the remainder of said property for the benefit of the plaintiffs.

4. That Anna L. Litaker died on October 6, 1969, and her Will was probated on October 27, 1969, and recorded in Will Book 16, page 252; that Anna L. Litaker by her Will attempted to devise said house and lot to the defendants Sadie W. Carr, Mildred W. Bost, and Harold L. Watkins, Sr.

5. That the defendants Sadie W. Carr, Mildred W. Bost, and Harold L. Watkins, Sr., under and by virtue of the Will of Walter R. Litaker and the Trustee's Deed to Anna L. Litaker recorded in Deed Book 182, page 31, Cabarrus County Registry, claim an interest adverse to the plaintiffs and Walter C. Litaker, Incompetent, in the real property located on the East side of Tournament Street in the City of Concord which was conveyed to Walter R. Litaker by Deed recorded in Deed Book 77, page 236, Cabarrus County Registry.

WHEREFORE, plaintiffs pray that they be adjudged to be the owners and entitled to the immediate possession of said property under the Will of Walter R. Litaker; that the Trustee's Deed to Anna L. Litaker be set aside and the provision in the Will of Anna L. Litaker devising said property be declared void; that the costs of this action be taxed against the defendants; and for such other and further relief as plaintiffs may be entitled to in the premises."

Defendants filed a motion to dismiss the action for failure to state a claim upon which relief can be granted. From the

entry of judgment allowing defendants' motion and dismissing the action, plaintiffs appeal.

Williams, Willeford, and Boger, by John R. Boger, Jr., for plaintiff appellant.

Hartsell, Hartsell, and Mills by W. Erwin Spainhour for defendant appellee.

VAUGHN, Judge.

Appellants assignment of error is that the trial court erred in granting defendants' motion to dismiss. This Court, in *Cassels v. Motor Co.*, 10 N.C. App. 51, 178 S.E. 2d 12, stated that, "A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant sufficient notice of the nature and basis of plaintiffs' claim to enable him to answer and prepare for trial." See also, *Redevelopment Comm. v. Grimes*, 277 N.C. 634, 178 S.E. 2d 345; *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161.

The judgment granting defendants' motion was based largely on the following "finding of fact:"

> "5. Plaintiffs have not alleged and have not moved to amend their complaint to allege that Anna L. Litaker did, in any way or manner, occupy a fiduciary relationship with the plaintiffs; or that by her purchase at foreclosure she practiced a fraud upon the plaintiffs; or that her relationship to the plaintiffs was anything other than that of life tenant to remaindermen; or that less than a full and adequate consideration was paid by Anna L. Litaker for said property."

The Supreme Court of North Carolina, in *Morehead v. Harris*, 262 N.C. 330, 137 S.E. 2d 174, stated:

> "If a life tenant purchases the property at a sale to satisfy an encumbrance, he cannot hold such property to his exclusive benefit, but will be deemed to have made the purchase for the benefit of himself and the remainderman or reversioner. If the life tenant pays more than his proportionate share, he simply becomes a creditor of the estate for that amount. * * *
>
> * * *

A life tenant who allows property to be sold to satisfy taxes or other encumbrance cannot acquire a title adverse to the remainderman or revisioner by purchasing at the sale. * * * "

See also *Farabow v. Perry,* 223 N.C. 21, 25 S.E. 2d 173; *Creech v. Wilder,* 212 N.C. 162, 193 S.E. 281; 51 Am. Jur. 2d, Life Tenants and Remaindermen § 280; Webster, *Real Estate Law In North Carolina* (1971) § 62.

Plaintiffs' complaint qualifies as "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved. . . , " thereby complying with Rule 8(a) of the North Carolina Rules of Civil Procedure. Plaintiffs have stated a claim upon which relief can be granted and it was error for the trial court to grant defendants' motion to dismiss.

Reversed.

Judges MORRIS and GRAHAM concur.

GEORGE KENNETH SNYDER v. DUKE POWER COMPANY

No. 7221SC262

(Filed 28 June 1972)

Contracts § 31; Master and Servant § 13— interference with employment contract — power company — incident of ownership

A power company is not liable for malicious interference with plaintiff's contract of employment by reason of the termination of his employment at will after the power company advised plaintiff's employer that plaintiff would no longer be permitted to work on its power lines, since, as an incident of its ownership of the power lines, the power company had an absolute right to say who could or could not work on such lines.

APPEAL by plaintiff from *Long, Judge,* 1 November 1971 Session of Superior Court held in FORSYTH County.

This is a civil action heard on defendant's motion for summary judgment wherein plaintiff, George Kenneth Snyder,

seeks to recover from Duke Power Company both actual and punitive damages for malicious interference with his employment with Harrison-Wright Company, Inc.

The pleadings, answer to interrogatories, exhibit, and affidavits disclose the following: On 25 September, 1970, Harrison-Wright, plaintiff's employer, was under contract with the defendant constructing and maintaining power lines of the defendant in North Carolina and South Carolina. The contract between the defendant and plaintiff's employer was not exclusive and was terminable by the defendant on 24 hours' notice. Plaintiff had been an employee of Harrison-Wright for 11 years, and according to the affidavit of Walter N. Hipp, Vice President of Harrison-Wright, plaintiff was "an employee at will of Harrison-Wright Company and had no term contract of employment in writing or otherwise." In his answers to interrogatories, plaintiff stated:

> " . . . On Friday morning, September 25, 1970, Mr. B. I. Braswell, Superintendent of Harrison-Wright, Inc., came from Charlotte, North Carolina, and talked with me on the job. This job was located on the southside of Winston-Salem on Yale Avenue. I was informed by Mr. Braswell that I was not to report to work the following Monday morning because he (Mr. Braswell) had received communications from Mr. Edwards and other Duke Power officials informing him of the incident on September 23 that they were raising hell about what had happened. Mr. Braswell informed me that he had instructions from Duke Power Company that I was no longer to do any work for that company because of the incidents which had occurred the previous few days. * * *
>
> During the week following my termination from Harrison-Wright, Inc., I spoke with James Phillips, my foreman at Harrison-Wright. He informed me that he had requested permission from Mr. Hampton of Duke Power that he be permitted to return me to my job with Harrison-Wright. Mr. Hampton informed Mr. Phillips that he could hire me back if he wanted to but if he did that Mr. Hampton would send the whole crew out. . . . I am informed and believe he told Phillips if I were hired back the crew would no longer be able to work on Duke Power work here."

The plaintiff never returned to work for Harrison-Wright.

From the Court's entry of summary judgment in favor of the defendant, the plaintiff appealed.

Eubanks and Sparrow by W. Warren Sparrow and Larry L. Eubanks for plaintiff appellant.

William I. Ward, Jr., and Womble, Carlyle, Sandridge & Rice by Allan R. Gitter for defendant appellee.

HEDRICK, Judge.

The one question presented on this appeal is whether the pleadings, answers to interrogatories, exhibits, and affidavits, show that there is no genuine issue as to any material fact and that the defendant Duke Power Company is entitled to judgment as a matter of law.

Our decision rests on the general rule, set out in 45 Am. Jur. 2d, Interference, § 23 as follows:

> "Absolute rights, including primarily *rights incident to the ownership of property,* rights growing out of contractual relations, and the right to enter or refuse to enter into contractual relations, may be exercised without liability for *interference without reference to one's motive* as to any injury directly resulting therefrom. This is in contrast to the exercise of common and qualified rights which may be exercised only where there is justification therefor. In other words, acts performed with such an intent or purpose as to constitute legal malice and without justification, which otherwise would amount to a wrongful interference with business relations, are not tortious where committed in the exercise of an absolute right." *Kelly v. Harvester,* 278 N.C. 153, 179 S.E. 2d 396 (1971); *Raycroft v. Traymtor,* 68 Vt. 219, 35 A. 53 (1896). (Our italics.)

The record before us clearly establishes that the defendant was the owner of the power lines on which Harrison-Wright and the plaintiff were working. As an incident of its ownership of the power lines the defendant had an absolute right to say who could or who could not work on its property. Upon giving 24 hours' notice, the defendant could terminate its contract with plaintiff's employer. As an incident of its ownership of its power lines, the defendant had a right to advise Harrison-Wright that the plaintiff would not be permitted to work on its property.

Upon this record, it is clear that there is no genuine issue as to any material fact, and the defendant is entitled to judgment as a matter of law.

Affirmed.

Judges BRITT and PARKER concur.

JOLEEN BLACKWELDER FAGGART v. ROBERT RAY FAGGART

No. 7219DC309

(Filed 28 June 1972)

Divorce and Alimony § 23— child support — findings — actual earnings — capacity to earn

Trial court's order directing defendant to pay $50 a week to support his two children was supported by its findings that defendant's adjusted gross income for 1970 from his beauty salon was $4,260, that $100 a week was deducted from the business and distributed to defendant and his present wife, and that he owns his home and two automobiles, and the court's further finding that "defendant is an able-bodied man and is able to be gainfully employed in another occupation to supplement his income from the beauty salon and his activities in the field of gambling" did not show that the trial court was basing the amount of child support on defendant's capacity to earn rather than his actual earnings.

APPEAL by defendant from *Walker, District Judge,* 18 January 1972 Session of District Court held in CABARRUS County.

This is a civil action for absolute divorce heard on plaintiff's motion to modify the prior order of the Court providing for the support of two minor children. After a hearing, Judge Walker made findings and conclusions which, except where quoted, are summarized as follows:

On 15 November 1962 an order was entered directing the defendant to pay for the support of Robbie Jo Faggart born 24 April 1955 and Robert Ray Faggart, Jr., born 11 September 1958, the sum of $20 each week. The needs of the children have changed since the entry of the original order and the cost of living has vastly increased.

"(T)he defendant of this action is now gainfully employed as the owner and operator of Judy's Style-A-Rama, a beauty

salon in Kannapolis, North Carolina; that the defendant's adjusted gross income for the year 1970 from the said business was Four Thousand Two Hundred Sixty Dollars and some odd cents ($4,260.00); that the evidence of the defendant showed that One Hundred Dollars ($100.00) a week was deducted from the income of the business and distributed to the defendant of this action and his present wife.

. . . the defendant of this action is the owner of a five (5) room framed dwelling; that he has recently traded a 1968 Cadillac for one (1) 1970 Cadillac and owes approximately Two Thousand and Two Hundred Dollars ($2,200.00) on the said automobile; that in addition thereto of the 1970 Cadillac the defendant and his present wife are the owners of one (1) 1968 Mustang; that the Court further found that the defendant owns many of the more expensive things in life such as jewelry, diamond rings for himself, and a color T.V.

. . . the defendant is an able bodied man and is able to be gainfully employed in another occupation to supplement his income from the beauty salon and his activities in the field of gambling."

From an order directing the defendant to pay $50 each week for the support of his two minor children, the defendant appealed.

Cecil R. Jenkins, Jr., for plaintiff appellee.

Davis, Koontz & Horton by Clarence E. Horton, Jr., for defendant appellant.

HEDRICK, Judge.

The defendant contends "the Court erred in awarding child support based on defendant's capacity to earn rather than his actual earnings, there being no evidence and no findings of fact to the effect that defendant was acting dishonestly or in bad faith, nor any evidence tending to show that he was engaged in a business to which he was not properly adapted, nor was there any evidence tending to show that he was not making a good-faith effort to earn a reasonable income, and such award amounted to an abuse of discretion." The defendant's contention has no merit simply because the findings and

conclusions made by Judge Walker reveal that he was not basing his order on the defendant's "capacity to earn." Judge Walker was faced with the problem of equitably dividing defendant's earnings so as to do the most good and the least harm to all parties concerned. As was said in *Reavis v. Reavis,* 271 N.C. 707, 157 S.E. 2d 374 (1967):

> "In these days of high taxes, inflation, and the extremely expensive cost of living, it is almost impossible for the average wage earner to support himself and his family. It can be done only by the most frugal and careful budgeting of the income."

The findings that the defendant for the year 1970 had an adjusted gross income from his beauty salon of $4,260.00, that $100.00 a week was deducted from the business and distributed to the defendant and his present wife, and that he owns his home and two automobiles, are sufficient to support the order directing him to pay $50 a week to support his two teenaged children. The finding "that the defendant is an able-bodied man and is able to be gainfully employed in another occupation to supplement his income from the beauty salon and his activities in the field of gambling" does not vitiate the other findings or show that the Judge abused his discretion. The order appealed from is

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JEFFREY S. MARTINDALE

No. 7215SC439

(Filed 28 June 1972)

Narcotics § 2— sale — indictment — name of purchaser

An indictment charging the sale of narcotics must allege the name of the purchaser or that his name is unknown.

APPEAL by defendant from *Hobgood, Judge,* at the November 1971 Session of ALAMANCE Superior Court.

Defendant was charged in a bill of indictment with two felonies, namely, (1) selling and (2) transporting a narcotic

drug, to-wit: marijuana, in a quantity of more than one gram. At the conclusion of the State's evidence the court allowed defendant's motion to dismiss the transporting count. The jury returned a verdict of guilty on the first count and from judgment imposing prison sentence defendant appealed.

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

John D. Xanthos for defendant appellant.

BRITT, Judge.

Defendant contends that the first count in the bill of indictment is fatally defective for that it does not name the person to whom a sale was allegedly made and does not allege that the name of the purchaser is unknown. The contention has merit.

The first count in the indictment alleges: "That Jeffrey S. Martindale late of the County of Alamance on the 15th day of April, 1971 at and in the county aforesaid, did unlawfully, wilfully and feloniously sell a quantity of narcotic drugs, to-wit: marijuana, in a quantity of more than one (1) gram against the form of the statute in such case made and provided and against the peace and dignity of the State."

The identical question raised here was considered by the Supreme Court in the recent case of *State v. Bennett,* 280 N.C. 167, 185 S.E. 2d 147 (1971). The court stated the question thusly: "Specifically, the inquiry is: In a count charging the sale of narcotics must the indictment allege the name of the purchaser?"

The court answered the question as follows: "The rule is stated in *State v. Bissette,* 250 N.C. 514, 517-18, 108 S.E. 2d 858, 861: 'Where a sale is prohibited, it is necessary, for a conviction, to allege in the bill of indictment the name of the person to whom the sale was made or that his name is unknown, *unless some statute eliminates that requirement.* The proof must, of course, conform to the allegations and establish a sale to the named person or that the purchaser was in fact unknown.' " (Emphasis added.)

As was true in *Bennett,* the act under which defendant stands indicted (the Uniform Narcotic Drug Act of 1935, G.S.

90-86 et seq.) contains no modification of the common law requirement that the name of the person to whom the accused allegedly sold narcotics unlawfully be stated in the indictment when it is known. In *Bennett* the Supreme Court arrested the judgment based on the count of the indictment charging unlawful sale of narcotics. We cannot distinguish the case at bar from *Bennett,* therefore, the judgment appealed from is arrested.

In fairness to the able judge who presided over the trial of this case, we point out that *Bennett* was filed on 15 December 1971 subsequent to the entry of judgment in this case on 30 November 1971.

We find it unnecessary to pass upon the other contentions argued in defendant's brief.

Judgment arrested.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. WALLACE LYNN RIGSBEE

No. 7218SC430

(Filed 28 June 1972)

Criminal Law § 163— broadside assignment of error

An assignment of error "that the Court erred in failing to declare and explain the law arising on the evidence given in the case" is broadside and ineffectual.

APPEAL by defendant from *Armstrong, Judge,* 17 January 1972 Session of Superior Court held in GUILFORD County.

Defendant was charged in a warrant with the offense of operating a motor vehicle on the highway while under the influence of intoxicating liquor (G.S. 20-138). Upon his conviction in the District Court, he appealed to the Superior Court where he was tried *de novo* by a jury.

The State's evidence tended to show that defendant was observed and stopped by a State Higway Patrol trooper; that defendant was given certain sobriety tests at the scene; that

defendant refused to take the breathalyzer test when requested; and that, in the opinion of the officer, defendant was under the influence of intoxicating liquor.

The defendant's evidence tended to show that about 8:00 a.m. he purchased a six-pack of beer, regular size; that he did not drink anything until about 9:00 a.m.; that from 9:00 a.m. to around 11:00 a.m. he visted a friend at Lake Tillery during which time they each drank three cans of the six-pack which defendant had purchased at 8:00 a.m.; that he ate cheese and crackers while drinking the beer; that he left Lake Tillery about 11:00 a.m. and drove to Greensboro where he was stopped by the officer at about 12:15 p.m.; that he was not under the influence of intoxicating liquor but was in full possession of his faculties; and that he refused to take the breathalyzer test because he didn't think it was legal.

From a jury verdict of guilty and judgment entered, defendant appealed.

Attorney General Morgan, by Associate Attorney Poole, for the State.

Douglas, Ravenel, Hardy & Crihfield, by Robert D. Douglas III, for defendant.

BROCK, Judge.

Defendant assigns as error "[t]hat the Court erred in failing to declare and explain the law arising on the evidence given in the case." Defendant argues that in so failing the Court violated G.S. 1-180.

Listed in 1 Strong, N. C. Index 2d, Appeal and Error, § 31, p. 166, note 35, are numerous cases which hold that this type of assignment of error is a broadside exception and will not be considered. The reason for the refusal by the appellate court to consider such a broadside exception to the charge is clear and fair. In order to do so, the appellate court would be cast in the role of advocate for the appellant, sifting through the charge looking for some error. This would destroy the impartiality which is necessary for the proper functioning of the judiciary.

Nevertheless, we have reviewed the record proper and the evidence. In our opinion defendant had a fair trial, free from

prejudicial error. The evidence presented by the State and by the defendant has been evaluated by a jury, who found under appropriate rules that defendant was guilty as charged.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

TOMMY S. SIMMONS v. TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

No. 7223SC293

(Filed 28 June 1972)

Appeal and Error § 39— time for docketing record on appeal — extension

After the 90-day period for docketing the record on appeal in the Court of Appeals has expired, the trial tribunal is without authority to enter a valid order extending the time for docketing. Court of Appeals Rule 5.

APPEAL by defendant from *Crissman, Judge,* 1 November 1971 Session of Superior Court held in WILKES County.

This is a civil action in which plaintiff, who was formerly an employee within a bargaining unit represented by the defendant Union, seeks recovery of damages for failure of defendant to represent plaintiff's interest properly when plaintiff lost his job following a strike. The jury returned verdict in favor of plaintiff, and from judgment on the verdict, defendant appealed.

Franklin Smith and W. G. Mitchell for plaintiff appellee.

Charles B. Merryman, Jr., and Joel Ronald Ax for defendant appellant.

PARKER, Judge.

The judgment appealed from was dated 5 November 1971. The record on appeal was not docketed in the Court of Appeals and no order extending the time for docketing was entered within 90 days after the date of the judgment. On appellant's motion, made after the expiration of the 90-day period, the trial

judge signed an order dated 7 February 1972 extending the time for docketing until 6 March 1972, and the record on appeal was docketed in the Court of Appeals on 3 March 1972. In the meantime, on 14 February 1972, appellee filed a motion in this Court to dismiss the appeal for failure to docket the record on appeal within apt time.

Article IV, Section 13(2) of the Constitution of North Carolina provides that "[t]he Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division." Pursuant to this authority, our Supreme Court has adopted Rules of Practice in the Court of Appeals of North Carolina.

> "The docketing of the record on appeal in the Court of Appeals is determined by Rule 5 of the Rules of Practice in the Court of Appeals. The record on appeal must be docketed in the Court of Appeals within ninety days after the date of the judgment, order, decree or determination appealed from. Within this period of ninety days, *but not after the expiration thereof,* the trial tribunal may for good cause extend the time not exceeding sixty days for docketing the record on appeal." (Emphasis added.) *Roberts v. Stewart* and *Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58, cert. denied, 275 N.C. 137.

After the time for docketing the record on appeal in the Court of Appeals has expired, the trial tribunal is without authority to enter a valid order extending the time for docketing. *Distributing Corp. v. Parts, Inc.,* 10 N.C. App. 737, 179 S.E. 2d 793; *State v. Evans* and *State v. Johnson,* 8 N.C. App. 469, 174 S.E. 2d 680, cert. denied, 277 N.C. 115; *Dixon v. Dixon,* 6 N.C. App. 623, 170 S.E. 2d 561; *Roberts v. Stewart* and *Newton v. Stewart, supra.* Accordingly, appellee's motion to dismiss must be allowed.

Appeal dismissed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. CALTON OXENDINE, JR.

No. 7216SC283

(Filed 28 June 1972)

1. **Criminal Law § 155.5— failure to docket record in apt time**

Appeal is dismissed for failure of appellant to docket the record on appeal within the time allowed by Court of Appeals Rule 5.

2. **Narcotics § 5; Criminal Law § 138— possession of marijuana — punishment — change in statute after offense committed**

A defendant convicted of an offense of possession of marijuana committed prior to 1 January 1972, the effective date of the Controlled Substances Act, is not entitled to the benefit of the more lenient punishment provisions of the new Act.

APPEAL by defendant from *Godwin, Special Judge,* 18 October 1971 Regular Criminal Session, Superior Court, ROBESON County.

Defendant was charged with possession of more than one gram of marijuana. Defendant was represented by privately retained counsel, entered a plea of not guilty, was found guilty by the jury, and appeals from judgment entered on the verdict.

Attorney General Morgan, by Assistant Attorney General Smith, for the State.

James R. Nance, Jr., by Wesley C. Watts, for defendant appellant.

MORRIS, Judge.

[1] This case was tried on 20 October 1971 and judgment entered on the jury verdict. The record on appeal was not docketed until 8 February 1972, well beyond the time limit provided by our rules. No order extending the time for docketing appears in the record. 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. *Keyes v. Oil Co.,* 13 N.C. App. 645, 186 S.E. 2d 678 (1972); *Phillips v. Wrenn Brothers,* 12 N.C. App. 35, 182 S.E. 2d 285 (1971), cert. denied 279 N.C. 619 (1971); *State v. Burgess,* 11 N.C. App. 430, 181 S.E. 2d 120 (1971), cert. denied 279 N.C. 350 (1971).

Nevertheless, we have carefully reviewed the record, and prejudicial error sufficient to warrant a new trial is not shown.

[2] Defendant contends on appeal that even if there is no error in the trial, he should have the benefit of the reduced sentence of six months provided in the Controlled Substances Act, effective January 1972. He relies upon *State v. McIntyre,* 13 N.C. App. 479, 186 S.E. 2d 207 (1972), rev'd. 281 N.C. 304, 188 S.E. 2d 304 (1972). The Supreme Court, in *State v. Harvey,* 281 N.C. 1, 20, 187 S.E. 2d 706 (1972), held that "the pre-existing law as to prosecution and punishment as set forth in Articles 5 and 5A, Chapter 90 of the General Statutes as written prior to 1 January 1972, remains in full force and effect as to offenses committed prior to 1 January 1972."

Appeal dismissed.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. DAVID LEE ROBERTSON, JR.

No. 7221SC456

(Filed 28 June 1972)

Narcotics § 5; Criminal Law § 138— possession of marijuana — punishment — change in statute after offense committed

A defendant convicted of an offense of possession of more than one gram of marijuana committed prior to 1 January 1972, the effective date of the Controlled Substances Act, is not entitled to the benefit of the more lenient punishment provisions of the new Act.

APPEAL by defendant from *Armstrong, Judge,* 14 February 1972 Session of FORSYTH Superior Court.

Defendant was charged with "unlawfully, wilfully, and feloniously" possessing narcotic drugs, to wit: more than one gram of marijuana in violation of the Uniform Narcotic Drug Act (G.S. 90-86 et seq.). He waived preliminary hearing and was bound over to Superior Court where he entered a plea of guilty to "the felony of possession of more than one gram of marijuana." The record contains the transcript of plea and adjudication thereon that the plea was freely, understandingly and voluntarily entered. From the entry of judgment sentencing

defendant to three to five years, suspended subject to certain terms and conditions of probation, defendant appealed.

Attorney General Morgan, by Associate Attorney Poole, for the State.

Eubanks and Sparrow, by Larry L. Eubanks, for defendant appellant.

MORRIS, Judge.

Defendant's sole contention on appeal is that he should be given the benefit of the reduced sentence provided under the North Carolina Controlled Substances Act, effective 1 January 1972, wherein a first offense of possession of marijuana is a misdemeanor punishable by not more than six months or $500 [G.S. 90-95(e)]. Because the offense was committed prior to 1 January 1972, however, the pre-existing law as to prosecution and punishment under the Uniform Narcotic Drug Act (Articles 5 and 5A, Chapter 90 of the General Statutes prior to the 1972 re-write) remains in full force and effect, and defendant was properly punished as a felon. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972); accord, *State v. Oxendine,* 15 N.C. App. 222, 189 S.E. 2d 607 (1972).

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. DAVID OAKLEY

No. 7219SC434

(Filed 28 June 1972)

1. **Criminal Law § 18— appeal to superior court — failure of district court to sign judgment**

Failure of the district judge to sign the judgment in a misdemeanor case did not deprive the superior court of jurisdiction to try defendant upon his appeal to that court.

2. **Criminal Law § 138— trial de novo in superior court — increased sentence**

When a defendant voluntarily appeals to the superior court from a judgment of the district court and obtains a trial *de novo* upon a charge of which the district court had jurisdiction, the superior

court may impose a greater sentence than that imposed in the district court without violating defendant's constitutional rights, so long as the sentence imposed is within the maximum provided by statute.

APPEAL by defendant from *Johnston, Judge,* 14 February 1972 Session of Superior Court held in ROWAN County.

The record on appeal reveals that it was stipulated that the defendant was tried in district court upon a warrant charging him with the misdemeanor of larceny, was found guilty, and was sentenced to six months in prison. He appealed to superior court and there entered a signed written plea of guilty wherein he swore that he was guilty as charged. The trial judge found, upon competent evidence, that the defendant's plea of guilty was freely, understandingly and voluntarily entered. From a judgment of imprisonment for a term of eight months, the defendant appealed to the Court of Appeals.

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

Graham M. Carlton for defendant appellant.

MALLARD, Chief Judge.

[1] Defendant's contention that the district court judge's failure to sign the judgment rendered in district court deprived the superior court of jurisdiction to try the defendant upon his appeal is without merit. In misdemeanor cases, the failure of the trial judge to sign the judgment does not affect its validity. *State v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738 (1953); *State v. Case,* 12 N.C. App. 11, 182 S.E. 2d 19 (1971); 2 Strong, N. C. Index 2d, Criminal Law, § 18.

[2] The defendant also contends that the trial judge committed error in imposing a sentence of eight months, which was more severe (by two months) than the sentence imposed in the district court. This contention is also without merit. It has been consistently held by the Supreme Court of North Carolina and followed by the Court of Appeals that when a defendant voluntarily appeals to the superior court from a judgment of the district court and obtains a trial de novo upon a charge of which the district court had jurisdiction, the superior court may impose a prison sentence of longer duration than that imposed in the district court without violating the defendant's

constitutional rights, so long as the sentence imposed is within the maximum provided by statute. *State v. Speights,* 280 N.C. 137, 185 S.E. 2d 152 (1971); *State v. Waller,* 11 N.C. App. 434, 181 S.E. 2d 195 (1971), *cert. denied,* 279 N.C. 351. The sentence of eight months imposed in superior court on this charge of misdemeanor larceny is within the maximum punishment permitted by statute. G.S. 14-72 and G.S. 14-3(a).

Affirmed.

Judges CAMPBELL and BROCK concur.

CORDIA McLEAN FORE v. SAMUEL D. FORE

No. 7211DC322

(Filed 28 June 1972)

1. **Divorce and Alimony § 17— divorce from bed and board — alimony — sufficiency of evidence**

The evidence supported a judgment granting the wife a divorce from bed and board, awarding her alimony of $50 per month during her lifetime or until she remarried, and requiring the husband to pay the wife's counsel $250.

2. **Divorce and Alimony § 17— permanent alimony — alimony pendente lite — proof**

In order to obtain an award of permanent alimony following a trial on the merits, it was not necessary for plaintiff to show that she did not have sufficient means whereon to subsist during prosecution of the suit and to defray the necessary expenses thereof as is required for an award of alimony *pendente lite.*

APPEAL by defendant from *Godwin, District Judge,* at the 11 November 1971 Session of LEE County District Court.

On 1 September 1971, pursuant to G.S. 50-16.1 et seq., plaintiff instituted this action against defendant, her husband, asking for divorce from bed and board, temporary and permanent alimony, and attorney fees. The action was regularly calendared for trial on its merits and was heard without a jury.

The court made numerous findings of facts and conclusions of law as contended by plaintiff and entered judgment granting plaintiff a divorce from bed and board, awarding alimony

in amount of $50 per month during plaintiff's lifetime or until she remarries, and requiring defendant to pay plaintiff's counsel $250. Defendant appealed.

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

Neill McK. Ross for defendant appellant.

BRITT, Judge.

Defendant's sole exception and assignment of error is to the signing and entry of the judgment. In *Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363 (1968) we find: "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." See also *Morris v. Perkins,* 11 N.C. App. 152, 180 S.E. 2d 402 (1971), cert. den. 278 N.C. 702, 181 S.E. 2d 602.

[1] In the case at bar we hold that the facts found by the trial court support the judgment, that the judgment is regular in form, and that error does not appear on the face of the record.

[2] Defendant relies on our decision in *Davis v. Davis,* 11 N.C. App. 115, 180 S.E. 2d 374 (1971). The cases are clearly distinguishable. In the instant case we are dealing with a judgment awarding permanent alimony following a trial of the action on its merits while in *Davis,* the appeal was from an order awarding alimony *pendente lite.* As was said in *Davis,* to obtain alimony *pendente lite* the dependent spouse must show, among other things, that he or she is entitled to the relief demanded by such spouse in the action in which the application for alimony *pendente lite* is made, *and* that he or she has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. G.S. 50-16.3.

The decision in *Davis* turned on the fact that the plaintiff did not show that she "has not sufficient means whereon to subsist during the prosecution . . . of the suit and to defray the necessary expenses thereof." In the present case, the trial

being on the merits of the action, it was obviously not necessary that plaintiff show that she did not have sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof.

The judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

SARAH S. DENNIS v. LUCY M. ROSS AND JAMES GAVIN ROSS

No. 7219SC216

(Filed 28 June 1972)

Appeal and Error § 6— orders appealable — denial of motion to dismiss — improper service of process

Defendants could not appeal from the denial of their motion to dismiss the action against them on the ground that they had not been properly served with process. Court of Appeals Rule 4.

APPEAL by defendants from *Johnston, Judge,* at the 1 November 1971 Session of CABARRUS Superior Court.

This action was instituted on 11 December 1969. Plaintiff seeks to recover for personal injuries allegedly received by her on 11 December 1966 when an automobile owned and operated by defendants collided with an automobile operated by plaintiff.

On 2 July 1971 defendants filed a motion to dismiss the action for that they have not been properly served with process and the court has no jurisdiction over them. On 28 October 1971 defendants filed what is designated as an "amended motion to dismiss" the action. Following a hearing an order was entered on 3 November 1971 adjudging that the Superior Court of Cabarrus County has jurisdiction over the subject matter and the defendants in this action. Defendants attempt to appeal from the order.

Cecil R. Jenkins, Jr., for plaintiff appellee.

Hartsell, Hartsell & Mills by Boyd C. Campbell, Jr., for petitioner appellants.

BRITT, Judge.

Under Rule 4 of the Rules of Practice in the Court of Appeals of North Carolina defendants may not appeal from the order entered by Judge Johnston; therefore, their attempted appeal is dismissed.

Pursuant to Rule 4 defendants have filed a petition for certiorari asking that this court review Judge Johnston's order. The petition is denied.

Appeal dismissed.

Petition for certiorari denied.

Judges PARKER and HEDRICK concur.

DIXON A. LAMB v. JACK P. McKIBBON

No. 7226SC201

(Filed 28 June 1972)

1. **Process § 16— nonresident motorist — substituted service of process**

The trial judge's findings of fact support his conclusions that defendant motorist was not a resident of this State, that defendant was subject to substituted service on the Commissioner of Motor Vehicles under G.S. 1-105, and that service upon defendant had been completed in accordance with G.S. 1-105.

2. **Appeal and Error § 26— assignment of error to entry of judgment**

An assignment of error to the entry of the judgment presents the face of the record for review, and review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found support the conclusions of law and the judgment; such an assignment does not present for review the findings of fact or the sufficiency of the evidence to support them.

APPEAL by defendant from *Friday, Judge,* 2 August 1971 Schedule A Session of Superior Court held in MECKLENBURG County.

Plaintiff instituted this action to recover damages for personal injury alleged to have been caused by the negligence of defendant in the operation of his motor vehicle. Plaintiff alleged that defendant was a resident of the town of Columbia, State of

Tennessee, and caused summons to be served on the Commissioner of Motor Vehicles in accordance with G.S. 1-105.

Defendant filed a motion to dismiss upon the grounds that defendant was not properly served with summons and complaint.

The trial judge denied defendant's motion to dismiss and defendant appealed.

John D. Warren for plaintiff.

Sanders, Walker and London, by James E. Walker, for defendant.

BROCK, Judge.

It is defendant's contention that plaintiff has failed to show that defendant was not a resident of North Carolina; therefore, substituted service under G.S. 1-105 is ineffective.

Defendant's sole exception and assignment of error is as follows:

> "I. The Court erred in denying Defendant's motion to dismiss this action for lack of jurisdiction for the reason that Defendant was not properly served with a copy of the Summons and Complaint in this action.
>
> "To the entry of the Order of the Court on August 12, 1971, and to the failure of the Court to dismiss the Plaintiff's action, Defendant excepts. This is Defendant's Exception # 1, R. p. 13."

[1] The trial judge made findings of fact which support his conclusion that defendant was not a resident of the State of North Carolina, that defendant was subject to service under G.S. 1-105, and that service upon defendant had been completed in accordance with G.S. 1-105. Defendant has not excepted to any finding of fact; he has only excepted to and assigned as error the entry of the judgment.

[2] Such an assignment of error presents the face of the record for review, and review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found support the conclusions of law and the judgment. But, such an assignment of error does not present

for review the findings of fact or the sufficency of the evidence to support them. *Prince v. Prince,* 7 N.C. App. 638, 173 S.E. 2d 567; 1 Strong, N. C. Index 2d, Appeal and Error, § 26, p. 152.

As noted above, the trial judge's findings of fact support his conclusions. Also, his findings of fact and conclusions support his order denying defendant's motion to dismiss. We find no error of law on the face of the record.

The trial judge granted defendant thirty days within which to file answer. This he may still do, if he is so advised.

Affirmed.

Judges HEDRICK and VAUGHN concur.

LOUISE SMITH THOMPSON, ADMINISTRATRIX OF THE ESTATE OF ABRAHAM L. CLAPP v. JIMMIE MILLER COBLE AND J. HAROLD COBLE

No. 7218SC425

(Filed 28 June 1972)

Automobiles § 62— death of pedestrian — negligence of motorist — insufficiency of evidence

Plaintiff's evidence was insufficient to be submitted to the jury on the issue of defendant's negligence in an action to recover for the alleged wrongful death of a pedestrian who was struck by defendant's automobile.

APPEAL by plaintiff from *Exum, Judge,* 17 January 1972 Session of Superior Court held in GUILFORD County.

Plaintiff instituted this action to recover damages for the alleged wrongful death of Abraham L. Clapp by the negligence of Jimmie Miller Coble in the operation of her husband's automobile.

Plaintiff's evidence tends to show that on 28 October 1969, at about 7:00 p.m., Jimmie Miller Coble was driving her husband's automobile in an easterly direction along rural paved road 3111 in Guilford County. The road was straight and unobstructed; it was 18 feet wide with shoulders approximately 6 feet wide. The road surface was coarse asphalt of a "blackish color."

Mrs. Coble was driving about 30 miles per hour in the center of the lane for eastbound traffic. She had her headlights on bright and was watching straight ahead. She did not see anything in the road, but she heard a noise of something on the car and knew that she had hit something. She immediately stopped to see what she had hit. Mrs. Coble's husband was following along behind her in his pickup truck and, when he came to where she had stopped, he stopped also. They were unable to find anything in the road or on the shoulder. Mr. Coble went to a nearby house, borrowed a flashlight, and returned to search the area more carefully. Deceased was then found in the southern roadside ditch, lying on his stomach with his head to the west and his feet to the east. Deceased was dressed in dark blue denim work clothes. The heel from a shoe was lying on the shoulder of the road about four or five feet from a "little dug out place" in the grass. One heel from deceased's shoes was missing. He died, without talking to anyone, shortly after being removed to the hospital.

At the close of plaintiff's evidence, defendants' motion for a directed verdict for defendants was allowed and plaintiff appealed.

Wade C. Euliss for plaintiff.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter, for defendants.

BROCK, Judge.

Plaintiff strenuously argues that the evidence is sufficient to make out a *prima facie* case of defendants' negligence and to require submission of the case to the jury. We have carefully studied the evidence offered and cannot agree. The jury would have to engage in pure speculation of how deceased was injured. The evidence presents a sad and unfortunate situation, but it fails to show actionable negligence on the part of defendants.

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. BONNIE LEE DAYE

No. 7214SC418

(Filed 28 June 1972)

1. **Criminal Law § 128— motion for mistrial — cross-examination of defendant**

The trial court did not err in the denial of defendant's motion for a mistrial made on the ground that he was prejudiced by questions asked him on cross-examination, where only three of defendant's objections to such questions were overruled, and defendant has offered no reason as to why those rulings were erroneous.

2. **Criminal Law § 128— motion for mistrial after judgment**

A motion for mistrial after verdict and judgment comes too late, the proper motion at such time being a motion to vacate the judgment, set aside the verdict, and order a new trial.

APPEAL by defendant from *Cooper, Judge,* 24 January 1972 Session of Superior Court held in DURHAM County.

Defendant was charged in a warrant with the offense of driving a motor vehicle on the public highway while his operator's license was suspended. He was found guilty as charged in District Court and he appealed. In the Superior Court he was tried *de novo* by a jury upon the original warrant and was again found guilty as charged. He has now appealed to this court.

Attorney General Morgan, by Associate Attorney Conely, for the State.

Newsom, Graham, Strayhorn, Hedrick & Murray, by E. C. Bryson, Jr., for the defendant.

BROCK, Judge.

Defendant assigns as error that the trial judge denied his motion for mistrial. Defendant argues that he was prejudiced by the questions propounded to him on cross-examination.

[1] An examination of the record on appeal reveals that of the seventeen exceptions, which are grouped under defendant's sole assignment of error, thirteen exceptions are to the Court's action in sustaining defendant's objection to a question propounded by the solicitor. Only three of defendant's objections were overruled, and he offers us no reason as to why these

three rulings were error. The seventeenth exception is to the denial of his motion for mistrial.

[2] We note that defendant waited until after the jury verdict, the judgment, and the appeal entries, before lodging his motion for mistrial. A motion for mistrial after verdict and judgment comes too late. The proper motion would be a motion to vacate the judgment, set aside the verdict, and order a new trial. In any event, the motion in this case was addressed to the discretion of the trial judge and his ruling will not be disturbed. There was no showing of abuse of discretion.

The State's evidence of defendant's guilt of the offense with which he was charged was unequivocal. Upon the whole record, we conclude there was no prejudicial error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. GARY DOUGLAS LEE

No. 7219SC421

(Filed 28 June 1972)

1. **Criminal Law § 155.5— docketing of record — expiration of 90 days — extension of time**

Appeal is subject to dismissal where the record on appeal was not docketed within 90 days after the date of the judgment appealed from, and an order extending the time for docketing was entered after the 90-day period had expired.

2. **Burglary and Unlawful Breakings § 8— entry of coin-operated machines — sentence**

Sentence of two years as a youthful offender imposed on an eighteen-year-old defendant who entered pleas of *nolo contendere* to six charges of unlawful entry into coin-operated machines was not cruel and excessive.

APPEAL by defendant from *Collier, Judge,* 13 December 1971 Session, CABARRUS County Superior Court.

This eighteen-year-old defendant was charged in six separate warrants with the unlawful entry into coin-operated

vending machines. In some instances the charge was the unlawful and unauthorized use of a key to the machine, and in others it was unlawfully breaking into the machine by the use of a tire tool. All the offenses occurred on the 26th of April 1971. In some instances money was obtained, and in other instances nothing was obtained.

Upon his trial the defendant entered a plea of *nolo contendere*. The effect of the plea was explained to him, and he was advised that he was subject to twelve years imprisonment for the various offenses. Upon competent evidence the trial judge found that the plea was freely, understandingly and voluntarily entered without any undue influence, compulsion, duress or any promises. Thereafter, the cases were consolidated for judgment, and a judgment was entered sentencing the defendant to two years imprisonment as a youthful offender.

From the entry of this judgment, the defendant appealed.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.

Williams, Willeford and Boger by John R. Boger, Jr., for defendant appellant.

CAMPBELL, Judge.

[1] It is noted that the judgment was entered in this case 13 December 1971. The ninety days for filing the case on appeal in this Court expired 13 March 1972. It was not until 10 April 1972 that the defendant procured an extension of time under Rule 5 of this Court to docket the appeal. This order was obtained too late, and for this reason this appeal is subject to dismissal.

[2] We, nevertheless, have considered the assignment of error to the effect that the punishment was cruel and excessive. This assignment of error is feckless and no error appears upon the face of the record.

Appeal dismissed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. CURTIS McCLOUD

No. 728SC148

(Filed 28 June 1972)

Criminal Law § 23— guilty plea — voluntariness

Defendant's plea of guilty was entered freely, voluntarily and understandingly.

ON *certiorari* to review order of *Cohoon, Judge,* January 1971 Session, Superior Court, WAYNE County.

Defendant, by indictment proper in form, was charged with felonious breaking or entering, felonious larceny, and receiving. Upon his arraignment, defendant entered a plea of guilty to the two felonies—breaking or entering and larceny. The court heard the evidence, consolidated the two cases for judgment, and entered judgment of imprisonment for not less than eight nor more than ten years. Defendant gave notice of appeal. Appeal was not perfected within the time allowed because defendant indicated his desire to withdraw his appeal. He was returned to court at his request for the purpose of withdrawing his appeal. However, when he appeared before the court he advised the court that he had again changed his mind and desired the appeal perfected. Whereupon the court directed his appointed counsel to petition this Court for a writ of certiorari. We allowed the petition.

Attorney General Morgan, by Assistant Attorney General Walker, for the State.

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

MORRIS, Judge.

Defendant entered a plea of guilty to felonious breaking or entering and felonious larceny. The court interrogated him upon his plea and defendant signed the transcript of plea. Upon the transcript, the court entered an adjudication that the plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. The court heard the evidence and entered upon the minutes a finding that "there is a factual basis for said plea," which finding is included in the record. The indict-

ment is proper and the sentence is within the limits provided by statute for the offenses committed.

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. LONNIE ROBERTS

No. 7223SC326

(Filed 28 June 1972)

Criminal Law § 91— denial of continuance — illness of defendant's wife

The trial court did not err in the denial of defendant's motion for continuance made on the ground that defendant's wife was going to be admitted to a hospital on the following day, where the trial court had previously informed defense counsel that a doctor's certificate verifying that defendant's wife was ill would be required, but no such certificate was presented, and there was no showing that defendant planned to call his wife as a witness or what her testimony would have been.

APPEAL by defendant from *Crissman, Judge,* 6 December 1971 Regular Session, Superior Court, WILKES County.

Defendant was charged in a valid bill of indictment with feloniously discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1. The case was consolidated, without objection, with two other misdemeanor charges for the purpose of trial, and the jury returned a verdict of guilty as to each of the three offenses. Defendant's appeal is from the conviction and resulting sentence for the felony.

Attorney General Morgan, by Assistant Attorney General Mitchell, for the State.

Whicker, Vannoy and Moore, by Howard C. Colvard, Jr., for defendant appellant.

MORRIS, Judge.

Defendant's sole assignment of error is that the trial court abused its discretion in denying his motion for a continuance made at the beginning of trial. *State v. Garner,* 203

N.C. 361, 166 S.E. 180 (1932); *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948). On 8 December 1971, the trial court informed defendant's attorney that before ruling on any motion for a continuance, he would require a doctor's certificate verifying that defendant's wife was ill. On 9 December 1971, the case was called for trial but before any evidence was presented, defendant moved for a continuance. Defendant's attorney admitted that he did not have the required doctor's certificate. Defendant's attorney did go on to say, however, that he did have a card which was an application to admit the defendant's wife to the hospital on the following day, 10 December 1971. In his discretion, the trial court denied defendant's motion for a continuance, and an exception was duly noted.

The record of the case on appeal contains no showing that defendant planned to call his wife as a witness or if he did, what her testimony would have been.

> "Whether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice. (Citation omitted.)" *State v. Moses,* 272 N.C. 509, 512, 158 S.E. 2d 617 (1968).

We find neither error nor prejudice in this case.

No error.

Judges VAUGHN and GRAHAM concur.

EULA SALE v. GOLDIE JAMES AND MAPLE GROVE REST HOME, INC.

No. 7221SC243

(Filed 28 June 1972)

Negligence § 57— assault by rest home employee — instructions

In an action to recover actual and punitive damages for an alleged assault on plaintiff by an employee of a rest home, the charge of the court, when considered contextually and in its entirety, adequately presented and applied the law to the evidence in the case.

APPEAL by defendants from *Long, Judge,* 1 November 1971 Civil Session of Superior Court held in FORSYTH County.

Plaintiff instituted this action to recover for actual and punitive damages allegedly incurred as the result of an assault on her person by defendant, Goldie James, while acting as the agent and employee of defendant, Maple Grove Rest Home, Inc. From the entry of judgment on the verdict awarding damages, defendant appealed.

Steadman Hines and Blackwell, Blackwell, Canaday, Eller & Jones by Walter R. Jones, Jr., for plaintiff appellee.

Wilson and Morrow by Harold R. Wilson and John F. Morrow for defendant appellant.

VAUGHN, Judge.

The evidence in this case was conflicting. That offered by plaintiff tended to show a brutal, malicious and unprovoked attack by defendant, Goldie James, which was acquiesced in by the General Manager of the corporate defendant. Defendants' evidence was to the contrary. The jury chose to believe the evidence presented by plaintiff, and we are not inclined to disturb their verdict. The only assignments of error brought forward by defendant are to the charge of the court. When this charge of the court is read contextually and considered in its entirety, we hold that it presented and applied the law to the evidence in the case in such a manner as to leave no reasonable cause to believe that the jury was misled or misinformed. We find no prejudicial error.

No error.

Judges MORRIS and GRAHAM 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. 7218IC443

(Filed 28 June 1972)

Master and Servant § 62— workmen's compensation — automobile accident — relation to employment

The record supported the Industrial Commission's determination that the deceased employee's fatal automobile accident while returning home on a weekend from his job site in another state did not arise out of and in the course of his employment.

APPEAL by plaintiffs from Award of the North Carolina Industrial Commission filed 24 November 1971.

From an award determining that the death of an employee did not arise out of and during the course of his employment and therefore denying death benefits, plaintiffs appealed.

Narron, Holdford and Babb by Talmadge L. Narron, for plaintiff appellants.

Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr., for defendant appellees.

VAUGHN, Judge.

For the factual background of this controversy see the opinion disposing of an earlier appeal. *Gay v. Supply Co.*, 12 N.C. App. 149, 182 S.E. 2d 664. In that decision, the order of the Commission was reversed and the cause was remanded for further deliberations. On 24 November 1971, the Commission again determined that the deceased employee's fatal accident did not arise out of and in the course of his employment.

Counsel for appellants have pursued their cause with admirable diligence. We hold, however, that the findings and conclusions of the Commission are supported by the record and, in law, we find no reversible error. The Award of the North Carolina Industrial Commission is affirmed.

Affirmed.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. ROBERT RAY GORDON

No. 7217SC452

(Filed 28 June 1972)

1. **Criminal Law § 148— newly discovered evidence — denial of new trial — appeal**

   Appeal does not lie from a refusal to grant a new trial for newly discovered evidence.

2. **Criminal Law § 131— new trial for newly discovered evidence — denial — discretion**

   The trial court did not abuse its discretion in the denial of defendant's motion for a new trial on the ground of newly discovered evidence.

PURPORTED appeal by defendant, treated as petition for certiorari, from *Crissman, Judge,* 3 January 1972 Session of Superior Court held in SURRY County.

Defendant was arrested, tried, and convicted in January 1971 on charges of breaking and entering and larceny. He appealed and no error was found. (12 N.C. App. 38, 182 S.E. 2d 14). On 26 October 1971, defendant filed a petition for new trial based on newly discovered evidence. A hearing on the petition was conducted before Judge Crissman, who denied the relief sought. Defendant gave notice of appeal.

Attorney General Robert Morgan by Associate Attorney Ralf F. Haskell for the State.

Carroll F. Gardner and Charles M. Neaves for defendant appellant.

VAUGHN, Judge.

[1, 2] Defendant contends that the trial court erred in refusing to grant his petition for a new trial on the basis of newly discovered evidence. Appeal does not lie from a refusal to grant a new trial for newly discovered evidence. *State v. Thomas,* 227 N.C. 71, 40 S.E. 2d 412; 3 Strong, N.C. Index 2d, Criminal Law, § 148. We have, however, treated defendant's appeal as a petition for *certiorari,* which is allowed. The granting of a new trial based on newly discovered evidence rests within the sound discretion of the trial court, and its ruling thereon is not reviewable in the absence of a showing of abuse

of that discretion. *State v. Williams,* 244 N.C. 459, 94 S.E. 2d 374; *State v. Blalock,* 13 N.C. App. 711, 187 S.E. 2d 404. After having carefully reviewed the record in the case, we find no abuse of discretion. The order denying defendant's petition is affirmed.

Affirmed.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. BENJAMIN HOLLIS

No. 7219SC405

(Filed 28 June 1972)

Assault and Battery § 14— felonious assault — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for felonious assault.

CERTIORARI in lieu of appeal from *Judge Robert M. Martin* 4 October 1971 Session of Superior Court held in CABARRUS County.

Defendant was found guilty of assaulting Douglas Richardson with a firearm inflicting serious injury. Judgment was entered imposing a five-year prison sentence. Defendant was also found guilty of assaulting Ricky Harris with a deadly weapon with intent to kill, inflicting serious injury. Judgment was entered imposing a prison sentence of not less than eight nor more than ten years. The sentences are to run concurrently. Defendant appealed.

Attorney General Robert Morgan by William Lewis Sauls, Associate Attorney, for the State.

Cecil R. Jenkins, Jr., for defendant appellant.

VAUGHN, Judge.

The only assignment of error brought forward by defendant, through his court-appointed counsel, is that the court erred in failing to grant defendant's motion for nonsuit in the charge of felonious assault on Douglas Richardson. The State

offered competent and convincing evidence of the defendant's guilt. That it was sufficient to go to the jury is so obvious as not to require discussion. In the trial from which defendant appealed, we find no error.

No error.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. SHELIA THOMPSON

No. 7210SC482

(Filed 28 June 1972)

Criminal Law §§ 155.5, 166— failure to docket record and file brief in apt time

Appeal is subject to dismissal for failure to docket on time and for failure to file a brief when due.

APPEAL by defendant from *Godwin, Judge,* 10 January 1972 Special Session of WAKE Superior Court.

Defendant appeals from judgment entered subsequent to a verdict of guilty as charged on a warrant alleging unlawful resisting, delaying and obstructing a police officer in attempting to discharge a duty of his office.

Attorney General Robert Morgan by Edwin M. Speas, Jr., Associate Attorney, for the State.

Paul, Keenan & Rowan by Jerry Paul, for defendant appellant.

VAUGHN, Judge.

Defendant was represented at trial and on appeal by privately employed counsel. The appeal is subject to dismissal for failure to docket on time, and for failure to file brief when due. We have, however, considered the appeal on its merits and find no error.

No error.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. ARVIL LEE JOHNSON

No. 7217SC451

(Filed 28 June 1972)

Homicide § 23— instructions

Although two isolated portions of the court's charge in a homicide prosecution might be regarded as erroneous when taken out of context, the charge as a whole presented the law fairly and clearly to the jury and was free from prejudicial error.

APPEAL by defendant from *Crissman, Judge,* 3 January 1972 Session, Superior Court, SURRY County.

Defendant was charged with first degree murder. At trial, the solicitor announced that the State would proceed on the charge of second degree murder or manslaughter, as the evidence might warrant. Defendant entered a plea of not guilty. The jury returned a verdict of guilty of second degee murder. Defendant appeals from the judgment entered. He was represented at trial by court-appointed counsel and is represented on appeal by the same counsel appointed by the court.

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

Carroll F. Gardner for defendant appellant.

MORRIS, Judge.

Defendant's only assignments of error are directed to two portions of the court's instructions to the jury. These two isolated portions of the charge taken out of context as they are and standing alone, might be regarded as erroneous. However, the charge to the jury must be construed contextually and not in detached parts. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971); *State v. Holt,* 13 N.C. App. 339, 185 S.E. 2d 429 (1971), cert. denied 280 N.C. 303 (1972). Here the charge as a whole presents the law fairly and clearly to the jury and is free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIAM STACY BAREFOOT

No. 7211SC414

(Filed 28 June 1972)

APPEAL by defendant from *Brewer, Judge,* 8 February 1971 Session of Superior Court held in JOHNSTON County.

By indictments proper in form defendant was charged with (1) murder of Mrs. Willie Albritton Dickinson, (2) felonious breaking or entering and larceny from the home of Mrs. Dickinson, and (3) felonious larceny of a 1967 Chevrolet automobile, the property of Mrs. Dickinson. The defendant, represented by court-appointed counsel, pleaded guilty to second degree murder, felonious breaking or entering, and felonious larceny of an automobile. The State entered a *nolle prosequi* as to the count charging felonious larceny from the home of Mrs. Dickinson. After due inquiry as to the voluntariness of the pleas, the Court adjudicated that each of the pleas of guilty was freely, understandingly, and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. The Court entered judgments imposing prison sentence of 30 years for second degree murder, 10 years for felonious breaking or entering, and 10 years for felonious larceny, all sentences to run consecutively. Defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Parks H. Icenhour for the State.

W. Kenneth Hinton for defendant appellant.

HEDRICK, Judge.

Defendant's court-appointed counsel concedes that he can find no error in this case. We too have carefully examined the record and find no prejudicial error.

The judgments appealed from are

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES BREEDEN

No. 7212SC503

(Filed 28 June 1972)

APPEAL by defendant from *Clark, Judge,* 28 February 1972 Session of Superior Court held in CUMBERLAND County.

Defendant was tried on a valid bill of indictment charging him with armed robbery. From a verdict of guilty and judgment imposing sentence, defendant appealed.

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

James Godwin Taylor for defendant appellant.

VAUGHN, Judge.

No assignments of error have been brought forward on appeal. We have examined the record and find no error.

No error.

Judges MORRIS and GRAHAM concur.

MRS. CARRIE BELL BATTLE, MOTHER AND GUARDIAN AD LITEM OF DAVID BATTLE AND CHARLES ANDREW BATTLE, SONS; DAVID DANIELS, DECEASED EMPLOYEE v. BRYANT ELECTRIC COMPANY, INC., EMPLOYER, AND AMERICAN AUTOMOBILE INSURANCE COMPANY, CARRIER

No. 7215IC280

(Filed 12 July 1972)

Master and Servant § 62— workmen's compensation — death prior to leaving for work — employer's truck

The death of an employee who was crushed by the dump body of his employer's truck while warming up the truck before he ate breakfast preparatory to going to the job site arose out of and in the course of his employment where the employer regularly furnished the employee a truck for transportation to and from the job site, and the employee customarily warmed up the truck before he ate breakfast each morning.

APPEAL by defendant from Opinion and Award of the North Carolina Industrial Commission filed 12 November 1971.

The evidence, except where quoted, tended to show that the deceased, David Daniels, was living in Wilmington prior to his death at Moncure on 9 May 1970, and he was a pipe layer employed by the Bryant Electric Company, Inc. (Bryant) on the date of his death. At that time Bryant had two small projects at Moncure, one with Allied Chemical and the other with Evans Product. The two projects were about two miles apart. While working in Moncure, the deceased was staying at a rooming or boarding house about two miles from the job site. This rooming house had been recommended to the deceased's foreman as a place for the workmen to stay while they were away from Wilmington, and he knew that the deceased was staying there.

On Friday night, 8 May 1970, the deceased, together with the foreman and some of the other workmen, worked in Moncure until about midnight installing a "raw water tank" near the Haw River, and the foreman, Mr. W. B. Ladner, instructed the deceased to take a company-owned dump truck as transportation to his rooming house and to return to the job "around six" the following morning. The men usually returned to their homes in Wilmington on Friday nights, but on this occasion it was necessary to return to the job site on Saturday and fill in dirt around the water tank to prevent the possibility of it washing out should the river rise, as it had done on a previous occasion. After this filling in was completed, the men planned to return to Wilmington.

The deceased had no function or duties in connection with the Bryant dump truck that the foreman instructed him to take, other than to drive it back and forth from his rooming house to the job site. Occasionally, the deceased would pick up some of the other men who lived in the same area and take them to or from work, or would take them to and from lunch in the truck. When the deceased was not going to return to the work site, he would leave the truck at the plant. The only tools on the truck were some hand tools, such as "shovels, picks, and boots."

About ten minutes before six o'clock on the following morning (9 May 1970), the deceased, before breakfast, was seen in

the truck with the motor running. The owner of the "rooming and boarding place" where deceased was living testified:

> " * * * The next time I saw him was that Saturday morning. I was going to call him and tell him to come eat. I heard the truck running. That was about ten 'til six. I usually fixed breakfast for him in the morning. I was looking out my picture window. He got out of the truck and went on the side. I was going to call. I didn't see him anymore. This boy ran out hollering. I ran out the door to see what was the matter, and I saw Mr. Daniels under the truck.
>
> When I first looked out to call him I heard the motor running. I don't remember whether the motor was running when I went outside. I was so excited after I saw him pinned under the truck, I ran back and started hollering for my husband to come. * * *
>
> * * * I was not there when his body was taken from under the dump part of the truck. I was trying to get an ambulance. When I came back, my sister and her husband were trying to get him out. I was not there when they took him out. I had run back to the house to call an ambulance. I got there when he was laying down on the side of the truck.
>
> His pocketbook was given to me. It was taken out of his back pocket. I saw it taken out of his hip pocket. It contained a hundred and some few dollars. I saw my brother take it from his hip pocket. He gave it to me. I gave it to Mr. Ladner.
>
> Mr. Daniels never used the truck when he was off work for his personal use. I never saw him with it. If he did, it was while I was working. I never saw him use it for his personal use."

Plaintiff's witness Lacy Stacker testified that he lived where the deceased was living and knew him and said:

> " * * * I helped to get him out from under the dump. I raised the dump. I did not know how to raise it, I just messed with every lever until I found the right one. The engine was off until my stepfather tried to start the engine. I got inside and tried every lever. I tried every

lever and got it raised. When I raised it, the tools fell off. All of the tools had been in the back of the truck until it was raised by me. Then we could get Mr. Daniels' body out. There were no tools there by him where he was. There were no tools by him or on the ground or in the truck. * * * I knew of Mr. Daniels' going out to the truck before breakfast on other occasions because the truck is parked right there by my bedroom when it is parked and I could hear it when it starts up. He started it on other occasions, like getting up in the morning and warming it up like you might do your car. * * * "

The autopsy report was introduced into evidence and indicated that the deceased was "crushed by hydraulic press" and that the probable cause of his death was "crush injury of chest and abdomen."

Plaintiff's evidence tended to show that David Battle and Charles Andrew Battle were the illegitimate children of the deceased.

Defendant's evidence tended to show that after the deceased's body was removed from the truck on 9 May 1970, the truck and dump body were tested and there was no malfunction —the dump body worked properly in the way it was designed to work. There was nothing about the truck that could be serviced from the place where the body of the deceased was found. There was a "shiny," clean space underneath the truck at a place where no other part of the truck body touched, but nothing could be hidden there that could not be seen. Defendant and its carrier investigated the accident and were unable to determine what the deceased was doing at the time he was crushed by the dump body.

The hearing commissioner found that on 9 May 1970 the deceased sustained an injury by accident arising out of and in the course of his employment with the defendant employer, which accident resulted in his death on the same date, and made an award as provided by statute to the two minor illegitimate children of the deceased. Upon appeal, the Full Commission adopted as its own the opinion and award of the hearing commissioner. From the opinion and award of the Full Commission, the defendants appealed to the Court of Appeals.

Beech & Pollock by H. E. Beech for plaintiff appellees.

Smith, Moore, Smith, Schell & Hunter by Stephen P. Millikin for defendant appellants.

MALLARD, Chief Judge.

The only question brought forward and presented on this appeal is whether the Industrial Commission committed error in finding and concluding that the injury to and death of David Daniels arose out of and in the course of his employment with the defendant employer.

> "The phrases 'arising out of' and 'in the course of' the employment are not synonymous, but involve two distinct ideas and impose a double condition, both of which must be satisfied in order to render an injury compensable. The words 'out of' refer to the origin or cause of the accident, and an accident arises out of the employment if there is a causal connection between the accident and the employment, or if the accident is the result of a risk originating in the employment or incidental to it. * * *
>
> * * *
>
> Where the cause of the accident is unexplained but the accident is a natural and probable result of a risk of the employment, the finding of the Industrial Commission that the accident arose out of the employment will be sustained; but where the cause of the accident is known and such cause is independent of, unrelated to, and apart from the employment, and results from a hazard to which others are equally exposed, compensation is not recoverable.
>
> The words 'in the course of' the employment refer to the time, place, and circumstances of the accident, and an accident arises in the course of the employment if it occurs while the employee is engaged in a duty which he is authorized or directed to undertake or in an activity incidental thereto." 5 Strong, N. C. Index 2d, Master and Servant, § 55.

In *Hardy v. Small,* 246 N.C. 581, 99 S.E. 2d 862 (1957), it is said:

> "The basic rule is that the words 'out of' refer to the origin or cause of the accident, and that the words 'in the

course of' refer to the time, place and circumstances under which it occurred. *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266; *Alford v. Chevrolet Co.*, 246 N.C. 214, 217, 97 S.E. 2d 869.

* * *

An injury does not arise out of and in the course of the employment unless it is fairly traceable to the employment as a contributing proximate cause. Hence, injury by accident is not compensable if it results from a hazard to which the public generally is subject. *Walker v. Wilkins, Inc.*, 212 N.C. 627, 194 S.E. 89; *Marsh v. Bennett College*, 212 N.C. 662, 194 S.E. 303, tornado cases; *Plemmons v. White's Service, Inc.*, 213 N.C. 148, 195 S.E. 370, mad dog case."

The evidence in this case tends to show that on this occasion the deceased was engaged in a special emergency job to cover the exposed water tank so that it would not float out of the hole in which it had been placed if the river should rise, and that the accident occurred on a Saturday, which was outside regular working hours. The truck that killed deceased customarily had been furnished to him by the employer as a means of transportation to and from the work sites. Also, he habitually warmed up the truck each morning preparatory to going to the job site before he ate breakfast.

On the morning in question the deceased "was going back to work at six" to help fill in dirt around the tank. It was ten minutes until six and before he had eaten breakfast when his landlady saw him warming up the truck. Perhaps the deceased may have thought he was late in going to work, or perhaps he detected something wrong with the truck while he was warming it up and had decided to attempt to fix it, but the record is silent as to how and why he got under the dump body and as to how or what caused it to come down on him and crush him between it and the chassis of the truck. It is not necessary, however, for a plaintiff in such cases to offer evidence explaining the exact cause of the accident. *Puett v. Bahnson Co.*, 231 N.C. 711, 58 S.E. 2d 633 (1950) and *Robbins v. Hosiery Mills*, 220 N.C. 246, 17 S.E. 2d 20 (1941). See also 99 C.J.S., Workmen's Compensation, § 235. Whatever caused this accident, it must have happened very quickly because the landlady was close enough to hear the truck running while the deceased was warming it up, and there is no evidence that she

heard him make any outcry before he was crushed to death by the truck.

The use by the deceased of the employer's truck on this occasion was convenient and advantageous for both employer and employee, and the evidence tends to show that the employer regularly furnished this employee a truck for transportation to and from the job.

In 1 Larson, Workmen's Compensation Law, §§ 17.00 and 17.10, it is said:

> "When the journey to or from work is made in the employer's conveyance, the journey is in the course of employment, the reason being that the risks of the employment continue throughout the journey.
>
> * * * The justification for this holding is that the employer has himself expanded the range of the employment and the attendant risks. He has, in a sense, sent the employee home on a small ambulatory portion of the premises, just as the sailor on a British ship is conceived to be on a little floating fragment of Britain herself."

We hold that the fatal accident in this case was the result of a risk originating in and traceable to the employment. It is uncontradicted that the deceased was killed by the vehicle furnished him by the employer for transportation, and the evidence is sufficient to show that his death occurred at a time when he was preparing the truck as he customarily did for the return trip to the job site. See *Beck v. Ashton,* 124 Pa. Super. 307, 188 A. 368 (1936) and 99 C.J.S., Workmen's Compensation, § 235. We also hold that the evidence was sufficient to support the finding that the deceased sustained an injury by accident arising out of and in the course of his employment with the defendant employer, which accident resulted in his immediate death, and that the award of compensation was proper.

Affirmed.

Judges CAMPBELL and BRITT concur.

FRED W. MABE, EMPLOYEE, PLAINTIFF v. THE NORTH CAROLINA GRANITE CORPORATION, EMPLOYER, SELF-INSURER, DEFENDANT

No. 7217IC444

(Filed 12 July 1972)

1. **Master and Servant § 94— workmen's compensation — findings not excepted to**

Findings of fact by the Industrial Commission which are not the subject of any exception are binding on appeal.

2. **Master and Servant § 68— workmen's compensation — silicosis — age and education — total disability**

Findings by the Industrial Commission that plaintiff, age 61, has a fifth grade education and his occupational abilities extend only to jobs requiring hard labor, and that he is unable to perform hard labor due to shortness of breath resulting from silicosis, *held* sufficient to support the Commission's conclusion that plaintiff is totally incapacitated because of silicosis to earn, in the same or any other employment, the wages he was earning at the time of his last injurious exposure, notwithstanding the advisory medical committee rated plaintiff as 40% disabled.

3. **Master and Servant § 68— workmen's compensation — disability from silicosis**

In determining an employee's disability from silicosis, the question is what effect has the disease had upon the earning capacity of that particular employee, not what effect a like physical impairment would have upon an employee of average age and intelligence.

4. **Master and Servant § 68— workmen's compensation — industrial disease — age and education**

If an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to the employee's advanced age and poor education on the ground that if it were not for such factors he might still retain some earning capacity.

APPEAL by defendant from order of Industrial Commission, filed 15 February 1972.

Plaintiff worked as a stone cutter for defendant for a period of 30 to 35 years. He quit his job in 1968 and subsequently filed claim against defendant for disability caused by silicosis. Defendant voluntarily paid compensation as provided by G.S. 97-61.5 for a period of 104 weeks. In October of 1971 the matter came on for hearing before Deputy Commissioner Roney for purposes of determining, as required by G.S. 97-61.6, "what

compensation, if any, the employee is entitled to receive in addition to the 104 weeks already received."

The only evidence offered at the hearing was testimony of plaintiff and a report from the advisory medical committee. The report, filed 3 August 1971, indicates that pursuant to G.S. 97-61.4, plaintiff was examined by the committee for the third and final time and in the opinion of the committee "he is 40% disabled from employment in his previous or any other occupation."

Plaintiff's testimony tends to show that he has not held regular employment since 1968 because, due to a shortness of breath and a lack of strength, he can no longer perform hard labor. Plaintiff has only a fifth grade education. He can read a little but "can't write much." He stated: "I have no education and don't know nothing but hard labor and I can't get a job like that."

Commissioner Roney entered an order finding facts and concluding that plaintiff is totally incapacitated for work because of silicosis. Based upon this conclusion, plaintiff was awarded total disability benefits as provided by G.S. 97-61.6. The Full Commission affirmed Mr. Roney's order and defendant appealed.

Hiatt and Hiatt by David L. Hiatt for plaintiff appellee.

Gardner and Gardner by John C. W. Gardner for defendant appellant.

GRAHAM, Judge.

Defendant does not dispute the fact plaintiff suffers some disability from silicosis contracted while exposed to silica during his employment by defendant. It says, however, that plaintiff is only partially incapacitated by his condition, and that the Commission erred in finding his disability to be total.

The term "disablement" as applied to cases of asbestosis and silicosis, "means the event of becoming actually incapacitated because of asbestosis or silicosis to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure. . . . " G.S. 97-54.

[1] In paragraphs 4 and 5 of the order, the Commission found that plaintiff, age 61, has a fifth grade education and his occupational abilities extend only to jobs requiring hard labor; and that, "he is unable to perform hard labor due to shortness of breath resulting from silicosis." These findings of fact are not the subject of any exception and are therefore binding upon appeal. *Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E. 2d 27; *Jacobs v. Manufacturing Co.*, 229 N.C. 660, 50 S.E. 2d 738; G.S. 97-86. Moreover, we find these findings supported by competent evidence. "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." *Thomason v. Cab Co.*, 235 N.C. 602, 605, 70 S.E. 2d 706, 708.

Defendant excepts to paragraph 7 of the order wherein it is stated, "[c]laimant's incapacity for work resulting from silicosis is total. . . . " It also excepts to the following conclusion: "Due to claimant's having been diagnosed as having Silicosis, Grade I, the Advisory Medical Committee rated claimant 40 percent disabled. However, this 40 percent rating coupled with claimant's education and experience which limit him to hard labor employment, which he cannot perform due to shortness of breath, renders claimant totally incapacitated ' . . . because of . . . silicosis to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure. . . . ' "

[2] The Commission's findings of fact are sufficient to establish that plaintiff is fully incapacitated because of silicosis to earn wages through work at hard labor, which is the only work he is qualified to do by reason of his age and education. In our opinion, these findings, which are not challenged by exception, justify the Commission's conclusion that the plaintiff is totally incapacitated because of silicosis to earn, in the same or any other employment, the wages he was earning at the time of his last injurious exposure.

[3] "Under the Workmen's Compensation Act *disability* refers not to physical infirmity but to a diminished capacity to earn money." *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857. The question is what effect has the disease had upon the earn-

ing capacity of this particular plaintiff; not what effect a like physical impairment would have upon an employee of average age and intelligence. The effect on this particular plaintiff is that he has been rendered totally incapacitated to earn any wages. To say that this might not be the case were plaintiff younger or better educated does not alter in the slightest the incapacity to earn which he actually suffers because of silicosis.

[4] Defendant contends that elements of age and poor education are factors which are beyond the control of an employer and cannot be considered in determining an employee's disability. The answer to this is that an employer accepts an employee as he is. If a compensable injury precipitates a latent physical condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable and no attempt is made to weigh the relative contribution of the accident and the pre-existing condition. 2 Larson, Workmen's Compensation Law, § 59.20, p. 88.109. By the same token, if an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to the employee's advanced age and poor learning on the grounds that if it were not for these factors he might still retain some earning capacity.

Our decision here is not in conflict with the recent case of *Dudley v. Motor Inn,* 13 N.C. App. 474, 186 S.E. 2d 188. In that case plaintiff contended she was entitled to compensation for total incapacity under G.S. 97-29 since the evidence indicated that a partial loss of use in her left hand rendered her unable to work as a cook, which was the only work she was experienced to do. This Court held to the contrary, saying plaintiff's compensation was controlled by the schedule set forth in G.S. 97-31(12) and (19) and by the express provision of G.S. 97-31 to the effect compensation in accordance with the schedule "shall be in lieu of all other compensation." In the instant case the provisions of G.S. 97-54 and 97-61.6 are controlling and the Commission correctly applied the provisions of these sections.

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. ADA ALTMAN

No. 728SC478

(Filed 12 July 1972)

1. **Searches and Seizures § 3— affidavit for search warrant — hearsay — confidential informant**

An affidavit to obtain a search warrant for narcotics may be based on hearsay from an undisclosed informant and need not reflect the personal observations of the affiant, but the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were present and from which the affiant concluded that the informant was credible and reliable.

2. **Searches and Seizures § 3— warrant to search for narcotics — affidavit**

Affidavit by a deputy sheriff stating that an informant had personal knowledge of the delivery of narcotic drugs and marijuana to defendant's residence at a specified time and date, that the sheriff's department had observed an unusual amount of traffic in and out of defendant's residence during the preceding year and had received other reports that defendant was dealing in drugs, and that the confidential informant "has proven reliable and credible in the past," *held* sufficient to support the issuance of a warrant to search defendant's residence and person for narcotics.

3. **Searches and Seizures § 3— affidavit — confidential informant — reliability**

Statement in an affidavit to obtain a search warrant that a confidential informant "has proven reliable and credible in the past" meets minimum standards for setting forth circumstances from which the affiant concluded that the informant was reliable.

4. **Criminal Law § 84; Searches and Seizures § 3— motion to suppress — sufficiency of affidavit for search warrant — failure to hold voir dire**

The trial court did not err in failing to conduct a *voir dire* hearing on the admissibility of evidence which defendant moved to suppress where defendant's challenge to the evidence was based on the sufficiency of the affidavit in support of a search warrant, and the affidavit and warrant were before the trial court.

APPEAL by defendant from *Cowper, Judge,* at the 17 January 1972 Session of WAYNE Superior Court.

Defendant was charged in a bill of indictment with possession of more than one gram of marijuana, which was a felony at that time.

The defendant entered a plea of not guilty.

At the trial, the State introduced evidence which, if believed, would tend to show that on 24 January 1971, Deputy

Sheriff Isaac Coley obtained a warrant to search the person and property of defendant Ada Altman. Armed with this warrant and accompanied by several other law enforcement officers, Deputy Coley went to defendant's residence in Goldsboro. The warrant was read to defendant, and a search of the residence was conducted. The officers then put defendant into a police car to take her to the police station where she was to be searched by the jailor's wife. In the police car, Deputy Coley and defendant sat in the back seat. When they arrived at the police station, Coley got out of the automobile and went around to the other side to open the door for defendant. As Coley approached the door on defendant's side of the automobile, he observed her take something wrapped in kleenex from her bosom and drop it on the ground outside of the automobile. The substance found in the kleenex was subsequently analyzed and found to be more than one gram of marijuana. Defendant was taken to the jail and searched by Mrs. Cobb, but nothing further was found. The marijuana was admitted into evidence over defendant's objection. No voir dire examination into the legality of the search was conducted.

Defendant testified in her own behalf and denied that she had ever seen the marijuana before Deputy Coley picked it up off the ground. She testified that when she got out of the police car, Deputy Coley said, "Mrs. Altman, you dropped something," and then he reached down and picked up something from the ground. Defendant testified that she told the officer she had not dropped anything. Defendant's son also testified as to the search of defendant's residence by the officers.

The jury returned a verdict of guilty and judgment was entered imposing a prison sentence.

From the verdict and judgment, defendant appealed.

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

Herbert B. Hulse for defendant appellant.

CAMPBELL, Judge.

Defendant assigns as error the admission into evidence of the marijuana alleged to have been seized from defendant.

Defendant contends that admission of this evidence was error because the affidavit on which the search warrant was based was insufficient and because no voir dire examination was conducted prior to the admission of this evidence.

Defendant argues that the supporting affidavit does not contain sufficient facts to support the issuance of a search warrant.

[1] G.S. 15-25 provides that a search warrant may be issued by any of the specified judicial officers upon a finding of probable cause for the search. An affidavit indicating the basis for the finding of probable cause must be a part of or attached to the warrant. G.S. 15-26. An affidavit may be based on hearsay from an undisclosed informant and need not reflect the personal observations of affiant, but the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were present and some of the underlying circumstances from which the affiant concluded that the informant was credible and reliable. *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964).

[2, 3] The affidavit in question is based on information given the affiant by an informer and substantiated by the affiant and other members of the Wayne County Sheriff's Department. The affiant stated that an informant had personal knowledge of the delivery of narcotic drugs and marijuana to the residence of defendant at 4:30 p.m. on 24 January 1971. Affiant stated that the Sheriff's Department had observed an unusual amount of traffic in and out of defendant's residence during the preceding year and other reports had been received that defendant was dealing in drugs. This affidavit is specific and detailed. It sets forth substantial underlying facts establishing probable cause for a search. The affidavit must also set forth circumstances from which the officer concluded that his informant was reliable. The affiant stated that the confidential informant, "has proven reliable and credible in the past." We are of the opinion that the circumstances set forth in support of the informant's reliability are the irreducible minimum on which a warrant may be sustained. The statement that the informant has proven reliable in the past is a statement of fact and not a mere conclusion. While we do not approve of such brevity in an affidavit, it does meet the minimum standards. See *State v. Moye,* 12 N.C. App. 178, 182 S.E. 2d 814 (1971).

" . . . Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. . . . " *United States v. Ventresca,* 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741.

We hold that this affidavit was sufficient and the search warrant, being adequate in all other respects, was valid.

[4] The defendant assigns as error the failure of the trial court to conduct a voir dire when defendant moved to suppress the evidence obtained under the warrant.

The voir dire is an examination out of the presence of the jury for the purpose of determining some preliminary question of fact. It is purely a procedural device. In ruling on some objections, particularly objections to the introduction of confessions or evidence seized without a warrant, it appears that a voir dire would almost always be necessary. For example, in ruling on the admissibility of a confession, the judge must find whether it was made voluntarily and it would appear that a voir dire is the only method for making such a determination. However, the case before us does not involve such an objection. The defendant has challenged the search warrant on the grounds that the affidavit (which is attached to the warrant) is insufficient. The affidavit and warrant were before the trial court. The sufficiency of the affidavit would appear from the face of the document itself. The affidavit is all that need be examined in order for the judge to rule on the challenge made here. Since all the evidence pertinent to this particular challenge was before the court, there was no need to conduct a voir dire. The trial court examined the affidavit and found it to be sufficient. The judge was asked to rule on a question which could be answered from the face of the affidavit and under these circumstances the defendant could not have been prejudiced by the trial court's failure to conduct a voir dire. We agree that a voir dire is the proper procedure where there is a motion to suppress evidence on the grounds that it is illegally obtained. *State v. Myers,* 266 N.C. 581, 146 S.E. 2d 674 (1966). But it is not required in every case. *State v. Eppley* and *State v. Block,* (filed 24 May 1972); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

We emphasize that defendant here has challenged the sufficiency of the affidavit itself, and we confine our decision in this case to that fact.

We hold that, in the circumstances of this case, it was not error for the trial court to rule on defendant's motion without conducting a voir dire.

In this trial we find,

No error.

Chief Judge MALLARD and Judge BRITT concur.

EUGENE WARDRICK BY HIS GUARDIAN AD LITEM, HERMAN WARDRICK v. EARL LEE DAVIS AND PETER DAVIS

No. 729SC396

(Filed 12 July 1972)

Automobiles § 94— riding with intoxicated driver — contributory negligence

Plaintiff's evidence established that he was contributorily negligent as a matter of law in riding in an automobile operated by defendant when he knew that defendant had been drinking beer and wine and was under the influence of intoxicants, although he may not have thought that defendant was drunk.

APPEAL by plaintiff from *Bone, Judge,* 17 January 1972 Special Civil Session of Superior Court held in FRANKLIN County.

The minor plaintiff, Eugene Wardrick, instituted this action through his Guardian Ad Litem, Herman Wardrick, against Earl Lee Davis, a minor and member of Peter Davis' household, and Peter Davis, the father of Earl Lee Davis and registered owner of a 1961 Plymouth involved in the complained of accident, seeking to recover damages for personal injuries resulting from a one car automobile accident.

Plaintiff alleged that on 7 April 1971 he was a passenger and invited guest in the 1961 Plymouth operated by the defendant, Earl Lee Davis, and that he was injured when the car left the paved portion of N. C. Highway # 56 and overturned three

times. Plaintiff alleged that his injuries were solely and proximately caused by the careless, reckless, negligent, and unlawful acts of the defendant, Earl Lee Davis, in the operation of the 1961 Plymouth just prior to and at the time of the accident. The specific actions, attributed to Earl Lee Davis, were that he operated said vehicle at a speed of approximatealy 80 m.p.h. in a 55 m.p.h. speed zone; that he failed to keep said vehicle under proper and reasonable control and failed to reduce his speed after being requested to do so by plaintiff; that he failed to keep a proper and careful lookout; and that he operated said vehicle while under the influence of intoxicating beverages, in violation of G.S. 20-138, which was unknown to plaintiff. Plaintiff further alleged that the negligence of Earl Lee Davis was imputed to the defendant, Peter Davis, under the family purpose doctrine.

In response, the defendants denied the material allegations in plaintiff's complaint, and alleged the plaintiff's contributory negligence as a bar to any recovery by plaintiff.

At trial, the plaintiff's evidence tended to show that on 7 April 1971 at about 7:00 p.m. plaintiff was injured while a passenger in an automobile driven by Earl Lee Davis.

Plaintiff testified that on the day of the accident he was 17 years old and in the 10th grade at Edward Best High School; that Earl Davis came by for him after school was out; that he and Davis with another friend, Austin, drove to Spring Hope, where they stopped and bought a six pack of the "big size beer"; that each drank about the same amount of the six beers, while riding around Spring Hope at about 4:00 or 4:20 p.m.; that at about 5 p.m. they bought a fifth of wine and "drank some" out of the bottle while parked on a dirt road; and that they then went to Austin's house where they stayed for about ten minutes.

Plaintiff stated, "I could have gotten out of the car at that time if I wanted to. I continued to ride with him knowing that he had drunk his part of the beer and his part of the wine."

As to the events preceding the accident, plaintiff testified as follows:

> "Austin got in his own car and we were going to see Austin's girl friend. Me and Earl left Austin's house first.

"At the time we left I was feeling the effect of the alcoholic beverage. Earl did not act like he was drunk. We got on Highway 56 going toward Castalia and Austin was following us. Austin passed us and Earl was driving slowly then, no more than forty miles per hour; we had pulled off at the stop sign; had traveled about one-fourth mile; we drove about two miles further before Earl lost the car in the curve."

C. G. Todd, a North Carolina Highway Patrolman who investigated the accident, testified that when he arrived at the accident scene the plaintiff and defendant, Earl Lee Davis, had been taken to the hospital. At approximately 8:00 p.m., Patrolman Todd visited the hospital and made observations, as to which he testified as follows:

"Based upon my observation of Mr. Davis [Earl] and Mr. Wardrick, both had been drinking. I smelled alcohol on both of them. With reference to defendant Davis, I smelled a strong odor of some intoxicating beverage about his breath and person, his pupils were dilated in his eyes, they were glassy, eyes were glassy, bloodshot, he was thick tongued, mush mouthed, highly excited, little bit confused, and his movements were not that of a normal person.

"Mr. Wardrick had a strong smell of some intoxicating beverage about his breath and person. He was a little more thick tongued than Mr. Davis."

At the close of plaintiff's evidence, the defendants moved for a directed verdict, their motion was allowed, and plaintiff appealed.

Hubert H. Senter for plaintiff-appellant.

Teague, Johnson, Patterson, Dilthey & Clay, by I. Edward Johnson, for defendant-appellees.

BROCK, Judge.

The only assignment of error that plaintiff brings forward on this appeal is that the trial judge erred in granting defendants' motion for a directed verdict at the close of plaintiff's evidence. The decision of the trial judge was based on the reason

that plaintiff's evidence tended to show that he was guilty of contributory negligence as a matter of law. We agree.

The thrust of plaintiff's argument is that his evidence was sufficient to establish a case for the jury and that his evidence fails to show that he was contributorily negligent as a matter of law. In fact, plaintiff relies upon *Jackson v. Jackson,* 4 N.C. App. 153, 166 S.E. 2d 541, and the cases cited therein. However, we find *Jackson* and the other cases plaintiff cites distinguishable in that in each case there were conflicting inferences which might be drawn from the circumstances and there were discrepancies and contradictions in the evidence for jury determination.

In the present case, plaintiff in his complaint alleged that defendant (Earl Davis) operated his vehicle upon the public roads of North Carolina while under the influence of intoxicating beverages in violation of G.S. 20-138, which was unknown to plaintiff. However, the evidence offered by plaintiff and his witnesses, even in the light most favorable to plaintiff, tends to show that both plaintiff and defendant, Earl Davis, had consumed a quantity of beer and a quantity of wine. Obviously, the defendant and plaintiff had been drinking and the plaintiff had knowledge of defendant's condition resulting from the spirits. In fact, the only clear inference from plaintiff's evidence was that the defendant Earl Davis was under the influence or intoxicated and no other reasonable conclusion could be drawn therefrom. The inference of defendant's being under the influence is unequivocal and is not diminished by plaintiff's pleading that this fact was unknown to him. The plaintiff's own statement that he was feeling the effect of the alcoholic beverage refutes any theory that he did not have knowledge of defendant being under the influence when both of them "drank about the same amount."

The language of Justice Sharp in *Davis v. Rigsby,* 261 N.C. 684, 136 S.E. 2d 33, which follows, is controlling:

"It is negligence *per se* for one to operate an automobile while under the influence of an intoxicant within the meaning of G.S. 20-138. [citation omitted]. If one enters an automobile with knowledge that the driver is under the influence of an intoxicant and voluntarily rides with him, he is guilty of contributory negligence *per se.* [citation omitted]."

In the case now before us, the plaintiff's evidence tends to show that he had knowledge that defendant had been drinking beer and wine during the afternoon in his presence and that he entered the car and rode with the defendant, whom plaintiff must have known to be under the influence of intoxicants, although he may not have thought him to be drunk. "He [plaintiff] cannot avoid the consequences of his lack of prudence by saying that the defendant was not *drunk*. The two terms are not necessarily synonymous." *Davis v. Rigsby, supra.*

Therefore, the plaintiff's evidence is not conflicting and it clearly tends to show that he was contributorily negligent as a matter of law. The directed verdict for defendant was proper and the order is

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. ALLEN VENELL LASSITER

No. 7214SC474

(Filed 12 July 1972)

1. Burglary and Unlawful Breakings § 2— felonious entry — breaking

A breaking is not an essential element of the offense of felonious entry of a building with intent to commit larceny therein. G.S. 14-54(a).

2. Criminal Law § 76— in-custody statement — determination of admissibility

Trial court's determination that defendant's in-custody statement to a detective was intelligently and voluntarily made without threats or promises being made to defendant was supported by the State's evidence presented on *voir dire* tending to show that the detective advised defendant of his constitutional rights, that defendant stated to the detective that he understood his rights, and that defendant signed a written waiver of his rights.

3. Criminal Law § 76— in-custody statement — voir dire — conflict in evidence

It was up to the trial judge to resolve the conflict in the evidence as to whether defendant read the complete written waiver of his rights before he signed it.

4. Criminal Law § 122— additional instructions after retirement of jury

When the jury returned after deliberating less than an hour and announced that it had not agreed on a unanimous decision, the trial court did not err in directing the jury to deliberate further and in giving the jury instructions relating to its duty to make a diligent effort to arrive at a verdict.

APPEAL by defendant from *Cooper, Judge,* 24 January 1972 Session of Superior Court held in DURHAM County.

Defendant was charged in a bill of indictment, proper in form, with the felonious entry of a building with the intent to commit larceny therein. He entered a plea of not guilty and the jury returned a verdict of guilty. Judgment was entered upon the verdict imposing an active prison sentence and defendant appealed.

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

Felix B. Clayton for defendant appellant.

GRAHAM, Judge.

Defendant assigns as error the overruling of his motion for 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.

The State's evidence tends to show the following: On 18 November 1971, Ernest Gann, an officer of Gann Industrial Suppliers Co., Inc., went to inspect an old building owned by the company and located on South Alston Avenue in Durham. The building, which is used as a storage facility, contained old but valuable knitting machines and dyeing equipment. Most of the machines have parts made of brass or copper. When Gann arrived at the building he heard banging noises coming from the basement. He located a police officer and the two men entered the building together. They found defendant and another man in the basement of the building. Defendant had tools in his hands and the men "were working on trying to get two pieces of brass apart." Neither defendant nor his companion had permission to enter the building. Defendant later admitted in a statement to a police detective that he had entered the building to "steal" brass fittings which he intended to sell at a junkyard.

[1] The State's evidence indicated that no breaking was necessary for defendant to gain entry to the building. The building's doors and windows were out and in past years it had been subject to a great deal of vandalism and pilfering. However, a breaking is not a necessary element of the offense charged here. G.S. 14-54(a) provides that any person who breaks *or enters* any building with intent to commit any felony or larceny is guilty of a felony. The offense defined in this section is complete, all other elements being present, if there was an entry with felonious intent. *State v. Vines,* 262 N.C. 747, 138 S.E. 2d 630; *State v. Bronson,* 10 N.C. App. 638, 179 S.E. 2d 823.

[2] Defendant contends the court erred in allowing in evidence an in-custody statement made by defendant to a Durham detective. When defendant objected to testimony about the statement, the court ordered a voir dire hearing. At the conclusion of this hearing, the court made full findings of fact and concluded that the statement was intelligently and voluntarily made without threats or promises being made to defendant.

"It is well established in North Carolina that findings of fact made by the trial judge and conclusions drawn therefrom on the voir dire examination are binding on the appellate courts if supported by evidence." *State v. Accor* and *State v. Moore,* 281 N.C. 287, 291, 188 S.E. 2d 332, 335. Evidence presented by the State on voir dire tended to show that defendant was fully advised by the detective as to his constitutional rights; that defendant stated to the detective that he understood his rights; and that defendant then signed a paper writing stating in part, "I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. I am not under the influence of drugs, alcohol, or any other pills. No promises or threats have been made to me, and no pressure of any kind has been used against me by any officer or any other person." The sufficiency of this evidence to support the court's findings and conclusions is beyond question.

[3] Defendant argues that the court should have found from his testimony on voir dire that he did not read the complete written waiver of his rights before he signed it. There was other evidence to the contrary. Therefore, it was up to the trial judge to resolve the conflict. *State v. Smith,* 278 N.C. 36, 178 S.E.

2d 597, *cert. denied,* 403 U.S. 934, 29 L.Ed. 2d 715, 91 S.Ct. 2266 (1971).

Through his third and fourth assignments of error defendant contends the court erroneously allowed the solicitor to ask certain questions on cross-examination. We have carefully examined each of the questions subject to exception and conclude that all were well within the bounds of legitimate cross-examination.

[4] Defendant's final contention is that the court should have ordered a mistrial when the jury returned after deliberating less than an hour and announced that they had not agreed on a "unanimous decision." The court directed the jury to deliberate further and gave appropriate instructions relating to their duty to make a diligent effort to arrive at a verdict. Nothing in the court's language tends in any way to coerce the jury to arrive at a verdict or to intimate any opinion of the court as to what the verdict should be. We find no merit in this assignment of error. *State v. Brown,* 280 N.C. 588, 187 S.E. 2d 85.

No error.

Judges MORRIS and VAUGHN concur.

L. E. GARRIS AND WIFE, ETHEL GARRIS v. G. L. BUTLER AND WIFE, WILLIE MAE BUTLER

No. 7212DC367

(Filed 12 July 1972)

1. Quieting Title § 2— burden of proof

In an action to remove cloud from title, the burden is upon plaintiffs to prove title good against the whole world or against the defendants by estoppel.

2. Adverse Possession § 1— nature of possession

In order for adverse possession to ripen title in the possessor, the possession must be actual, open, hostile, exclusive and continuous.

3. Adverse Possession § 3— belief that land is included in claimant's deed

Where a grantee went into possession of the tract of land conveyed and also a contiguous tract under the mistaken belief that the

contiguous tract was included within the description in his deed, no act of the grantee, however exclusive, open and notorious, constituted adverse possession of the contiguous tract so long as he thought his deed covered the contiguous tract, since there was no intent on his part to claim adverse to the true owner.

APPEAL by defendant from *Herring, District Judge,* 19 October 1971 Session of District Court held in CUMBERLAND County.

This is a civil action to remove cloud from title of a 2.14 acre tract of land claimed by plaintiffs, L. E. Garris and wife, Ethel Garris, and defendants, G. L. Butler and wife, Willie Mae Butler. In their complaint, plaintiffs alleged that in the year 1948 they "assumed the full, complete, open, notorious and adverse possession" of a 2.14 acre tract of land in Cumberland County, North Carolina, and that for a period of more than 21 years prior to the commencement of this "have been in actual, open, notorious, hostile, continuous, exclusive and adverse possession of said land described in this complaint under known and visible lines and boundaries." Defendants filed answer denying the material allegations of the complaint but admitted "that they have an interest or estate in the land described in the complaint adverse to the claim of the plaintiffs."

At a trial before the judge without a jury, the plaintiffs offered evidence tending to show that in 1948 they purchased from a Mrs. Beatty a 7.2 acre tract of land (Beatty land) adjacent to and south of the land in controversy. In 1948 the plaintiffs rented a portion of the land in controversy to a Mrs. Evans for a hog pasture. Mrs. Evans kept the hogs on the land from time to time until about 1960. The plaintiffs, Mrs. Evans, and others went on the land whenever they desired, and the plaintiffs cut wood for their barbeque pit from time to time. The plaintiffs never listed the property for taxes but paid taxes on the Beatty land which they believed included the land in controversy "until recently." The plaintiff, Garris, testified:

> "I did not discover until recently that the 2.14 acre tract of land in dispute was not a part of the land I received by deed from Mrs. Beatty. I decided that it was not a part of the Beatty property when Dr. Butler built the road that leads to his house."

Dr. Butler cut a road to his house in 1966. The plaintiff sold Dr. Butler 3 acres of the Beatty land in 1966. Dr. Butler has

cut wood from the land in controversy since 1966. The plaintiffs had a road built from the Beatty tract across the land in controversy to Highway 59 or Country Club Drive in 1970.

The defendants offered evidence in substantial confict with that of the plaintiffs regarding use of the land in controversy by the plaintiffs from 1948 until the time of the trial.

The defendants' motion of involuntary dismissal made at the close of all of the evidence was allowed as to the claim of the plaintiff, Ethel Garris, and was denied as to the claim of the plaintiff, L. E. Garris. From a judgment declaring that the plaintiff, L. E. Garris, is the owner of the land in controversy and that the defendants have no interest or estate in said land and that the deeds under which the defendants claim title are nullities, the defendants appealed.

No counsel for plaintiff, L. E. Garris, appellee.

Arthur L. Lane for defendant appellants.

HEDRICK, Judge.

[1-3] The defendants contend the court erred in denying their timely motion for involuntary dismissal. Defendants' motion for an involuntary dismissal in an action tried by the Court without a jury challenges the sufficiency of the plaintiffs' evidence to establish the right to relief. *Wells v. Insurance Co.*, 10 N.C. App. 584, 179 S.E. 2d 806 (1971). In an action to remove cloud from title, the burden is upon plaintiffs to prove title good against the whole world or against the defendants by estoppel. *Walker v. Story*, 253 N.C. 59, 116 S.E. 2d 147 (1960). "The plaintiff may safely rest his case upon showing such facts and such evidences of title as would establish his right to recover, if no further testimony was offered. This *prima facie* showing of title may be made by either of several methods." *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889). In this action plaintiffs attempted to establish their title to the land in controversy by adverse possession under known and visible boundaries for more than 20 years. 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, p. 54. Where as here, a grantee goes into possession of the tract of land conveyed to him and also a contiguous tract not included in the conveyance under the mistaken belief

that the contiguous tract was included within the description in his deed, no act of such grantee, however exclusive, open and notorious will constitute adverse possession of the contiguous tract so long as he thinks his deed covers the contiguous tract, since there is no intent on his part to claim adverse to the true owner. *Price v. Whisnant,* 236 N.C. 381, 72 S.E. 2d 851 (1952). The evidence clearly reveals plaintiff, Garris, first assumed possession of the land in controversy in 1948 under the mistaken belief that his deed to the Beatty land embraced the disputed area, and that he did not discover his mistake until 1966 when he sold 3 acres of Beatty land to the defendants. No act of the plaintiff prior to the time he discovered that the land in controversy was not included in the Beatty land will be considered adverse, regardless of how exclusive, open and notorious it might have been. *Price v. Whisnant, supra; Gibson v. Dudley,* 233 N.C. 255, 63 S.E. 2d 630 (1951). Therefore, because the plaintiff's possession from 1948 to 1966 was not adverse, we need not consider what use, if any, the plaintiff made of the land in controversy after he learned it was not a part of the Beatty land since this covered a period of not more than six years.

We hold the plaintiff failed to offer sufficient evidence to show title in himself to the land in controversy by adverse possession for 20 years, and the court erred in not allowing the defendants' motion of involuntary dismissal. However, this does not have the effect of adjudicating title to the land in controversy in the defendants. *Taylor v. Scott* and *Lewis v. Scott,* 255 N.C. 484, 122 S.E. 2d 57 (1961). The judgment appealed from is

Reversed.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. DELORES HAMLET

No. 725SC458

(Filed 12 July 1972)

1. **Narcotics § 4— constructive possession**

Evidence tending to show that hypodermic syringes and needles and heroin were found in a suitcase labeled with defendant's name, and that the suitcase was found beneath a bed in a bedroom recently occupied by her in a house which she leased as a tenant would support, but not require, a jury finding that defendant had knowledge of the prohibited articles and that she had both the intent and capability to maintain dominion over them, thereby having them within her constructive possession.

2. **Narcotics § 4.5— instructions — inference of possession**

While evidence that heroin was found in a house rented by defendant may give rise to a permissible inference that defendant had knowledge of the heroin and the power and intent to control its disposition and use, it is necessary for the jury to draw such inference after consideration of all the evidence, and the jury in a prosecution for possession of heroin should have been so instructed; consequently, the trial court erred in merely instructing the jury that such evidence would be sufficient for it to find beyond a reasonable doubt that defendant possessed the heroin.

APPEAL by defendant from *Webb, Judge,* 24 January 1972 Session of Superior Court held in NEW HANOVER County.

By two bills of indictment defendant was charged with (1) unlawful possession of a hypodermic syringe and needle for the purpose of administering habit-forming drugs and (2) unlawful possession of the narcotic drug heroin. Both offenses were alleged to have been committed on 18 November 1971. The two cases were consolidated for trial and defendant pleaded not guilty to both charges. The State's evidence in substance showed the following: On 18 November 1971 police officers, armed with a search warrant, searched a residence at 908 North Tenth Street, Wilmington, N. C. No one was in the house when the officers arrived. The officers found a suitcase under the bed in the front bedroom. There was a strip of masking tape on the suitcase with the word "McCoy," which was defendant's maiden name, written on it. The suitcase contained syringes with needles attached, a bottle cap, plastic bags with white powder in them, and other articles. Analysis of these items by the Raleigh laboratory of the S.B.I. revealed that some of the white powder and the residue in the bottle

cap contained heroin. The State's evidence also showed that on 15 October 1971 defendant entered into a lease agreement with a realty company for rental of the house located at 908 North Tenth Street in Wilmington and signed an undated tenancy application which stated that the premises would be occupied by two adults and two children. In the same bedroom in which the suitcase was found the officers found a prescription containing defendant's name. Defendant's sister, called as a witness by the State, testified that she and her daughter lived in the house with defendant and defendant's children, that she was living there on 18 November 1971, and that defendant "did live in that bedroom (referring to the front bedroom) but she wasn't staying there lately."

Defendant did not present evidence. The jury found her guilty on both charges. From judgments imposing concurrent five-year prison sentences, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Henry E. Poole for the State.

W. K. Rhodes, Jr., for defendant appellant.

PARKER, Judge.

The State's evidence was sufficient to warrant submission of the cases to the jury and defendant's motions for nonsuit were properly overruled.

> "An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey,* 281 N.C. 1, 12, 187 S.E. 2d 706, 714.

[1] Evidence in the present case that the prohibited articles were found in a suitcase labeled with defendant's maiden name and that the suitcase was found beneath a bed in a bedroom recently occupied by her in a house which she leased as tenant, would support, but certainly not require, a jury finding that de-

fendant had knowledge of the prohibited articles and that she had both the intent and capability to maintain dominion over them, thereby having them within her constructive possession in violation of the statutes under which she was charged. *State v. Harvey, supra; State v. Allen,* 279 N.C. 406, 183 S.E. 2d 680.

[2] For error in the charge, however, there must be a new trial. At one point in its charge, the trial court instructed the jury as follows:

> "But, on the evidence that the defendant rented this house and the Heroin, if you should be satisfield beyond a reasonable doubt, from the evidence that she rented it, and that there was Heroin found in the house, then that would be enough evidence for you to find beyond a reasonable doubt that she possessed this Heroin."

A somewhat similar instruction was given in the case in which defendant was charged with unlawful possession of a hypodermic syringe and needle.

While the facts recited in the quoted portion of the charge, if found by the jury, may give rise to a permissible inference that the defendant had knowledge of the prohibited articles and had both the power and intent to control their disposition and use, *State v. Harvey, supra; State v. Allen, supra,* it was still necessary for the jury to draw that inference after consideration of all of the evidence, and the jury should have been clearly so instructed. In other portions of the charge the court correctly instructed the jury to the effect that an essential element of the crimes charged was that defendant "knowingly possessed" the prohibited articles, but it cannot be determined that the jury was not unduly influenced by the incorrect portion of the charge above quoted, and defendant is entitled to a new trial.

We do not discuss appellant's remaining assignments of error, some of which appear to have merit, since the questions presented may not recur upon a second trial.

New trial.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA EX REL ROBERT MORGAN, ATTORNEY GENERAL v. DARE TO BE GREAT, INC., GLENN TURNER ENTERPRISES, INC., AND GLENN W. TURNER

No. 7210SC517

(Filed 12 July 1972)

1. **Injunctions § 12— show cause hearing — affidavits**

Affidavits may be considered by the trial court in a show cause hearing for a preliminary injunction, the court not being limited by G.S. 1-485(1) to what appears in the complaint.

2. **Injunctions § 4; Unfair Competition— pyramid, chain, referral sales — injunction at instance of State**

Even though individual remedies may exist, the State may obtain injunctive relief against the continuation of pyramid or chain sales schemes prohibited by G.S. 14-291.2 and referral sales schemes prohibited by G.S. 25A-37.

APPEAL by defendants from *Canaday, Judge,* 27 March 1972 Session of WAKE Superior Court.

Plaintiff filed the complaint in this action on 14 March 1972 seeking, among other things, a preliminary injunction prohibiting defendants from engaging in certain illegal activities including participation in any pyramid or chain sales schemes prohibited by G.S. 14-291.2 and referral sales declared unlawful by G.S. 25A-37. On the same day a show cause order was entered upon the motion of plaintiff ordering defendants to appear and show cause why the injunction should not be granted. The show cause hearing was held before Canaday, Judge, on 22 March 1972 at which time plaintiff introduced thirteen affidavits in support of its motion for a preliminary injunction. Defendants did not offer affidavits or other evidence. On 27 March 1972, an order for a preliminary injunction was entered. Defendants appealed.

Attorney General Robert Morgan by Staff Attorney Donald A. Davis for plaintiff appellee.

Broughton, Broughton, McConnell & Boxley by Charles P. Wilkins and John D. McConnell, Jr., for defendant appellants.

VAUGHN, Judge.

[1] Defendants contend that the thirteen affidavits were not admissible into evidence at the show cause hearing. This contention is based on the following wording of G.S. 1-485(1):

"When it appears by the complaint that the plaintiff is entitled to the relief demanded, . . ." We do not agree with defendants' contention that, if proceeding under G.S. 1-485(1) for a preliminary injunction, the court is limited to what appears in the complaint. Our courts have historically heard motions for preliminary injunction on affidavits. In *Huggins v. Board of Education,* 272 N.C. 33, 157 S.E. 2d 703 (1967) the application for a temporary injunction was heard upon affidavits. In *Milk Commission v. Food Stores,* 270 N.C. 323, 154 S.E. 2d 548 (1967) at the show cause hearing, the matter was heard upon affidavits. For other cases where the same procedure was followed see: *Board of Elders v. Jones,* 273 N.C. 174, 159 S.E. 2d 545 (1968); *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590 (1962); *Conference v. Creech* and *Teasley v. Creech and Miles,* 256 N.C. 128, 123 S.E. 2d 619 (1962); *Causby v. Oil Co.,* 244 N.C. 235, 93 S.E. 2d 79 (1956); *Collins v. Freeland,* 12 N.C. App. 560, 183 S.E. 2d 831 (1971). Rule 65 of the Rules of Civil Procedure recognizes that preliminary injunctions are sought by motion. G.S. 1A-1, Rule 7(b) (1) provides that an application to the court for an order shall be by motion, and G.S. 1A-1, Rule 43 (e) provides: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Accordingly, both before and after the adoption of the new rules of civil procedure, it was and is proper for the court to consider evidence by affidavits in show cause hearings for injunctions. Defendant's contention that G.S. 1-485(1) prohibits this is overruled.

[2] Defendants also contend that the court erred in concluding as a matter of law that the State of North Carolina, through economic loss to its individual citizens and residents, may suffer immediate and irreparable injury unless the defendants are enjoined during the pendency of this action. Defendants contend that the conclusion is not supported by the findings of fact and that any person damaged will have an adequate remedy at law. We do not agree with this contention. G.S. 14-291.2 prohibits pyramid and chain schemes such as alleged in the instant case. Section (c) of that statute provides for injunctive relief from the continuation of such schemes. The pleadings and affidavits tend to show an effort to continue such schemes

within the State. G.S. 25A-37 forbids referral sales schemes. G.S. 25A-44(4) makes the knowing and willful violation of any provision of Chapter 25A an unfair trade practice under G.S. 75-1.1. G.S. 75-14 provides for permanent or temporary injunctions and temporary restraining orders to carry out the provisions of the chapter. In *State Ex Rel Turner v. Koscot Interplanetary, Inc.*, 191 N.W. 2d 624 (Iowa, 1971) a case involving another Glenn Turner enterprise similar to Dare To Be Great, Inc., (it dealt with cosmetics instead of motivational courses,) the court enjoined the defendant although a section in the Iowa Code (713.24(2b)) provided an individual remedy. We hold, therefore, that even though individual remedies may exist, the statutes provide for injunctive relief at the instance of the State. To hold otherwise would, we believe, cripple the legislative intent to provide an effective means of curbing illegitimate business schemes and protecting the consumers of our State.

Defendants present several other assignments of error. We have considered each of them and the same are overruled. The order from which defendant appealed is affirmed.

Affirmed.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. HARRY WOODROW RUSSELL

No. 7226SC422

(Filed 12 July 1972)

1. **Criminal Law § 106— nonsuit — consideration and sufficiency of evidence**

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, and nonsuit should be denied where there is sufficient evidence, direct, circumstantial, or both, from which the jury could find that the offense charged has been committed and that defendant committed it.

2. **Arson § 4— felonious burning — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury in a prosecution for the felonious burning of a building.

State v. Russell

APPEAL by defendant from *Snepp, Judge,* 31 January 1972 Session of Superior Court held in MECKLENBURG County.

Defendant was charged in two bills of indictment, proper in form, with (1) felonious breaking and entering and felonious larceny, and (2) felonious burning of a building. The charges were consolidated for trial and defendant entered a plea of not guilty to each charge.

The evidence presented by the State tended to show, among other things, the following: Michael G. Plumides, attorney for C'est Bon, Inc., was present in the building occupied by the C'est Bon Club at approximately 1:30 or 2:00 a.m. on 30 May 1971. At that time, Mr. Plumides and the manager of the club checked the building to make sure no one was still inside and then secured and locked the premises. At 5:06 a.m. on 30 May 1971, an alarm was turned in to the Charlotte Fire Department concerning a fire at the C'est Bon Club. At 6:15 a.m. on the same morning, Captain J. R. Thomas, a fire investigator with the Charlotte Fire Department, arrived at the club and described the building as a total loss.

Donald M. Freeman testified that on the night of 29 May 1971 he went by defendant's place of employment, the Jolly Oil Company, and picked defendant up when he got off of work. The two rode around Charlotte for some time and at approximately 2:00 or 3:00 a.m., 30 May 1971, they rode by the C'est Bon Club but did not stop. Freeman and defendant then returned to the Jolly Oil Company where defendant secured a five gallon can of gas, which he placed in the trunk of the car. The pair then drove back to the C'est Bon Club and parked in the rear of the building. Defendant got out of the car, climbed through a rear window of the building, opened the front door of the club, and came around and got Freeman. The two men then re-entered the building and Freeman assisted defendant in removing from the premises a guitar, some camera equipment, and several eight-track tapes, which they placed in the car. Freeman also opened the cigarette machine and removed the change. After storing the items in the car, defendant removed the gas can from the trunk and he and Freeman went back into the club, whereupon defendant proceeded to pour gasoline around the interior of the building. Freeman asked defendant why he was going to burn the building and defendant said that, ". . . Joel wanted it burned." Freeman returned to

the car as defendant was spreading the gas. Defendant came out shortly thereafter and said, "Let's get the hell out of here." Defendant and Freeman took the stolen articles to Freeman's house and returned later to the C'est Bon Club where they observed the Charlotte Fire Department fighting the blaze. At this time defendant make a remark to Freeman to the effect that this would, ". . . probably make Joel happy."

Defendant offered no evidence. The jury returned verdicts of guilty. Judgments were entered sentencing defendant to two active concurrent prison terms of seven years. Defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Burley B. Mitchell, Jr., for the State.

W. Herbert Brown, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant's only assignment of error relates to the charge of feloniously burning a building. He contends that it was error for the trial court to deny his motion for a dimissal and directed verdict of not guilty made at the close of the State's evidence and renewed at the close of all the evidence. Defendant argues that the State failed to produce substantial evidence of all the material elements of the felonious burning charge, and therefore his motion should have been granted.

[1] Motions to dismiss, for a directed verdict of not guilty, or as of nonsuit are used interchangeably in criminal prosecutions. *State v. Clanton,* 278 N.C. 502, 180 S.E. 2d 5. "Motion to nonsuit requires the trial court to consider the evidence in its light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. [Citations omitted.] Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled." *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469. See also, *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49; *State v. Moore,* 262 N.C. 431, 137 S.E. 2d 812.

[2] Considering the evidence in this case in light of the foregoing, we hold that it was substantial as to all the material ele-

ments of the crime charged, and therefore, the trial court correctly denied defendant's motion and submitted the case to the jury.

No error.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. CORNELL BARNES

No. 7214SC527

(Filed 12 July 1972)

Criminal Law § 23— plea of guilty

Where the court informed defendant of the maximum sentence of imprisonment he could receive on his plea of guilty, failure of the court to inform defendant that he could also be fined did not render the plea of guilty invalid, though made after waiver of counsel, especially since the solicitor had previously informed defendant that he might be subject to a fine.

APPEAL by defendant from *Cooper, Judge,* 7 February 1972 Session of Superior Court held in DURHAM County.

Defendant was charged in a warrant with the offense of larceny of property of the value of $61.27, a misdemeanor. In the district court he pleaded *nolo contendere* and was sentenced for a term of not less than 12 nor more than 18 months. He appealed to the superior court, where he signed a written waiver of counsel and pleaded guilty. Before accepting the plea, the judge questioned the defendant and adjudged that the plea was freely, understandingly and voluntarily made. The court also heard evidence showing the factual basis for the plea. From judgment entered on his plea of guilty sentencing defendant to prison for a term of six months, defendant appealed. Upon finding that defendant was unable to employ counsel, the court appointed counsel to represent him in perfecting this appeal.

Attorney General Robert Morgan by Assistant Attorney General James L. Blackburn for the State.

Kenneth B. Spaulding for defendant appellant.

PARKER, Judge.

Appellant's sole contention is that the trial court erred during its questioning as to the voluntariness of defendant's plea by not apprising him that upon such plea he could be fined as well as imprisoned. He contends that being an indigent, monetary matters were of "supreme importance" to him, and he seeks to distinguish *State v. Harris*, 12 N.C. App. 576, 183 S.E. 2d 864, by pointing out that in that case the defendant was represented by counsel when the plea was entered, whereas in the present case defendant had waived counsel, and by pointing out further that in the present case, but not in *Harris*, the solicitor "promised or informed the defendant who was without legal counsel albeit waived that the Judge would inform him as to the maximum fine he could receive upon his plea of guilty." We find appellant's contention without merit and the distinctions which he seeks to draw between this case and *Harris* to be distinctions which show no material difference insofar as concerns the only real question before us, which is whether the record adequately supports the trial judge's finding that defendant's plea of guilty was in fact "freely, understandingly and voluntarily made."

To begin with, in view of defendant's knowledge of his own indigency and that he was unable to pay and therefore probably would not pay any fine whatever, no matter in what amount imposed, we think it highly unrealistic to assume that his plea of guilty would have been any more "freely, understandingly and voluntarily made" had he been explicitly and correctly informed by the trial judge that a fine in addition to a prison sentence might be imposed against him. In addition, the record before us reveals that before defendant was called upon to plead, the solicitor correctly informed him of the charge against him as contained in the warrant, and also informed him "[t]hat it is a misdemeanor, carrying up to a possible penalty which the Judge would tell the defendant in a few minutes of up to two years possible, and also a fine of some amount, he was not sure of the value of, and asked the defendant how he would like to plead to the charge of misdemeanor larceny." The defendant thereupon pleaded guilty. It is, therefore, clearly apparent in this case that immediately before defendant first tendered his plea of guilty, he was made aware by the solicitor's statement of the possibility that a fine "in some amount," in addition to a possible prison sentence for up to two years, might

be imposed against him. With this information, he nevertheless pleaded guilty.

Defendant has failed to show how he was prejudiced by the judge's failure to inform him of the exact amount of a possible fine. No fine was in fact imposed against him. The prison sentence which was imposed was less than the maximum which he had been correctly informed might be imposed against him. We hold that the requirements of *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274, were sufficiently complied with in this case, and in the judgment appealed from find

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. ANDREW KENT SUMMERS

No. 7226SC437

(Filed 12 July 1972)

1. **Narcotics § 4— possession defined**

An accused has possession of contraband material within the meaning of the law when he has both the power and intent to control its disposition or use.

2. **Narcotics § 4— possession — marijuana in defendant's yard**

There is sufficient evidence of constructive possession of marijuana to warrant submitting the case to the jury where 20 grams of the contraband material are found in defendant's fenced-in backyard at a point practically up against defendant's house.

APPEAL by defendant from *Friday, Judge,* 31 January 1972 Schedule "B" Session of Superior Court held in MECKLENBURG County.

Defendant was indicted for the unlawful possession of 20 grams of marihuana. He pleaded not guilty. The State's evidence showed: At 8:35 p.m. on 8 October 1971 Charlotte police officers, armed with a search warrant, searched a one-story, frame, five-room, single-family dwelling at 2444 Greenland Avenue. When they arrived, they found defendant lying on a couch in the living room and approximately fifteen to twenty other young people in the house listening to a hi-fi set. Defendant told one

of the officers that he and a Jerry Hull lived at the house but that Hull was not there. A clerk in the City Water Department testified that on 1 July 1970 a deposit had been made for 2444 Greenland Avenue in defendant's name. No marihuana was found in the house, and three of the officers then proceeded to search outside. At the rear of the house, these officers found a chain link fence approximately four feet high around the back portion of the yard. There were gates leading inside the fence. A large dog was out there, and one officer was instructed by his superior to watch the dog so that it didn't bite the other officers while they were trying to search in the rear. Outside and at the rear of the house, the officers found an old electric stove sitting "practically up against the house, almost as close as you can get it." Under the stove they found a small plastic bag approximately two inches deep and about five inches long, which contained green vegetable material which on analysis was determined to be marihuana weighing a little over 20 grams. During the time the officers were searching the premises, they did not permit anyone to leave the house.

Defendant did not introduce evidence. The jury found him guilty, and the court sentenced him to prison for a term of six months, but suspended the sentence and placed him on probation for a period of two years upon conditions agreed upon by the defendant. From this judgment, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Millard R. Rich, Jr., for the State.

Charles B. Merryman, Jr., for defendant appellant.

PARKER, Judge.

There was no evidence of actual possession and the question presented is whether there was sufficient evidence of constructive possession to warrant submitting the case to the jury. We think there was.

[1, 2] An accused has possession of contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to

the jury on a charge of unlawful possession." *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706. Here, the evidence was sufficient to permit the jury to find that the backyard where the marihuana was found was under defendant's control. There was a chain link fence around the backyard and a large dog was in the yard. The marihuana was found at a point in the yard "practically up against the house." In *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779, the State's evidence was held sufficient to support a jury finding that areas more remote from the accused's living quarters than here shown were under his control.

We hold that defendant's motions to dismiss were properly overruled. Defendant's remaining assignment of error, directed to admission of the testimony of the clerk of the City Water Department, is without merit.

No error.

Judges VAUGHN and GRAHAM concur.

EVA ROBERTS v. CLARISSA SAWYER DAVIS AND FRED ALLEN DAVIS

No. 721SC459

(Filed 12 July 1972)

Damages § 11; Negligence § 7— willful or wanton negligence — insufficiency of evidence

In this action to recover for injuries received by plaintiff when she was allegedly dragged beside defendants' truck while trying to persuade a passenger of the truck to get out and ride with her, the evidence was insufficient to support a finding that plaintiff was injured by the willful and wanton conduct of defendant driver, and the trial court, therefore, properly refused to submit an issue of punitive damages.

APPEAL by plaintiff from *Tillery, Judge,* 31 January 1972 Session of Superior Court held in CURRITUCK County.

Plaintiff instituted this action to recover for injuries sustained by her as she was being dragged beside a truck owned by defendant Clarissa Davis and being operated by defendant Fred Davis. Plaintiff's evidence was substantially to the effect

that one Frankie Lee was seated in the truck and that plaintiff was trying to persuade him to get out of the truck and ride with her. The truck motor was running. Suddenly the truck jerked forward and threw her against the door. Plaintiff grabbed for something and couldn't get loose. The truck did not move fast nor did it just creep along, but plaintiff was unable to get up until the truck stopped after travelling some five hundred feet. She sustained serious and painful injuries including cuts and abrasions to her knees, feet and ankles.

Defendant's evidence was substantially to the effect that when passenger Lee refused to get out of the truck, plaintiff grabbed his arm and tried to pull him out. Defendant driver told plaintiff to release Lee which she refused to do. The truck then started forward very slowly so that plaintiff would have to walk and release Lee, but she continued to hold Lee with both hands. The truck door stayed open the entire time. After about four car lengths, the driver stopped the truck and again told plaintiff to release the passenger. Plaintiff just cursed and told Lee to come and go with her. Driver started off again at about the same speed and, after a short distance, plaintiff fell, whereupon the truck immediately stopped.

The trial judge refused to submit issues as to punitive damages. Issues of negligence and contributory negligence were answered in the affirmative. Plaintiff appealed.

John T. Chaffin for plaintiff appellant.

Leroy, Wells, Shaw, Hornthal & Riley by Dewey W. Wells for defendant appellees.

VAUGHN, Judge.

The evidence, taken in the light most favorable to the plaintiff, is insufficient to support a finding that plaintiff was injured by the willful and wanton conduct of defendants. The trial judge, therefore, properly declined to submit issues as to punitive damages.

We have carefully considered plaintiff's other assignments of error. The evidence was conflicting. The jury rejected plain-

tiff's version of the accident in a trial which we hold to have been free of prejudicial error.

No error.

Judges PARKER and GRAHAM concur.

OTHA W. DAVIS v. CHAUFFEURS, TEAMSTERS & HELPERS LOCAL 391, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

No. 7221DC181

(Filed 12 July 1972)

Appeal and Error § 57— review of findings of fact — sufficiency of evidence

The trial court erred in entering judgment for plaintiff based on a finding of fact that there were 4500 union members participating in a retirement plan at the time of plaintiff's retirement when all the evidence tended to show that the number of participating members fluctuated, and there was no evidence with respect to the number participating at plaintiff's retirement.

APPEAL by defendant from *Clifford, Judge,* 7 September 1971 Session of District Court held in FORSYTH County.

Plaintiff instituted this action on 30 October 1970 to recover the balance allegedly due him from a death, disability and retirement fund administered by defendant for union members who voluntarily participated in the fund. Plaintiff retired on 1 February 1968 and received payment from the fund in the amount of $4,000.00. At trial, plaintiff contended that the rules regarding administration of the fund which were in effect at the time of his retirement entitled him to receive $4,500.00, a sum equal to one dollar for each member participating. Defendant contended that plaintiff had been fully paid. From the entry of judgment granting plaintiff recovery in the amount of $500.00, plus costs, defendant appealed.

W. Warren Sparrow for plaintiff appellee.

Drum, Liner and Redden by Renn Drum for defendant appellant.

VAUGHN, Judge.

Defendant's single assignment of error is that there was insufficient evidence to support the trial court's finding of fact that, at the time of plaintiff's retirement, there were 4500 union members participating in the voluntary retirement fund. The judgment entered is based largely on the judge's finding of fact number four, which reads:

> "There were 4,500 participants at the time of plaintiff's retirement thereby entitling plaintiff to be paid a total of $4,500.00 from the fund administered by defendant. According to rules and policy in effect at the time of plaintiff's retirement, on or about February 1, 1968, plaintiff was entitled to receive $4,500.00 from the 'Death, Disability and Retirement Fund' administered by defendant."

The only testimony relating to the number of union members participating in the fund at the time of plaintiff's retirement in 1968 is to be found in that of Mr. Earl W. Kiger, an officer of the union. At the time of plaintiff's retirement Mr. Kiger was only a member of the union and did not become an officer until 1969. He testified he had never "looked up" how many members were participating at the time of plaintiff's retirement. Mr. Kiger's testimony, in relevant part, is as follows:

> "Q. How many members were there on February 1, 1968?
>
> A. I can't tell you.
>
> Q. Was it more than four thousand?
>
> A. I can't tell you.
>
> Q. How many were participating in the plan?
>
> A. In 1968?
>
> Q. Right.
>
> A. I don't know; I can't say exactly.
>
> Q. Didn't you have about eight thousand members in 1968?
>
> A. No, we didn't have eight thousand in '68.

Q. How many did you have?

A. Well, I would say approximately sixty-five hundred.

Q. Sixty-five hundred participating in your trust fund account for this—

A. No, I said members.

MR. DRUM: Objection.

Q. How many participants did you have then if you had sixty-five hundred members and the figure was different, how many participants did you have to your recollection?

A. I don't know; I couldn't give you—I'd say between forty-four to forty-six hundred.

Q. Closer to forty-six?

A. I would imagine; I can't answer you correctly because I don't know.

Q. And they are entitled to one dollar a piece.

A. Yes, sir.

Q. For forty-six hundred members. Thank you, that is all."

It is obvious that the witness had no knowledge as to the number of members participating in the fund on 1 February 1968. He repeatedly disclaimed any such knowledge. It is equally clear that he had no knowledge of any facts which would have enabled him to base an opinion as to the number. His testimony, therefore, does not support the court's finding of fact to which exception was taken. The finding is not bolstered by the testimony of another witness for plaintiff who testified that he retired in "approximately" April of 1968 and subsequently received $4,500.00. All of the evidence was to the effect that the number of participating members fluctuated. The evidence, therefore, does not support the finding of fact. It was error for the trial judge to enter judgment for the plaintiff based on a finding of fact not supported by competent evidence. *Morse v. Curtis,* 276 N.C. 371, 172 S.E. 2d 495; *Horton v. Redevelopment Commission,* 264 N.C. 1, 140 S.E. 2d 728; *Coble*

v. Brown, 1 N.C. App., 159 S.E. 2d 259; 1 Strong, N.C. Index 2d, Appeal and Error, § 57.

Reversed.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. BOBBIE GENE THOMAS

No. 725SC448

(Filed 12 July 1972)

1. **Criminal Law § 1— nature and elements of crime in general**

The proof of every crime consists of proof that the crime charged has been committed by someone and proof that the defendant is the perpetrator of the crime.

2. **Criminal Law § 106— confession — sufficiency of evidence aliunde confession**

A naked extra-judicial confession of guilt by one accused of crime, uncorroborated by any other evidence, is not sufficient to sustain a conviction.

3. **Criminal Law § 106— confession — sufficiency of evidence aliunde confession**

Where there was ample evidence outside defendant's confession that felonious breaking and entering and felonious larceny had been committed by someone, defendant's confession was sufficient to sustain the jury's finding that he was the perpetrator of the crimes charged.

APPEAL by defendant from *Copeland, Judge,* 7 February 1972 Session of Superior Court held in NEW HANOVER County.

Defendant pleaded not guilty to the charges contained in an indictment charging him with (1) felonious breaking and entering and (2) felonious larceny. The State presented evidence in substance as follows: The owner of Joe's Grill at Carolina Beach testified that when she opened her place of business on the morning of 11 December 1971 she discovered that $78.40 in money was missing from the drawer of the cash register, a bag of change was gone, the cigarette machine had been pried open and approximately $30.00 had been taken from it, and an electric portable organ was missing. Shortly prior to that time, defendant had been employed at the grill as a dishwasher. Both the front and back doors were locked when

the owner arrived, but she then learned for the first time that the back door would open when pressure was applied. Defendant's written and signed confession, given to the police on 19 December 1971, in which defendant admitted entering the building at night through the back door, opening the cigarette machine, and taking the money and organ, was admitted in evidence when the trial judge found as facts on a *voir dire* examination that the confession had been freely, voluntarily and intelligently made after the defendant had been fully advised of his rights and after he had signed a written waiver of counsel.

Defendant presented no evidence. The jury found him guilty on both counts. From judgments imposing prison sentences, defendant appealed.

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

Charles E. Rice III for defendant appellant.

PARKER, Judge.

Appellant's counsel concedes that the trial court's findings on *voir dire* were supported by competent evidence, and on this appeal he does not attack the admissibility of the confession. His sole contention is that there was insufficient evidence *aliunde* the confession to warrant submitting the case to the jury. In this contention we find no merit.

[1, 2] The proof of every crime consists of (1) proof that the crime charged has been committed by someone and (2) proof that the defendant is the perpetrator of the crime. The first element is the *corpus delicti;* the second is defendant's guilty participation therein. *State v. Macon,* 6 N.C. App. 245, 170 S.E. 2d 144. A naked extrajudicial confession of guilt by one accused of crime, uncorroborated by any other evidence, is not sufficient to sustain a conviction. There must be evidence apart from the confession tending to establish the fact that a crime of the character charged has been committed, *i.e.,* tending to establish the *corpus delicti. State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396; *State v. Bass,* 253 N.C. 318, 116 S.E. 2d 772; Comment Note, 45 A.L.R. 2d 1316. "This does not mean, however, that the evidence tending to establish the *corpus*

delicti must also identify the defendant as the one who committed the crime." *State v. Cope,* 240 N.C. 244, 81 S.E. 2d 773.

[3] In the present case there was ample evidence apart from defendant's confession tending to establish that the offenses charged in the indictment had been committed by someone. Defendant's confession was sufficient to sustain the jury's finding that he was the perpetrator of the crimes charged. In the trial and judgments appealed from we find

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. GARY MACKEY

No. 7226SC395

(Filed 12 July 1972)

Criminal Law § 138— active sentence — discretion

The trial judge was acting in the exercise of his discretion in imposing an active sentence for felonious escape and did not hold that an active sentence was required as a matter of law, where the judge advised defense counsel that, under the circumstances of the case, he did not feel justified in suspending defendant's sentence.

APPEAL by defendant from *Ervin, Judge,* 17 January 1972 Session of Superior Court held in MECKLENBURG County.

Defendant, represented by counsel, tendered a plea of guilty to felonious escape. After inquiry by the court the plea was accepted. Judgment was entered imposing a prison sentence of six months with the recommendation that defendant be allowed to serve the sentence under the work release plan. Defendant appealed.

Attorney General Robert Morgan by Edward L. Eatman, Jr., Assistant Attorney General, for the State.

Mraz, Aycock & Casstevens by Frank B. Aycock III for defendant appellant.

VAUGHN, Judge.

Defendant's first assignment of error is that the court held that an active sentence was required as a matter of law.

It is perfectly clear that the judge was acting in the exercise of his discretion when he imposed a very short active sentence. Defendant's counsel requested that the sentence be suspended because, among other things, of the pregnancy of the defendant's wife. The judge advised counsel that, under the circumstances of the case, he did not feel justified in so doing. All of defendant's assignments of error have been considered and the same are overruled.

The judgment from which defendant appealed is affirmed.

Affirmed.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. ERVIN O'NEAL OSBY

No. 7227SC519

(Filed 12 July 1972)

Criminal Law § 161— judgment entered on plea of guilty — assignment of error to entry of judgment

Where the indictment properly charges the offense, defendant pleads guilty, the trial court inquires into the voluntariness of the plea and finds it in fact voluntary and the sentence imposed is within the statutory limits, defendant's assignment of error as to the entry of judgment is without merit.

ON *certiorari* to review judgment entered by *Thornburg, Judge,* at the 1 November 1971 Session of GASTON Superior Court.

Defendant was charged in an indictment with the felony of armed robbery. At the trial he entered a plea of guilty. Judgment was entered imposing a prison sentence.

We granted certiorari to review this trial.

Attorney General Robert Morgan by Assistant Attorney General William F. O'Connell for the State.

Daniel J. Walton for defendant appellant.

CAMPBELL, Judge.

Defendant's sole assignment of error is to the entry of judgment. Defendant does not present any argument, but merely submits this case for our review.

The indictment in this case properly charged the offense. The defendant entered a plea of guilty. The trial court inquired fully into the voluntariness of the plea and adjudged that it was in fact voluntary. This adjudication appears in the original record but was not reproduced in the printed record. The sentence imposed was within statutory limits.

After a careful examination of this record, we find,

No error.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. GREGORY McSWAIN

No. 7215SC521

(Filed 12 July 1972)

Criminal Law § 103— function of jury

It is within the province of the jury to resolve conflicts between witnesses of plaintiff and witnesses of defendant.

APPEAL by defendant from *McKinnon, Judge,* 14 February 1971 Session of Superior Court held in CHATHAM County.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injuries. He was found guilty of assault with a deadly weapon inflicting serious injury. From judgment on the verdict sentencing defendant to prison for a maximum term of four years as a committed youthful offender under G.S. 148-49.4, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Ralf F. Haskell for the State.

Robert L. Gunn for defendant appellant.

PARKER, Judge.

There was ample evidence to support the verdict. On conflicting evidence, the jury believed the testimony of the State's witnesses rather than the testimony of defendant and his witnesses. It was the jury's province to resolve the conflict. We have carefully reviewed the entire record and in defendant's trial and the judgment appealed from find

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. ERNEST BUD GREEN

No. 7227SC483

(Filed 12 July 1972)

ON *certiorari* to review judgment of *Falls, Judge,* entered at the 7 December 1970 Session of CLEVELAND Superior Court.

By indictment proper in form defendant was charged with armed robbery on 7 July 1970. When the case was called for trial defendant tendered a plea of guilty as charged. The trial judge conducted a hearing to determine if the plea was freely, understandingly and voluntarily made. The record sets forth the written transcript of plea sworn to and subscribed by the defendant before an assistant clerk of the superior court. The transcript discloses that defendant, among other things, declared: he understood that he was charged with the felony of armed robbery, that the charge had been explained to him, that he had a right to plead not guilty and be tried by a jury, that he was in fact guilty and that a guilty plea could result in his imprisonment for as much as 30 years; that he had conferred with his lawyer about the case and was satisfied with his lawyer's services, and that neither the solicitor, his attorney, any policeman or anyone else had made any promise or threat influencing him to plead guilty.

The court questioned defendant about his guilty plea and following the inquiry adjudged that the plea was freely, understandingly and voluntarily made, without undue influence, com-

pulsion or duress, and without promise of leniency. After accepting the plea and hearing testimony from the robbery victim and from a police officer, the court entered judgment that defendant be imprisoned for a term of not less than 25 nor more than 30 years, with credit to be given for time served in jail awaiting trial.

In apt time defendant excepted to the judgment and gave notice of appeal. Thereafter, on motion of defendant, his appeal was withdrawn. On 21 February 1972 defendant petitioned for certiorari and on 8 March 1972 the Court of Appeals allowed the petition.

Attorney General Robert Morgan by Claude W. Harris, Assistant Attorney General, for the State.

Hamrick & Hobbs by L. Lyndon Hobbs for defendant appellant.

BRITT, Judge.

Defendant's court appointed counsel candidly admits that although he has carefully reviewed the record in this case he is unable to assign error but asks that this court review the record and determine if any error exists.

We too have carefully reviewed the record but find that it is free from prejudicial error. The judgment of the superior court is

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. ROBERT McCUIEN

No. 724SC477

(Filed 2 August 1972)

1. **Criminal Law § 164— failure of defendant to renew motion of nonsuit at close of all evidence**

Failure of defendant to renew his motion for nonsuit at the close of all the evidence after having first made such motion at the close of State's evidence does not preclude review of the sufficiency of the State's evidence on appeal. G.S. 15-173.1.

2. **Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence to overrule nonsuit**

In an action charging defendant with breaking and entering with intent to steal and larceny, the State's evidence was sufficient to take the case to the jury where it tended to show that stolen television sets were found in defendant's car with him present and in possession of the car keys, that defendant had been riding around in his car, though not driving, during the time that the larceny of the television sets occurred, and that defendant had told a deputy sheriff that his car had not been moved, but if it had, it had been moved by a thief.

3. **Criminal Law § 106— sufficiency of evidence to overrule nonsuit**

Motion to nonsuit in a criminal prosecution is properly denied if there is any competent evidence to support the allegations of the warrant or bill of indictment, considering the evidence in the light most favorable to the State; a like rule applies when the State relies upon circumstantial evidence.

4. **Criminal Law § 106— State's evidence both inculpatory and exculpatory**

Where some of the evidence introduced by the State tends to inculpate a defendant and other portions of it to exculpate him, the incriminating evidence requires submission of the case to the jury, and the State is not precluded from showing the facts to be other than as stated in a declaration of the defendant as related by one of its witnesses.

APPEAL by defendant from *Rouse, Judge,* 21 February 1972 Session of Superior Court held in ONSLOW County.

Defendant was charged in a bill of indictment, proper in form, with the felonies of breaking and entering with the intent to steal, larceny and receiving stolen goods knowing them to have been stolen. The defendant pleaded not guilty and a jury trial was had.

At the close of the State's evidence, defendant moved for judgment as of nonsuit on all charges. As to the charges of

breaking and entering and larceny, the motion was denied; as to the charge of receiving stolen property, the motion was allowed. The defendant then presented evidence and took the stand in his own behalf, but did not renew his motion for judgment as of nonsuit at the close of all the evidence. From a jury verdict finding him guilty as charged of breaking and entering and larceny and judgment that he be imprisoned for not less than three nor more than five years, the defendant appealed to the Court of Appeals.

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

Edward G. Bailey for defendant appellant.

MALLARD, Chief Judge.

[1] The defendant contends that there are two questions presented for decision on this appeal: (1) whether the trial court erred in denying his motion for nonsuit at the close of the State's evidence, and (2) whether the trial court erred in denying his motion to set aside the verdict as being against the greater weight of the evidence. The defendant failed to renew his motion for nonsuit at the conclusion of all the evidence; however, we will review the sufficiency of the evidence of the State on this appeal. See *State v. Pitts*, 10 N.C. App. 355, 178 S.E. 2d 632 (1971), *cert. denied*, 278 N.C. 301; and G.S. 15-173.1.

[2] The evidence for the State in the case before us tended to show that early in the morning of 1 January 1972, the television repair shop at Furniture Fair, Inc., a corporation near Jacksonville, North Carolina, was broken and entered by means of breaking out the lower portion of a glass door and that four portable television sets were stolen therefrom. Mr. B. G. Woodward, an Onslow County deputy sheriff, testified that about 9:05 a.m. on 1 January 1972, he observed the defendant's automobile being driven north on U. S. Highway 17 by one Arthur Burke, and that he was looking for Burke. Woodward then went to the defendant's apartment, two or three miles from the Furniture Fair, seeking Burke. He arrived about 9:30 a.m. and found the defendant outside, standing beside his automobile with the car keys in his hand. Woodward inquired if the defendant had seen Burke, and when defendant

said that he had not seen him in several days, he informed the defendant that he, the officer, had seen Burke driving the defendant's automobile shortly before. The defendant said that the automobile had been in his driveway beside his apartment since four o'clock that morning. The officer placed his hand on the hood and found that it was warm. He then opened the hood with the defendant's permission and found that the radiator was hot. Looking in the back seat and noticing that the spare tire was in the back seat of the vehicle, the officer asked for permission to look into the trunk and defendant handed him the keys. When the trunk was opened, it was found to contain three portable television sets, which were later identified as three of the four sets stolen from Furniture Fair on 1 January 1972. The defendant denied any knowledge or ownership of the sets and professed not to know how they came to be placed in the trunk of his automobile. The defendant also stated to the officer that the automobile had not been moved since he himself had parked it in the driveway at 4:00 a.m., and that if the officer had just seen Burke driving it, Burke had stolen the car.

Arthur Burke also testified for the State. He testified that he had known the defendant for seven or eight years and that he had started driving the defendant's automobile shortly before midnight (on 31 December 1971); that the defendant was in the automobile with him when they had passed Woodward the morning of 1 January 1972 but that the defendant "had kind of squashed down" in the front seat because the defendant did not want to be seen with him, and that there was no spare tire in the back seat at that time. On cross-examination, Burke admitted that he had been convicted of stealing a pocketbook from a woman at the Triangle Variety Store on the morning of 1 January 1972 (which was why Woodward was seeking him for questioning on that date), that he had subsequently been convicted of "temporary larceny" of the defendant's automobile on the same date, and that he had been convicted previously of a number of other crimes (including burglary, breaking and entering and receiving stolen property) and had been addicted to narcotic drugs. Burke, however, denied any participation in the breaking and entering of the Furniture Fair or any knowledge of the televisions stolen therefrom.

[3] Considered in the light most favorable to the State, this evidence was sufficient to take the case to the jury. The cases

cited by the defendant are distinguishable. In 2 Strong, N. C. Index 2d, Criminal Law, § 106, it is said:

> "Motion to nonsuit in a criminal prosecution is properly denied if there is any competent evidence to support the allegations of the warrant or bill of indictment, considering the evidence in the light most favorable to the state, and giving it the benefit of every reasonable inference fairly deducible therefrom. If there is more than a scintilla of competent evidence to support the allegations of the warrant or bill of indictment, motion to nonsuit is properly denied. And if there is evidence sufficient to support a conviction of the crime charged or an included crime, motion to nonsuit is properly denied. If there is any evidence tending to prove the fact of guilt or which reasonably conduces to this conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt.
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> * * *
>
> A like rule applies when the state relies upon circumstantial evidence; in such instance it is for the court to determine whether the circumstantial evidence, either alone or in combination with the direct evidence, provides substantial proof of each essential element of the offense, it being for the jury to determine whether such evidence points unerringly to defendant's guilt and excludes any other reasonable hypothesis. Decisions to the effect that the court must determine, in passing upon a motion to nonsuit, whether the circumstantial evidence excludes any other reasonable hypothesis but guilt, are apparently no longer the law, in view of the later decisions cited in this section."

See also, *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969) and *State v. Godwin,* 3 N.C. App. 55, 164 S.E. 2d 86 (1968), *cert. denied,* 275 N.C. 341.

In *State v. Godwin, supra,* this court stated the rule as follows:

> " * * * The test of the sufficiency of circumstantial evidence to withstand a motion for nonsuit is the same as the rule applicable to direct evidence. If there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury. Reliance upon circumstantial evidence does not make it necessary that every reasonable hypothesis of innocence be excluded before the case can be submitted to the jury. *State v. Swann,* 272 N.C. 215, 158 S.E. 2d 80."

The defendant's own evidence, and particularly the testimony of the defendant himself, tended to contradict some of the testimony of Woodward and Burke. This was of no consequence insofar as it related to the question of nonsuit, being a matter of credibility for determination by the jury.

As to the doctrine of possession of recently stolen goods and the quantum of evidence necessary to overcome motion for judgment as of nonsuit, see *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62 (1966); *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578 (1965); and *State v. Holloway,* 265 N.C. 581, 144 S.E. 2d 634 (1965). We think that the evidence for the State is stronger in the case before us than it was in *Holloway.* In *Holloway,* an inventory disclosed that a number of television sets were missing from a warehouse owned by Telerent, Inc., and the appellants were found in possession of some of the sets two or three weeks later. The State relied largely upon "the presumption arising from the possession of goods recently stolen" and the Supreme Court held that the evidence was sufficient to go to the jury. In the case before us, only a few hours at most had elapsed from the time of the breaking and entering and larceny and the discovery of the stolen television sets in the defendant's possession.

The defendant further contends, however, that the State's evidence "wholly exculpates him from guilt, and for this reason the trial court should have allowed his motion of nonsuit." We do not agree. It is true that Deputy Sheriff Woodward testified that the defendant had told him that he knew nothing about the television sets found in his automobile, that they were not his and that the deputy could take them, and that he told

Woodward that he had not seen Burke and that if Burke had driven the automobile that morning he had stolen it. The State also had presented some evidence that there was blood on the broken glass from the door at the Furniture Fair after the break-in, and Woodward testified that he observed no cuts or scratches on the hands and arms of the defendant, and further, Woodward testified that when he asked the defendant for permission to look into the trunk of the automobile, the defendant "hestitated for a moment and his expression changed and he handed me the keys." While this testimony from the State's witnesses may or may not have been favorable to the defendant, it did not erase the other evidence tending to establish the defendant's guilt. The case of *State v. Hoskins,* 236 N.C. 412, 72 S.E. 2d 876 (1952), cited by appellant, is not controlling.

In *Hoskins,* the defendant Lockley was charged with felonious breaking and entering, larceny of some automobile tires and feloniously receiving the automobile tires, but the evidence for the State tended to show only that Lockley had expressed an interest in buying some tires and that a co-defendant (and witness for the State) and another man went to the home of Lockley between one and two o'clock on the morning after the breaking and offered to sell him some tires. Lockley said that it was too late to look at any tires. The State's witnesses testified to the effect that Lockley had no part in the larceny of the tires, that he had no reason to believe that the tires had been stolen, and that the tires were not initially left on Lockley's premises but were moved there by others at a later time. When a woodlot owned by Lockley was later searched with his permission and the tires were found on a truck belonging to Lockley (but inoperable), Lockley seemed and acted surprised and told the officer of the visit by the co-defendant and another to his house on the night of the breaking. Another witness for the State, "Capt." Ed Belangia, testified on cross-examination, "The only connection that Diz (Lockley) had was that this man went to his home at 2:30 in the morning. He told us that."

On appeal, the Supreme Court in *Hoskins* held that the inference or presumption arising from the possession of recently stolen property, *without more,* did not extend to the statutory charge of receiving such property knowing it to have been feloniously stolen and that this evidence *alone* was insufficient to make out a case for the jury. The Court also noted:

"Indeed, the testimony of the officers, offered by the State, as to statements of defendant in respect to the automobile tires, stolen from Jake Hill, tend to wholly exculpate defendant of the charge of receiving them. By offering such statements, the State thereby presents them as worthy of belief. See *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349, and cases there cited at page 456. 'When the State offers evidence which tends to exculpate the defendant, he is entitled to whatever advantage the testimony affords, and so, when it is wholly exculpatory, he is entitled to his acquittal.' *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740."

[4] In the case before us, there was in addition to the fact that the stolen television sets were found in the trunk of the defendant's automobile, the testimony of Burke (the credibility of which was for the jury) that tended to show that the defendant had been in the automobile from before midnight the previous day until shortly before the deputy sheriff arrived at the defendant's apartment (which was the time period during which the building of Furniture Fair, Inc., was entered and the television sets stolen therefrom), and the testimony of the officer that tended to show that the defendant had the keys to the automobile, and dominion and control thereof, when he arrived. This additional evidence was sufficient to make out a case for the jury. Furthermore, if the defendant's conduct and self-serving declarations at the time the stolen property was found, as testified to by the State's witness Woodward, had a tendency to exculpate him, he was entitled to the advantage afforded thereby, but he was not exculpated as a matter of law. Where some of the evidence introduced by the State tends to inculpate a defendant and other portions of it to exculpate him, the incriminating evidence requires submission of the case to the jury, and the State is not precluded from showing the facts to be other than as stated in a declaration of the defendant as related by one of its witnesses. See *State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466 (1969), *cert. denied,* 398 U.S. 959, *reh. denied,* 400 U.S. 857; *State v. Jenkins,* 1 N.C. App. 223, 161 S.E. 2d 45 (1968); and the cases cited at 2 Strong, N. C. Index 2d, Criminal Law, § 104, n. 81.

We hold that the trial court properly denied defendant's motion for judgment as of nonsuit on the charges of felonious breaking and entering and larceny and properly denied defendant's motion to set the jury's verdict aside. *State v. Massey,*

273 N.C. 721, 161 S.E. 2d 103 (1968). We have thoroughly reviewed the record on appeal and, in the trial in superior court, we find no prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. LOUIS AARON TAYLOR

No. 7226SC531

(Filed 2 August 1972)

Homicide §§ 9, 28— self-defense — defendant's immoral conduct — time and place of killing

The trial court's instruction in a manslaughter case that to claim a right of self-defense, a defendant must be in a place where he had a right to be and a defendant living in a woman's apartment in adultery had no right to be there, was improper in that it informed the jury that defendant's right of self-defense was precluded solely by reason of his prior improper association with the wife of the deceased, and it eliminated the possibility that the episode between deceased and his wife which involved the actual shooting of deceased might not have been precipitated by the previous adulterous conduct of defendant and deceased's wife.

APPEAL by defendant from *McLean, Judge,* 17 April 1972 "C" Session of Superior Court held in MECKLENBURG County.

The defendant was placed on trial pursuant to a bill of indictment proper in form charging him with the crime of manslaughter. The defendant entered a plea of not guilty. The jury returned a verdict of guilty as charged in the bill of indictment, and from a prison sentence of fifteen years the defendant appealed.

The record agreed to by the solicitor on behalf of the State and by the attorney for the defendant states the following factual situation:

> " . . . The evidence in the light most favorable to the State indicated that the defendant was dating the estranged wife of the deceased on the 18th of December 1971. The deceased had on several occasions prior to this date threatened the defendant and the defendant's separated wife with bodily harm and death. On the 18th of December at

approximately 1:30 a.m. the deceased gained entrance to the house where the defendant and his estranged wife were staying and commenced an assault upon the wife. As the decedent's assault upon his wife increased, she was chased from the house by the deceased into an open field some distance away from the home where he began to assault her once again, hitting her with a two by four or stick. The defendant followed the deceased and his estranged wife from the house and came upon this situation in the open field, whereupon he told the deceased to stop beating his wife. At this, the deceased turned on the defendent stating, 'you are going to die tonight' and advanced upon the defendant with the two by four in one hand and at the same time reaching in his pocket. The defendant backed up from the deceased and fired once in the air, once in the ground, fired at the defendant, hitting him in the arm, all the time backing up. The deceased did not stop and continued to advance upon the defendant admonishing that he was going to kill the defendant at that time. At this time the defendant fired the fatal shots and ran from the scene."

In addition to the factual situation set out above, the record discloses that the deceased, John Henry McNeely, and his wife, Pamela Elaine McNeely, were married sometime in February 1970. On 18 December 1971 Pamela and the deceased had been living separate and apart for about two and one-half months. Pamela was living in an apartment on Jones Street with her sister. Also in the apartment was the sister's boyfriend, Pamela's older brother and Pamela's two children. When Pamela separated from her husband, she got in touch with the defendant and invited him to move in with her, and the defendant did so. The defendant was the father of Pamela's youngest child. On several occasions prior to 18 December, the deceased had told the defendant to move out and leave Pamela alone. In fact, on one occasion the deceased had threatened the defendant with a pistol. The defendant, who was eighteen years of age, purchased a .22 pistol which he carried in his pocket at all times. About 9:00 p.m. on December 18 the deceased and a male companion came to the apartment. The deceased and Pamela got into an argument, and the deceased struck Pamela with his fist. The deceased remained in the apartment fussing and fighting with Pamela until about 11:30 p.m. when

the deceased and his companion left. About 1:30 a.m. the deceased and his companion returned to the apartment, and the deceased renewed the fighting with Pamela. Pamela finally ran out of the room and down the stairs and out of the house. In the field where the deceased again caught Pamela he was apparently beating her with a stick or a two by four when the defendant came to her aid. The deceased was shot three times by the defendant. The defendant testified as to the fatal shooting and the events just prior thereto as follows:

> " . . . After John chased Pam out of the house, I ran out behind them and when I got outside I could not see them. I first went up to the store because the telephone was up there, but I did not see Pam and John. The store is about 200 yards from Jones and Grant Street. I didn't hear anything up there and I was coming back down to the apartment and I heard Pam hollering and screaming from in the field over there on Grant Street. I ran to the field and when I got in the field I saw John was standing over Pam beating her with a two by four. She was lying down on the ground and I got to within about 15 feet of them.
>
> When I got to that point, I hollered at John and told him to let her up, that she didn't want to go back to him. I did not have my pistol in my hand at that time, it was in my pocket. I hollered at him to let her up, he told me he was going to kill me and stuck his hand in his pocket and started toward me. I started backing up. I got scared and that's when I pulled the pistol out. I shot once up in the air and told him I didn't want to kill him and I shot another one in the ground, but he did not stop. He kept coming on me and said that he was going to kill me. After I shot in the air and shot in the ground, I kept backing up and he kept coming. I shot again. This time I aimed and shot at his arm. I don't think I hit him when I shot at his arm. I don't know whether I hit him or not. When I did that he still didn't stop and then I shot another shot at him. I fired five shots all together and during the time that I was shooting, I was still backing up. I didn't just turn my back and try to run because he had a two by four in his hand and he was going in his pocket attempting to get something and I was scared of him.
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> After I fired the fifth shot he was still coming and at that time I ran. . . . "

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.

Waggoner, Hasty and Kratt by John H. Hasty for defendant appellant.

CAMPBELL, Judge.

The defendant assigns as error the instruction of the trial judge to the jury pertaining to the right of self-defense asserted by the defendant.

The trial judge instructed the jury that "[s]elf defense may be divided into two general classes, namely, the perfect and imperfect right of self defense." The Court then went on to describe the difference between a perfect and an imperfect right of self-defense in accordance with the doctrines set out in *State v. Crisp,* 170 N.C. 785, 87 S.E. 511 (1915) and then added:

> "Now, the Court instructs you, members of the jury, that a person in order to claim a perfect right of self defense must be at a place where he has a right to be. The Court instructs you that if you should find from this evidence beyond a reasonable doubt that the defendant was there in Apartment 3 at 305 Jones St., living in adultery with the deceased man's wife, that he had no right to be there. The law of this land provides that two people unmarried who move into an apartment and live together are living in the state of adultery in violation of the law and the defendant would have had no right to have been there living in a state of adultery with this wife of the deceased McNeely and if he was there violating the law and under those circumstances he brought about a condition of things which produced the condition in which he found himseslf, the fighting of McNeely and his wife, and even though he was fighting in his own proper self defense, he could not complain of a perfect self defense and if under those circumstances he shot and killed the deceased McNeely, not in his own perfect right of self defense but due to circumstances which he had created himself by living there in adultery with the wife of McNeely, he would be guilty of at least manslaughter."

After the jury had deliberated for some time, the jury returned to the courtroom and requested the trial judge to redefine that portion of the charge on perfect self-defense and imperfect self-defense. Pursuant to this request, the Court again instructed the jury on the two general classes of self-defense, namely, the perfect and imperfect right of self-defense. After so instructing the jury again, the Court concluded with these words:

> "So, the Court instructs you, members of the jury, that in order for the defendant to avail himself of the right of self defense, he must not have done or committed any act which would have brought on the difficulty and he must be in a place which he had a right to be at the time.
>
> Now, the Court instructs you if you find from this evidence beyond a reasonable ground that this defendant was living there in a state of adultery with the wife of the deceased man and that as a result of him living there with the deceased man's wife the situation arose out of which the killing occurred, then the Court instructs you that he could not plead a perfect self defense and if you find those facts beyond a reasonable doubt, that he was living there in a state of adultery where he had no right to be, and under such circumstances as the deceased man came there seeking his wife and as a result of which they got into an argument and under such circumstances the defendant killed the deceased, by bringing about the circumstances himself or contributing to those circumstances, jointly with the wife of the deceased man, then the Court instructs you that he could not plead a perfect self defense and that under those circumstances if he by his own conduct brought about the circumstances under which he killed the deceased, even though he was fighting in his own self defense, he would be guilty of manslaughter."

The defendant assigns as error those two portions of the charge set forth above.

We think this exception well taken.

In the case of *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447 (1969), the Court, after quoting from *State v. Crisp, supra,* stated:

"Likewise, it is our opinion that conduct towards another must be evaluated within the framework of the surroundings, circumstances and parties, including their previous relations and the then existing state of their feelings. However, the fact that a person has previously been guilty of immoral conduct or wrongful acts, or has had past difficulties with the decedent, does not, standing alone, deprive a defendant of his right of self-defense. 40 C.J.S., Homicide, § 119, at 990. The requirement that a defendant must be free from fault in bringing on the difficulty before he can have the benefit of the doctrine of self-defense ordinarily means that he himself must not have precipitated the fight by assaulting the decedent or by inciting in him the reaction which caused the homicide. Usually, whether the defendant is free from blame or fault will be determined by his conduct at the time and place of the killing. Yet the fault in bringing on a difficulty which will deprive him of the right of self-defense is not confined to the *precise* time of the fatal encounter, but may include fault so closely connected with the difficulty in time and circumstances as to be fairly regarded as operating to bring it on. 40 Am. Jur. 2d, Homicide, § 145, at 434.

Here, defendant had been engaged for a period of years in conduct with deceased's wife which, in the eyes of an average juror, would fix him with blame and fault, and under the particular facts of this case the court should have amplified and explained the meaning of 'without fault' and 'free from blame.' . . . "

In the instant case the mandate of the trial judge to the jury was to the effect that if the defendant was living in adultery with the estranged wife of the deceased, then he had forfeited his right of self-defense and precluded the jury from considering all of the facts and circumstances and particularly the fact that the espisode which occurred in the field when the actual shooting took place might not have been precipitated by the previous adulterous conduct of the defendant and Pamela. The mandate in the instant case was too strongly slanted against the defendant.

In the brief for the State, it is contended that the case at bar is distinguishable from the facts in *State v. Jennings, supra,* because in the *Jennings* case the deceased had known of the illicit relations for some time and had spoken to the defendant

about the same; whereas, in the case at bar, there is no evidence that the deceased knew of the illicit relationship. We do not find this distinguishing characteristic in the instant case. Just as in *Jennings,* in the instant case the deceased knew of the illicit relations between his wife Pamela and the defendant. In fact, the deceased had previously threatened the defendant and had ordered the defendant to remove himself from the apartment where Pamela was living. On the very night of the homicide, the deceased reminded the defendant that he had previously ordered him to leave and that the defendant had not done so. We find the present case controlled by the rules laid down in *Jennings.* For a subsequent trial of *Jennings* see *State v. Jennings,* 279 N.C. 604, 184 S.E. 2d 254 (1971).

New trial.

Chief Judge MALLARD and Judge BRITT concur.

R. W. MAYO, PLAINTIFF v. AMERICAN FIRE AND CASUALTY COMPANY, ORIGINAL DEFENDANT, AND MAX G. CREECH, ADDITIONAL PARTY DEFENDANT

No. 7211SC499

(Filed 2 August 1972)

1. **Insurance § 4— binder — agent's failure to notify company — liability of company**

The trial court erred in its conclusion that defendant insurance agent did not bind defendant insurance company to a contract of insurance with plaintiff based on a finding that agent did not notify company of any commitment of liability as he was required to do under his agency contract.

2. **Insurance § 4— binder — notice to company**

An insurance agency contract providing for notice to be given the company by the agent on or before the date on which the insurance is effective places a duty on the agent to give notice after he has already committed the company to an insurance contract and does not contemplate that the agent apply to the company for issuance of insurance coverage or that he notify the company in advance before he commits it to liability.

3. **Insurance § 4— binder defined**

A binder is insurer's bare acknowledgment, either oral or written, of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued, or until insured gives

notice of its election to terminate; such contract may be made for a period not to exceed sixty days. G.S. 58-177(4).

4. **Trial § 57— trial by the court without a jury**

Waiver of a jury trial invests the trial judge with the dual capacity of judge and jury.

5. **Insurance § 4— binder — inclusion of contract terms**

It is not essential that a valid binder contain all the terms of an insurance contract, but it must contain the most important terms.

6. **Insurance § 4— binder — extension of credit to insured for premium**

Extension of credit to an insured for the insurance premium does not destroy the effectiveness of a binder.

APPEAL by additional defendant, Max G. Creech, from *Brewer, Judge,* 10 January 1972 Session of Superior Court held in JOHNSTON County.

Civil action to recover damages incurred by plaintiff when property owned by him was destroyed by fire on 28 May 1969. In his original complaint, plaintiff alleged that at the time of the fire the property was insured by American Fire and Casualty Company (Casualty Company) under an oral insurance binder issued 20 May 1969 by the company's agent, Max G. Creech. Plaintiff thereafter filed an amended complaint, adding Creech as a defendant, and seeking recovery in the alternative against him for negligently failing to obtain insurance coverage for plaintiff's property as he had agreed to do.

The parties stipulated the amount of damages and agreed that the case be tried by the court without a jury.

Uncontroverted evidence tended to show the following:

At all times pertinent, Max G. Creech was engaged in business as an insurance broker and was an agent of Casualty Company under an agency contract authorizing him "to issue and deliver policies, certificates, endorsements and binders which the company may, from time to time, authorize to be issued and delivered. . . ." On 20 May 1969, plaintiff requested Creech to procure insurance in a specified amount on a building and contents owned by plaintiff. Creech advised plaintiff that the property was now insured and that the insurance would be with Casualty Company. Payment of the premium was to be made on open account. Creech also advised plaintiff that he would furnish him with a written binder of insurance shortly thereafter. That same day, Creech delivered to his secretary

notes he had taken during his conversation with plaintiff and instructed her to prepare a written binder of insurance for plaintiff with Casualty Company. The secretary forgot to prepare the written binder as directed. On 28 May 1969 plaintiff's property was destroyed by fire. He immediately notified Creech who then learned, for the first time, that his secretary had not prepared the written binder. Creech nevertheless assured plaintiff that the property was insured and notified Casualty Company what had happened. The company denied coverage.

The court entered findings from which it concluded that Creech did not bind Casualty Company to a contract of insurance with plaintiff; that Creech negligently failed to procure insurance coverage for plaintiff as alleged in the complaint, and that plaintiff is entitled to recover judgment against Creech. Judgment was entered dismissing plaintiff's claim against Casualty Company and adjudging that he recover the stipulated amount of damages from Creech. Only Creech appealed.

Robert A. Spence for plaintiff appellee.

Teague, Johnson, Patterson, Dilthey & Clay by Ronald C. Dilthey for defendant appellee American Fire and Casualty Company.

James A. Wellons, Jr., for defendant appellant Max G. Creech.

GRAHAM, Judge.

Plaintiff did not appeal. The judgment is therefore a final adjudication as between plaintiff and Casualty Company. *Conger v. Insurance Co.*, 266 N.C. 496, 146 S.E. 2d 462. Even so, whether plaintiff was entitled to recover from Casualty Company and, if not, the ground of Casualty Company's nonliability, has significance in determining plaintiff's right to recover from appellant. *Conger v. Insurance Co., supra.* If insurance was in effect as a result of appellant's oral conversation with plaintiff on 20 May 1969, plaintiff's right of recovery would be against Casualty Company and not against appellant. *Wiles v. Mullinax*, 270 N. C. 661, 155 S.E. 2d 246.

[1] The trial court's conclusion that appellant did not bind Casualty Company to a contract of insurance with plaintiff is based upon its finding that appellant did not notify Casualty

Company of any commitment of liability as he was required to do under his agency contract. In our opinion this finding does not support the conclusion made and the case must therefore be remanded for a new trial.

[2] It is undisputed that appellant failed to give timely notice to Casualty Company as his agency contract required. However, we do not interpret the requirement of notice in the contract as affecting the authority of appellant to bind the company in the first instance. The provision in question provides in pertinent part:

> "The Agent may bind the Company for the kinds of insurance and within the limits set forth in the current or amended 'General Rules' as furnished by the Company. * * * Notice of any commitment of liability by the Agent shall be sent to the Company on or before the date on which the insurance is effective."

The duty to give notice under the above provision arises after the agent has committed the company to an insurance contract. The provision does not contemplate that the agent apply to the company for issuance of insurance coverage for a customer or that he notify the company in advance before he commits it to liability. The agent is authorized to enter into the contract on behalf of the company. He must then notify the company, on or before the date the insurance is effective, that it is bound. The agent's failure to notify the company does not invalidate an otherwise valid commitment, though it may subject him to liability to the company. Indeed, the agency contract specifically provides that the agent "shall be liable for any loss sustained by the company from any negligent delay in complying with the provisions of this paragraph."

Appellant does not deny that he was under a duty to obtain insurance coverage for plaintiff. His position is that he performed this duty by orally binding his principal, Casualty Company, to a contract of insurance with plaintiff, effective 20 May 1969.

[3] "In an insurance parlance, a 'binder' is insurer's bare acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued, or until insured gives notice of its election to terminate." *Moore v. Electric Co.*, 264 N.C. 667, 673, 142 S.E. 2d 659, 664.

"Binders or other contracts for temporary insurance may be made, orally or in writing, for a period which shall not exceed sixty days. . . . " G.S. 58-177(4). See also *Moore v. Electric Co., supra; Distributing Corp. v. Indemnity Co.*, 224 N.C. 370, 30 S.E. 2d 377; *Lea v. Insurance Co.*, 168 N.C. 478, 84 S.E. 813.

The essential questions to be determined are: Did appellant have the authority to orally bind Casualty Company to a contract of insurance; and if so, did he do so by his oral remarks on 20 May 1969? If he did, insurance was in force at the time of plaintiff's loss and appellant is not liable to plaintiff. On the other hand, if insurance coverage did not attach as a result of the oral conversation between appellant and plaintiff, appellant had the duty to exercise reasonable diligence to obtain it and may be liable within the amount of the policy for his negligent failure to do so. *Wiles v. Mullinax, supra; Equipment Co. v. Swimmer,* 259 N.C. 69, 130 S.E. 2d 6; *Elam v. Realty Co.*, 182 N.C. 599, 109 S.E. 632.

[4] In determining the essential questions involved the trial judge will pass upon the credibility of the testimony in his capacity as jury. Waiver of a jury trial invests the trial judge with the dual capacity of judge and jury. *Taney v. Brown,* 262 N.C. 438, 137 S.E. 2d 827. The construction of documents introduced and their legal effect present questions of law for the court. *Wiles v. Mullinax, supra.*

[5, 6] If, on the next trial, the trial judge determines that appellant had authority to bind Casualty Company by an oral contract, he will then determine whether, for valid consideration, appellant orally agreed on behalf of the company to provide insurance for plaintiff until a more formal written binder or policy could be issued; and whether the content of the oral agreement was sufficient to constitute a valid binder. In this connection it should be noted that it is not essential that a valid binder contain all the terms of an insurance contract. It is only necessary that it contain the most important terms. *Distributing Corp. v. Indemnity Co., supra.* See particularly *Wiles v. Mullinax, supra* at 668, 155 S.E. 2d at 251. It should be further noted that extension of credit to an insured for the insurance premium does not destroy the effectiveness of a binder. *Wiles v. Mullinax, supra; Lea v. Insurance Co., supra.*

New trial.

Judges PARKER and VAUGHN concur.

ESTHER ZERDEN GREENE, PLAINTIFF v. EDWARD IRVING GREENE, DEFENDANT

— AND —

EDWARD I. GREENE, PETITIONER v. ESTHER Z. GREENE, RESPONDENT v. MARVIN S. ZERDEN AND WIFE, ELAINE S. ZERDEN, INTERVENORS

No. 7218DC238

(Filed 2 August 1972)

1. **Divorce and Alimony § 16— alimony — defense of adultery**

Alimony is not payable when an issue of adultery pleaded in bar thereto is found against the spouse seeking alimony. G.S. 50-16.6.

2. **Divorce and Alimony § 14; Evidence § 12— action for alimony — cross-examination as to adultery**

In an action for alimony without divorce, the trial court did not err in striking admissions by plaintiff on cross-examination, over objection of her counsel, that she committed adultery during the marriage, since neither the husband nor the wife is a competent witness in any action *inter se* to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery, and may not be compelled to give such evidence. G.S. 8-56; G.S. 50-10.

3. **Divorce and Alimony § 4.5— defense of connivance**

Connivance in the law of divorce is the plaintiff's consent, express or implied, to the misconduct alleged as a ground for divorce and is based on the doctrine of unclean hands.

4. **Divorce and Alimony § 4.5— sexual misconduct — connivance as defense**

Connivance is a defense not only to a plea of adultery but also to other charges of sexual misconduct, including allegations of unnatural sex acts.

5. **Divorce and Alimony § 4.5—evidence of connivance**

The evidence was sufficient to support the court's finding that defendant husband was guilty of connivance in the sexual misconduct of plaintiff wife where it tended to show that when efforts of a detective failed to uncover any misconduct on plaintiff's part, defendant and the detective agreed to procure plaintiff's misconduct by employing, at substantial financial cost to defendant, immoral persons to induce plaintiff to commit acts which could be used as evidence against her, and that they were successful in this endeavor.

6. **Evidence § 14— privileged communications with physician**

The trial judge was exercising his discretion in refusing to find that privileged testimony sought to be elicited from a psychiatrist was necessary to a proper administration of justice, and it was not necessary that he assign a reason therefor. G.S. 8-53.

7. Witnesses § 6— exclusion of tape recording — absence of prejudice

In an action for alimony without divorce, defendant was not prejudiced by the trial court's exclusion of tape recordings offered by defendant for the purpose of impeaching a defense witness who furnished no evidence at trial bearing on any fact thereafter found by the court.

8. Appeal and Error § 57— absence of evidence — conclusiveness of finding

When the evidence on which the court based a finding of fact is not in the record, the finding is conclusive on appeal.

Judge VAUGHN dissents.

APPEAL by defendant from *Washington, District Judge,* 16 September 1971 Session of District Court held in GUILFORD County.

This appeal is from an order awarding plaintiff permanent alimony without divorce in the sum of $100,000.00, payable in annual installments of $10,000.00 until paid. The question of the custody of the minor children born of the marriage was raised in a habeas corpus proceeding. *(Edward I. Greene v. Esther Z. Greene v. Marvin S. Zerden and wife, Elaine S. Zerden.)* The cases were consolidated for hearing and heard by the court without a jury, the parties having waived a jury trial on the alimony issues. Separate orders were entered in each case. Only the order awarding alimony was appealed.

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd and William P. Aycock II for plaintiff appellee.

Jordan, Wright, Nichols, Caffrey & Hill by Luke Wright and Edward L. Murrelle for defendant appellant.

GRAHAM, Judge.

Defendant's first assignment of error is to the court's refusal to dismiss plaintiff's claim pursuant to G.S. 1A-1, Rule 41(b).

The record of more than five hundred pages, plus numerous exhibits, is replete with sordid accounts of marital misconduct on the part of both parties. The court made extensive findings of fact, concluded that defendant was guilty of abandonment and that plaintiff's misconduct was in some instances condoned by defendant and that in other instances it resulted from defendant's connivance.

The evidence tends to show that the parties were married in August of 1952 and lived together until 26 October 1970 at which time defendant left the plaintiff. It is undisputed that plaintiff is a dependent spouse and defendant is a supporting spouse within the meaning of G.S. 50-16.1. It is also undisputed that defendant is a man of considerable financial means. No question is raised with respect to the amount of the alimony awarded.

[1] Defendant's contention that the action should have been dismissed is based upon admissions by plaintiff on cross-examination, over objection by her counsel, that she committed adultery during the marriage. Alimony is not payable when an issue of adultery pleaded in bar thereto is found against the spouse seeking alimony. G.S. 50-16.6. The court admitted plaintiff's admissions of adultery for consideration on the question of custody but ordered them stricken in the alimony action. In addition, the court found that even if this testimony were admissible, the acts admitted by plaintiff were condoned by her husband and therefore do not bar plaintiff's alimony claim.

[2] We hold that the testimony was properly stricken. "Construing G.S. 8-56 and G.S. 50-10 together, . . . neither the husband nor the wife is *a competent witness* in any action *inter se* to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery, *and may not be compelled* to give such evidence." *Wright v. Wright,* 281 N.C. 159, 167, 188 S.E. 2d 317, 322. See also *Hicks v. Hicks,* 275 N.C. 370, 167 S.E. 2d 761.

[4] Defendant next contends that the court erred in sustaining plaintiff's plea of connivance. He argues that connivance is a defense only to a plea of adultery and that the court here improperly extended the defense to include another act of sexual misconduct.

The court found that defendant employed agents to "induce, persuade and coerce Esther Zerden Greene into participating in illicit sexual activities" and concluded that in doing so defendant thereby "actively connived at and corruptly procured those events."

[3] "Connivance in the law of divorce is the plaintiff's consent, express or implied, to the misconduct alleged as a ground for

divorce." 1 Lee, N. C. Family Law, § 86, p. 328. "Connivance, or procurement, denotes direction, influence, personal exertion, or other action with knowledge and belief that such action would produce certain results and which results are produced." Cohen, Divorce and Alimony in North Carolina, § 59. IV, p. 98. "The basis of the defense of connivance is the maxim 'volenti non fit injuria,' or that one is not legally injured if he has consented to the act complained of or was willing that it should occur. It is also said that the basis of the defense of connivance is the doctrine of unclean hands." 24 Am. Jur. 2d, Divorce and Separation, § 193, p. 352.

The evidence tends to show that a detective employed by defendant paid numerous persons to go by plaintiff's house from time to time in an attempt to engage plaintiff in immoral conduct. The detective reported these activities to defendant. The detective testified: "After I couldn't get any pictures with a man, he [defendant] probably told me to try a woman. With regard to whether that is probably right or whether I know that is right, well I am sure that is the gist of what he said. Yes, it is not necessary to say probably. I know that is the gist of what he said." Following these instructions, the detective, accompanied by a girl whom he suspected of unnatural sex tendencies, went to plaintiff's home on the pretext that the detective and the girl were getting married and were interested in buying the home. The detective told defendant that he was sending the girl back to the house "to see what she could do." Defendant agreed to reimburse the detective for the substantial expenses he would incur in employing the girl for this purpose. Thereafter the detective hired a second girl whom he suspected of tending toward a "woman to woman relationship." The two girls were to visit plaintiff and go places with her. The detective stated, "I told them that they were to do anything that Mrs. Greene wanted to do. I told them that I wanted to take pictures. They knew that. They knew that I didn't just want to take pictures going in and out of the grocery store. I did tell them the nature of the pictures that I wanted them to take."

Eventually the girls arranged for Mrs. Greene to go with them and one Wade Carson on a picnic. The detective had employed Carson, promising him $75.00 in payment and representing that "there was a possibility that he could have intercourse with the women." At the picnic, Mrs. Greene, who was not accustomed to drinking, consumed a large quantity of alco-

holic beverages which were brought there by Carson. Mrs. Greene admitted that during the day she engaged in reprehensible conduct including using a "vibrator" on one of the girls. It is with respect to this act that defendant says plaintiff's plea of connivance is inapplicable.

[4] It is true that connivance is most frequently asserted as a defense to a charge of adultery in divorce actions. However, we know of no reason why the plea should not also be available as a defense to other charges of sexual misconduct. The plea is founded upon equitable principles. As stated in the case of *Fonger v. Fonger,* 160 Md. 610, 623, 154 A. 443, 448:

> "[T]he foundation of equitable jurisdiction is justice, and one of its greatest landmarks is that 'he who does iniquity shall not have equity,' and connivance is iniquity. . . . 'Nothing can be more basely infamous or more degrading' . . . and it is certain that a court of equity will not lend its aid to one who has knowingly connived at his wife's adultery . . . since it regards him as unclean."

We agree with plaintiff's argument that, "[t]o say that the plea of connivance is a defense to allegations of adultery but not to allegations of abnormal sex acts, is to call the corrupt procurement of bad conduct inequitable while labeling the procurement of worse conduct acceptable."

[5] Defendant also challenges the sufficiency of the evidence to support the court's findings and conclusions with respect to connivance. Considering the evidence in the light most favorable to plaintiff, it is sufficient to show the following: Defendant has had an extramarital affair with his secretary, Joyce Marr, for a number of years. Nude photographs of Mrs. Marr were found in defendant's desk drawer. Mrs. Marr, who has played more than a passing role in obtaining evidence for use against plaintiff, was divorced from her husband in October of 1969. That same month defendant engaged a detective to obtain evidence that could be used against his wife. When exhaustive efforts of the detective failed to uncover any misconduct on plaintiff's part, defendant and the detective agreed to procure plaintiff's misconduct by employing, at substantial financial cost to defendant, totally immoral persons to induce plaintiff to commit acts which could be used as evidence against her. In this endeavor they were successful.

We find the evidence plenary to support the judge's findings. A statement in the case of *Wotherspoon v. Wotherspoon,* 108 Pa. S. 309, 311, 164 A. 842, 843, seems applicable to the facts of this case.

> " 'Text writers and our courts agree, that a man who suspects a wife may take means to procure proof, but he must not lead her into a fresh wrong because he feels she is guilty of an old one. He may leave open the opportunities which he finds, but he must not lay new temptations in her way; it is one thing to permit, and another to invite; and one who takes advantage of an agent's unauthorized fraud is answerable for the fraud; when a husband intentionally lays a lure for his wife, either acting in person or through an agent, his will necessarily concurs in her act.' "

Defendant next assigns as error the court's sustaining of plaintiff's objection to the testimony of Dr. Carr, a psychiatrist. This assignment of error is overruled. Dr. Carr consulted briefly with plaintiff in 1959. He made no notes at the time of the consultation and admitted that since that time he has seen literally thousands of patients and consulted on literally thousands of cases in which he did not see the patients.

[6] The evidence defendant sought to elicit from the psychiatrist was privileged, unless the trial court found that it was necessary to a proper administration of justice. G.S. 8-53. The court did not so find. In refusing to so find, the trial judge was exercising his discretion and it was not necessary that he assign a reason therefor. "When no reason is assigned by the court for a ruling which may be made as a matter of discretion for the promotion of justice or because of a mistaken view of the law, the presumption on appeal is that the court made the ruling in the exercise of its discretion." *Brittain v. Aviation, Inc.,* 254 N.C. 697, 703, 120 S.E. 2d 72, 76.

Defendant next assigns as error the refusal of the court to allow in evidence tape recordings made by defendant of conversations between him and Christine Carter, the parties' former maid. Mrs. Carter was called by defendant as a witness. She acknowledged that in 1967, and perhaps in 1968 and 1969, she had conversations with defendant about his wife and that defendant tape recorded the conversations. She contended, however, that defendant told her what to say during the

conversations. Defendant offered three tape recordings in evidence for the purpose of impeaching Mrs. Carter's testimony. Plaintiff objected and the court sustained the objection after expressly considering testimony given under oath by defendant and other witnesses during prior proceedings in this cause. The following previous testimony was considered by the court:

Testimony of defendant given on his deposition on 2 December 1970:

"Q. I believe you were present this morning, were you not, sir, when Christine Carter testified?

A. Yeah; yeah.

Q. You heard her testimony?

A. Yeah.

Q. Was that testimony truthful?

A. As far as I know—I mean I—

Q. As far as you know it was?

A. Yes.

Q. Did you hear the question that I put to her concerning certain recordings?

A. Uh-huh.

Q. As to whether or not she'd ever had a conversation recorded by you?

A. Uh-huh.

Q. And I believe she said 'No,' that she had not; is that your recollection?

A. Yeah.

Q. Was that a truthful answer?

A. So far as I know.

Q. Well, if you had made a recording of a conversation with Christine Carter you would know it, would you not, Mr. Greene?

A. Oh, yeah.

Q. Had you made such a recording?

A. No.

Q. Do you know if anyone else has made such a recording?

A. I don't know.

Q. If there has been such a recording made, you haven't heard it; would that be an accurate statement?

A. That's right.

Q. Have you ever heard Christine Carter's voice on a recording?

A. No.

Q. Did you hear Christine Carter's answer to the question that she had never talked with you about Mrs. Greene?

A. That's right.

Q. I believe she answered no; is that your recollection?

A. You asked her what?

Q. Whether she had ever talked with you about Mrs. Greene?

A. Yeah; and she said no.

Q. She said no?

A. Okay; that's right. That's right."

Testimony given by Mrs. Carter during hearing on a motion in this cause on 9 December 1970:

"Q. Did you know that Mr. Greene recorded any conversations that he had with you?

A. Yes, he did, but I didn't know it.

Q. You didn't know it was being recorded?

A. No.

* * *

Q. Now did you tell Mr. Greene things about his wife that he recorded on tape, that you later learned that he had recorded on tape?

A. Yes, and all of those I told him was lies, because he put them in my mouth. They was all lies; they was not true.

Q. In other words, Mr. Greene sort of picked out of you and put whatever words he wanted in your mouth; is that right?

A. Yes."

Testimony given by Joyce Marr, defendant's secretary, on her deposition 2 December 1970:

"Q. Did you ever have any conversations with Christine Carter about either Mr. or Mrs. Greene?

A. No, sir."

(Mrs. Marr's testimony at trial tended to show that she actually participated in the conversations with Mrs. Carter which were recorded by defendant. Mrs. Marr testified at length concerning what was said in the conversations.)

Defendant contends that irrespective of his denial under oath that the tape recordings existed, it was error for the court to refuse to allow him to use them in evidence for impeachment purposes. In this connection it should be noted that after defendant's false testimony concerning the tape recordings, his counsel immediately and candidly admitted to plaintiff's counsel that he knew there were two tape recordings. These two recordings were later produced in response to a motion to produce filed by plaintiff. The third tape recording was not produced until the trial.

[7] Plaintiff contends that since defendant knowingly and falsely denied the existence of the tape recordings during plaintiff's discovery proceedings, he should be estopped from using the recordings at trial. We find this argument quite persuasive. However, aside from this, we think defendant has failed to show that he was prejudiced by the exclusion of the recordings. They were competent, if at all, only for impeachment purposes. The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the trier of facts to give less weight to the witness's testimony in arriving at the ultimate facts in the case. Stansbury, N. C. Evidence 2d, § 38, p. 76. Mrs. Carter furnished no evidence at

trial bearing on any fact thereafter found by the court. Consequently, whether she was a credible witness is of no significance.

Defendant's final contention is that the court erred in finding that defendant had been deliberately evasive in responding to discovery directed to questions of his earning capacity and financial condition. This contention is without merit.

[8] Pursuant to G.S. 1A-1, Rule 45, defendant was ordered to produce at the trial appraisals of real estate which he owned, appraisals of his leasing agreements and copies of the last three tax returns for corporations in which he owned 50% or more of the outstanding stock. He failed to produce any of these documents. His explanation as to why he did not comply with this order was not transcribed and is not a part of the record. The court found that it was because he made no effort to comply. Since the evidence on which the court based this finding is not in the record, the finding is conclusive on appeal. *Bundy v. Ayscue,* 5 N.C. App. 581, 169 S.E. 2d 87, *appeal dismissed* 276 N.C. 81, 171 S.E. 2d 1.

Affirmed.

Judge MORRIS concurs.

Judge VAUGHN dissents.

ULYSSES VERNON BEASLEY, JAMES A. KIGER, EMIDIO J. BASSETTI, AND JOE W. JONES v. FOOD FAIR OF N. C., INC., AND RAY F. MESSICK

No. 7221SC457

(Filed 2 August 1972)

1. **Master and Servant § 10— discharge for union membership — supervisors — jurisdiction of State court**

Where meat market managers who are union members have been classified as supervisors by the National Labor Relations Board, the State court has jurisdiction of an action brought by such meat market managers to recover damages for their discharge because of membership in the union. G.S. 95-81; G.S. 95-83.

2. **Master and Servant § 10— discharge for union membership — right-to-work statute — applicability to supervisors**

Supervisors come within the purview of G.S. 95-83 giving the right to recover damages to any "person" whose continuation of employment has been denied because of union membership.

Beasley v. Food Fair

APPEAL by plaintiffs Beasley, Bassetti and Jones from *Gambill, Judge,* 28 February 1972 Session, Superior Court, FORSYTH County.

Plaintiffs jointly brought an action asking for $500,000 actual damages and $1,000,000 punitive damages, without separation of damages as to each plaintiff. They alleged that they were employed by defendant Food Fair as meat market managers. After a campaign and election, Local 525 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, was, on 24 June 1971, certified as collective bargaining representative for all of defendant Food Fair's meat market employees. Plaintiffs joined this labor organization in April and May 1971, and defendants had knowledge of this prior to 24 June 1971. On 25 and 27 June 1971, defendant Messick, acting individually and as agent for defendant Food Fair, discharged plaintiffs because of their membership in the union. As a result of this, plaintiffs suffered embarrassment and humiliation in their community, lost all means of income, and have been unable to find other employment. The plaintiffs further alleged that the conduct was "willful, reckless, malicious, and without the slightest regard for the rights guaranteed the Plaintiffs by the General Statutes of North Carolina."

Defendants filed motion to dismiss and plea in abatement. Grounds for motion to dismiss were that the complaint failed to state a claim upon which relief could be granted because the court lacked jurisdiction and because the complaint alleges violations as to all four plaintiffs but alleges damages collectively and fails to define or allege that damages were suffered by each plaintiff. By way of plea in abatement defendants alleged that a prior action involving the same parties and same subject matter was pending before the National Labor Relations Board. In the alternative, defendants moved to dismiss as to punitive damages on the ground punitive damages are not recoverable in this action as a matter of law. The court considered the motions to dismiss and for judgment on the pleadings as a motion for summary judgment and allowed it, dismissing the action with prejudice. Plaintiffs Beasley, Bassetti, and Jones appealed.

Eubanks and Sparrow, by Larry L. Eubanks, for plaintiff appellants.

McCaul, Grigsby and Pearsall, by Robert C. Moss, and Hudson, Petree, Stockton, Stockton and Robinson, by R. M. Stockton, Jr., and James H. Kelly, Jr., for defendant appellees.

MORRIS, Judge.

It appears from the affidavit and copy of the National Labor Relations Board's order filed with defendants' motion that the plaintiffs, who are meat market managers, are classified as supervisors under the definition contained in the Labor Management Relations Act. This is conceded by plaintiffs. It also appears by stipulation that plaintiffs' appeal to the General Counsel of the National Labor Relations Board from a denial of their claim under the Act was denied. The pertinent portions of the letter of denial follow: "Your appeal in the above matter has been duly considered. The appeal is denied. The four alleged discriminatees involved herein were supervisors within the meaning of Section 2 (11) of the Act and hence were not entitled, in the circumstances herein, to the protection of the Act."

Statutes dealing with labor organizations are contained in Article 10 of Chapter 95 of the General Statutes, and became effective 18 March 1947. Section 95-78 declares the policy:

> "The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association."

G.S. 95-83 provides:

> "Any person who may be denied employment or be deprived of continuation of his employment in violation of §§ 95-80, 95-81 and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment."

Plaintiffs contend that defendants have violated Section 95-81:

> "No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

Defendants, however, contend that plaintiffs are supervisors, a fact which is conceded by plaintiffs, and that under the provisions of the Labor Management Relations Act they are specifically excluded as employees entitled to protection of the Act; that the National Labor Relations Board took jurisdiction, and denied their claim because they are not afforded the protection of the Act; and that the Taft-Hartley Act, under its provisions, has excluded and preempted State jurisdiction.

This is a case of first impression in this State. Counsel have cited no authority directly in point, nor have we found any case on "all fours." Determination requires that we first consider certain sections of the Taft-Hartley Act (Labor Management Relations Act) hereinafter referred to as the Act. Reference to section numbers shall be to those adopted in United States Code Annotated, Title 29, unless otherwise indicated. Definitions are found in Section 152. Those pertinent to this appeal are:

> "(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include . . . any individual employed as a supervisor . . ."
>
> "(8) The term 'unfair labor practice' means any unfair labor practice listed in section 158 of this title."
>
> "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or

clerical nature, but requires the use of independent judgment."

Section 157 gives to "employees" the right "to form, join, or assist labor organizations." Section 158(a) sets out certain actions which shall be deemed unfair labor practices on the part of an employer. Among those are (1) interference with rights guaranteed to employees in Section 157 and (3) discrimination with respect to hiring or tenure of employment by reason of an employee's membership in any labor organization.

In defining "supervisors," Congress had in mind supervisory personnel traditionally regarded as a part of management and to place into the employer category those who act for management in formulating and executing its labor policies. *International Union of United Brewery, etc. v. N.L.R.B.*, 298 F. 2d 297, (D.C. Cir. 1961), cert. denied 369 U.S. 843, 7 L.Ed. 2d 847, 82 S.Ct. 875 (1962). In excluding supervisors from the rights and protections afforded employees, the purpose was to assure to employers their right to select their supervisors and to procure the loyalty and efficiency of their supervisors. *National Labor Rel. Bd. v. Retail Clerks Inter. Ass'n.*, 211 F. 2d 759 (9th Cir. 1954), cert. denied 348 U.S. 839, 99 L.Ed. 662, 75 S.Ct. 47 (1954). As was said in *National Labor Relations Bd. v. Edward G. Budd Mfg. Co.*, 169 F. 2d 571, 579 (6th Cir. 1948), cert. denied 335 U.S. 908, 93 L.Ed. 441, 69 S.Ct. 411 (1949): "We believe it is clear that Congress intended by the enactment of Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities."

Erosion of this purpose appeared with the 1947 amendment (effective 23 June 1947, after the enactment and effective date of North Carolina's Right-to-Work Act), allowing supervisors to join a labor organization. Section 164(a) provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

The question of federal preemption in the labor relations field has frequently been before the courts since the enactment of Taft-Hartley. As was said in *Garner v. Teamsters Union,* 346 U.S. 485, 488, 98 L.Ed. 228, 74 S.Ct. 161 (1953), "[t]he National Labor Management Relations Act . . . leaves much to the states, though Congress has refrained from telling us how much."

"When a union attempts to organize supervisors, or when supervisors elect to become members of a union, a problem of federal preemption does arise." 4 Jenkins, Labor Law, § 21.9, The Federal Preemption Doctrine, p. 103. In *San Diego Unions v. Garmon,* 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773 (1959), Mr. Justice Frankfurter, speaking for the majority, laid down certain guidelines when he said:

> "If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7 [29 U.S.C.A. 157], or prohibited by § 8 [29 U.S.C.A. 158], then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States." 359 U.S., at p. 245.

In *Hanna Mining v. Marine Engineers,* 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965), in an opinion by Mr. Justice Harlan, expressing the view of eight members of the Court, it was held that under the circumstances of that case, the federal act did not preempt the state's jurisdiction. Plaintiffs, employers, declined to negotiate with a union representing the marine engineers until it was established that the union represented a majority of the engineers whereupon the union picketed plaintiffs' ships. Employers petitioned that a representation election among its engineers be held. The petition was dismissed by the National Labor Relations Board on the ground that the engineers were "supervisors" under the Act, and excluded from the definition of employees. The employers' charge alleging a violation of Section 8 [29 U.S.C.A. § 158] of the Act was dismissed on the ground that the union's conduct fell outside the provisions of the Act because it sought to represent "supervisors" rather than "employees." Plaintiffs then brought suit in Wisconsin state court seeking injunctive relief. The state court dismissed for lack of jurisdiction. The Supreme Court of

Wisconsin affirmed on the ground that the picketing, while illegal under Wisconsin law, arguably violated Sections 8(b)(4)(B) and 8(b)(7) of the Act [29 U.S.C.A. § 158(b)(4)(B) and 29 U.S.C.A. § 158(b)(7)] and so fell within the exclusive jurisdiction of the National Labor Relations Board. In reversing, the Supreme Court said:

> "The ground rules for preemption in labor law, emerging from our Garmon decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by § 7, or prohibited by § 8' of the National Labor Relations Act, see 359 U.S., at 244-246, and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation, cf. 359 U.S., at 245.
>
> For the reasons that follow, we believe the Board's decision that Hanna engineers are supervisors removes from this case most of the opportunities for preemption." 382 U.S., at pp. 187-188.

The Court went on to say that exclusion of supervisors from the definition of employees had the obvious result that many provisions of the Act employing that pivotal term would cease to operate where supervisors were the focus of concern. There cannot be protection by Section 157 nor do supervisors come within the prohibitions of Section 158. The defendants argued that Section 164(a) ousted both state and federal authority and signified "a laissez faire toward supervisors." The Court said the position had no merit since "the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. Whether the legislators fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted § 8(b) [29 U.S.C.A. § 158(b)] is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing." 382 U.S., at pp. 189-190.

[1] Applying what we deem to be the holding of *Hanna,* i.e., that a state does have jurisdiction over activities of supervisors because the activities of supervisors could not be arguably either prohibited or protected under the Act, we reach the conclusion that in the case before us where, as in *Hanna,* the union

members involved have been classified by the National Labor Relations Board as supervisors, the State court has jurisdiction. Plaintiffs as supervisors are not arguably either protected by Section 157 or prohibited by Section 158. While *Willard v. Huffman,* 250 N.C. 396, 109 S.E. 2d 233 (1959), cert. denied 361 U.S. 893, 4 L.Ed. 2d 150, 80 S.Ct. 195 (1959), did not deal with supervisors, we think this position is within the rationale of that holding.

[2] We next reach the question of whether plaintiffs come within the purview of G.S. 95-83 giving the right to recover damages to any "person" whose continuation of employment has been denied because of union membership. Defendants strenuously insist that the purpose of North Carolina's Right-to-Work Statutes is the same as the Labor Management Relations Act—to protect rank and file employees from unfair labor practices and provide them with the right, if they choose, to negotiate as one on an equal basis with management. They contend that to interpret the statute as including supervisors would result in the division of management into owners and supervisors, seriously weaken the position of management, and create a severe imbalance between labor and management. While we are inclined to agree, we are bound by the rules of statutory construction. "If the language of a statute is clear and unambiguous, judicial construction is not necessary. Its plain and definite meaning controls. (Citations omitted.) But if the language is ambiguous and the meaning in doubt, judicial construction is required to ascertain the legislative intent. (Citations omitted.)" *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 479, 164 S.E. 2d 2 (1968). The meaning of the word "person" certainly is clear and unambiguous and leaves no room for argument. It is defined as "an individual human being." Webster's Third New International Dictionary (1968). The term obviously includes supervisors as well as employers. We recognize the fact that this statute was enacted just a few months prior to the effective date of 29 U.S.C.A. 164(a). However, the legislature did not see fit to use the word "employee," specifically excluding supervisors from its meaning, as did the legislatures of some states in enacting right-to-work statutes. To give the plain language of the statute, by interpretation, a meaning it does not have would result in amending the statute. This is the prerogative of the legislature.

For the reasons stated herein, the judgment of the trial tribunal must be reversed. The court did not rule on defendants' motion to dismiss the prayer for relief as to punitive damages nor for misjoinder of claims. These questions, therefore, are not before us.

Reversed.

Judges VAUGHN and GRAHAM concur.

ROBERT WHITE v. DAVID H. REILLY

No. 7215DC428

(Filed 2 August 1972)

1. **Automobiles § 73— contributory negligence as a matter of law — backing into lane of travel**

Plaintiff's evidence did not show him contributorily negligent as a matter of law where defendant collided with the rear end of plaintiff's car as he had completed backing out of a parking space and prepared to proceed forward.

2. **Rules of Civil Procedure § 50— directed verdict — judgment NOV**

In an action for damages to plaintiff's automobile, the trial court did not err in denying defendant's motions for directed verdict and judgment NOV where plaintiff's evidence did not show that he was contributorily negligent as a matter of law and where there were contradictions in the evidence offered by both parties.

3. **Evidence § 45— nonexpert opinion evidence as to value**

Weight to be given plaintiff's opinion testimony as to the fair market value of his automobile before and after the accident was for jury determination.

4. **Negligence § 37— instructions on negligence**

The court's instruction giving the jury a free hand to find negligence in any respect it wished without restrictions to negligence as may have been shown by the evidence was error prejudicial to defendant.

5. **Trial § 35— burden of proof — error in court's instructions**

The trial court erred in its instructions upon the damage issue in an automobile collision case when it failed to place the burden of proof upon plaintiff.

APPEAL by defendant from *McLelland, District Judge,* 15 November 1971 Session of CHATHAM District Court.

Plaintiff, Robert White, instituted this action against defendant to recover the sum of $400 as damages to his automobile arising out of a collision which occurred on 3 December 1970, at approximately 4:30 p.m., on Hillsborough Street (U.S. Highway 15-501) in Pittsboro, North Carolina.

In his complaint, plaintiff alleged that defendant was negligent in that he drove at an excessive speed, failed to keep a proper lookout, and failed to reduce speed or turn his automobile aside in order to avoid a collision.

In response, defendant denied the material allegations of the complaint and alleged the plaintiff's contributory negligence as a bar to any recovery by plaintiff. By way of counterclaim, defendant alleged that the plaintiff negligently backed his vehicle out of a parking space into defendant's path of travel, smashing into the right front end of defendant's vehicle. Defendant further alleged that plaintiff's negligence was the sole proximate cause of said collision, resulting in damages and expenses to defendant in the sum of $1,000.

Plaintiff repied denying the allegations in defendant's counterclaim.

The case was tried before the District Judge and a jury. Both parties presented evidence, and each moved for a directed verdict, at the close of all the evidence. Both motions were denied.

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

"1. Was plaintiff damaged by the negligence of defendant as alleged in the Complaint?

"Answer: Yes

"2. Did plaintiff, through his own negligence, contribute to his damages as alleged in the Answer of defendant?

"Answer: No

"3. What amount, if any, is plaintiff entitled to recover of defendant?

"Answer: $400.00

"4. Was defendant damaged by the negligence of plaintiff as alleged in the Answer?

Answer: [blank]

"5. What amount, if any, is defendant entitled to recover of plaintiff?

Answer: [blank]"

The defendant then moved for a judgment notwithstanding the verdict and a new trial. Both of these motions were denied and the trial judge entered judgment in accord with the jury verdict. Defendant appealed.

Teague, Johnson, Patterson, Dilthey & Clay, by Robert W. Sumner, for plaintiff-appellee.

Haywood, Denny & Miller, by James H. Johnson III, for defendant-appellant.

BROCK, Judge.

Defendant brings forward numerous assignments of error grouped under five arguments on this appeal.

Defendant assigns as error the trial judge's denial of his motions for a directed verdict made at the close of all the evidence and for judgment notwithstanding the verdict. It is defendant's contention that these motions should have been allowed on the grounds that the plaintiff's evidence, when considered in the light most favorable to plaintiff, clearly establishes his own contributory negligence. We do not agree.

Plaintiff's evidence tends to disclose the following:

Immediately prior to the accident on 3 December 1970, plaintiff was parked in the third diagonal parking space above the intersection of Hillsborough (U.S. 15-501) Street and Salisbury Street as you proceed north on Hillsborough Street. Both diagonal parking spaces on each side of plaintiff's car were occupied by other cars.

Plaintiff testified that it was not possible to back out of one of the diagonal parking spaces without blocking the lane of travel proceeding north on Hillsborough Street. Plaintiff further testified that prior to backing his car out of the parking space he observed the traffic signal at the intersection

of Hillsborough and Salisbury Streets and that it was red for traffic proceeding on Hillsborough Street.

Plaintiff testified that the events before the collision were as follows:

> "When I backed out my car, I looked continuously until I started my motion forward right after I got backed out. I did not observe any traffic coming up Hillsborough Street or going down this street because the light held them. There were cars stopped on Hillsborough Street going North and South. I was backing out of the space just fast enough and barely moving. I did not see any cars proceeding in the northbound lane of Hillsborough Street while I was backing out, nor did I ever observe any cars coming prior to the moment of impact. I never did hear any horn blow, nor did I hear any screeching of brakes."

Approximately two or three seconds after plaintiff looked forward and put his car into forward gear, the defendant's car struck plaintiff's car in the rear.

Larry O. Hipp, a driver of a van truck which was the second vehicle stopped in the southernbound lane of Hillsborough Street for the traffic signal at the time of the accident, testified in the plaintiff's behalf that he observed plaintiff back out of his parking space and come to a complete stop in the northbound lane prior to the collision. Mr. Hipp further testified that when he first observed defendant's car it was proceeding east on Salisbury Street and making a left turn with a green traffic light (the traffic light was red for Mr. Hipp's lane of travel) into the northbound lane of travel on Hillsborough Street. In his opinion, the defendant's car was traveling approximately 15 to 20 m.p.h. when it moved through the intersection.

Prior to the moment of impact between the plaintiff and defendant's vehicles, Mr. Hipp observed the following: " . . . [T]wo people in front of the [defendant's] car and I noticed a lady and a man in front . . . . The driver of the Reilly vehicle did not appear to be looking ahead, but he appeared to be looking for traffic from his right or talking to the person on the right side of the car to his right. He was not looking ahead at the time."

The defendant's evidence was contrary to that offered by the plaintiff. Defendant testified that he had three passengers in his car and that, immediately prior to the accident, he had stopped for a red light at the intersection. He further related that when the traffic signal changed to green for his lane of travel, he proceeded to make a left turn, looking both ways and turning on his left turn indicator; that there was no traffic in the northbound lane of Hillsborough; that his vehicle completed its left turn when plaintiff's car suddenly backed out of a parking space and into his lane of travel; and that he attempted to brake his car to avoid the collision but there was not time.

As mentioned above, defendant contends that plaintiff's evidence showed that plaintiff was contributorily negligent as a matter of law in backing out of the parking space. The thrust of defendant's argument is that plaintiff owed the duty to yield the right-of-way to defendant. The cases defendant relies upon, *Warren v. Lewis,* 273 N.C. 457, 160 S.E. 2d 305; *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111, are factually distinguishable and are not controlling in the case presently before us. Both of these cases involved vehicles entering public highways from private roads and failure to yield the right-of-way to the approaching motorists on the highway. In the case before us, the plaintiff's car was parked on a public highway and the defendant's theory of principles of yielding the right-of-way [statutory standard in G.S. 20-156(a)] while entering the highway from a private drive do not apply.

[1, 2] The plaintiff's evidence, when considered in the light most favorable to him, justifies a jury finding that plaintiff maintained a proper lookout prior to starting his backing maneuver and during the backing maneuver. Plaintiff did not observe any vehicles proceeding into the northbound lane of travel on Hillsborough Street during his backing maneuver. In fact, plaintiff's evidence tends to show that his automobile had stopped its backing maneuver and was preparing to proceed forward when defendant's vehicle entered the intersection. In our opinion the trial judge was correct in denying defendant's motions for a directed verdict and a judgment notwithstanding the verdict. The discrepancies and contradictions in the evidence offered by both parties were for the jury to resolve.

[3] The defendant also assigns as error the trial judge's refusal to strike plaintiff's answers concerning opinion testi-

mony as to the fair market value of plaintiff's automobile before and after the accident upon defendant's motion to strike the answers to the objected questions. The testimony offered by plaintiff clearly shows that he was familiar with the value of his car both before and after the accident and that plaintiff had such knowledge and experience as to enable him intelligently to place a value on his car. The weight to be given to the testimony was for jury determination. This assignment of error is without merit and is overruled.

Defendant brings forward and argues eighteen assignments of error based on eighteen exceptions properly taken to the instructions given by the trial judge to the jury. We are not disposed to discuss all of these.

We point out however that defendant has failed to distinguish between errors which are prejudicial to defendant and errors which are prejudicial to plaintiff. At least seven of defendant's exceptions to the charge are to portions which, although erroneous and although prejudicial to plaintiff, are not prejudicial to defendant. Defendant is not entitled to a new trial for errors which are beneficial to him.

[4] In his final mandate to the jury upon the first issue (issue of defendant's negligence) the trial judge instructed the jury as follows:

> "If you are satisfied by the plaintiff's evidence and by its greater weight that defendant negligently drove his automobile into plaintiff's automobile causing damage complained of, then you will answer the first issue, yes."

This instruction is error, prejudicial to defendant, because it gives the jury a free hand to find negligence in any respect it wishes without restriction to negligence as may have been shown by the evidence.

[5] In the instructions upon the damage issue (the third issue) the trial judge did not place the burden of proof upon plaintiff. This failure to properly instruct constitutes prejudicial error.

There are other errors in the charge which we trust will not reoccur.

New trial.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. LINWOOD EARL HINES

No. 728SC495

(Filed 2 August 1972)

1. **Indictment and Warrant § 9— unnecessary averment — surplusage**

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

2. **Burglary and Unlawful Breakings § 5— motion for nonsuit — sufficiency of evidence**

In a prosecution charging defendant with possession of a dangerous and offensive weapon with intent to feloniously break and enter a business establishment, defendant's motions for nonsuit were properly overruled where the evidence, viewed in the light most favorable to the State, tended to show that defendant was discovered late one night near the door of a business establishment with a claw hammer in his hand and that there was a hole in the door where earlier in the day there had been none.

3. **Burglary and Unlawful Breakings § 6— "implement of housebreaking" — "dangerous or offensive weapon" — instructions**

In an action charging defendant with the first offense defined in G.S. 14-55, the trial court erred in instructing the jury on the first and the second offenses defined in G.S. 14-55 when it substituted "implement of housebreaking," an element of the second offense defined in the statute, for "dangerous or offensive weapon," an element of the first offense defined in the statute.

4. **Criminal Law § 158— matters in record — conclusiveness on appeal**

The record imports verity and the court is bound on appeal by the record as certified and can judicially know only what appears of record.

APPEAL by defendant from *Tillery, Judge,* 15 December 1971 Session of WAYNE Superior Court.

The bill of indictment returned by the grand jury in this case charged as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Linwood Earl Hines late of the County of Wayne on the 18th day of October 1971 with force and arms, at and in the County aforesaid, unlawfully, wilfully, and feloniously was found armed with and having in his possession without lawful excuse a certain dangerous and offensive weapon, to wit: a claw hammer and other implements of dangerous and offensive nature fitted and designed for use in burglary and other house breakings with

intent to so use said implements for the purpose of unlawfully and feloniously breaking and entering a dwelling and other building occupied by one George B. Bagley, trading as Bagley Wholesale Co., located at 606 N. Center Street, Goldsboro, N. C. and to commit a felony therein, against the form and 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 AFORESAID DO FURTHER PRESENT: That the said Linwood Earl Hines afterwards, to wit: on the day and year aforesaid, with force and arms, at and in the County aforesaid, was found and did then and there unlawfully and feloniously and wilfully have in his possession without lawful excuse certain implements of house breaking, to wit: a claw hammer, and other implements of dangerous and offensive nature fitted and designed for use in burglary and other house breakings against the form of the statute in such case made and provided and against the peace and dignity of the State.

Before pleading to the indictment defendant moved to strike the first count and the second count in the indictment. The court overruled the motion as to the first count but allowed the motion as to the second count. Defendant then moved to strike the words "and other implements of dangerous and offensive nature" from the first count and the motion was allowed.

The jury returned a verdict finding the defendant "guilty as charged" and from judgment imposing prison sentence of not less than four nor more than six years, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Charles Lloyd for the State.

George F. Taylor for defendant appellant.

BRITT, Judge.

Defendant first assigns as error the failure of the court to grant his motion to strike the first count in the bill of indictment.

G.S. 14-55 provides: "If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to

commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein, such person shall be guilty of a felony and punished by fine or imprisonment in the State's prison, or both, in the discretion of the court."

[1] The quoted statute defines three separate offenses. *State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377 (1966). Although the challenged count contains words set forth in the second offense defined in the statute, namely, "having in his possession without lawful excuse," we hold that said words are mere surplusage and that the count sufficiently embraces the first offense defined in the statute. If an averment in an indictment is not necessary in charging the offense, it may be treated as surplusage. *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252 (1966).

[2] Defendant assigns as error the overruling of his timely made motions for nonsuit. The evidence viewed in the light most favorable to the State tends to show: Police officers saw defendant kneeling by a beer truck at a sliding wooden door at Bagley Wholesale, 606 N. Center Street in Goldsboro, N. C. at approximately 11:30 p.m. on 18 October 1971. Defendant was about six inches from the sliding door with a claw hammer in his hand. There was a hole in a plywood section of the door, but not all the way through the door. No hole appeared there when last seen by the operator of Bagley Wholesale at 5:00 p.m. on 18 October 1971 and defendant stated to police officers that he was going into the store and get him some beer. We hold that the evidence is plenary to withstand the motions for nonsuit. See *State v. Lovelace,* 272 N.C. 496, 158 S.E. 2d 624 (1968). The assignment of error is overruled.

By his third assignment of error defendant contends that the court erred in its instructions to the jury, and particularly that the court did not properly declare and explain the law arising on the evidence as required by G.S. 1-180. The assignment of error is well taken and must be sustained.

As hereinabove indicated, defendant was indicted under G.S. 14-55 which defines three separate offenses. The first count in the indictment returned by the grand jury charged defendant with committing the first offense defined in the

statute and the second count charged him with committing the second offense defined in the statute. On motion of defendant the second count was stricken. The court instructed the jury as follows:

> "Now, with respect to the particular aspects of the offense in which the defendant is charged. I charge you, that in order for you to find the defendant guilty, the State must prove the following things beyond a reasonable doubt.
>
> "First, that the defendant was in possession of an implement of housebreaking. Now, I instruct you that a claw hammer, such as has been introduced in evidence in this case, is an implement of housebreaking. If you find from the evidence beyond a reasonable doubt that it is reasonably adapted for such use. Second, you must find beyond a reasonable doubt that there was no lawful excuse for the defendant's possession. That is the State must prove circumstance which show beyond a reasonable doubt that the defendant intended to use the implement, that is the claw hammer, in breaking into Mr. Bagley's Building or did, in fact, so use.
>
> * * * *
>
> "I further instruct you that for you to convict the defendant of this offense you must find beyond a reasonable doubt that he had this claw hammer with the intent to break or enter the building of Mr. Bagley.
>
> * * * *
>
> "So I charge you that you find from the evidence beyond a reasonable doubt that on or about the 18th day of October, 1971, that the defendant, Linwood Earl Hines, was in possession without lawful excuse of a claw hammer and that the claw hammer was an implement of housebreaking and if you further find that while armed with this implement he had the intent to break or enter the Bagley Building and if you further find beyond a reasonable doubt that it was his intention to commit a felony or larceny therein. If you find all of this beyond a reasonable doubt then it would be your duty to return a verdict of guilty as charged."
>
> * * * *

[3] The State concedes, and we hold, that the quoted instructions contain error. The State contends, however, that

defendant was not prejudiced by the instructions as they placed a greater burden on the State than proper instructions would have. We cannot agree with this contention. It is apparent that the court was charging on the first two offenses defined in G.S. 14-55; this might not have been prejudicial to defendant if the court had instructed completely on the offense defendant was charged with. While the charge against defendant included his being "armed with . . . a certain dangerous and offensive weapon," the only place in the jury instructions that the court referred to a dangerous or offensive weapon was in reading the indictment and the statute to the jury. It appears that the court substituted "implement of housebreaking," an element of the second offense defined in the statute, for "dangerous or offensive weapon," an element of the first offense defined in the statute.

[4] A close reading of the first sentence of the last paragraph of the instructions quoted above discloses that there is no "if" in the first line, rendering the sentence clearly erroneous. While defendant did not point out this particular error, his exception included the entire paragraph. In all probability this is a stenographic error but the record imports verity and we are bound by the record as certified and can judicially know only what appears of record. 1 Strong, N.C. Index 2d, Appeal and Error, § 42, p. 182.

Because of prejudicial errors in the jury instructions, there must be a

New trial.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. JAMES RICHARD CALDWELL

No. 7226SC417

(Filed 2 August 1972)

1. **Criminal Law § 76— voluntariness of confession — findings of court conclusive on appeal**

The trial judge's findings with respect to the voluntariness of defendant's confession were supported by competent evidence and hence conclusive on appeal.

2. **Criminal Law § 74— reading of confession to jury**

Permitting the officer to whom it was given to read defendant's confession to the jury did not constitute prejudicial error by giving undue emphasis to the confession.

3. **Criminal Law § 76— admissibility of confession — determination by the court and not by the jury**

The trial court did not err in failing to instruct the jury that before they could give any consideration to defendant's confession they must first be satisfied beyond a reasonable doubt that it was voluntary, as the admissibility of a confession is for determination by the judge unassisted by the jury.

4. **Criminal Law § 26— double jeopardy — two offenses — same transaction**

Defendant's contention that the two counts in the bill of indictment arose out of but one single criminal act and that to charge him with two offenses constituted a violation of the double jeopardy clause of the Fifth Amendment was untenable, since the offense of breaking and entering and the offense of larceny of personal property were completely separate offenses committed one after the other and not simultaneously, and since conviction of each offense required proof of different facts.

5. **Criminal Law § 142— prayer for judgment continued — no appeal lies**

On a verdict finding defendant guilty of felonious larceny, prayer for judgment was continued and defendant appealed; however, where prayer for judgment is continued and no conditions are imposed, there is no judgment, no appeal will lie, and the case remains in the trial court for appropriate action upon motion of the solicitor.

APPEAL by defendant from *Friday, Judge,* 29 November 1971 Schedule "A" Criminal Session of Superior Court held in MECKLENBURG County.

In a two-count indictment defendant was charged with (1) felonious breaking and entering and (2) felonious larceny. He pleaded not guilty to both charges. The State's evidence was in substance as follows: The owner of the dwelling described in the indictment testified that when he left his home

to go to work on the morning of 7 June 1971, the doors and windows were locked. When he returned home in the afternoon, the wire was torn on the screen door on the back porch, the hook inside the screen door was unlatched, glass on the door leading from the porch into the kitchen was broken out, and the hook inside that door was unlatched and the door left open. A shotgun, valued at $150.00, two boxes of shells, and two pairs of shoes were missing from the residence. Fingerprints identified as the defendant's were found on a pane of the glass broken from the kitchen door. Defendant's confession was admitted in evidence after the trial judge heard evidence on *voir dire* and found that the confession had been freely and voluntarily made.

Defendant did not introduce evidence. The jury found him guilty as charged in both counts of the indictment. On the verdict finding defendant guilty of felonious breaking and entering, judgment was entered sentencing defendant to prison as a youthful offender, for a term of not less than two nor more than five years. On the verdict finding defendant guilty of felonious larceny, prayer for judgment was continued. Defendant appealed.

Attorney General Robert Morgan by Associate Attorney George W. Boylan for the State.

Don Davis for defendant appellant.

PARKER, Judge.

[1] On the *voir dire* examination concerning his in-custody confession, defendant admitted that before he confessed the officers had given him the *Miranda* warnings and he had signed a written waiver of his rights. He testified that he did not read or "exactly understand" the statement which he signed, and testified that he confessed only because one of the officers told him that if he did so, the officer would tell the judge that defendant "cooperated" and it would "make it a lot easier" on him. The officer denied making any such promise. Upon conflicting evidence, the trial judge made full findings of fact concerning the circumstances under which defendant's confession was made, found that defendant had been fully advised and fully understood his contitutional rights, found that no promises or threats of any kind were made to him, and determined that defendant gave his statement freely and voluntarily and with-

out hope of reward. The trial judge's findings, being supported by competent evidence, are conclusive on this appeal, *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404, and the judge committed no error in allowing evidence of defendant's confession to be introduced before the jury.

[2] Nor do we think that defendant suffered any prejudicial error when the judge, after allowing the State to introduce defendant's signed confession as an exhibit, permitted the officer to whom it was given to read it to the jury in the course of his testimony concerning it. The contents of the confession were not thereby unduly emphasized.

[3] Appellant contends that the trial court erred in failing to instruct the jury that before they could give any consideration to defendant's confession they must first be satisfied beyond a reasonable doubt that the confession was voluntarily made. While the courts of some jurisdictions hold that such an instruction is required, such has never been the law in North Carolina. Annot., Voluntariness of confession admitted by court as question for jury, 85 A.L.R. 870, Supplemented in 170 A.L.R. 567. "Under North Carolina procedure, voluntariness is a preliminary question to be passed on by the trial judge in the absence of the jury." *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885, *rev'd on other grounds,* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2287. "If the judge determines the proffered testimony is admissible, the jury is recalled, the objection to the admission of the testimony is overruled, and the testimony is received in evidence for consideration by the jury. If admitted in evidence, it is for the jury to determine whether the statements referred to in the testimony of the witness were in fact made by the defendant and the weight, if any, to be given such statements if made. Hence, evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury. Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge." *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833. This has long been established as the law in this jurisdiction, *State v. Dick,* 60 N.C. 440, and the trial judge in the present case correctly instructed the jury in accordance with it.

[4, 5] Finally, defendant contends that the two counts in the bill of indictment arise out of but one single criminal act and

that to charge him with two offenses constitutes a violation of the double jeopardy clause of the Fifth Amendment of the Federal Constitution which *Benton v. Maryland,* 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056, held applicable to the States through the Fourteenth Amendment. We do not agree with appellant's major premise. The offense of breaking and entering was completed when the victim's house was unlawfully entered. The larceny of personal property thereafter was a completely separate offense, conviction of which required proof of other facts. Defendant has not twice been put in jeopardy for the same offense. Moreover, defendant here has no standing even to raise the question; no judgment was entered on the charge contained in the second count and no appeal will lie in that case. "Where prayer for judgment is continued and no conditions are imposed, there is no judgment, no appeal will lie, and the case remains in the trial court for appropriate action upon motion of the solicitor." *State v. Pledger,* 257 N.C. 634, 127 S.E. 2d 337.

The result is: In the case in which defendant is charged in the second count of the bill of indictment with the crime of larceny, the attempted appeal is dismissed and the cause is remanded to the superior court. In the judgment imposed upon defendant's conviction of the crime charged in the first count of the bill of indictment, we find

No error.

Judges VAUGHN and GRAHAM concur.

ALLEN F. HOOTS AND WIFE, SALLIE B. HOOTS v. H. R. CALAWAY AND WIFE, ALICE B. CALAWAY

No. 7221SC445

(Filed 2 August 1972)

1. **Evidence § 32— memorandum of sale — parol evidence**

Where a memorandum introduced in evidence stated that the sales price of two farms was $110,000 and that the farms contained "400 acres more or less," the parol evidence rule did not preclude plaintiffs' evidence that defendant had agreed orally on a sales price of $275 per acre for a guaranteed 400 acres and had agreed orally to refund to plaintiffs $275 per acre for any shortage of acreage, the memorandum itself and defendant's evidence having established that the parties did not intend to incorporate their entire agreement in the memorandum, and plaintiffs' evidence not having contradicted the memorandum.

2. **Rules of Civil Procedure § 50— erroneous judgment NOV — reinstatement of jury verdict**

Where the appellate court concludes that the trial court properly denied defendant's motions for directed verdict at the close of plaintiff's evidence and at the close of all the evidence, and that the trial court erred in the allowance of defendant's motion for judgment notwithstanding the verdict, the cause will be remanded for entry of judgment on the verdict rendered by the jury. G.S. 1A-1, Rule 50.

Judge VAUGHN dissents.

APPEAL by plaintiffs from *Long, Judge,* 10 January 1972 Session, Superior Court, FORSYTH County.

Plaintiffs allege that prior to 2 July 1968, they entered into negotiations with defendant H. R. Calaway (Calaway) for the purchase of certain farm land then owned by defendants; that Calaway represented that all of the tracts contained a total of 400 acres and guaranteed the tracts to contain a total of 400 acres within one acre difference; that in the event the tracts contained less than 400 acres, the purchase price would be reduced or refunded by defendants in an amount equal to $275 per acre multiplied by the difference between actual acreage in the tracts and the 400 acres represented by defendants to be in said tracts; that plaintiffs and Calaway agreed upon a purchase price of $275 per acre for a total acreage of 400 acres; that pursuant to the agreement plaintiffs gave Calaway a check for $30,000 and their five promissory notes totalling $80,000 which notes were secured by a purchase money deed of trust conveying the farm lands purchased and took a deed conveying

the lands; that subsequently plaintiffs discovered there was an acreage deficiency of 42 acres; that they are entitled to a reduction in purchase price or a refund of $11,550 plus the interest paid on that amount of $1,155 and interest on the overpayment of interest.

Defendants answered admitting the sale and purchase of the land for $110,000, but denying a per acre agreement and denying any agreement to refund or reduce the purchase price by $275 per acre of deficiency under 400 acres.

At trial the court allowed defendant's motion for directed verdict as to Alice B. Calaway, and plaintiffs do not appeal from that ruling.

At the end of plaintiffs' evidence and again at the end of all the evidence the remaining defendant moved for a directed verdict. The motion was denied and the matter was submitted to the jury. The jury found that the defendant contracted with plaintiffs to sell the land on a per acre basis as alleged in the complaint and that the acreage was deficient by 42 acres. Upon the coming in of the verdict, the court set aside and vacated the verdict, granted defendant's motion for judgment notwithstanding the verdict, granted defendant's motion for directed verdict, dismissed the action with prejudice, and denied plaintiffs' alternative motion for a new trial. Plaintiffs appealed.

Booe, Mitchell, Goodson and Shugart, by William S. Mitchell and Wayne C. Shugart, for plaintiff appellants.

White and Crumpler, by James G. White and Michael J. Lewis, for defendant appellees.

MORRIS, Judge.

Plaintiff, Allen Hoots, testified, out of the presence of the jury, with respect to: Calaway's offer to sell the land for $300 per acre or $120,000 and his counter offer of $275 per acre or $110,000 which was accepted by Calaway; Calaway's guarantee of 400 acres and agreement to refund at the rate of $275 per acre if there was any deficiency in acreage; his payment to Calaway of $500 as good faith money and a meeting a few days thereafter at which $30,000 was paid as a down payment; and a memorandum of the transaction which was prepared

by Calaway's son, signed by Calaway and given to plaintiff Allen Hoots. Defendant objected to testimony of the alleged agreement as to acreage on the ground that it violated the parol evidence rule. The record contains no ruling by the court but it is obvious the court ruled it admissible because the testimony continued before the jury in the same vein.

Plaintiffs' evidence tended to show: Plaintiff, Allen Hoots (Hoots), approached Calaway with respect to purchasing two farms owned by defendants. Calaway offered to sell them for $300 per acre or a total of $120,000. Hoots offered to pay $275 per acre or a total of $110,000. This offer was accepted by Calaway who guaranteed that the two farms contained a total of 400 acres. Hoots gave Calaway a check for $500 "for good faith." A few days later, they met at the farm and with Mr. Cecil Robertson, who worked for Calaway, went in a jeep over both farms for the purpose of showing Hoots the boundary lines and corners. Coming back from "looking at the northwest corner up the branch on the big farm," Hoots asked Calaway how he wanted to handle the transaction in the event of any shortage in the land and whether he wanted to go to a lawyer and draw up an agreement. Calaway replied there was only one way to handle it and that was the same way he had handled the piece of land they just looked at, the upper tract. He said he bought it from Mr. Lester Riley and thought he was getting 77 acres called for by the deed. He later had it surveyed and it was only 65 acres; that Riley brought the money back and gave it to him. Calaway said that was the only way to handle this deal—in the event there is a shortage, he would refund to Hoots at the rate of $275 per acre. This testimony came in before the jury without objection. They returned to the house, and Calaway gave Hoots some "maps and plots of the farm." They agreed to meet Saturday for the payment of the down payment. On Saturday Calaway brought his son, a lawyer. The lawyer, in his own handwriting, prepared a memorandum which Calaway signed and this was delivered to Hoots. The memorandum is as follows:

"North Carolina Memorandum of Sale
Davie County

H. R. Calaway — Seller
Allen F. Hoots—Buyer

Farm
Total Sales Price 110,000.00
Down payment 30,000.00
Time Balance 80,000.00
Financed 5 years 16,000.00 annually
Interest 5%

Notes as follows:

	dated	interest	due	interest payable
Note 1	July 1, 1968	5%	July 1, 1969	July 1, 1969 &
Note 2	July 1, 1968	5%	July 1, 1970	on July 1 of
Note 3	July 1, 1968	5%	July 1, 1971	each year till
Note 4	July 1, 1968	5%	July 1, 1972	all notes paid
Note 5	July 1, 1968	5%	July 1, 1973	in full —

Default in one cause others to fall due —

escrow priviledge (sic) re substitution of collateral to clear title —

if notes carried over interest is 6%

purchase money mortgage—release if sell 65 acre lester place —

Received of Allen F. Hoots the sum of $30,000.00 as down payment on purchase price of 2 farms in Advance, N. C. (400 acres more or less). The total price of farm is $110,000.00. The balance of $80,000.00 on purchase price will be financed for 5 years at 5% interest. The notes, deed of trust, and deed will be executed on July 1, 1968 or as soon thereafter as attorneys for both parties hereto can complete arrangements.

Allen F. Hoots H. R. Calaway
Signed H. R. Calaway"

Hoots gave Calaway his check for $30,000 payable to H. R. and Alice Calaway. They then discussed the personal property involved in the transaction and agreed to meet at Calaway's office "as soon as the papers could be drawn up." They did so meet, with all parties present, and the plaintiffs executed the notes and deed of trust, and defendant executed and delivered a deed conveying to plaintiffs 400 acres, "more or less." The deed, deed of trust and notes all were dated 2 July 1968. At the same time, the parties signed a contract with respect to some of the personal property involved in the transaction. Some eleven months later Hoots had the farm surveyed, and the survey revealed that there was a deficiency in acreage of 42 acres. Plaintiff testified the memo of the transaction was not intended to contain the entire agreement and did not contain the entire agreement.

Defendant's evidence tended to show that there was no per acre agreement and no agreement to refund. Both Calaway and his son testified that the memorandum prepared by the son did not and was not intended to contain the entire transaction but was for the purpose of binding Calaway and assisting the son in the drafting of instruments to close the transaction. Defendant's evidence tended to show that Hoots was given maps of the property and was taken over the property to see the lines; that the surveys he had made revealed over 400 acres in the two farms. Robertson testified he did not hear any conversation with respect to acreage. Calaway testified he agreed to sell the land for $110,000 and no per acre discussion was had.

On appeal defendant appellees contend that the court's rulings were correct because the evidence with respect to a per acre agreement and refund for shortage of acreage on a per acre basis was not admissible in violation of the parol evidence rule, and plaintiffs are bound by the written memorandum accepted by Hoots and kept by him for some eleven months without requesting any change in it. This appears to be the view of the trial judge. In allowing the defendant's motion the court said:

> "Gentlemen, as you may know, at the end of the evidence in this case I was tempted to direct a verdict, but we had so much time and energy invested in the case I wanted to submit the case to the jury in the event it would be er-

roneous to direct a verdict so there would be an alternate verdict which might prevent the retrial of the case.

I am still of the opinion that the verdict should have been directed; that though the plaintiff did not sign the memorandum, that he took it, kept it, took a deed drawn in those terms and did not complain until some eleven months later; that under those circumstances the plaintiff was not entitled to introduce evidence as to a per acre contract. For that reason, I will enter judgment notwithstanding the verdict, and hopefully it could be resolved without another trial."

[1] We agree that determination of this appeal rests upon application of the parol evidence rule.

"The parol evidence rule, as customarily phrased, prohibits the admission of parol evidence to vary, add to, or contradict a written instrument. Notwithstanding this mode of expression, the rule is in reality not one of evidence but of substantive law. It does not place restrictions on the manner of proving a fact in issue, but declares certain facts to be legally ineffective and therefore not provable at all. . . .

Translated into the language of the substantive law, the parol evidence rule may be expressed thus: Any or all parts of a transaction prior to or contemporaneous with a writing *intended to record them finally* are superseded and made legally ineffective by the writing. The execution of the final writing may be termed the 'integration' of the transaction. By it all prior and contemporaneous negotiations or agreements, whether oral or written, are 'merged' into the writing, which thus becomes the exclusive source of the parties' rights and obligations with respect to the particular transaction or the part thereof intended to be covered by it." (Emphasis supplied.) Stansbury, N.C. Evidence 2d, § 251, pp. 603-605.

The memorandum here certainly did not contain a merger clause. The words "escrow priviledge (sic) re substitution of collateral to clear title" obviously do not comprise the entire agreement as to that detail. Nor do the words "purchase money mortgage—release if sell 65 acre lester place" indicate an entire agreement. Calaway testified that the agreement was not a

complete agreement and that "there were several things we didn't put in it." Calaway's son testified, "[T]here were various things that had to be done in addition to what is in this memorandum." Also indicative of the fact that this was not an integration of the transaction is the provision included in the agreement with respect to the personal property that Hoots would not cut any timber on the land until the notes were paid in full. The instrument itself and the evidence of defendant Calaway, we think, leave no doubt but that this memorandum was not intended to reduce to writing the entire agreement of the parties.

The North Carolina position on the parol evidence rule is stated in *Stern v. Benbow,* 151 N.C. 460, 66 S.E. 445 (1909). There plaintiff brought an action for the reformation of an option agreement, entered into between plaintiff and defendant giving plaintiff an option to purchase certain lands, to make it speak the truth by inserting a guarantee alleged to have been given by defendant that the tract contained 100 acres. There was evidence that defendant had advertised the land for sale as containing 108 acres and had, in a personal interview with plaintiff, guaranteed that it contained 100 acres. The acreage was actually 78.03 acres. Defendant denied that he had guaranteed the number of acres and denied that anything was omitted from the contract. The jury found for plaintiff. In affirming the trial court, the Supreme Court said:

> "When a contract is reduced to writing, parol evidence cannot be admitted, to vary, add to, or contradict the same. But when a part of the contract is in parol and part in writing, the parol part can be proven if it does not contradict or change that which is written. *Nissen v. Mining Co.,* 104 N.C., 310, and citation in annotated edition.
>
> It is true, also, that an agreement for the conveyance of the land is not binding unless reduced to writing and signed by the party to be charged; but a guarantee of the number of acres, like the receipt of the purchase-money or recital of the consideration, is not required to be in writing. *Sherrill v. Hagan,* 92 N.C., 349; *McGee v. Craven,* 106 N.C., 356; *Currie v. Hawkins,* 118 N.C., 595; *Quinn v. Sexton,* 125 N.C., 452; *Brown v. Hobbs,* 147 N.C., 77." 151 N.C., at p. 462. See also *Buie v. Kennedy,* 164 N.C. 290, 80 S.E. 445 (1913).

In our opinion the evidence submitted by plaintiffs did not contradict the memorandum. We see nothing in the evidence which would make co-existence of the written agreement and the oral agreement impossible. We think it was properly a question for the jury as to whether the alleged oral agreement was made. The jury found that it was.

Cases cited by defendant calling for the application of the rule of caveat emptor are cases where the agreement was for bulk sale with no guarantee of acreage. *Galloway v. Goolsby*, 176 N.C. 635, 97 S.E. 617 (1918), relied on by defendant, is distinguishable. There the agreement was full and complete, executed by all parties, and contained a description of the land "containing about 97 acres. The price of the land is $700." It further provided for deferred payments, prepayment privilege, provision in event of default, provisions for delivery of deed upon completion of payments, provision for possession, and provision for the collection of rents and crops. The per acre agreement was set up as a defense and no counterclaim was filed.

[2] We conclude that the court properly denied defendant's motions for directed verdict at the close of plaintiffs' evidence and at the close of all the evidence. The allowing of the motion for judgment notwithstanding the verdict constituted error. The jury verdict is reinstated and the cause is remanded to the Superior Court for the entry of judgment on the verdict rendered by the jury. G.S. 1A-1, Rule 50; *Dobson v. Masonite Corporation*, 359 F. 2d 921 (5th Cir. 1966); 5A Moore's Federal Practice, § 50.14, p. 2383.

Reversed and remanded.

Judge GRAHAM concurs.

Judge VAUGHN dissents.

IN THE MATTER OF: THE IMPRISONMENT OF EUGENE EDISON

No. 7227SC520

(Filed 2 August 1972)

1. **Contempt of Court § 2— direct and indirect contempt**

A direct contempt of court consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session or during recess which tend to subvert or prevent justice; an indirect contempt is one committed outside the presence of the court, usually at a distance from it, which tends to degrade the court or interrupt, prevent or impede the administration of justice.

2. **Contempt of Court §§ 2, 3— civil and criminal contempt**

Acts or omissions which ordinarily constitute criminal contempt are designated by G.S. 5-1 as punishable "for contempt," and acts or omissions which ordinarily constitute civil contempt are designated by G.S. 5-8 as punishable "as for contempt."

3. **Contempt of Court § 5— necessity for notice and hearing**

Notice and hearing were required in order for the court to hold a person in contempt for perjury committed in a bond forfeiture hearing held three weeks previously.

ON *certiorari* from the order of *Harry C. Martin, Judge,* entered at the 18 April 1972 Session of GASTON Superior Court.

On 3 May 1972 this court granted certiorari to review an order of Harry C. Martin, Judge, denying the petition of Eugene Edison (Edison) for a writ of habeas corpus to discharge him from custody pursuant to an order of Kirby, District Judge, adjudging Edison in contempt of court.

The record discloses the following uncontradicted facts: On 27 September 1971 three arrest warrants were issued in Gaston District Court charging Barbara J. Bond with three separate offenses of shoplifting on said date. On the same day an appearance bond in amount of $500 was executed by Barbara Jean Bond as principal and Ernest M. Dow and Freddie Dow as sureties requiring Barbara J. Bond to appear before the district court in Gastonia at 9:00 a.m. on 13 October 1971 to answer three counts of larceny. Annie Bell Davis signed the "justification of surety" along with Ernest and Freddie Dow. On 13 October 1971 judgment *nisi* was entered on the bond, a writ of *scire facias* was issued, and a capias instanter was issued for the arrest of Barbara J. Bond. On 15 October 1971 the capias was returned unserved with notation that defendant

could not be found in Gaston County. On 15 October 1971 the sci. fa. was returned served on Ernest Dow but unserved as to Barbara Bond. Ernest Dow filed an answer to the sci. fa. and on 21 March 1972 Kirby, D.J., entered judgment absolute on the bond in amount of $350.00.

On 17 April 1972 affidavits on Betty Jean Davis (Betty) and Annie Bell Davis (Annie), bearing date of 17 April 1972, were filed, and pertinent portions of the affidavits are summarized as follows: Betty was arrested in Gastonia on 27 September 1971 on charges of shoplifting but told arresting officers her name was Barbara J. Bond. She was taken to the courthouse and there saw Ray Smith whom she knew, Smith being an employee of Dow Bonding Company (Dow). Smith told Betty that he knew her and her parents and that Dow would make her bond. Betty went with Smith to Dow's office and her mother was called to come to the office. Two other girls were arrested at the same time Betty was arrested, they gave fictitious names, and were at Dow's office at the same time Betty was there. When Annie arrived, "Flip" Dow, who knew Betty and Annie and knew Betty's correct name, was paid $45.00 on the $75.00 bond premium and the bond was made. On 7 October 1971 Betty and Annie went to Dow's office and talked with Ernest Dow, the father of the other two Dows in the bonding company. Ernest Dow told Betty and Annie if they would pay him $502.00 that he would take care of the case. The $502.00 was obtained and paid to Dow. Ernest Dow told Betty she need not go to court and "not to be uptown getting into any trouble and to stay away from town for awhile . . . ." On 8 October 1971 Betty and Annie went to Dow's office and paid the $30.00 balance of the bond premium. All of the members of Dow had known Annie and her husband for many years and had been to her home. Betty and Annie heard nothing more about the case until sometime later when Captain Elmore of the Gastonia Police Department went to Annie's home, inquired about Betty and stated that the case against Betty was still pending.

On 17 April 1972 Kirby, D.J., entered an order stating that on 21 March 1972 he remitted $150.00 of a $500.00 bond posted in the case of *State v. Barbara J. Bond;* that said action was taken following the introduction of sworn testimony given on said date; that from sworn statements of Betty Jean Davis, alias Barbara J. Bond, and her mother, Annie Bell Davis, the court concluded that the order of 21 March remitting a portion

of the bond should be set aside because of fraud and perjured testimony given to the court. He ordered that the surety pay the balance of $150.00.

On 17 April 1972 Kirby, D.J., entered an order commanding the Sheriff of Gaston County to forthwith bring before him Gene Edison, Ernest M. Dow, Freddie Dow, and Howard Clinton "for such orders as will appear at the time of their appearance."

On 17 April 1972 Kirby, D.J., entered the following order:

"This matter coming on to be heard, and being heard before the undersigned Judge of the District Court of Gaston County, North Carolina, and the Court finding the following facts:

"That on the 21st day of March, 1972, Gene Edison, an employee of Dow Bonding Company, offered sworn testimony in the captioned matters that he and other representatives of Dow Bonding Company had made an extensive search for Barbara Bond; that no such person existed and that in fact Barbara Bond was an alias or fictitious name and that despite extensive efforts, they were unable to locate her; that the Court in the exercise of its discretion entered an Order remitting $150.00 of the $500.00 bond in consideration of all the facts and the alleged efforts to locate the defendant;

"That in fact the said Barbara Bond was known personally to the members of the Dow Bonding Company and had not only paid the premium for the bond in the sum of $75.00, but also had paid into the office of Dow Bonding Company the sum of $502.00, which amount was paid upon representations by Ernest M. Dow that her case would be 'taken care of' as appears in Affidavits executed this date by Betty Jean Davis, Annie Bell Davis, and Edgar Rhyne, which are attached hereto, and by reference incorporated herein;

"That the said Gene Edison by virtue of sworn testimony which was false, untrue and perjured, and offered for the purpose of obtaining unwarranted relief upon a bond forfeiture, has committed contemptuous conduct in the presence of the Court which conduct was intended to

impair the respect due the Court's authority, and for the purpose of interrupting the Court's proceedings, and impeding justice; and for such contemptuous conduct the Court hereby sentences the said Gene Edison to be imprisoned in the County Jail of Gaston County for thirty (30) days, as by law provided.

"This 17th day of April, 1972.

ROBERT KIRBY
District Court Judge"

The proceedings before Kirby, D.J., on 17 April 1972 when Edison and the others summoned appeared are summarized as follows: The court stated that what he had been told on 21 March was untrue. He had caused an investigation to be made and sworn affidavits from Betty Jean Davis and her mother had been obtained and he read the affidavits. The court then stated: "Now, gentlemen, I always try to shoot square with everybody. She's taking down everything that is said. I wouldn't say anything, gentlemen, not a word. Now, Mr. Edison, you are the one who took the witness stand, and I don't have any alternative but to enter the following Order."

Following the entry of the above quoted order of Kirby, D.J., Edison applied to Superior Court Judge Harry C. Martin for a writ of habeas corpus. On 18 April 1972 Judge Martin entered an order summarized as follows: The facts found in the order of the district court judge of April 17, 1972 are binding upon the superior court. The facts found in the district court order constitute contempt of court under G.S. 5-1 and 6 and are sufficient to support the sentence imposed. The judgment was within the jurisdiction of the district court which acted within its lawful authority. The petition that Edison be discharged from custody is denied.

Judge Martin entered an order allowing Edison bond pending his petition to the Appellate Division for certiorari.

Attorney General Robert Morgan by Assistant Attorney General Russell G. Walker, Jr., for the State.

Hollowell, Stott & Hollowell, Frank P. Cooke and Steve B. Dolley, Jr., by Grady B. Stott for petitioner appellant.

BRITT, Judge.

Edison assigns as error (1) the entry by the district court of its order of 17 April 1972 committing Edison to jail for contempt and (2) the failure of Judge Martin to vacate the order and grant Edison's petition for habeas corpus. Our writ of certiorari brings the entire matter before us for review.

The first question for consideration is whether the district court followed the proper procedure in adjudging Edison in contempt. We hold that it did not.

[1] If the facts found by the district court constitute contempt of court under G.S. 5-1, it is not a direct contempt, therefore, the procedure for indirect contempt must be followed including an order to show cause. The law concerning contempt in North Carolina can become somewhat confusing. Contempts of court are classified in two main divisions known as direct and indirect contempt. A direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session or during recess which tend to subvert or prevent justice. *Galyon v. Stutts,* 241 N.C. 120, 84 S.E. 2d 822 (1954). An indirect contempt is one committed outside the presence of the court, usually at a distance from it, which tends to degrade the court or interrupt, prevent, or impede the administration of justice. *Galyon v. Stutts, supra.*

[2] Proceedings for contempt are further classified as criminal and civil. In *Galyon* the court said: "With us contempts are defined and classified generally by two statutes: G.S. 5-1 and G.S. 5-8. These statutes recognize and preserve the fundamental distinction between civil and criminal contempt in substance but not in name. Acts or omissions which ordinarily constitute criminal contempt as defined in the textbooks are designated by our statute (G.S. 5-1) as punishable 'for contempt,' without further designation; the acts or omissions which ordinarily constitute civil contempt as defined in the books are designated by our statute (G.S. 5-8) as punishable 'as for contempt.' Thus, under our statutes the proceedings for criminal and civil contempt are 'for contempt' and 'as for contempt,' respectively." G.S. 5-1(6) provides punishment "for contempt" upon "(T)he contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal and proper interrogatory."

G.S. 5-8(4) provides for punishment "as for contempt" "(a)ll persons summoned as witnesses in refusing or neglecting to obey such summons to attend, be sworn, or answer, as such witness."

The court goes on in *Galyon* to say: "(I)t is thus noted, from the tenor of the latter two statutes, that the refusal of a witness to testify at all or to answer any legal or proper question is made punishable both 'as contempt' and 'as for contempt.' And since the power of the court over a witness in requiring proper responses is inherent and necessary for the furtherance of justice, it must be conceded that testimony which is *obviously false* or evasive is equivalent to a refusal to testify within the intent and meaning of the foregoing statutes, and therefore punishable 'as contempt' or 'as for contempt,' depending upon the facts of the particular case." (Emphasis added.)

Since giving "obviously false" testimony can be punishable by contempt civilly or criminally our concern here is whether the contempt, if any, was direct or indirect, without attempting to equate direct or indirect contempt with civil or criminal contempt. We distinguish the facts of this case from direct contempt in that all the facts necessary to establish the false testimony were not before the court, therefore, it is impossible to say that there were words spoken or acts committed in the actual presence of the court which would constitute direct contempt. "(W)hen the conduct complained of was before a commissioner or other subordinate officer of the court and *the court has no direct knowledge of the facts constituting the alleged contempt,* in order for the court to take original cognizance thereof and determine the question of contempt, the proceedings must follow the procedural requirements as prescribed for indirect contempt . . . and be based on rule to show cause or other process constituting an initiatory accusation meeting the requirements of due process as prescribed by our statutes." (Emphasis added.) *Galyon v. Stutts, supra.*

Assuming, *arguendo,* that the conduct in question would amount to direct contempt the recent case of *Groppi v. Leslie,* 404 U.S. 496, 30 L.Ed. 2d 632, 92 S.Ct. 582 (1972) would indicate that regardless of what kind of contempt was involved that under the facts in this case notice and a hearing would be required as is the practice in our state when an order to show cause is issued in an indirect contempt. In *Groppi,* the

Wisconsin legislature cited the petitioner for contempt for conduct on the floor of the State Assembly that occurred two days previous to the contempt resolution. This procedure was held to violate petitioner's due process since he was readily available, but was given no notice before the resolution was adopted or afforded any opportunity to respond by way of defense or extenuation.

Quoting from *Groppi* at 30 L.Ed. 2d 639, we find:

> A legislature, like a court, must, of necessity, possess the power to act "immediately" and "instantly" to quell disorders in the chamber if it is to be able to maintain its authority and continue with the proper dispatch of its business. (Citations.) Where, however, the contemptuous episode has occurred two days previously, it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable a legislative body to proceed with its business.
>
> * * * * * *
>
> Where a court acts immediately to punish for contemptuous conduct committed under its eye, the contemnor is present of course. There is then no question of identity, nor is hearing in a formal sense necessary *because the judge has personally seen the offense and is acting on the basis of his own observations.* (Emphasis added.) Moreover, in such a situation, the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution. (Citations.) . . . . Where, however, a legislative body acts two days after the event, in the absence of the contemnor, and without notice to him, there is no assurance that the members of the legislature are acting, as a judge does in a contempt case, on the basis of personal observation and identification of the contemnor engaging in the conduct charged, nor is there any opportunity whatsoever for him to speak in defense or mitigation, if he is in fact the offender.

In the case of *Ex Parte Savin,* 131 U.S. 267, 33 L.Ed. 150, 153, 9 S.Ct. 699 (1888) the U. S. Supreme Court said:

> Where the contempt is committed directly under the eye or within the view of the court, it may proceed "upon its own knowledge of the facts, and punish the offender,

without further proof, and without issue or trial in any form" (EX PARTE TERRY, 128 U.S. 289, 309) [32:405, 410]; whereas, in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286.

[3] We hold that the facts in the case at bar, where more than three full weeks elapsed between the conduct charged and the sentencing for contempt, fall sufficiently within the facts in *Groppi* to render the giving of notice and a hearing to Edison imperative.

The next question that arises is whether the alleged conduct of Edison constitutes contempt of court. In 17 Am. Jur. 2d, Contempt, § 33, p. 38, it is said: "Making a false statement under oath may constitute contempt, notwithstanding that the conduct may also be a crime, such as perjury or false swearing." In *Galyon v. Stutts, supra,* the court indicated that the giving of testimony which is "obviously false" can constitute contempt. However, since we are invalidating the contempt order on procedural grounds, and due to the limited record before us, we do not pass upon this question.

The alleged conduct of Edison and his associates if true was reprehensible and appropriate action should be taken against those implicated in practicing a fraud on the courts. Nevertheless, those guilty or accused of the most reprehensible conduct are entitled to due process and on the record before us we hold that due process requires that Edison have his day in court.

For the reasons stated we declare invalid the order of the district court adjudging Edison in contempt and reverse the order of Judge Martin denying Edison's petition for habeas corpus.

Reversed.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. RESTONY ROBINSON

— AND —

STATE OF NORTH CAROLINA v. MARY ROBINSON

No. 7218SC523

(Filed 2 August 1972)

1. **Conspiracy § 4; Indictment and Warrant § 13— bill of particulars — motion addressed to judge's discretion**

Trial judge did not err in denying defendant's motion for a bill of particulars as the motion was addressed to his discretion, and his ruling thereon is not subject to review, except for palpable and gross abuse thereof. G.S. 15-143.

2. **Criminal Law § 168— consideration of charge as a whole**

The court on appeal must consider the trial court's entire charge to the jury contextually in determining whether it contains prejudicial error.

3. **Conspiracy § 7— separate instructions for each defendant — no error in charge**

In a prosecution charging two defendants with conspiring with each other and with a third person to murder a fourth person, the trial court did not err in giving separate instructions as to the findings necessary to convict each of the two defendants and in carefully instructing the jury as to the possible verdicts that could be returned as to each defendant.

4. **Conspiracy § 5; Criminal Law § 83— incompetency of husband to testify against wife — exception to incompetency rule — felony committed by one spouse against the other**

In an action charging a wife with conspiracy to murder her husband, the wife could not complain that her husband was not a competent witness against her, because the general rule that one spouse is not a competent witness against the other in a criminal proceeding does not apply where one spouse is tried for a felony committed against the other spouse. G.S. 8-57.

5. **Husband and Wife § 8— presumption that wife commits crime in presence of husband under his coercion — presumption not available in murder case**

Where a married woman has committed a criminal act in the presence of her husband, a rebuttable presumption arises that she was acting under his influence or coercion; however, the wife is almost universally denied the benefit of that presumption when she is on trial for murder or treason.

APPEAL by defendants from *Seay, Judge*, 3 January 1972 Criminal Session of Superior Court held in GUILFORD County.

Defendants were tried together upon separate bills of indictment charging them with conspiring with each other and with Tommy Lee Tinsley for the purpose of murdering Raymon McMiller.

Only the State offered evidence. Raymon McMiller testified that he and defendant Mary Robinson were married in 1959 and lived together thereafter for about ten or eleven years. A marriage certificate showing the date of the marriage as 1 October 1959 was received in evidence. McMiller stated that he never obtained a divorce from feme defendant, and no evidence of a divorce having been obtained by either party was introduced. However, the State introduced a marriage certificate showing that a ceremony was conducted in the State of South Carolina on 27 July 1971 purporting to unite defendants in marriage.

McMiller testified that he saw defendants riding in a car together on 23 July 1971. They stopped in front of McMiller's house and Robinson stated, "I'm going to shut your mouth up." He had a chrome plated pistol but stated, "I don't need my gun." Robinson struck McMiller and before getting into the car and leaving said, "I'll get you yet."

In the early morning hours of 24 July 1971, McMiller answered a knock at his front door. He recognized the person at the door as Tommy Tinsley, a male. Tinsley had on a wig and was dressed like a woman. McMiller recognized the wig as one he had given feme defendant. Tinsley stated, "Man, my car is knocked out, and I need somebody to help me fix it, bad." McMiller replied that he couldn't help. Tinsley then asked for a match. McMiller gave the following description of what then occurred: "So I reached in my pocket and handed him the match. . . . He had a pocketbook, and he kept fumbling in it. And so I kind of pushed the door together a little bit. And so when I pushed it up, he pulled out the little, chrome-plated pistol and started shooting and shot through the door three times. He shot through my door. When I heard the gun shooting, I closed the door. After I closed the door, I ran back to my room and I got my shotgun and then I called across the street to my neighbors and asked them to call the police officers."

Tommy Tinsley testified that defendants dressed him as a woman, took him to McMiller's house and ordered that he kill McMiller. Restony Robinson stood across the street with a gun

pointed at Tinsley while Tinsley talked with McMiller. Feme defendant remained in the car outside McMiller's house. Before Tinsley fired at McMiller, Robinson told him, "Go ahead on. What you waiting on." Tinsley stated that Robinson furnished him with the gun and a lady's pocketbook to put it in. Feme defendant shaved off Tinsley's mustache, put the wig on him, and assisted him in dressing as a woman. According to Tinsley, Robinson said the reason he wanted McMiller killed was that McMiller repeatedly had Robinson locked up about his wife.

The jury found both defendants guilty as charged. They appeal from judgments imposing imprisonment.

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

Flye, Johnson and Barbee by Walter T. Johnson, Jr., for defendant appellants.

GRAHAM, Judge.

[1] Defendants assign as error the denial of their motion for a bill of particulars made on 4 January 1972, the date on which the case was set for trial peremptorily as the first case.

Although defendants were arrested four months previously and were given a preliminary hearing on 6 September 1971, no motion was made for a bill of particulars and no request was made of the solicitor for information until court opened on 4 January 1972. The peremptory setting for that date was prompted by a previous continuance made necessary when defendants requested the discharge of their second court-appointed attorney and asked for a continuance in order to obtain counsel of their own choosing. Counsel first appointed to represent defendants had also been discharged at their request but remained willing and available to assist in apprising counsel subsequently obtained as to information he had with respect to the State's case. He had represented defendants at the preliminary hearing and had subsequently filed several motions on their behalf.

After finding the above facts, and others, the trial judge denied defendants' motion in his discretion. We affirm his order. The motion was addressed to the discretion of the trial judge, G.S. 15-143, and his ruling thereon is not subject to review, except for palpable and gross abuse thereof. *State v.*

Vandiver, 265 N.C. 325, 144 S.E. 2d 54. No abuse of discretion is shown.

Defendants contend the court erred in allowing in evidence various portions of McMiller's testimony. The record does not show that this testimony was objected to at the trial or that any motion was made to strike it. Moreover, we are of the opinion that the testimony complained of would have been admissible even if objection had been properly imposed.

[2, 3] Defendants bring forth one exception to the charge, contending that the court improperly charged the jury that they must find both defendants guilty or both of them not guilty. An instruction to this effect might have been appropriate if defendants had been the only ones named in the bill of indictment, because when all conspirators are acquitted except one, the one convicted is entitled to his discharge. *State v. Littlejohn,* 264 N.C. 571, 142 S.E. 2d 132. Here, however, defendants were charged with conspiring with Tinsley as well as with each other. Hence, the jury could have found one of them guilty and the other not guilty on the theory that the guilty party conspired with Tinsley while the other party conspired with no one. However, upon reading the entire charge contextually, as we are required to do, *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476, we do not find that the court instructed the jury as defendants contend. We do not see how the charge as given could have left the jury with the impression that the conviction of one defendant necessitated the conviction of the other. The court gave separate instructions as to the findings necessary to convict each defendant, and carefully instructed the jury as to the possible verdicts that could be returned as to each defendant. We hold that the charge does not contain prejudicial error.

[4] Other assignments of error relate only to the appeal of feme defendant. She contends that it was error for the court to permit Raymon McMiller to testify against her. Her position is that the State's evidence shows her to be the spouse of McMiller, and that the provisions of G.S. 8-57 therefore render him an incompetent witness against her.

In commenting on G.S. 8-57, Justice Bobbitt (now Chief Justice) stated for the Supreme Court in the case of *State v. Alford,* 274 N.C. 125, 161 S.E. 2d 575:

"No statute provides that a husband is not a competent witness against his wife or that a wife is not a competent witness against her husband in any criminal action or proceeding. The statute now codified as G.S. 8-57, and the statutes on which it is based, simply provide that the rules of the common law with reference to whether a husband is competent to testify against his wife or a wife is competent to testify against her husband in a criminal action or proceeding are unaffected by these statutes. . . . "

The opinion in *Alford* collects and summarizes many of the cases relating to exceptions to the general common law rule that one spouse is not a competent witness against the other in a criminal proceeding. It appears from these authorities that an exception to the general rule is applicable where one spouse is tried for a felony committed against the other spouse. For instance, in discussing exceptions to the common law rule, the Supreme Court stated in *State v. Hussey,* 44 N.C. 123: "The rule, as we gather it from authority and reason, is, that a wife may be a witness against her husband for felonies perpetrated, or attempted to be perpetrated on her. . . . " See also *State v. Alderman,* 182 N.C. 917, 110 S.E. 59, where the husband was held a competent witness to testify against his wife upon her trial for attempting to murder him by poisoning.

Feme defendant in this case was charged with a serious felony which she and others allegedly perpetrated against the man she contends is her husband. The public's interest in having her brought to justice far outweighs any conceivable interest the public might have in precluding McMiller from testifying against her. We hold that he was a competent witness.

[5] Feme defendant also contends that the court erred in failing to instruct the jury that there is a rebuttable presumption that she acted under the influence or coercion of her husband, Restony Robinson. There is authority in this State that where a married woman has committed a criminal act in the presence of her husband, a rebuttable presumption arises that she was acting under his influence or coercion. *State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915.

We note that feme defendant contends she is the wife of McMiller for purposes of one assignment of error and the wife of Restony Robinson for purposes of another. Conceding

for purposes of argument that the evidence would permit the jury to find that defendants were lawfully married, we nevertheless hold that the presumption in question was not available here. "When on trial for murder or treason, the wife is almost universally denied the benefit of the presumption that she was coerced." 35 N.C.L. Rev. 104. See also Stansbury, N.C. Evidence 2d, § 245 at p. 597. It stands to reason that if the presumption is not available in a trial for murder, it is likewise not available in a trial for conspiracy to commit murder.

We have carefully reviewed all of defendants' assignments of error and conclude that they had a fair trial free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. LAWRENCE WINFORD BROOKS, ALIAS WAYNE HAYWOOD BROOKS

No. 7227SC494

(Filed 2 August 1972)

1. **Criminal Law § 73— hearsay evidence — competency to show state of mind of witness**

In a prosecution for possession of burglary tools, the admission on *voir dire* of testimony by the officer who apprehended defendant that he had stopped defendant's automobile because another officer had informed him that an automobile similar to that of defendant had been observed in the vicinity of a supermarket which had been burglarized the previous week, *held* no error because the testimony fell within the exception to the hearsay rule which permits testimony of assertions of third persons for the purpose of showing the state of mind of the witness in consequence of such assertions and not for the purpose of proving the matters asserted.

2. **Criminal Law § 42— introduction of burglary tools into evidence — proper identification**

Where burglary tools allegedly found in defendant's automobile by the arresting officer were tagged, taken to a crime laboratory, retrieved from the laboratory and identified by the arresting officer as they were introduced into evidence, defendant's contention that the items were not properly identified was without merit.

3. **Criminal Law § 99— comments of court to witness — display of burglary tools — expression of opinion by judge**

The trial judge's instructions to defendant about where to place a pistol and how to stand during a courtroom demonstration and the judge's direction that items in evidence be placed on a table for the jury to view before instructions were given did not constitute expressions of opinion by the judge. G.S. 1-180.

4. **Criminal Law § 99— comment of judge — prejudicial expression of opinion**

A comment or question of the judge should be considered in the light of the facts and circumstances disclosed by the record, and any error will be considered harmless unless it is apparent that an infraction of the rules was prejudicial to defendant.

5. **Criminal Law § 166— filing of brief after argument without leave of court**

Defendant's filing of a brief, without leave of the court, eight days after the case had been heard on oral argument could not be considered, as no brief or written argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel. Court of Appeals Rule 11.

APPEAL by defendant from *Wood, Judge,* at the 6 December 1971 Session of GASTON Superior Court.

Defendant was arrested on 14 October 1971 in Gaston County and charged with possession of burglary tools.

Defendant, being unable to produce bond, was held in the county jail pending his trial on this charge. While in jail, the defendant filed numerous motions including:

Motions:

Reduction of Bond, Speedy Trial, Appointment of Investigator, Commission to Take Depositions, Speedy Trial, Micro-Analysis Expert, To Declare Preliminary Hearing Void, Inspection of Documents, List of State's Witnesses, Bill of Particulars, Subpoenas Duces Tecum, Severance, To Be Represented by Counsel and Himself, Change of Venue, and Experimental Evidence.

All of these motions, except the motion for separate trials, were denied. The trial court made findings of fact and concluded as a matter of law that the motions were insolent and void of merit and were intended to interrupt the proceedings of the Court and impair its respect.

At the November 22, 1971 Session, the Grand Jury returned a true bill of indictment charging defendant with possession of burglary tools.

At the trial of this case the State introduced evidence to the effect that on the early morning of 14 October 1971 at about 4:00 a.m. Leroy Howard of the Gaston County Sheriff's Department observed a 1963 Thunderbird automobile on North Carolina Highway 7. The automobile turned off Highway 7 at the Winn-Dixie Store and College Park Pharmacy in the vicinity of Belmont Abbey College. The automobile went behind the store and the pharmacy where it turned around. The Thunderbird then pulled out from behind the stores and returned to Highway 7. The time, place and conduct aroused the suspicions of Howard, and he began to follow the Thunderbird and radioed for assistance. Howard stopped the Thunderbird and was immediately joined by Sgts. Hinson and Duncan of the Belmont Police Department. Defendant and two other men were found in the automobile. Defendant was seated in the front passenger seat and one Raymond Gibson was seated in the right rear seat. (See a companion case, *State v. Gibson,* Opinion filed in this Court June 24, 1972.) When the vehicle was stopped, the driver got out and presented his driver's license to Howard. At the same time Sgt. Hinson approached the right side of the automobile and asked defendant to identify himself. As he did, Hinson noticed what appeared to be the outline of a pistol in the pocket of defendant's pants. The defendant moved his leg and Hinson saw the handle of the pistol. Defendant was then placed under arrest for carrying a concealed weapon. Gibson was asked to get out of the automobile. When Gibson got out of the automobile, Officer Howard saw a canvas bag on the back seat with two wrecking bars and a hammer handle protruding from it. The bag was opened and found to contain one sledge hammer, one flashlight, one adjustable wrench, one screwdriver, one combination punch pry bar, one T-50 wrecking bar, one T-23 wrecking bar, one No. 12 drill bit, one pair of goggles, three pairs of gloves and two Craftsman cutting torch heads. Gibson had been sitting on this bag of tools. These items were taken to the crime laboratory and some of them were introduced into evidence at the trial.

Prior to the introduction of these articles in evidence, a voir dire examination was conducted; and on ample evidence, the trial court found that the arrest was legal and proper, and

the articles were in plain view and competent to be introduced as evidence.

The defendant offered the testimony of Gibson and one Claude Braswell, the driver of the automobile at the time of the arrest. They testified that they had gotten a ride with defendant in Blacksburg, South Carolina, earlier that evening. Defendant had asked Braswell to drive and Braswell had agreed to do so. They had stopped at a service station and then returned to the highway and proceeded to the point at which they were arrested. There was testimony that they did not leave Highway 7 and drive behind the Winn-Dixie Store and the College Park Pharmacy. They testified that they did not see any of the alleged burglary tools in the automobile when they were riding in it.

The jury returned a verdict of guilty as charged and a prison sentence was imposed.

From the verdict and judgment, defendant appeals.

Attorney General Robert Morgan by Associate Attorney Richard B. Conely for the State.

Henry L. Fowler, Jr., and Bob W. Lawing for defendant appellant.

CAMPBELL, Judge.

Defendant first assigns as error the denial of his pretrial motions. We do not feel it necessary to discuss each of the numerous motions filed by defendant. They were, for the most part, entirely frivolous and without merit. We have, nevertheless, reviewed each motion and the trial court's ruling in each case. We find no error in the denial of defendant's pretrial motions.

[1] The defendant's second assignment of error is to the admission of hearsay evidence on the voir dire examination. Defendant contends that it was error for the court to admit the testimony of Officer Howard that another officer had informed him that an automobile similar to the one in this case had been observed in the vicinity of a supermarket which had been burglarized the previous week. The testimony in question was offered for the purpose of showing why Officer Howard stopped the automobile. It was not offered for the purpose of

proving the truth of the assertion that a similar vehicle was seen near the scene of a previous crime. The testimony, therefore, falls within the exception to the hearsay rule which permits "testimony of such assertions [those of third persons] for the purpose of showing the state of mind of the witness in consequence of such assertions and not for the purpose of proving the matters asserted." 2 Strong, N.C. Index 2d, Criminal Law, § 73 at p. 573. There was no error in the admission of this testimony on voir dire.

[2] Defendant assigns as error the admission into evidence of the items listed in the bill of indictment and allegedly found in the automobile occupied by defendant. Defendant contends that these items were not properly identified and that the chain of evidence was not complete. We do not agree with this argument. There was testimony by Officer Hinson that after the tools were found in defendant's automobile, he marked them by tag and then took them to the crime laboratory in Charlotte. Hinson testified that the items were retrieved from the crime laboratory about five days later. Each item was identified by Officer Hinson as it was introduced into evidence. There is no evidence that any of these items were tampered with and they were properly identified by the officer who found them. This assignment of error is overruled.

[3] On the cross-examination of Officer Hinson, the defendant endeavored to show by demonstration, that the officer could not have seen the outline of the pistol as he had claimed. The defendant participated in the demonstration. During this demonstration the trial court gave the defendant certain instructions about where to place the pistol and how to stand. It is contended that these instructions amounted to an expression of opinion by the court in violation of G.S. 1-180. Prior to charging the jury, the trial court directed that the items in evidence be placed on a table so that the jury could view them. Defendant contends that this also is an expression of opinion by the court in violation of G.S. 1-180. Defendant cites no authority for his argument that these actions of the trial court were error. More importantly, he does not show how defendant was in any way prejudiced by the trial court's actions.

[4] The court, in its instructions to defendant, was merely assuring that the demonstration illustrated the testimony as it was given. In ordering the State's exhibits placed on the

table the court was merely allowing the jury to view the evidence. These acts did not amount to an expression of opinion. It is proper for the judge to attempt to obtain a proper understanding and clarification of the testimony. A comment or question of the judge should be considered in the light of the facts and circumstances disclosed by the record, and any error will be considered harmless unless it is apparent that an infraction of the rules was prejudicial to defendant. *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950); *State v. Hoyle,* 3 N.C. App. 109, 164 S.E. 2d 83 (1968). Here we find that there was no error in the judge's remarks and certainly the defendant could not have been prejudiced by these remarks. This assignment of error is overruled.

Defendant assigns as error the denial of his motions for nonsuit. It is contended that the tools allegedly found with defendant should not have been admitted in evidence and that without this evidence the State had failed to prove its case. In view of our holding that the evidence was admissible, this argument is without merit.

Defendant has assigned as error several portions of the trial court's charge to the jury. We have examined the charge in its entirety, and we find that, when taken as a whole, it provides a fair and accurate statement of the evidence and law in this case. We conclude that the charge was correct and free from prejudicial error.

The defendant has made several other assignments of error. We have considered each of them and find them to be without merit.

[5] Without the authority or leave of this Court, and contrary to the rules, the defendant filed what purports to be a brief in this cause on 13 July 1972, after the case had been heard on oral argument on 5 July 1972. Rule 11 of the Rules of Practice in the Court of Appeals provides, "No brief or written argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel."

This defendant was accorded a full and impartial trial and we find

No error.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. WADE McCRAY, JR.

No. 7210SC569

(Filed 2 August 1972)

1. **Constitutional Law § 32— right to counsel — written waiver**

In a prosecution charging defendant with breaking and entering, larceny and receiving stolen goods, the trial judge did not err in concluding, after a *voir dire* hearing, that defendant had properly waived his constitutional rights to counsel and against self-incrimination at an in-custody interrogation where the evidence showed that defendant had been warned, both orally and in writing, of his constitutional rights and that defendant had voluntarily and understandingly signed a written waiver of these rights.

2. **Criminal Law § 73— hearsay evidence — telephone call made by defendant**

A police officer could properly testify to what he overheard the defendant say while defendant was making a telephone call after he had been taken into custody.

3. **Constitutional Law § 37; Searches and Seizures § 2— waiver of right to be free from searches and seizures**

Defendant's claim that his home was searched without his consent was untenable where the trial judge found on *voir dire* that defendant and his mother freely, voluntarily, intentionally, intelligently and in writing consented to a search of the premises.

4. **Criminal Law § 162— general objection to testimony competent in part**

When defendant objected before the witness had completed answering a question and moved to strike without indicating specifically which part of the testimony he found objectionable, the trial court did not err in denying the motion to strike, since some of the testimony was clearly competent and not prejudicial.

5. **Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence to overrule motion for nonsuit**

In a prosecution for breaking and entering and larceny of goods from three places of business, the State's evidence was sufficient to withstand a motion for nonsuit where it tended to show that three businesses had been broken into and goods had been stolen therefrom; the defendant admitted having stolen the goods found in a home where he lived with his mother and her boyfriend; some merchandise stolen from all three businesses was found in that home; the defendant admitted breaking into one of the businesses and in a statement to officers absolved his mother and her boyfriend of any participation in the crimes.

APPEAL by defendant from *Godwin, Judge,* 31 January 1972 Special Criminal Session of Superior Court held in WAKE County.

Defendant was charged in each of three bills of indictment with the felonies of breaking and entering, larceny, and receiving stolen goods knowing them to have been stolen. In the bill of indictment in case No. 71CR54422, the three crimes were alleged to have been committed on 21 October 1971 at 127 East Martin Street in Raleigh. In the bill of indictment in case No. 71CR53692, the three crimes were alleged to have been committed on 3 October 1971 at 112 East Hargett Street in Raleigh. In the bill of indictment in case No. 71CR53691, the three crimes were alleged to have been committed on 21 October 1971 at 224 South Blount Street in Raleigh.

The three cases were, by consent, consolidated for trial and tried on the first two charges in each bill of indictment. On 3 February 1972, the jury found the defendant guilty of breaking or entering, and larceny, as charged in case No. 71CR53691; guilty of breaking or entering, and larceny, as charged in case No. 71CR53692; and guilty of breaking or entering, as charged in case No. 71CR54422. Prison sentences were imposed and the defendant appealed to the Court of Appeals, assigning error.

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

Ralph McDonald for defendant appellant.

MALLARD, Chief Judge.

[1] Defendant's first assignment of error is that the trial judge erred in finding and concluding after a voir dire hearing that the defendant had properly waived his constitutional rights to counsel and against self-incrimination at an in-custody interrogation and in subsequently admitting into evidence certain inculpatory statements made by the defendant to police officers. This assignment of error is overruled. The evidence before the trial judge on the voir dire hearing, among other things, was that the defendant had been warned, both orally and in writing, of his constitutional rights as required in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 794 (1966), that the defendant had voluntarily and understandingly signed a written waiver of these rights (which was in evidence) and that at the time of this waiver he was not under the influence of intoxicating liquor as contended by defendant.

[2] Defendant's second assignment of error is that the trial judge erred in allowing a police officer to testify to what he had overheard the defendant say while defendant was making a telephone call. At the time the defendant was in custody, he had asked to be permitted to use the telephone and was allowed to do so. The officer testified he overheard the defendant talking on the telephone and that "(h)e stated on the phone that he had other merchandise which was hot in his house at 310 South Bloodworth Street and that he did not know whether or not he would be home, because he would probably going to be busted again." This evidence was admissible. Thereafter, according to the State's evidence, the defendant said to the investigating officer, "I am the one responsible for all of the merchandise and not my mother, Mary Frances McCray, or her boy friend, Willie Lee Short. They did not know that this merchandise was hot. I am the one who stole it and I do not want them to be involved." Furthermore, the defendant was found to have freely and voluntarily repeated the substance of his telephone conversation to the officer. It was not prejudicial error to admit the testimony of the officer as to what he heard the defendant say over the telephone.

[3] The defendant's third and fourth assignments of error are that the trial court erred in finding that the defendant had consented to a search of his residence, and also in the subsequent admission of the results of the search. This assignment of error is overruled. The defendant and his mother signed a written consent for the officers to search their premises. The judge found on voir dire, upon conflicting evidence, that the defendant, and also his mother, " . . . freely, voluntarily, intentionally and intelligently . . . waived their rights to be free from unreasonable searches and seizures and consented to a search of the premises . . . " where they lived.

[4] The defendant's fifth assignment of error is that "(t)he Court below erred in overruling the defendant's motion to strike testimony regarding defendant's criminal record when the defendant had not testified." This assignment of error is based on defendant's exception number 18 which was taken during the re-examination of State's witness Kenneth Johnson and when the following occurred:

"Q. What did he say?

A. He stated that they did not know that this merchandise was hot, 'I am the one who stole it and I do not want

them to be involved. I gave my mother the T.V., and gave Willie Lee Short some clothing to wear, but they did not know where this merchandise came from. I broke into Jerome's Shoe and Clothing Store and took these items, but I am not going to give the names of anybody that was with me, I have been to prison before and don't mind going again. And, I know that you have a lot of cases that you want to put on me, but as I said, I don't mind going back to prison.' And, he refused to make any other—OBJECTION AND MOTION TO STRIKE BY MR. MCDONALD.

COURT: THE OBJECTION IS FOUNDED ON GROUNDS HERETOFORE ADVANCED? MCDONALD: THAT AND . . . .

COURT: IF THERE IS ANY OTHER OBJECTION THAT HAS NOT BEEN ADVANCED, I'LL BE GLAD TO CONSIDER IT.

MCDONALD: I'LL SAY YOUR HONOR, THAT IT'S IRRELEVANT AND NOT IN THE NATURE OF AN ADMISSION AND IT'S PREJUDICIAL TO THE DEFENDANT IN THIS CASE.

OBJECTION OVERRULED.

EXCEPTION NO. 18."

There was no objection to the question. The "objection and motion to strike" came before the witness had completed the sentence but after he had testified to some of the "other statements" the witness said the defendant had made. Some of these statements were clearly competent, and the defendant did not specify what portion of the answer of the witness he was moving to strike. In *State v. Ledford,* 133 N.C. 714, 45 S.E. 944 (1903), the Court said: "The objections are general, and the rule is well settled that such objections will not be entertained if the evidence consists of several distinct parts, some of which are competent and others not. In such a case the objector must specify the ground of the objection, and it must be confined to the incompetent evidence. Unless this is done he cannot afterwards single out and assign as error the admission of that part of the testimony which was incompetent. * * * "

In Stansbury, N. C. Evidence 2d, § 27, it is said: "The opponent must specify his ground of objection and the part of the offer to which it is applicable." See also, *Nance v. Telegraph Co.,* 177 N.C. 313, 98 S.E. 838 (1919).

"Objections to evidence *en masse* will not ordinarily be sustained if any part is competent." *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 357 (1963). In the case before us the defendant failed specifically to move to strike that part of the testimony relating to what the witness testified the defendant said about having "been to prison before" or "going back to prison," and therefore he does not properly present the question he seeks to present. Moreover, we think that under the factual circumstances of this case, the fact that the officer testified that the defendant told him that he had been to prison was not incompetent and prejudicial. See *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954) and 22A C.J.S., Criminal Law, § 683. The case of *State v. Burgess,* 2 N.C. App. 677, 163 S.E. 2d 662 (1968), cited by defendant, is distinguishable.

[5] The defendant's sixth assignment of error is to the failure of the trial judge to allow the defendant's motions for judgment of nonsuit. The evidence for the State tended to show that the three places of business described in the bills of indictment had been broken and entered and goods, wares and merchandise had been stolen therefrom; the defendant admitted to the officers that he stole the merchandise they found at the home where the defendant lived with his mother and his mother's "boy-friend"; some merchandise stolen from all three of the places of business was found in that home; the defendant admitted to the officers that he broke into one of the places and the defendant in his statement to the officers absolved his mother and her "boy-friend" of any and all participation in the crimes. The evidence was plenary and the trial court properly submitted the case to the jury.

We have carefully considered the defendant's assignments of error relating to the court's charge to the jury and are of the opinion that when the charge is read as a whole, no prejudicial error is made to appear.

The defendant's assignment of error that the trial court erred in overruling the defendant's motions in arrest of judgment, for a new trial, and to set the verdict aside are also overruled.

In the trial we find no prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

JAMES L. MOORE, ELIZABETH EVA MOORE ALLEY AND MARY M. OLIPHANT v. BELLE ALLISON TILLEY AND HUSBAND, ROBERT TILLEY, GERTA WOLFE AND HUSBAND, J. DOUGLAS WOLFE, ROSEMARIE MOORE CRAWFORD AND HUSBAND, CHARLES WILLIAM CRAWFORD, EVA HARRIS MOORE, WIDOW, JOAN MOORE DOUGLAS AND HUSBAND, RICHARD DOUGLAS, JULIAN CLARK MOORE, UNMARRIED MINOR, BILLIE CAROLYN MOORE, SINGLE, CHARLES P. MOORE, JR. AND WIFE, LORRAINE MOORE, JOHN LEE MOORE AND WIFE, MARILYN MOORE, HILDA MOORE, WIDOW, J. FRANK MOORE, JR., AND WIFE, MRS. J. FRANK MOORE, JR., J. THOMAS MOORE AND WIFE, MRS. J. THOMAS MOORE, ELSIE MOORE VANN AND HUSBAND, HERBERT W. VANN, BETTY MOORE WILLIAMS AND HUSBAND, MALLORY HOWARD WILLIAMS, HARRIET NAN MOORE, SINGLE MINOR, MARY MOORE JENNETTE AND HUSBAND, CARTER JENNETTE, BESSIE MOORE CARTER, WIDOW, GRANT CARTER AND WIFE, BARBARA CARTER, BERTHA M. THOMAS AND HUSBAND, PERCY THOMAS AND EVA D. MOORE, WIDOW

No. 7222SC368

(Filed 2 August 1972)

1. **Wills § 39— provision for support — equitable lien**

A devise to three named children of the testatrix of "all of my real estate 150 acres and they are to give support and home to" four other children of testatrix who are blind *is held* to have created an equitable lien or charge upon the land for support of the blind children which will follow the land into the hands of purchasers.

2. **Wills § 36— defeasible fee — contingent remainder**

An item of a will devising land to three named children of the testatrix subject to an equitable lien for the support of four other children of the testatrix who are blind, when considered with another item providing that in case of the death of either of the devisees, "their interest and responsibility above named to go to the other two or if two of them die to the one living," *held* to give each of the devisees a fee defeasible upon (1) his death, (2) during the life of one or more of the blind children, and (3) during the life of one or more of the devisees, plus a contingent remainder to the interest of the other devisees.

APPEAL by plaintiffs from *Chess, Judge,* 17 January 1972 Session of Superior Court held in IREDELL County.

Plaintiffs instituted this action for a declaratory judgment construing the will of Margaret Guy Moore.

The facts which are not in dispute are set forth in the judgment of the trial judge as follows:

"1. Margaret Guy Moore died testate a resident of Iredell County on June 17, 1908, leaving a will which reads as follows:

'I, Margaret M. Moore of Iredell County, North Carolina, being of sound mind but realizing the uncertainty of my earthly existence do make this my last will and testament.

'First. I will to my son, T. L. Moore, and my two daughters, E. M. Emma Moore, and Ella M. Moore, all of my real estate 150 acres and they are to give support and home to my two sons, J. Robert Moore, W. Vester Moore, and my two daughters, Harriet A. Moore and Ida B. Moore.

'Second. I will in case of the death of either of the first named in this will that their interest and responsibility above named go to the other two or if two of them die to the one living.

'Third. I will to my son, John S. Moore $5.00.

'Witness my hand and seal this 8th day of September, 1906.

's/ MARGARET M. MOORE (SEAL)'

"2. At the time of her death, Margaret Guy Moore was the owner of the real estate described in paragraph 3 of the Complaint, the detailed description of which is hereby incorporated in this judgment by reference.

"3. At the time of her death, Margaret Guy Moore had eight living children, four of whom were normal and four of whom were blind.

"4. One of the normal children, John S. Moore took $5.00 under his mother's will, but otherwise did not share in her estate.

"5. The three other normal children and the year of their deaths are as follows, the year of death appearing in parenthesis after the name of the child:

(a) E. M. Emma Moore (1949)
(b) Ella M. Moore (1952)
(c) Thomas Lee Moore (1963)

"6. The four blind children and the year of their deaths are as follows, the year of death appearing after the name of the child:

(a) J. Robert Moore	(1934)
(b) W. Vester Moore	(1946)
(c) Harriet A. Moore	(1958)
(d) Ida B. Moore	(1966)

"7. During the lives of each and every one of the blind children, the rents and profits of the real estate described in the complaint, the description of which is incorporated herein by reference, were used for the maintenance, benefit and support of the blind children.

"8. The plaintiffs and defendants are the descendants, or the spouses of descendants, of Margaret Guy Moore and constitute all persons who have or may have an interest in the real estate described in the complaint and incorporated in this judgment by reference.

"9. The will of Margaret Guy Moore was probated on September 5, 1910, and duly recorded in the office of the Clerk of Superior Court of Iredell County, North Carolina, in Will Book 7, page 301.

"10. That the relationship of all of the parties in this action to Margaret Guy Moore is as set forth in the complaint."

The trial judge concluded and adjudged that under the will E. M. Emma Moore, Ella M. Moore and Thomas Lee Moore each took an undivided one-third interest in fee simple in the said real estate, not subject to divestment but subject only to a covenant upon the land to secure support and a home for J. Robert Moore, W. Vester Moore, Harriet A. Moore, and Ida B. Moore.

The plaintiffs, the three children of Thomas L. Moore who was the last survivor of the three devisees, appealed.

Collier, Harris & Homesley, by Walter H. Jones, Jr., for plaintiffs.

Raymer, Lewis & Eisele, by Douglas G. Eisele, for defendants.

BROCK, Judge.

The facts are not in dispute. We are confronted with the necessity of determining the intent of Margaret Guy Moore at the time she executed her will in 1906. Only the "First" and "Second" items of the will are involved.

A provision in a will that a devisee shall support a named person is perfectly reasonable and consistent with the policy of the law, and is constantly upheld. In North Carolina, as in most states, provisions relating to support or service, if regarded as conditions, are construed as subsequent rather than precedent whenever possible. 5 Bowe-Parker Revision, Page on Wills, § 44.22. Because of the language used, a provision in a will for support of a named person has been construed to create an estate on condition subsequent, as in *Brittain v. Taylor,* 168 N.C. 271, 84 S.E. 280, and in *Huntley v. McBrayer,* 169 N.C. 75, 85 S.E. 213. However, conditions subsequent are not favored in the law and are strictly construed against forfeiture. *Hinton v. Vinson,* 180 N.C. 393, 104 S.E. 897. A provision in a will for support of a named person, depending upon the language used, may be construed as constituting a personal covenant, as in *Perdue v. Perdue,* 124 N.C. 161, 32 S.E. 492, in *Ricks v. Pope,* 129 N.C. 52, 39 S.E. 638, and in *Lumber Co. v. Lumber Co.,* 153 N.C. 49, 68 S.E. 929. Or it may be construed as constituting a charge upon only the rents and profits from the lands, as in *Gray v. West,* 93 N.C. 442, and in *Wall v. Wall,* 126 N.C. 405, 35 S.E. 811. However, in a majority of the cases the provision for support has been construed as constituting an equitable lien or charge upon the land itself which will folllow the land into the hands of purchasers. *Minor v. Minor,* 232 N.C. 669, 62 S.E. 2d 60; *Marsh v. Marsh,* 200 N.C. 746, 158 S.E. 400; *Cook v. Sink,* 190 N.C. 620, 130 S.E. 714; *Bailey v. Bailey,* 172 N.C. 671, 90 S.E. 803; *Helms v. Helms,* 135 N.C. 164, 47 S.E. 415; *Outland v. Outland,* 118 N.C. 138, 23 S.E. 972; *Laxton v. Tilly,* 66 N.C. 327; *Woods v. Woods,* 44 N.C. 290.

The reasons for treating provisions for support as an equitable lien or charge upon the land rather than a condition subsequent, or a personal covenant, or a charge upon only the rents and profits, is aptly stated in *Helms v. Helms,* 135 N.C. 164, 47 S.E. 415, as follows:

> "The difficulties which readily occur in treating provisions of this kind as conditions are numerous. The un-

certainty into which titles would be thrown is a strong reason for construing provisions for support as covenants and not conditions is recognized by the courts. To treat them as mere personal covenants, having no security for their performance save the personal liability of the grantor, would often lead to injustice, leaving persons who had made provision for support in old age or sickness without adequate protection or relief. The courts have almost uniformly treated the claim for support and maintenance as a charge upon the land, which will follow it into the hands of purchasers. In this way the substantial rights of both grantor and grantee are preserved."

The "First" item of the will presently under consideration reads as follows:

"First. I will to my son, T. L. Moore, and my two daughters, E. M. Emma Moore, and Ella M. Moore, all of my real estate 150 acres and they are to give support and home to my two sons, J. Robert Moore, W. Vester Moore, and my two daughters, Harriet A. Moore and Ida B. Moore."

[1] The four beneficiaries of the support provision were blind and the testate was primarily concerned with providing for their comfort and support throughout their lives. She devoted her entire estate to this purpose. When the foregoing "First" item is considered in the light of pertinent precedent and reasoning, it is clear that its provision for support constituted an equitable lien upon the land devised. This lien, however, has now been fully discharged by reason of the land having been applied for the use and benefit of the blind children throughout their respective lives.

[2] If we consider only the "First" item, it appears that the testate devised a one-third undivided interest each to T. L. Moore, E. M. Emma Moore, and Ella M. Moore, subject to the equitable lien for support. However, the testate made further provision in the "Second" item which reads as follows:

"Second. I will in case of the death of either of the first named in this will that their interest and responsibility above named go to the other two or if two of them die to the one living."

As stated earlier, the testate's primary concern was for the comfort and support of her four blind children to whom she pledged her entire estate. We think her intent was, first, to care for the four blind children; second, to provide the survivors or survivor of the devisees the means of caring for the blind children without a claim of title by the heirs of a deceased devisee; and third, to reward those devisees or that devisee who shoulders the responsibility of support longest.

"In construing a will the court considers the entire instrument and seeks to ascertain from it the testator's intent. To effectuate the intention of the testator the court may transpose or supply words, phrases and clauses when the sense of the devise in question 'as collected from the context manifestly requires it.' [citation omitted]" *Jernigan v. Lee,* 279 N.C. 341, 182 S.E. 2d 351.

In our opinion the "Second" item of the will limits the devise of the "First" item to a devise to each of the three devisees of a defeasible fee, plus a contingent remainder. The "Second" item of the will should be read as though it were written as follows:

> Second. I will in the case of the death of either of the first named [the devisees] in this will [during the life of any of the supportees and during the life of any of the devisees] that their interest and responsibility above named go to the other two [devisees] or if two of them die [during the life of any of the supportees and during the life of one of the devisees] to the one [the last devisee] living.

This we think effectuates the intent of the testate.

Upon the death of the testate, T. L. Moore, E. M. Emma Moore, and Ella M. Moore each took a defeasible fee title to a one-third undivided interest in the 150 acre tract of land, subject to defeasance upon the concurrence of three events: (1) his or her death, (2) during the life of one or more of the blind children, and (3) during the life of one or more of the devisees. Each of the devisees also took a contingent remainder to the interest of the other, subject to vesting upon the concurrence of the three events.

When E. M. Emma Moore died in 1949, her fee was defeated by the concurrence of the three events: (1) her death (2)

during the life of one or more (two) of the blind children, and (3) during the life of one or more (two) of the devisees. The remainder after the determined estate vested in T. L. Moore and Ella M. Moore subject to defeasance upon the concurrence of the three events.

When Ella M. Moore died in 1952, her fee was defeated by the concurrence of the three events: (1) her death (2) during the life of one or more (two) of the blind children, and (3) during the life of one or more (one) of the devisees. The remainder after the determined estate vested in T. L. Moore, no longer subject to defeasance.

At this point the fee of T. L. Moore was no longer defeasible because the concurrence of the three events was no longer possible; i.e., he could not die during the life of one or more of the devisees. "When the event upon which the fee is to be defeased becomes impossible the fee becomes a fee simple absolute." 4 Thompson on Real Property (1961 Replacement), § 1891. The fee simple title to the 150 acre tract of land became absolute in T. L. Moore upon the death of Ella M. Moore in 1952 subject only to an equitable lien for the support of the surviving blind children. Upon the death of T. L. Moore in 1963, the fee title to the 150 acre tract passed to the heirs or devisees of T. L. Moore, subject only to the equitable lien for support which became fully satisfied upon the death of Ida B. Moore (the last surviving blind child) in 1966.

The judgment of the trial court is reversed and this cause is remanded to the Superior Court for entry of a declaratory judgment construing the will of Margaret Guy Moore in accordance with this opinion.

Reversed and remanded.

Chief Judge MALLARD and Judge CAMPBELL concur.

REEVES BROTHERS, INC. v. THE TOWN OF RUTHERFORDTON AND THE TOWN OF RUTH

No. 7229SC409

(Filed 2 August 1972)

Taxation § 38— taxpayer's remedy against collection of tax

A corporate taxpayer was not entitled to maintain an action for a declaratory judgment to determine its tax liability to a municipality and for an injunction restraining the municipality from listing the taxpayer as a tax delinquent and advertising for sale its tax lien against the taxpayer, where there was no allegation that the municipality was without authority to levy the tax in question, that the rate was unconstitutional or that the property in question was exempt from taxation, the taxpayer's remedy being to pay the tax under protest and sue for recovery of the excess portion after administrative remedies have been exhausted. G.S. 105-381.

APPEAL by plaintiff from *Falls, Judge,* 10 January 1972 Session of Superior Court held in RUTHERFORD County.

Civil action under the North Carolina Declaratory Judgment Act to determine the tax liability of the corporate plaintiff to the respective municipal defendants. In its complaint, plaintiff alleged that in 1966 it was the owner of a small mill, known as the "Grace Plant" and located partially in the Town of Rutherfordton and partially in the adjoining Town of Ruth. Desiring to expand the Grace Plant and finding that there was some uncertainty as to the exact dividing line between the two contiguous towns, plaintiff purported to enter into an agreement with the Town of Rutherfordton and the Town of Ruth regarding the taxation of the plant's real and personal property, including goods in process, raw materials, finished goods and machinery. The purported agreement with the Town of Rutherfordton provided, in part, as follows:

"STATE OF NORTH CAROLINA
COUNTY OF RUTHERFORD

TOWN OF RUTHERFORDTON

A CALL MEETING OF THE TOWN BOARD was held in the City Hall of Rutherfordton, Rutherford County, North Carolina, on March 12, 1966, with the Mayor and three Commissioners present; Commissioner Jack Davis was absent due to illness. Commissioner Twitty moved, and Com-

missioner Sparks seconded, to adopt the following resolution:

THAT WHEREAS, REEVES BROTHERS, INC., desires to build an addition to that plant, which addition will be almost entirely in the Town of Ruth, North Carolina; and

* * *

WHEREAS, The Town of Ruth has also agreed to the following solution to the problem:

FIRST: Rutherfordton will tax the present real estate, land and buildings now located in Rutherfordton;

SECOND: Ruth will tax the land in Ruth and the new buildings to be added to the present plant;

THIRD: The Stock in Process, Raw Materials, Finished Goods, Machines and Fixtures, and all other property of every kind and description located in the Grace Plant, (both the old and the new addition), shall be returned on the Rutherford County return, and when the County has fixed a taxable value for this property, the Town of Rutherfordton will take twenty (20%) percent of such value and levy its tax on that amount; and the Town of Ruth will take eighty (80%) percent of its value and levy its tax upon that amount;

FOURTH: The Rutherfordton Town Council, and each member thereby, believes this action to be to the best interest of Rutherfordton;

FIFTH: The Ruth Town Council, and each member thereby, believes this action to be to the best interest of Ruth."

It is further alleged that the plaintiff then, in reliance upon this agreement, expended considerable sums of money expanding the new plant and buying new machinery, and that from 1966 through 1969, paid its taxes to the respective municipalities in accordance with the terms of the resolution as set out above.

On 30 December 1969, plaintiff was advised by the attorney for the Town of Rutherfordton, in a letter attached to the complaint as Exhibit B, that:

". . . (E)ffective with 1970 the Town of Rutherfordton will assess and levy taxes on all the real property of the Grace Plant which is *actually located* within the city limits of the Town of Rutherfordton. It has been determined that 60% of the building addition made in 1966 is situated within the Rutherfordton city limits and, consequently, 60% of the assessed value thereof is taxable by the Town of Rutherfordton and 40% by the Town of Ruth. This differs from your former practice of paying taxes on the entire value of the 1966 addition to the Town of Ruth.

You are further advised that *all* tangible personal property of the Grace Plant is taxable by the Town of Rutherfordton, and taxes will be levied accordingly for the year 1970. This differs from your former practice of paying to the Town of Rutherfordton taxes on 20% of the value thereof and paying to the Town of Ruth taxes on 80% of the value thereof."

Plaintiff thereafter on 11 December 1970 tendered to the defendant Town of Rutherfordton an amount for its 1970 taxes which plaintiff alleged was due under the terms of the 1966 resolution, but the defendant returned plaintiff's check and billed plaintiff for taxes allegedly due according to its own calculations. Plaintiff refused to pay this tax assessment and the Town of Rutherfordton listed the plaintiff as a tax delinquent and advertised its tax lien against plaintiff's property for sale.

In its complaint, plaintiff further alleged that the Town of Ruth agreed with plaintiff's position but that a genuine dispute existed between it and the Town of Rutherfordton, and prayed that the court:

"1. Declare the rights of the parties to this action;

2. Issue an Order to the Town of Rutherfordton restraining it from listing plaintiff as a tax delinquent or advertising or selling the property of plaintiff while this action is pending;

3. Permit the plaintiff to immediately pay into court the amount of tax owed according to said agreement;

4. That all issues be heard before a jury;

5. Such other and further relief as to the court may seem just and proper in the premises."

On 13 July 1971, the defendant Town of Rutherfordton filed a motion to dismiss pursuant to Rule 12(b) of the Rules of Civil Procedure for failure to state a claim upon which relief could be granted and for want of jurisdiction over the subject matter, in that:

> "(1) Plaintiff did not pursue its administrative remedies pursuant to G.S. 105-327(g) (2) or G.S. 105-406.
>
> (2) Plaintiff does not allege, in support of its request for injunctive relief, that the tax or assessment is illegal or invalid or levied or assessed for an illegal or unauthorized purpose, as required by G.S. 105-406.
>
> (3) The Declaratory Judgment Act does not supersede G.S. 105-406 or other administrative remedies, or provide an additional or concurrent remedy.
>
> (4) Plaintiff bases its Complaint upon a resolution of the Rutherfordton Town Council which, on its face, is by statute illegal and, therefore, void, and plaintiff is not released from any taxes that were not assessed or collected due to the resolution; and which resolution, on its face, is ultra vires."

The matter came on for hearing at the 10 January 1972 Session of Superior Court held in Rutherford County, and in a judgment filed 12 January 1972, it was ordered, adjudged and decreed that the plaintiff's complaint be dismissed and the costs taxed to the plaintiff for the following reasons:

> "1. Plaintiff did not pursue and exhaust the administrative remedies provided it by Chapter 105 of the General Statutes of North Carolina, nor did it comply with the provisions of G.S. 105-406.
>
> 2. The Declaratory Judgment Act does not supersede G.S. 105-406, or the administrative remedies provided plaintiff by Chapter 105 of the General Statutes of North Carolina, nor does it provide an additional or concurrent remedy."

To these findings and to the judgment that its complaint be dismissed, the plaintiff appealed to the Court of Appeals.

Hamrick & Hamrick by J. Nat Hamrick for plaintff appellant.

Owens & Arledge by A. Jervis Arledge and Hollis M. Owens, Jr., for defendant appellee, the Town of Rutherfordton.

MALLARD, Chief Judge.

The only question for decision on appeal is whether or not the remedy of bringing an action under the Uniform Declaratory Judgment Act, seeking injunctive and other relief, was available to this plaintiff and therefore whether or not the trial court erred in dismissing its complaint pursuant to motion.

G.S. 1A-1, Rule 57 provides:

> "The procedure for obtaining a declaratory judgment pursuant to article 26, chapter 1, General Statutes of North Carolina, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a prompt hearing of an action for a declaratory judgment and may advance it on the calendar."

But as Professor James E. Sizemore notes in his article, *General Scope and Philosophy of the New Rules,* "The basic statutory provisions for obtaining declaratory judgments have been retained. Rule 57 simply provides that the *procedure* for this remedy shall be in accordance with the new Rules . . . ." (Emphasis original.) 5 Wake Forest Intra. Law Rev. 1 at 9, 10.

We find nothing in the language of the Uniform Declaratory Judgment Act itself which would preclude the determination of the controversy before us by proceeding under the Act. See, e.g. G.S. 1-253 and G.S. 1-254. However, it is a well-settled rule in this State that:

> "Ordinarily, the rule that the sovereign may not be denied or delayed in the enforcement of its right to collect revenues applies to municipalities and every subdivision of state government, and when a tax is levied against a taxpayer he must pay same under protest and sue for recovery after he has exhausted all existing administrative remedies.

Bragg Development Co. v. Braxton, 239 N.C. 427, 79 S.E. 2d 918.

G.S. 105-406 reads as follows:

> *'Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose,* no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the nonpayment thereof; . . .' (Emphasis ours.)

This statute and our case law recognize a distinction between an erroneous tax and an illegal or invalid tax. An illegal or invalid tax results when the taxing body seeks to impose a tax without authority, as in cases where it is asserted that the rate is unconstitutional, *Perry v. Commissioners of Franklin County,* 148 N.C. 521, 62 S.E. 608, or that the subject is exempt from taxation, *Southern Assembly v. Palmer,* 166 N.C. 75, 82 S.E. 18. Injunction will lie when the tax or assessment is itself invalid or illegal. *Purnell v. Page,* 133 N.C. 125, 45 S.E. 534; *Sherrod v. Dawson,* 154 N.C. 525, 70 S.E. 739; *Wynn v. Trustees of Charlotte Community College,* 255 N.C. 594, 122 S.E. 2d 404. Here, the equitable remedy of injunction is proper since appellant contends that the taxing body is without authority to impose the tax because of the constitutional exemption." *Redevelopment Comm. v. Guilford County,* 274 N.C. 585, 164 S.E. 2d 476 (1968).

We note that G.S. 105-406 was repealed effective 1 July 1971. Therefore, even though the statute was in effect at the time the defendant Town of Rutherfordton notified the plaintiff of its intention to tax the "Grace Plant" other than in accordance with the purported agreement of 1966, it was not in effect at the time Judge Falls filed his judgment of 12 January 1972. We think, however, that the rule set forth in *Redevelopment Comm. v. Guilford County, supra,* is applicable in the case before us. See also, *Development Co. v. Braxton,* 239 N.C. 427, 79 S.E. 2d 918 (1954); *Express Co. v. Charlotte,* 186 N.C. 668, 120 S.E. 475 (1923); *Carstarphen v. Plymouth,* 186 N.C. 90, 118 S.E. 905 (1923) and G.S. 105-381.

G.S. 105-381 and the cases decided under prior statutory provisions clearly provide that, except where it is sufficiently

alleged that the tax assessed is itself invalid or illegal, the taxpayer's exclusive remedy is to pay the tax in full and then seek a refund of the excess portion. A tax or assessment is invalid or illegal only when the taxing body lacks the authority to impose the tax, as where the rate is unconstitutional or the subject is exempt from taxation. *Redevelopment Comm. v. Guilford County, supra.* Here, there is no allegation in the plaintiff's complaint that the Town of Rutherfordton was without authority to levy the tax in question, that the rate was unconstitutional or that the subject property was exempt from taxation; therefore, we hold that plaintiff, not having paid the tax in question, was not entitled to seek a declaratory judgment and was not entitled to injunctive relief.

For the foregoing reasons, we think that Judge Falls reached the correct conclusion in his judgment of 12 January 1972, and the judgment dismissing plaintiff's action is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. MANUEL C. CARTER, JR.

No. 7210SC487

(Filed 2 August 1972)

1. Automobiles § 120— driving under the influence of intoxicating liquor

In a prosecution for driving while under the influence of intoxicating liquor, G.S. 20-138, as written at the time of the alleged offense, required the State to prove that defendant (1) drove a vehicle, (2) upon a highway of the State, (3) while under the influence of intoxicating liquor.

2. Automobiles § 121— driving under the influence of intoxicating liquor — "driving" defined

The word "driving," when used in statutes prohibiting the operation of a motor vehicle while under the influence of intoxicating liquor, is almost universally construed as requiring that the vehicle be in motion.

3. Automobiles § 127— motion for nonsuit — circumstantial evidence — sufficiency of evidence

State's evidence tending to show that an officer discovered defendant asleep at the wheel of his car, the car was in the right-hand

lane of travel with its motor running, there were opened and unopened containers of beer in the car, sobriety tests showed defendant to be highly intoxicated, and defendant stated to the officer that he was on his way home from a nearby town, *held* sufficient to withstand a motion for nonsuit in a prosecution for driving under the influence of intoxicating liquor since the test of the sufficiency of circumstantial evidence to withstand nonsuit is whether a reasonable inference of defendant's guilt may be drawn from the evidence.

APPEAL by defendant from *Canaday, Judge,* 7 February 1972 Session of Superior Court held in WAKE County.

Criminal prosecution for the offense of driving while under the influence of intoxicating liquor in violation of G.S. 20-138.

The only witness was Officer J. T. Ward of the State Highway Patrol. Ward testified that, in response to a call on 4 September 1971, he went to the intersection of rural roads 2352 and 2349 about two miles east of Wendell. When he arrived about 12:25 a.m., he observed a car stopped in the center of the right-hand lane of road 2352 and in front of a stop sign. The car was not there when the officer passed the intersection some 2 to 4 hours earlier. The lights on the car were off but the motor was running at a "high idle." The car windows were up. Defendant was sitting in the driver's seat. He had his knees pulled up to his chest and was asleep. An open container of beer was next to defendant. Three or four unopened containers of beer were on the left rear floorboard. In the opinion of the officer, defendant was under the influence of intoxicating liquor. Sobriety tests administered within a reasonable time thereafter tended to show that defendant was highly intoxicated when he was found in the car by Officer Ward. After being advised of his constitutional rights, defendant stated to Officer Ward that he had been to Zebulon earlier that night and was on his way home.

Defendant did not testify or offer other evidence.

The jury returned a verdict of guilty and defendant appeals from judgment of imprisonment suspended upon the payment of a fine of $250.00 and other conditions.

Attorney General Morgan by Associate Attorney Sauls for the State.

Kirk & Ewell by Clarence M. Kirk for defendant appellant.

GRAHAM, Judge.

The sole question presented is whether the evidence was sufficient to withstand defendant's motion for nonsuit.

At the time of defendant's arrest, G.S. 20-138 made it unlawful for a person under the influence of intoxicating liquor "to drive any vehicle upon the highways within this State." By amendment, effective 1 October 1971, this section was rewritten. It now provides: "It is unlawful . . . for any person who is under the influence of intoxicating liquor to drive *or operate* any vehicle upon any highway or *any public vehicular area* within this State." (Emphasis added.) Operator, as defined by the Uniform Driver's License Act, includes a person in the driver's seat of a motor vehicle when the engine is running. G.S. 20-6.

[1] We are not concerned here with the question of whether, in sitting in the driver's seat of his automobile with the engine running, defendant was operating the vehicle within the meaning of G.S. 20-138 as amended. The statute, as written at the time of the alleged offense, required the State to prove that defendant (1) drove a vehicle, (2) upon a highway of this State, (3) while under the influence of intoxicating liquor. *State v. Kellum,* 273 N.C. 348, 160 S.E. 2d 76.

[2] The word "driving," when used in statutes prohibiting the operation of a motor vehicle while under the influence of intoxicating liquor, is almost universally construed as requiring that the vehicle be in motion. Annot., Driving While Drunk, 47 A.L.R. 2d 570. Our Supreme Court has held that the term "operate," when used in connection with an automobile, clearly imports motion and that holding an automobile motionless by putting one's foot on a brake pedal is not operating the automobile. *State v. Hatcher,* 210 N.C. 55, 185 S.E. 435. In the instant case the arresting officer never saw defendant's car in motion. The only evidence that defendant drove his car while under the influence of intoxicating liquor was circumstantial.

[3] The test of the sufficiency of circumstantial evidence to withstand nonsuit is whether a reasonable inference of defendant's guilt may be drawn from the evidence. 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 guilty. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679. Put

another way, the question here is whether it may be fairly and logically inferred from the circumstantial evidence offered by the State that defendant drove his vehicle on the highway and that he did so while he was under the influence of intoxicating liquor. We hold that it may.

Defendant stated to the officer that he had gone to Zebulon earlier that night and was on his way home. This statement, when considered together with evidence that defendant was sitting in the driver's seat of his car while the engine was running; that the car was stopped in its proper lane at a stop sign, and that no one else was in or near the car, would permit the jury logically to infer that defendant drove the car to the intersection where he was found by the officer.

We are of the further opinion that a reasonable inference arises from the evidence that defendant was under the influence of intoxicating liquor when he drove the car to where it was found. He was highly intoxicated when found by the officer. There was no evidence that he was otherwise physically disabled or that his car was disabled. An open container of beer was within his easy reach. Surely, if defendant had been in full control of his physical and mental faculties, he would not have parked his car, with the lights out and the engine running, on the traveled portion of the road, and then proceeded to get drunk and fall asleep. The most logical conclusion that can be drawn from the circumstances is that defendant was already under the influence of an intoxicant when he drove his car to the intersection, and that this explains why he stopped his car there and went to sleep. In speaking to similar facts in the case of *State v. Hazen,* 176 Kan. 594, 272 P. 2d 1117, the Supreme Court of Kansas stated:

> "For all the record shows, the jury reached the obvious conclusion that defendant drove the vehicle to the place where it was found, and that at the time was under the influence of intoxicating liquor, on the theory that a sober person would not park his car in the middle of the highway, with the lights off, after dark."

In *State v. Haddock,* 254 N.C. 162, 118 S.E. 2d 411, our Supreme Court held facts similar to those involved here to authorize "the fairly logical and legitimate inference that defendant actually drove . . . upon a highway within the State, while under the influence of intoxicating liquor. . . ." Defend-

ant points out that in *Haddock* there was evidence that defendant's car had been driven within fifteen minutes before it was found parked partially on the shoulder of the road with defendant sitting under the steering wheel with his head drooped over. There is no evidence in the instant case that the car in question had been driven within such a short period of time. However, other factors present here tend to strengthen the inferences permissible against defendant. For instance, in explaining his presence at the intersection defendant has stated that he was on his way home. His car was stopped completely on the travel portion of the road in a rural area; whereas, in *Haddock* the defendant's car was partially on the shoulder of the road and was near a service station. Alcoholic beverages were found in this defendant's car. None was found in the car involved in the *Haddock* case.

When confronted with similar facts, courts in other jurisdictions have reached conflicting results. In our opinion, the better reasoned decisions support the position we take here. See for instance: *State v. Damoorgian,* 53 N.J. Super. 108, 146 A. 2d 550; *Noell v. State,* 120 Ga. App. 307, 170 S.E. 2d 306; *State v. Eckert,* 186 Neb. 134, 181 N.W. 2d 264; *State v. Englehart,* 158 Conn. 117, 256 A. 2d 231. Contra: *State v. DeCoster,* 147 Conn. 502, 162 A. 2d 704; *State v. McDonough,* 129 Conn. 483, 29 A. 2d 582; *State v. Hall,* 271 Wis. 450, 73 N.W. 2d 585.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. FAYE MARIE DAVIS

No. 7219SC407

(Filed 2 August 1972)

1. Homicide § 6— involuntary manslaughter — elements

Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury.

2. Homicide § 30— failure to charge on involuntary manslaughter — prejudicial error

In an action where defendant was tried for second degree murder or manslaughter, the trial court committed prejudicial error in

not giving the jury instructions with respect to involuntary manslaughter since defendant's testimony was replete with evidence that she unintentionally shot deceased and that the pistol discharged accidentally.

APPEAL by defendant from *Chess, Judge,* 31 January 1972 Session of Superior Court, RANDOLPH County.

The defendant, Faye Marie Davis, was indicted for the murder of James Charlie Crump (hereinafter referred to as Jimmy) on 5 August 1971 and tried thereon for murder in the second degree or manslaughter. It was stipulated by all counsel in open court that Jimmy's death was "the sole, direct, and proximate result of a gunshot wound."

The State's evidence as presented by the investigating police officers tends to show that the defendant and Jimmy lived together though not lawfully married and that they had five children. Jimmy was much larger than defendant, being five feet nine or ten inches tall and weighing approximately 165 to 175 pounds. Jimmy's reputation in the community was not good. He had been known to drink in excess, to be a "troublemaker," to be violent towards defendant and to have previously beaten her.

The police received a call reporting the shooting at about 9:55 p.m. and found Jimmy lying in the yard of defendant's grandmother with a small wound in the left side of his head. He died shortly thereafter. Defendant was taken to the Randolph County jail where she made a handwritten statement after having been fully advised of her constitutional rights. That statement reads as follows:

"I was in the cafe when Jimmy came in. I was eating hamburger and drinking a soda, and Jimmy said, 'Let's go,' and I said, 'wait until I get through,' and he said, 'Let's go now,' and he said, 'You are going now,' so I see he was mad so I got my hamburger and soda and left and said, 'Let's get the kids before we go,' and he said, 'Let's go now,' and I said, 'I'm going to them anyway,' and he started through the path like he was going home and then he turned around and came back where I was and pushed me down and hit me, and I throw up my hands so he won't hit me again, and I was pushing my way up a tree to get up and told him to take care of and leave me alone because

I didn't want to hurt him, and he was going to hit me again, and I get the gun out of my pocketbook, and he saw the gun and tried to get it and when we were scuffling with the gun, and it went off, and Jimmy and I fell on the ground and then I got up because that I thought that he wasn't shot and was standing on the porch and my sister came out and said he was shot, and I was crying and standing on the porch, waiting for Jimmy to get up and he didn't, and I knew he was shot, and I heard somebody kept saying, throw the shot away, throw the gun away, so I did. Signed, Faye Davis and witnessed by Charles Bulla."

After the State had rested its case, the trial court in its discretion allowed the State to introduce into evidence the testimony of two additional witnesses, Ronald Matthews and Steve Fair. Matthews's testimony tended to show that he was beside the cafe on the night of the shooting and saw defendant pull her hand out of the pocketbook after she refused to go with Jimmy. Jimmy kept walking toward her with his hand out and when he stopped, defendant said, "I'm not going." Jimmy "reached to grab her arm, and she pulled her hand out of the pocketbook and just shot him. There was no tussel over the gun, but when he fell, he fell directly on her, and that is the reason she fell. . . . There was not a scuffle for this gun between Faye and Jimmy. She pulled it out of her pocketbook. He didn't grab her arm but he was going towards her arm, but she shot him as quick as she pulled out the gun. He didn't grab her . . ."

Fair's testimony tended to show that he was sitting in the cafe on the night of the shooting and left when defendant and Jimmy did. Fair testified that he didn't see Jimmy hit defendant nor any "fussing or anything," but that he just heard a shot and didn't see anybody shoot. "About the time the ambulance came, Faye said, 'I told the S.O.B. not to mess with me.' She said, 'I told the son of a bitch not to mess with me.' About that time her sister, Clara Johnson, came out the door. Faye said something to me about, you'll get the same thing, and I turned around and we left and that was it."

Defendant testified in her own behalf that Jimmy was drinking when he came into the cafe to get her and that she was afraid of him. Upon leaving the cafe, defendant got away from Jimmy but he caught her by the tree, pushed her and she fell

against the tree. "Then he began to cuss me while I was pushing myself up from the tree. That is when I got the gun out of my pocketbook. I told him to go away and leave me alone because I didn't want to hurt him. Then he started at me and we started fumbling with the gun and he was trying to get it away from me. The gun went off. I did not intend to shoot him." Defendant testified that when the gun went off, Jimmy fell on top of her but that she didn't think he had been shot because he tried to get up. When Jimmy tried to get up, defendant ran.

Defendant's evidence further tends to show that for the past two years Jimmy would get drunk and beat her every weekend, and that she had been to a doctor and to the hospital as a result of these beatings. Even though Jimmy mistreated defendant, she continued to live with him because ". . . I didn't have any other place to stay." Defendant repeatedly testified that she never intended to shoot and kill Jimmy. "I was scared of him. I wasn't really mad at him. I didn't intend to shoot him. I thought if he saw the gun he'd leave me alone. I was just going to bluff him. That's all. I ended up shooting him. . . . I just wanted to scare him so he'd leave me alone. I pulled the gun out of my handbag so he wouldn't bother me. . . ." Defendant's evidence also tends to show that she never made any statement in the presence of Steve Fair that she was going to kill Jimmy nor did she say anything to her sister to that effect on the night of the shooting or at any other time. "I did not intend to shoot Jimmy Crump. The gun went off by accident. I do not remember pulling the trigger."

Clara Johnson, defendant's sister, gave testimony which substantially corroborated defendant's evidence that she never said anything to Steve Fair.

The jury returned a verdict of guilty of manslaughter, and a judgment imposing a prison sentence of not less than seven nor more than ten years was entered. Defendant excepted and appealed, setting forth numerous assignments of error.

Attorney General Morgan, by Associate Attorney Ricks, for the State.

Bell, Ogburn and Redding, by John N. Ogburn, Jr., for defendant appellant.

MORRIS, Judge.

Of the seven assignments of error directed towards the trial court's instructions to the jury, this opinion is based upon the failure of the trial tribunal to submit involuntary manslaughter as a permissible verdict. The trial court instructed the jury they could return a verdict of guilty of murder in the second degree, or a verdict of guilty of voluntary manslaughter, or a verdict of not guilty. Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation. *State v. Rummage,* 280 N.C. 51, 185 S.E. 2d 221 (1971), and cases cited therein. Some of the record evidence tends to show that the killing was *intentional* and a charge upon voluntary manslaughter was justified either upon the theory that defendant shot Jimmy in the heat of passion or that she used excessive force in the exercise of her right of self-defense. See Justice Sharp's dissenting opinion in *State v. Wrenn,* 279 N.C. 676, 687, 185 S.E. 2d 129 (1971).

[1, 2] "Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, *and without intention to kill or inflict serious bodily injury.* . . ." (Citations omitted.) *State v. Wrenn, supra,* at p. 682. Defendant's testimony is replete with evidence that she *unintentionally* shot Jimmy and that the discharge of the pistol was accidental. "It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. . . ." (Citations omitted.) *State v. Foust,* 258 N.C. 453, 459, 128 S.E. 2d 889 (1963). We hold that the evidence offered by defendant, if believed by the jury, is sufficient to support a verdict of involuntary manslaughter. *State v. Lilley,* 3 N.C. App. 276, 164 S.E. 2d 498 (1968); *State v. Batts,* 8 N.C. App. 551, 174 S.E. 2d 704 (1970). The failure to submit appropriate instructions as to a lesser degree of the crime charged in the bill of indictment was erroneous and so prejudicial as to require a new trial. *State v. Stimpson,* 279 N.C. 716, 185 S.E. 2d 168 (1971); *State v. Wrenn, supra.*

Because a new trial will be required, discussion of defendant's remaining assignments of error is deemed unnecessary.

New trial.

Judges VAUGHN and GRAHAM concur.

EMANUEL L. JOHNSON AND WIFE, DORIS A. JOHNSON v. CITY OF WINSTON-SALEM

No. 7221DC226

(Filed 2 August 1972)

1. **Municipal Corporations § 42— tort claims against city — notice — waiver — knowledge by city employee**

Knowledge by some municipal employees of the incident in question did not constitute a waiver by the municipality of a city charter provision requiring that written notice of a tort claim be given to the mayor or the board of aldermen within 90 days after the cause of action accrues.

2. **Municipal Corporations § 42— tort claims — notice — estoppel — knowledge by city employees**

A municipality is not estopped to deny notice of a tort claim to the mayor or board of aldermen by the fact that some municipal employees had knowledge of claimant's injury.

3. **Municipal Corporations § 21— clogged sewer — insufficiency of evidence of negligence**

In an action to recover for damages allegedly sustained when a sewer line owned and operated by defendant municipality became clogged and sewage backed up and flowed into plaintiff's residence, plaintiff's evidence was insufficient to show that there was a defective condition in the sewer lines or that any defective condition was of such a nature that defendant should have known of it and taken precautions to remedy the defect.

Judge VAUGHN concurs in the result.

APPEAL by plaintiffs from *Billings, Judge,* 18 October 1971 Session, District Court, FORSYTH County.

Plaintiffs instituted this action to recover for damages to real and personal property allegedly caused by the clogging of sewer lines owned and operated by the defendant municipality which resulted in raw sewage backing up and flowing into plaintiffs' residence on 4 January 1970. Plaintiffs alleged in paragraph number IV of their complaint "[t]hat defendant

had for a period of time permitted the sewer lines serving plaintiffs' home to become clogged with all manner of debris, and had permitted others using it to use material which slowed and clogged the sewer line . . ." causing damage for which they had filed a claim with Mr. Kemp Cummings, but that defendant municipality had refused to pay. Plaintiffs alleged in paragraph number V of their complaint "[t]hat the City impliedly warranted to furnish services reasonably safe and suited to plaintiffs' needs and not to injure plaintiffs on their property by a breach of their contractual obligations . . . ", but that by failing to inspect the sewer main periodically and to remove the accumulation of foreign substances, the defendant breached the implied contract for which they also seek recovery.

After first generally denying plaintiffs' allegations, defendant asserted in its answer that the plaintiffs' failure to install a back pressure or check valve when the difference in elevation between the sewer main and plaintiffs' house was less than four feet was in violation of Section 23-16 of the Winston-Salem City Code and thus a plea in bar to their claim for breach of contract. As its other defense, defendant asserted that: "[a]lthough the plaintiffs have alleged a purported cause of action for breach of implied warranty and contractual obligations, the complaint is bottomed on the tort action of negligence, so that Section 115 of the City Charter, requiring notice, is applicable"; that "Section 115 of the Charter of the City of Winston-Salem . . . requires written notice of loss to be given to the Board of Aldermen or Mayor within 90 days after the cause of action in tort accrues"; and that plaintiffs' failure to comply with Section 115 was a plea in bar to their claim for negligence.

At the conclusion of plaintiffs' evidence, counsel for defendant moved for a directed verdict under G.S. 1A-1, Rule 50, on the grounds that plaintiffs' evidence was insufficient to go to the jury either on the issue of breach of contract or of negligence, if construed as a tort claim. Following arguments on the motion, the trial court ruled that this was a tort action, that the required notice was not given and that the motion by defendant for directed verdict should be allowed. Accordingly judgment was entered, and plaintiffs appealed.

Pettyjohn and Frenck, by H. Glenn Pettyjohn, for plaintiff appellants.

Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter and Roddey M. Ligon, Jr., for defendant appellee.

MORRIS, Judge.

The evidence tends to show that plaintiffs called City Hall on 8 December 1969 when they noticed the commode was slow in flushing. Three city employees and a sewer truck were dispatched to the scene where a sewer line in front of plaintiffs' house was full of water but not overflowing. The city employees opened the sewer main but did not know what caused the stoppage which resulted in some leakage on the floor of plaintiffs' basement. A city employee, who was the foreman of the sewer truck at that time, testified that he did not make periodic inspections before or after that occasion because no other complaints were received until 4 January 1970 and that in his opinion, the nature of the trouble was not sufficient to cause such concern or suspicion as to require periodic checks. There is also evidence which tends to show that the stoppage on 4 January 1970 was caused by "crusher run," a mixture of sand and gravel, which was not present on the previous occasion when the sewer main was unstopped. The only evidence presented to show how the crusher run got there was a supposition on the part of the sewer truck foreman that the manhole lid may have been misplaced while the street was being dragged and oiled. When the raw sewage began to flood plaintiffs' house on 4 January 1970, defendant sent several employees to free the sewer line of obstruction and help plaintiffs clean up. Mr. Kemp Cummings, Jr., a claims investigator for the city, also went to plaintiffs' home that afternoon and made certain photographs while personally inspecting the damage. Mr. Cummings stayed at the Johnson residence two and a half or three hours on 4 January 1970 but did not authorize or suggest that any of the damaged property be hauled off. In response to a request for an admission by plaintiffs' attorney, Mr. Cummings deposed that he was employed by defendant municipality to investigate and report on claims, but "that I have no authority to negotiate or settle claims against the City of Winston-Salem." The evidence tends to show that Mr. Johnson and Mr. Cummings "discussed flying and this type of thing," but does not indicate

that their conversation included any mention of a claim against defendant.

Attached to plaintiffs' complaint as Exhibit A is a copy of a purported claim against the defendant municipality, but the record fails to reveal a letter which allegedly accompanied Exhibit A and was requested by Mr. Cummings. The purported claim is dated 12 February 1970 and merely consists of an inventory of expenses and valuation of damaged property, comparing present value with original cost. The inventory itself contains no mention of the damage—when, where and how it occurred—nor does it expressly indicate that plaintiffs considered it a claim against the city or that they were considering the defendant liable. The evidence tends to show that shortly after plaintiffs sent the inventory to Mr. Cummings on 12 February, Mr. Cummings and Mr. Stewart, an attorney for the city, came to see plaintiffs, but "[h]e did not have too much to say to me." Mr. Stewart promised to come back and he did, but their conversation was basically the same. At this last meeting which plaintiffs had with any representative of the city, which was six to eight weeks after the flooding, Mr. Stewart and Mr. Gitter, counsel for defendant appellee, looked through some of the items taken from the house and "commented on my outdoorsness." The evidence fails to show that any representative of the defendant municipality ever represented to plaintiffs that the city was liable, but does tend to show, however, that plaintiffs never indicated they were filing a claim or holding the city liable until 8 October 1970 when they sent a letter to the Mayor of Winston-Salem demanding damages, which was some nine months after the incident occurred.

[1] Plaintiffs' principal contention on appeal is that their evidence, when considered in the light most favorable to them, was sufficient to go to the jury on the issue of negligence, even if they did not strictly comply with the notice provision for tort claims under Section 115 of the Winston-Salem Charter. Relying upon *Webster v. Charlotte,* 222 N.C. 321, 22 S.E. 2d 900 (1942); *Perry v. High Point,* 218 N.C. 714, 12 S.E. 2d 275 (1940); *Graham v. Charlotte,* 186 N.C. 649, 120 S.E. 466 (1923), and numerous cases from other jurisdictions, plaintiffs urge this Court to hold that under the circumstances of this case the defendant municipality waived its formal requirement of written notice to the Mayor or the Board of Aldermen because some of its employees knew about the incident.

"The contention of plaintiff that the mayor was one of the first persons to arrive after the accident, and that therefore the city had notice of it, does not relieve plaintiff from the necessity of making a demand. The law requires that a demand, in writing, be made upon the board of aldermen, stating the nature and infliction of the injuries, etc., and the *amount of damages claimed therefor.* The city could not be charged with such notice simply because the mayor happened to help care for intestate after he was injured.

The town authorities cannot waive this statutory requirement that a demand in writing be made, even if the mayor should have imagined that a suit was to be brought. In *Borst v. Sharon,* 48 New York Supp., 996; 14 American Digest, 1991, the Court says that 'The municipal officers of a town cannot waive any statutory requirements as to notice of claim imposed for the protection of the municipality.' " *Pender v. Salisbury,* 160 N.C. 363, 366-367, 76 S.E. 228 (1912); see also *Nevins v. Lexington,* 212 N.C. 616, 194 S.E. 293 (1937).

We find plaintiffs' contention without merit.

In the alternative, plaintiffs argue that defendant, through the actions and representations of its employees, "lulled" plaintiffs through the notice period and should now be estopped to deny having notice.

"Ordinarily, the giving of timely notice is a condition precedent to the right to maintain an action, and nonsuit is proper unless the plaintiff alleges and proves notice. . . . However, there is an exception to the rule. The plaintiff may relieve himself from the necessity of giving notice by alleging and proving that at the time notice should have been given he was under such mental or physical disability as rendered it impossible for him by any ordinary means at his command to give notice; and that he actually gave notice within a reasonable time after the disability was removed. . . ." (Citations omitted.) *Carter v. Greensboro,* 249 N.C. 328, 331, 106 S.E. 2d 564 (1959).

[2, 3] The case of *Sowers v. Warehouse,* 256 N.C. 190, 123 S.E. 2d 603 (1962), involved the same provision of the Winston-Salem Charter (§ 115) as the case at bar which requires 90-day notice of tort claims. There our Supreme Court held that where

a claimant fails to file within the prescribed time and there is no allegation or evidence of incapacity or disability, an action against the city is barred and nonsuit proper. We find no authority in North Carolina to support plaintiffs' contention that the defendant municipality may be estopped to deny notice when some employees had knowledge of the injury, but there is no evidence that the *mayor* or *board of aldermen* were aware of the claim until after the time period had expired. Compare *Perry v. High Point, supra.* We are inclined to the view, although we do not so hold, that the Board of Aldermen in considering tort claims is acting in a public or governmental function, and in that circumstance the doctrine of estoppel is not applicable. See *Sykes v. Belk,* 278 N.C. 106, 179 S.E. 2d 439 (1971). Even if the doctrine of equitable estoppel were applicable, the facts necessary to apply the doctrine are not present in the case at bar. Similarly, we hold that there was insufficient evidence of a defective condition in the sewer lines or that it was of such a nature and extent that the defendant should have known of the condition and taken precautions to remedy the defect. For, equally strong reasons, the insufficiency of evidence of negligence dictates the affirmance of a directed verdict in defendant's favor. *Pennington v. Tarboro,* 184 N.C. 71, 113 S.E. 566 (1922); *Waters v. Roanoke Rapids,* 270 N.C. 43, 153 S.E. 2d 783 (1967).

As for plaintiffs' other assignment of error, suffice it to say that plaintiffs failed to present sufficient evidence of a contract between the parties for sewer services, express or implied, and thus could not go to the jury on the issue of breach of contract. The whole trial proceeded on the theory of negligence and this assignment of error is overruled.

Affirmed.

Judge GRAHAM concurs.

Judge VAUGHN concurs in the result.

EMPLOYERS COMMERCIAL UNION COMPANY OF AMERICA (FORMERLY COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK) v. WESTINGHOUSE ELECTRIC CORPORATION

No. 7226SC100

(Filed 2 August 1972)

1. **Limitation of Actions § 4— negligent repair — breach of warranty — applicable statute**

An action to recover damages for the negligent repair of a furnace transformer and for breach of a warranty contained in the repair contract was governed by the three-year statute of limitations provided by G.S. 1-52, not the six-year statute of limitations provided by G.S. 1-50(5) for actions to recover damages arising from a defective improvement to real property, where the transformer had been removed and sent to defendant's plant for the repair work and was, therefore, not part of the realty at the time defendant repaired it.

2. **Limitation of Actions § 4— deficiencies in repair work — beginning of limitation period**

The statute of limitations for an action to recover damages allegedly sustained because of deficiencies in repair work completed by defendant on a furnace transformer began to run at the time the transformer was delivered to the owner's agent, a railroad, not when the transformer was thereafter again repaired by defendant in compliance with a warranty of materials and workmanship in its contract to repair.

3. **Limitation of Actions § 4— deficiencies in repair work — beginning of limitation period**

The statute of limitations for an action to recover damages allegedly sustained because of deficiencies in repair work on a furnace transformer began to run when the transformer was delivered to the owner's agent, a railroad, and not when the owner received it and had an opportunity to inspect it.

Judge VAUGHN concurs in result.

APPEAL by plaintiff from a Judgment entered by *Friday, Judge,* 23 July 1971, following a hearing at the 12 July 1971 Session of Superior Court held in MECKLENBURG County.

This action was instituted on 13 March 1970 by plaintiff, an insurer of Great Lakes Carbon Corporation (Great Lakes), to recover, through its subrogation rights, the sum of $143,-504.61 in damages from defendant, Westinghouse Electric Corporation (Westinghouse), because of its alleged breach of warranty and negligent failure to repair properly a furnace transformer for Great Lakes.

Plaintiff alleged in pertinent part the following factual sequence:

On or about 11 November 1966, the furnace transformer located in Great Lakes' plant at Morganton, North Carolina, failed to operate and defendant was requested to perform the necessary repairs. The defendant undertook to perform the repairs and after about four months defendant returned the repaired transformer to Great Lakes, where it was reinstalled on or about 17 March 1967.

The repaired transformer completed its first run and, after approximately four hours into its second run, on or about 19 March 1967, the transformer failed, which caused Great Lakes to be substantially closed down for five months while defendant undertook repairs a second time.

The damages suffered by Great Lakes as a result of the transformer failure the second time were covered by its insurer (plaintiff) and are the basis for this action.

Defendant admitted that it repaired the transformer the first time at Great Lakes' request; that it performed the repair work in accordance with its agreement with Great Lakes; that it returned the repaired transformer to Great Lakes on 9 March 1967, F.O.B. Charlotte, North Carolina. Defendant further admitted that it repaired the transformer the second time under the "warranty clause" after the transformer had malfunctioned on 19 March 1967. The defendant denied the further material allegations of the complaint.

On 9 April 1971, defendant moved for summary judgment on the following grounds: (1) the action was barred by the statute of limitations; (2) the defendant had complied fully with all its obligations to Great Lakes; (3) damages were not recoverable from the defendant under the contract between it and Great Lakes; and (4) the defendant had been discharged and released from any claim of Great Lakes arising on the pleadings.

After hearing, Judge Friday considered the pleadings and affidavits, and entered Judgment granting the defendant's motion for summary judgment. Plaintiff appealed to this Court.

Fairley, Hamrick, Monteith & Cobb, by S. Dean Hamrick, for plaintiff-appellant.

Carpenter, Golding, Crews & Meekins, by John G. Golding, for defendant-appellee.

BROCK, Judge.

The plaintiff-appellant's sole assignment of error on this appeal is to the action of the trial court in granting the defendant's motion for summary judgment.

[1] The trial court did not state the reason for granting the defendant's motion under G.S. 1A-1, Rule 56; therefore, the parties have argued each of the grounds set out in defendant's motion. The first of these is that the action is barred by the statute of limitations. Defendant asserts that the three year limitation is applicable. Plaintiff-appellant contends that the factual situation of this case is controlled by the provisions of the six year statute of limitations contained in G.S. 1-50(5). Plaintiff resourcefully argues that the transformer in question was part of the realty and that this action is one to recover damages arising from a defective improvement to real property made by defendant.

We feel that it would serve no useful purpose to discuss the plaintiff's interpretation of the factual situation relating to the transformer and its contention that the transformer be considered "an improvement to real property" or part of the realty. It is sufficient to note that the transformer was not part of the realty at any time Westinghouse was repairing it. The evidence shows that Great Lakes severed and removed it from its plant, and sent it to defendant's plant in Charlotte by railroad flatcar for repair. We think G.S. 1-50(5) clearly was not enacted to cover situations as at issue here, and that the six year limitation is not applicable in this case.

The theories upon which plaintiff seeks to recover damages are negligent failure to repair and breach of warranty of material and workmanship in the repair contract. Thus, the period prescribed for the commencement of this action, whether regarded as arising out of contract or of tort, is three years. G.S. 1-52; *Motor Lines v. General Motors Corp.*, 258 N.C. 323, 128 S.E. 2d 413.

In this case the defendant properly pled the statute of limitations; therefore, the burden was upon plaintiff to show that its action was begun within the time permitted by statute. *Jewell v. Price,* 264 N.C. 459, 142 S.E. 2d 1.

Plaintiff instituted this action on 13 March 1970, and it contends that its cause of action, through subrogation, did not accrue until on or after 13 March 1967. Plaintiff contends that this action comes within the authority of *Styron v. Supply Company,* 6 N.C. App. 675, 171 S.E. 2d 41, and authorities cited therein.

In the *Styron* case, a cooling system; in *Heath v. Furnace Co.,* 200 N.C. 377, 156 S.E. 920, a furnace; and in *Nowell v. Tea Co.,* 250 N.C. 575, 108 S.E. 2d 889, a building, were guaranteed by the manufacturer or contractor to perform to certain standards, were constructed, furnished and installed by the defendants in those cases and put into operation by the defendants, and the defendants kept working on them and attempting to make them operate according to the prescribed standard. In the above cases, the defendants' work was not completed.

[2] In the present case plaintiff is not bringing suit for a failure on defendant's part to complete the work contracted for and undertaken, but for damages alleged to have been suffered because of deficiencies in repair work completed in March 1967. Westinghouse completed its work under the contract of repair and placed the repaired transformer on a railway flatcar, F.O.B. Charlotte, on 9 March 1967. At this time the originally contracted repair work was completed, and the transformer was no longer in the control of defendant, but in the hands of Great Lakes' agent (railroad). Therefore, the defendant had relinquished control over the transformer more than three years before the date of the institution of this lawsuit.

In this case the transformer was sent back to the Westinghouse plant after its failure on 19 March 1967, at which time defendant completely reworked the transformer in compliance with the warranty of material and workmanship in its contract to repair. This activity was not a continuation of negligent and unsuccessful efforts to repair the transformer. There was no allegation or suggestion of negligence or breach of warranty in the second effort to repair. The damages complained of by

plaintiff were alleged to have been caused by reason of negligence or breach of warranty occurring during the repair work performed while the transformer was in possession of defendant on the first occasion. This possession ended when defendant delivered the transformer to Great Lakes, F.O.B. Charlotte, on 9 March 1967.

[3] The plaintiff-appellant further contends that the statute of limitations began to run, not at the time of completion and delivery of the repaired transformer to Great Lakes, but at a later time, 13 March 1967, when Great Lakes received it and had an opportunity to inspect it. We do not agree.

The courts of this State have consistently held that the statute of limitations for claims for injury or damage from a defective product begins to run from the date of the sale and delivery of the product (not the date of the ultimate failure of the product or the injury). *Bradley v. Motors, Inc.*, 12 N.C. App. 685, 184 S.E. 2d 397; *Jarrell v. Samsonite Corp.*, 12 N.C. App. 673, 184 S.E. 2d 376; *State v. Aircraft Corp.*, 9 N.C. App. 557, 176 S.E. 2d 796; *Motor Lines v. General Motors Corp., supra.* G.S. 1-15(b) was enacted after this cause of action arose and it has no application to this case.

The summary judgment for defendant on the ground that plaintiff's action was not commenced within three years from the date its cause of action accrued is

Affirmed.

Judge HEDRICK concurs.

Judge VAUGHN concurs in result.

PIGGLY WIGGLY RETAIL OPERATIONS, INC. v. PROMOTIONAL SALES COMPANY, INC.

No. 7211SC388

(Filed 2 August 1972)

1. **Parties § 2— real party in interest — assertion on appeal — stipulation**

Defendant is in no position to assert on appeal that plaintiff had no right to bring the action because it is not the real party in interest where it was stipulated that all parties are properly before the court and the court has jurisdiction of the parties and subject matter, and that there is no question of misjoinder or nonjoinder of parties.

2. **Contracts § 27— trading stamps — failure to redeem — breach of contract**

The evidence supported findings by the trial court that defendant, the seller of trading stamps, breached a contract with plaintiff by removal and failure to replenish premium displays at plaintiff's stores, refusal to redeem trading stamps plaintiff had purchased from defendant, and failure to otherwise service plaintiff's stores in accordance with its agreement.

APPEAL by defendant from *Clark, Judge,* 25 October Civil Session, Superior Court, LEE County.

This action was instituted by plaintiff to recover $61,681.59 for which it alleges defendant is liable by reason of defendant's failure to redeem 34,267.6 units of trading stamps under the provisions of an agreement between the parties. Defendant admitted that it distributed its trading stamps to plaintiff for a valuable consideration, but denied any breach of contract by it. By way of counterclaim, defendant seeks $77,000 in damages resulting from plaintiff's allegedly wrongful seizure and withholding of defendant's merchandise and destroying defendant's business. The parties agreed that the matter could be heard by the judge without a jury. The court found facts and made conclusions thereon awarding plaintiff damages and dismissing defendant's counterclaim. Defendant appealed.

George M. McDermott and O. Tracy Parks, III, for plaintiff appellee.

J. Benjamin Miles for defendant appellant.

MORRIS, Judge.

[1] By assignments of error Nos. 1 and 2 defendant contends that plaintiff has no standing to bring this action because it is not the real party in interest. The record contains a stipulation of the parties wherein it is said:

> "5. All parties are properly before the Court and the Court has jurisdiction of the parties and of the subject matter.
>
> 6. All parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties."

Defendant is not now in a position to raise this question for the first time on appeal. These assignments of error are based on exceptions to paragraphs 15 and 16 of the court's findings of fact and conclusion of law No. 4. Defendant contends the findings of fact are not substantiated by competent evidence. On the contrary, there is in the record before us sufficient competent evidence upon which to base the findings of fact.

[2] All other assignments of error are directed to the findings of fact and conclusions thereon. We are of the opinion that all of the findings of fact are based on competent evidence and that they are sufficient to support the conclusions of law and award made by the court.

In our view, the evidence is plenary that defendant terminated the agreement between the parties. It is undisputed that plaintiff and defendant entered into an agreement with Progressive Stores, predecessor in title to plaintiff, under which Progressive would purchase defendant's trading stamps and dispense them to its customers as they purchased merchandise from Progressive. Defendant agreed to furnish displays and redeem the stamps for merchandise selected by the customer from the displays or from the catalogue furnished by defendant. Defendant's *modus operandi* was slightly different from some other trading stamp operations in that it provided for redemption of stamps at Progressive's various stores. A representative of defendant called on the stores on Monday, picked up the orders for customers together with the stamps to be redeemed, and delivered the premium to the store the following Monday to be picked up by the customer. Order forms and envelopes were provided for this purpose. If the desired item

was in the defendant's display at the store, the customer could obtain it from the store by turning in to the store the required number of stamps and paying the required sales tax. Defendant would then replenish the display of redemption merchandise. The parties had no problems until defendant heard that Progressive planned to sell its assets to plaintiff. Defendant then became concerned as to whether its stamp program would be retained or replaced by another. Defendant's President testified that in the original conference with Progressive, he was promised 90 days notice of termination of the agreement. Evidence of plaintiff was that no agreement was made with respect to notice and that plaintiff's representative made no such agreement. Defendant was never notified of a sale nor that there was any plan whatever to replace its stamp program with another. However, on or about 6 January 1969, defendant, through its President and sole stockholder, Herbert Meadows, notified its personnel to pick up all displays and discontinue picking up orders for redemption merchandise. Whereupon, defendant's representatives removed the displays from some of plaintiff's stores. In some instances, defendant's representatives called upon a store, removed the displays and returned stamps previously picked up for redemption and left orders scheduled to be picked up without explanation. From that time defendant refused to service the stores of plaintiff. Subsequently plaintiff put in the Green Bax stamp program. Green Bax agreed with plaintiff to redeem the defendant's stamps or issue its own in equivalent values therefor. This was done and Green Bax kept a record of all stamps issued by defendant taken in by it and the values thereof and stored them for plaintiff at its warehouse. Green Bax claims no interest in the stamps. Its representative testified unequivocally that the stamps were not the property of Green Bax but that they were being stored for plaintiff at plaintiff's request. The representative also stated that it expected payment for the stamps when delivered to plaintiff. There was evidence that defendant had no redemption centers other than the stores purchasing and issuing its stamps. There was also evidence that plaintiff had made demands upon defendant for redemption of the stamps outstanding either for merchandise or the cash equivalent. This was alleged in the complaint and admitted in the answer.

Upon the facts found, the court made the following conclusions of law:

"1. The defendant breached its agreement with the plaintiff in the following material respects:

(a) removal and failure to replenish premium displays at plaintiff's stores.

(b) Refusal to fill outstanding orders for premiums for which trading coupons had been previously delivered to defendant from and after January 6, 1969.

(c) Failure to accept orders for premiums and redeem trading coupons presented for redemption at plaintiff's stores from and after January 6, 1969.

(d) Failure to otherwise service plaintiff's stores in accordance with its agreement.

2. The plaintiff did not breach the agreement with the defendant.

3. The question of whether the restrictive language set forth on the Hearts Desire trading coupons constitutes an enforceable limitation on their transfer or an improper restraint of trade, is not presented for decision in this action, in that here plaintiff is ' . . . the person to whom (the coupons were) originally issued' and in any event is not seeking enforcement of defendant's obligations under its trading coupons held by the plaintiff; but rather is seeking recovery of damages sustained by reason of defendant's failure to comply with material terms of the Agreement between the parties.

4. The evidence establishes that by reason of defendant's breach of contract the plaintiff has sustained actual loss and damages at least equal to the purchase price it paid to the defendant for the 33,452.3 units of unredeemed Hearts Desire trading coupons now held by the plaintiff, and the 815.25 units previously delivered to the defendant, totaling $61,681.59. The plaintiff is entitled to recover said amount from the defendant with interest at the rate of 6% per annum from January 6, 1969, less a credit of $1,000.00 against the principal amount for the trading coupons initially furnished to the plaintiff by the defendant.

5. The defendant is not entitled to recover any sum from the plaintiff by reason of its counterclaim, such loss or

damage, if any, as defendant may have sustained being the result of its own conduct and breach of contract."

Upon the conclusions made, the court awarded damages to plaintiff.

The defendant contends that the court should have concluded that if defendant breached the contract it was an anticipatory breach and further that no cause of action could arise, until a customer had presented the stamps collected to a redemption center and redemption was denied.

As to the breach of the contract the court found the facts, resolving conflicts in the evidence in favor of plaintiff. We reiterate that our study of the record reveals that the findings are supported by the evidence. We agree with the court that the plaintiff is the party to whom the stamps were originally issued and the action is not to enforce the defendant's obligations under the stamps held by plaintiff, but to recover damages sustained by reason of defendant's failure to comply with material terms of the agreement between the parties. Defendant has cited several cases, primarily involving Sperry and Hutchinson litigation to prevent trading in its stamps by others as a commercial venture for profit. We find the cases cited by defendant to be inapposite and clearly distinguishable.

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. CLINTON THOMPSON

No. 7216SC476

(Filed 2 August 1972)

1. **Criminal Law §§ 146, 161— necessity for exceptions — constitutional question — failure to raise in trial court**

In a prosecution for kidnapping, armed robbery and rape, defendant's failure to move to dismiss and to take an exception in the trial court on the ground that he was denied his constitutional right to a speedy trial precluded him from raising the issue for the first time on appeal, particularly where defendant did not show delay as a result of the State's wilfulness or neglect. Court of Appeals Rules 19 and 21.

2. **Criminal Law § 84— evidence obtained by allegedly unlawful search — motion to suppress**

After arraignment, but before trial, defendant was not entitled to a hearing on his motion to suppress evidence obtained from an allegedly unlawful search; rather, he should have made a motion to suppress at trial, thereby entitling himself to a *voir dire* hearing.

3. **Searches and Seizures § 1— admissibility of evidence obtained without search warrant — "plain view" items**

The admission into evidence of a bumper and two tires removed, without a search warrant, from defendant's automobile was not error as there was no search requiring a warrant involved in the seizure of items in plain view.

ON *certiorari* to review the judgments of *Canaday, Judge,* 1 March 1971 Session of Superior Court, ROBESON County.

Defendant Clinton Thompson was serving a ten-year sentence for a conviction unrelated to this appeal and was an honor grade prisoner when on 8 June 1968 he walked away from the prison unit where he had been confined. During the March 1969 Session of Robeson Superior Court, defendant was indicted under separate bills charging that on 10 March 1969, he raped Cynthia Locklear and robbed her boy friend with a pistol. The Robeson County grand jury returned another bill of indictment during the November 1969 Session charging defendant with kidnapping Cynthia Locklear on that same date. On 18 November 1969 defendant was apprehended in Georgia, and a detainer was filed against defendant with the North Carolina Department of Corrections requesting that he be held to answer the charges pending against him in Robeson County. Defendant waived extradition to this State on the day following his arrest. On 12 January 1970 a jury was called and sworn, counsel was appointed

to represent the indigent defendant, and he was arraigned on the capital felony of rape. Upon motion by the defendant for a continuance, he was ordered back to prison after having had an opportunity to confer with his attorney. On 9 March 1970 defendant on his own motion petitioned to quash the indictments "on the grounds of illegal search and seizure and improper identification." The motion was placed on the calendar for hearing and on 27 May 1970 Judge Brewer entered an order finding as a fact: "that the allegations contained in the petition or application set forth no probable grounds for relief requested, either in law or in fact; and . . . that the relief sought is not a proper legal question to be determined under the Post-Conviction Act"; and concluded that defendant's motion should be denied.

In reply to his letter, the solicitor informed the defendant on 12 June 1970 that the trial date had been delayed because one of the victims had just recently returned from military service overseas and that the case would be set for trial as as soon as possible. Defendant's appointed counsel also explained to defendant that he had no control over the calendar and that he would try the case as soon as it was called. On 12 January 1971 defendant moved for a continuance until the 8 February 1971 Session of Robeson Superior Court and on the following day, requested another postponement. On 13 January 1971 Judge Canaday ordered the case be continued until the 22 February 1971 Session. Defendant's oral motion to appoint additional counsel due to the gravity of the case was denied. Defendant then moved to dismiss his assigned counsel because "[w]e can't see eye to eye," and Judge Canaday allowed defendant's appointed attorney to withdraw. After several attorneys' names had been submitted as possible replacements, defendant expressed a desire to be represented by an attorney whose name was next on the list so the court entered an order accordingly. At trial on 1 March 1971, defendant entered pleas of not guilty to kidnapping and to armed robbery. The State announced that on the charge of rape, it would not seek a greater verdict than guilty of assault with intent to commit rape whereupon defendant also entered a plea of not guilty to this charge. Verdicts of guilty on all three offenses were returned by the jury, and judgments imposing prison sentences of 20-40 years, 20-25 years and 10-15 years respectively were entered thereon.

Defendant gave notice of appeal but due to an inability to file within the time allowed by our rules, this Court allowed his petition for certiorari on 15 February 1972.

Attorney General Morgan, by Associate Attorney Kane, for the State.

William S. McLean for defendant petitioner.

MORRIS, Judge.

[1] Defendant asserts for the first time on appeal that he was denied his constitutional right to a speedy trial. No motion to dismiss on these grounds was made at the trial level, and no exception was taken which would properly put this issue before us. Rule 19 and 21, Rules of Practice in the Court of Appeals of North Carolina; *State v. Hudson,* 281 N.C. 100, 187 S.E. 2d 756 (1972).

Even had this assignment of error been properly presented, defendant's contention is without merit in light of the recent decisions of our Supreme Court in *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289 (1972); *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972); and *State v. Harrell,* 281 N.C. 111, 187 S.E. 2d 789 (1972). Defendant has not shown the delay was a result of the State's wilfulness or neglect. To the contrary, defendant has demonstrated that the delays were unavoidable due to the unavailability of a witness for the State or caused by defendant himself who requested three continuances and who, after one year had passed, requested a new attorney. Defendant has shown no prejudice, and this assignment of error is overruled.

[2] By another assignment of error, defendant excepts to the entry of Judge Brewer's order denying his motion to quash the indictments and contends the court erred in failing to afford him a hearing on his motion to suppress. It is obvious from the record that because of the vague language in defendant's motion, Judge Brewer thought the motion to suppress was directed towards the trial in which defendant had already been convicted and had served part of his sentence prior to his escape in 1968. Consequently Judge Brewer treated defendant's motion as one under the Post-Conviction Hearing Act (G.S. 15-217, et seq.) and correctly denied it. *State v. White,*

274 N.C. 220, 162 S.E. 2d 473 (1968); *State v. Noles,* 12 N.C. App. 676, 184 S.E. 2d 409 (1971). It now appears on appeal that defendant desired a pretrial hearing to determine the admissibility of evidence seized in connection with the offenses for which he had not yet been tried. Defendant cites as authority *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334 (1968), which is clearly distinguishable and recognizes the trial court's duty to pass upon the validity of a search and the competency of evidence procured thereunder when *properly* made the subject of inquiry. See *State v. Woody,* 277 N.C. 646, 178 S.E. 2d 407 (1971). In the case at bar, defendant never moved to suppress the evidence at trial which would have entitled him to a *voir dire* hearing. Nor did he offer any evidence to contradict the State's evidence that the seizure was lawful. *State v. Altman,* 15 N.C. App. 257, 189 S.E. 2d 793 (1972). We find no merit in defendant's contention that due process entitles him to a hearing on his motion to suppress after arraignment but before trial. This assignment of error cannot be sustained.

[3] The admission into evidence of a bumper and two tires removed, without a search warrant, from the automobile which defendant drove was not error since the evidence was not obtained as the result of an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States. The automobile used in the commission of the crimes collided with a pine tree in making its getaway, and the tires left clear tracks in the clay soil at the scene of the crime. No interior search of the automobile was necessary in order to observe the pine bark and resin on the bumper or the tire treads which were clearly visible. No search warrant was needed to seize the items in plain view, and they were properly admitted into evidence. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970). Nor do we believe there was any error in admitting plaster casts of the tire prints into evidence.

Defendant was represented by competent and able counsel throughout this proceeding. He received a fair and impartial trial, and the sentences imposed were within the limits set by statute. We find

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. EUGENE MURPHY

No. 7212SC420

(Filed 2 August 1972)

1. **Searches and Seizures § 3— requisites and validity of search warrant**

In a prosecution charging defendant with possession of heroin, the trial court did not err in finding on *voir dire* that the warrant issued for a search of defendant's home was valid where an affidavit incorporated into the warrant described with reasonable certainty the premises to be searched, sufficiently indicated the basis for the finding of probable cause, and sufficiently described the contraband for which the search was to be conducted. G.S. 15-26.

2. **Searches and Seizures § 3— validity of search warrant — voir dire hearing**

On *voir dire* to determine the validity of a search warrant, it is the better practice for the court to find facts and make conclusions; however, this is not required where no conflicting testimony is offered on *voir dire.*

3. **Criminal Law § 75— Miranda warnings — in-custody statements**

Where defendant made incriminating statements during the course of conversation while in the custody of an officer on a charge other than the one for which he was being tried, the officer was not required to advise defendant of his constitutional rights as his statements were voluntary and not the result of custodial interrogation.

4. **Narcotics § 4— sufficiency of evidence to withstand nonsuit**

In a prosecution for possession of heroin, State's evidence was sufficient to withstand motion for nonsuit where it tended to show that officers with a valid search warrant went to defendant's home and upon gaining admittance found defendant and a brown paper bag containing heroin in the bathroom.

APPEAL by defendant from *Clark, Judge,* 17 January 1972 Criminal Session, Superior Court, CUMBERLAND County.

Defendant was charged with possession of heroin. On his plea of not guilty, he was convicted by the jury. Judgment was entered thereon, and defendant gave notice of appeal. Record on appeal was docketed within the time provided by our rules. Neither appellant nor the State has filed brief. After the time for filing appellant's brief had expired, defendant moved in this Court to withdraw his appeal, which motion was denied.

No appearances on appeal.

MORRIS, Judge.

Errors assigned are directed to the failure of the trial court to exclude evidence seized during the search of the premises, failure of the court to exclude certain statements made by defendant, failure of the court to strike all testimony relating to evidence found in the course of the search of the premises, and failure of the court to grant defendant's motion for nonsuit.

[1] Upon objection by defendant, the court conducted a *voir dire* examination with respect to the validity of the search warrant. The search warrant and the affidavit upon which it was based were introduced into evidence. Officer Parham testified that he went before a magistrate on 22 September 1971 to obtain a search warrant and at that time he had with him an affidavit which he had prepared himself. He was sworn by the magistrate as to the facts contained in the affidavit. The affidavit, dated 22 September 1971, described the premises in detail including postal enumeration and stated as facts establishing probable cause for the issuance of a search warrant, the following: "That a confidential informant who has given this affiant good and reliable information in the past states that on 9/22/71 he had been to the above address, 912-A Gillis Street, and bought a one-half spoon of Heroin for the sum of twenty dollars. That he also saw a large quantity of heroin at 912-A Gillis Street and that the heroin was still at 912-A Gillis Street at this time."

Upon this affidavit the magistrate issued a search warrant containing the following:

> "Whereas information has been furnished me by the affiant named in the affidavit on the reverse hereof, who stated under oath that John Doe or Anyone in Charge has property described in said affidavit, related in the manner described in the affidavit with the commission of a crime, also described in said affidavit, that such property is located as described in the affidavit. And whereas I have examined under oath the affiant and am satisfied that there is probable cause to believe that the named person has such property on his premises or under his control, described in the aforesaid affidavit, you are commanded to search the premises for the property in question. If this property is found, seize it and keep it subject to court order. Herein

fail not and of this warrant make due return. Issued this the 22nd day of September 1971, at 11:40 o'clock p.m. upon information furnished under oath by the affiant named below: H. B. Parham. Signed by Stacy Autry, Magistrate."

Applying the principles enunciated in *State v. Shirley,* 12 N.C. App. 440, 183 S.E. 2d 880 (1971), cert. denied 279 N.C. 729 (1971), and *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972), we are of the opinion that the affidavit complied with the provisions of G.S. 15-26 and met the constitutional standard of reasonableness and probable cause requisite to the issuance of a search warrant. The warrant, by reference to the affidavit, which was made a part of the warrant, described with reasonable certainty the premises to be searched, sufficiently indicated the basis for the finding of probable cause, and sufficiently described the contraband for which the search was to be conducted. See *State v. Shirley, supra.* Holding as we do that the warrant was valid, it follows that the evidence obtained was properly admitted into evidence.

[2] Defendant offered no evidence on *voir dire,* and the court did not find facts. Although it is the better practice for the court to find facts and make conclusions, this is not required where, as here, no conflicting testimony is offered on *voir dire. State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971).

[3] During the course of the State's evidence Officer White testified that on 23 September 1971 he, with Sergeant Nichols, had an occasion to ride in a car with defendant from Raleigh to Fayetteville. On this trip defendant asked the witness about "a date that we busted him on Gillis Street. He asked if there was really any heroin in the bag. I told him there was. He said to me that he did not believe there was." Upon objection by defendant's counsel, a *voir dire* was conducted. The evidence for the State was that this conversation took place on a day other than the day of his arrest for the offense for which he was being tried and on an occasion when officers were returning him to Fayetteville from Raleigh upon his apprehension for escape on another charge. Upon his arrest upon the offense for which he was being tried, he was fully advised of his rights, understood what was being told him and signed a "rights form." On the occasion covered by the *voir dire* the officer to whom defendant was talking did not advise him of his constitutional rights because he did not have him under arrest for

anything. They had not been discussing the narcotics charge against him at the time defendant asked the officer if there was really any heroin in the bag. When the officer told him there was, defendant commented that he didn't believe it because he had counted three and saw three go down in the commode; that he had just miscounted. He continued to discuss the use of narcotics in Fayetteville and how easy it was to obtain drugs there. Defendant offered no evidence. The court found the statements to have been voluntary, that defendant was not being interrogated and that the warnings required by *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), were not applicable. In this we find no error. The fact that defendant was in custody when he made the statements does not of itself render the inculpatory statements inadmissible. *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363 (1965). There is no evidence indicating pressure or fear or the promise of reward. The record clearly shows that there was no custodial interrogation. Therefore, the officer was not required to warn defendant of his rights as required by *Miranda v. Arizona, supra. State v. Muse,* 280 N.C. 31, 185 S.E. 2d 214 (1971), cert. denied 406 U.S. 974, 32 L.Ed. 2d 674, 92 S.Ct. 2409 (7 June 1972).

[4] The evidence presented by the State tended to show that the officers went to the address set out in the search warrant, knocked on the door, and told the occupants they were with the police and had a search warrant. The officers then saw defendant run from the living room to the bathroom. They attempted to knock the door open, and a man inside opened the door. The officer went immediately to the bathroom and attempted to open the door. It was latched, and he forced it open and took defendant by the arm. There was a brown paper bag on the floor between the commode and the bathtub. Another agent picked up the bag and took out a tinfoil package which contained a white powder. Defendant was placed under arrest and advised of his rights. The evidence was that chemical analysis showed the package contained heroin.

The evidence was sufficient to take the case to the jury.

No exception is taken to the charge of the court to the jury. Defendant, represented by competent counsel, has been given a fair and impartial trial free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. BENNIE BOYCE TESSENAR

No. 7226SC446

(Filed 2 August 1972)

1. **Criminal Law § 75— Miranda warnings — defendant not in custody**

In a murder prosecution, defendant's volunteered statement made to an officer before he was taken into custody that he was "the man who did it" was admissible, since "Miranda warnings" are required only where a defendant is being subjected to custodial interrogation.

2. **Criminal Law § 51— expert testimony — absence of finding by court**

The trial court's failure specifically to find a witness an expert in the field of firearms and munitions before allowing the witness to give opinion testimony did not constitute reversible error where there was plenary evidence that the witness was fully experienced in his field and had test fired the gun with respect to which he testified.

3. **Homicide § 20— photograph of deceased's body — admissibility — illustration of testimony**

A photograph depicting the body of the deceased was competent for the purpose of illustrating the testimony of witnesses despite the fact that it was gory or gruesome.

4. **Criminal Law § 99— judge's expression of opinion**

The judge's inquiry made to the jury as to whether they would return after supper "and work a while tonight" did not constitute coercion of the jury or an expression of opinion.

APPEAL by defendant from *McLean, Judge,* 17 January 1972 Schedule "C" Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was charged in a bill of indictment, proper in form, with first degree murder. The solicitor elected in open court to seek a verdict of guilty of second degree murder, manslaughter "or whatever the evidence might warrant." Defendant entered a plea of not guilty.

Mrs. Margaret Kirkland testified for the State that she and deceased, whom she was dating, were at defendant's trailer home on the night of 24 September 1971. All of them had been drinking. About midnight deceased and defendant got into an argument over Mrs. Kirkland but they stopped and shook hands. Later the two men started pushing each other. They were not fighting but just pushing. Mrs. Kirkland started to leave but was called back by deceased who assured her they would not

fight anymore. Defendant then went to the back of his trailer and got his shotgun. Mrs. Kirkland described the events which followed: "Edgar was standing right in front of the couch. Bennie went back, I think, in the bedroom and came back with a gun. I don't remember how he was carrying it, but he come back and pointed it towards Edgar and it frightened me. Edgar sat down on the couch. I begged Bennie not to kill him. I grabbed hold of the gun at the barrel and gripped it and he pushed me away and told me to get out of his damn way. He pushed me towards the bar. Bennie looked at Edgar and pointed the gun back towards him and he said, 'You have made me mad and I am going to kill you, you god-damned son-of-a-bitch,' and he cocked the gun and shot him. At this time Edgar was sitting on the couch. He did not stand up or attempt to stand up. Bennie was standing two or three feet from Edgar with the gun."

Police officer D. G. Lutrick went to the scene some time after 2:00 a.m. on the morning of 25 September 1971. As he pulled up to the trailer park, he asked two men whom he observed standing near defendant's trailer if they were having trouble there. Defendant, who was one of the two men, replied, "I am the man that did it." Officer Lutrick entered the trailer. He observed the deceased leaning against the back of the couch. Deceased had a wound in the area of the face approximately an inch in diameter, and in the opinion of the officer, he was dead at that time. A shotgun, offered into evidence as State's Exhibit 1, was found inside the trailer.

Defendant testified that his gun discharged accidentally as he jerked it from the closet in order to protect himself from deceased who was threatening him with a pistol. He stated he was from 12 to 14 feet from deceased at the time the gun discharged. Defendant also stated that after the shooting Mrs. Kirkland ran from the trailer with deceased's pistol.

The State offered rebuttal evidence tending to show that defendant's gun was discharged in close proximity to deceased and that defendant told a neighbor immediately after the killing that he shot deceased because deceased had a knife.

The jury returned a verdict of guilty of manslaughter. Defendant appeals from judgment entered on the verdict imposing an active prison sentence of from 15 to 20 years.

Attorney General Morgan by Associate Attorney Lloyd for the State.

Jerry W. Whitley for defendant appellant.

GRAHAM, Judge.

Defendant's first assignment of error challenges the sufficiency of the State's evidence. This assignment of error is overruled.

[1] Defendant next contends the court erred in permitting Officer Lutrick to testify over objection that defendant told him, "I am the man who did it." This contention is without merit. The record affirmatively shows that this statement was volunteered by defendant before he was taken into custody. "Miranda warnings" are required only where a defendant is being subjected to custodial interrogation. *State v. Fletcher* and *State v. Arnold,* 279 N.C. 85, 181 S.E. 2d 405; *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638.

[2] Defendant objected to testimony by a witness as to his opinion with respect to the distance State's Exhibit #1 (defendant's shotgun) was from the deceased when it fired the shot which inflicted the fatal wound. The court did not enter a specific finding that the witness was an expert in the field of firearms and munitions. However, there was plenary evidence to show that the witness was fully experienced in this field, and also that he had test fired the gun in question. Under these circumstances, the court's failure to specifically find the witness to be an expert does not constitute reversible error. "[T]he failure of the trial judge to specifically find that the witness is an expert before allowing him to give expert testimony will not sustain a general objection to his opinion evidence if it is in response to an otherwise competent question, and if there is evidence in the record on which the court could have based a finding that the witness had expert qualifications. In such a case, it will be assumed that the court found the witness to be an expert; otherwise, it would not have permitted him to answer the question." *Teague v. Power Co.,* 258 N.C. 759, 764, 129 S.E. 2d 507, 511.

[3] Defendant's next assignment of error is directed to the admission of a photograph depicting the body of the deceased on the couch inside the trailer. The record clearly indicates

that this photograph was admitted only for the purpose of illustrating the testimony of witnesses. It was competent for that purpose. *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; *State v. Matthews,* 191 N.C. 378, 131 S.E. 743. The fact the photograph is gory or gruesome does not render it incompetent. *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. McCain,* 6 N.C. App. 558, 170 S.E. 2d 531.

[4] Defendant's final assignment of error is directed to an inquiry made by the judge to the jury at 7:00 p.m. as to whether they would be willing to return at 8:00 p.m., after supper, "and work a while tonight." We find nothing in the judge's statement tending to suggest, as defendant contends, that the jury would be there all night if they did not agree upon a verdict. Nothing in the court's language tends in any way to coerce the jury or intimate an opinion as to what the verdicts should be. *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652. We note that defendant did not move for a mistrial nor object to the court's statement at the time it was made. The objection he makes now is overruled.

After reviewing the entire record we conclude that defendant was afforded a fair trial free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. DANIEL THOMAS SMITHEY

No. 7214SC324

(Filed 2 August 1972)

1. Embezzlement § 2— fraudulent intent

Fraudulent intent which constitutes a necessary element of the crime of embezzlement is the intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. G.S. 14-90.

2. Embezzlement §§ 2, 6— fraudulent intent — sufficiency of evidence to withstand motion for nonsuit

In a prosecution for embezzlement, a reasonable inference could be drawn that defendant either fraudulently or knowingly and willfully misapplied his employer's funds, or that he secreted his em-

ployer's funds with the intent to embezzle or fraudulently or knowingly and willfully misapply them where the evidence tended to show that defendant was responsible for depositing funds of his employer in the bank; he failed to make deposits for several days, claiming that he locked the funds up in a room on employer's premises; the funds disappeared from the room, though defendant had the only key and the room had not been broken into; hence, defendant's motions for nonsuit were properly overruled.

3. **Criminal Law § 132— motion to set aside the verdict — no review on appeal**

Motion to set aside the verdict is addressed to the sound discretion of the trial judge and his ruling thereon will not be reviewed on appeal absent a manifest abuse of discretion.

APPEAL by defendant from *McKinnon, Judge,* 27 September 1971 Session of Superior Court held in DURHAM County.

Defendant was charged in a bill of indictment with embezzling $2,023.58 from his employer, Direct Oil Co., Inc. He pleaded not guilty. The State's evidence in substance showed the following: On 12 December 1969 defendant became the manager in charge of the service station of the Direct Oil Co., Inc., at 909 Alston Avenue in the City of Durham. As such manager he was the custodian of monies received by Direct Oil Co., Inc., and according to company custom and practice he was supposed to deposit the monies each night in the night depository at the bank. As of 12 December 1969 defendant had a key to make such night deposits and on 22 December 1969 he told his supervisor that he was making the deposits. Defendant did not make any deposits in the bank on 23, 24, 25, or 27 December 1969. On the morning of 29 December 1969 defendant phoned his supervisor and reported that he had lost some money but he did not then know how much. Defendant told his supervisor that he had locked up the money in the back room of the service station. The back room was locked by a padlock to which defendant had the only key. The padlock had not been tampered with when the money was found to be missing. It was found that $2,023.58 had been taken, which was money in the custody of the defendant as manager of the Direct Oil Co., Inc. Defendant told his supervisor that he knew he should have made the night deposits, said that he did not have a key to make them, but offered no explanation as to why he had not previously called his supervisor or attempted to obtain another night deposit key from the bank. There was a floor safe in the filling station which was secured both by a

key lock and a combination lock, and defendant had a key and knew the combination to this floor safe.

The State's evidence also indicates that following his arrest and while free on bail awaiting trial, defendant left the State and was subsequently again arrested in the State of West Virginia.

Defendant did not testify, but presented the testimony of his two sisters to the effect that defendant had a good reputation.

The jury found defendant guilty, and from judgment imposing a prison sentence of not less than two nor more than three years, defendant appealed.

Attorney General Robert Morgan by Associate Attorney General Benjamin H. Baxter, Jr., for the State.

Kenneth B. Spaulding for defendant appellant.

PARKER, Judge.

Defendant assigns error to denial of his motions for nonsuit. There was ample direct evidence that defendant, as agent of his employer and by the terms and in the course of his employment, received money belonging to his employer and that he failed to account for it. Defendant's contention is that the evidence was insufficient to show any fraudulent intent or that he willfully misapplied the property of his employer for any purpose. We do not agree.

[1] "Fraudulent intent which constitutes a necessary element of the crime of embezzlement, within the meaning of the statute, G.S. 14-90, is the intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held." *State v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863. "Such intent may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred." *State v. McLean,* 209 N.C. 38, 182 S.E. 700. It is not necessary to show that the agent converted his principal's property to the agent's own use. *State v. Foust,* 114 N.C. 842, 19 S.E. 275. It is sufficient to show that the agent fraudulently or knowingly and willfully misapplied it, or that he secreted

it with intent to embezzle or fraudulently or knowingly and willfully misapply it. G.S. 14-90.

[2] When the evidence in the present case is viewed in the light most favorable to the State and the State is given the benefit of every reasonable inference which may be fairly drawn therefrom, as we are required to do when passing on motion for nonsuit, *State v. Block,* 245 N.C. 661, 97 S.E. 2d 243, there was evidence from which a reasonable inference may be drawn that defendant either fraudulently or knowingly and willfully misapplied his employer's funds, or that he secreted his employer's funds with the intent to embezzle or fraudulently or knowingly and willfully misapply them. He admitted to his supervisor that he had received the funds and that he understood he was supposed to deposit them each night in the bank for the account of his employer. He admitted he had failed so to deposit them and that this failure had continued for a considerable period of time. His excuse for his failure to deposit the funds as he had been instructed to do was so inadequate as to make permissible an inference that the excuse was untrue. Even had his excuse, that he did not have a key to the bank depository, been accepted as true, he offered no explanation as to why he had failed to utilize the floor safe in the service station but had simply locked the money in a back room. The evidence showed that the back room had not been broken into, and he offered no explanation as to how any third party might have taken the funds from this room, to which he held the only key. Viewing the direct evidence as to defendant's admitted actions in the light of all of these circumstances, the jury might reasonably draw the inference that he embezzled his employer's funds or that he secreted them with the intent so to do. Defendant's motions for nonsuit were properly overruled.

[3] Defendant's remaining assignment of error, that the trial judge erred in failing to grant his motion to set aside the verdict, is also without merit. Such a motion is addressed to the sound discretion of the trial judge and his ruling thereon will not be reviewed on appeal absent a manifest abuse of discretion. *State v. Massey,* 273 N.C. 721, 161 S.E. 2d 103. No abuse of discretion has been shown.

In defendant's trial and in the judgment appealed from we find

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE MITCHELL

No. 7228SC71

(Filed 2 August 1972)

1. **Criminal Law § 162— exception to exclusion of evidence — record fails to show what witness would have said**

The exclusion of testimony cannot be held prejudicial when the record fails to show what the excluded testimony would have been.

2. **Criminal Law § 77— declarations not part of the res gestae — competency**

Declarations of a prisoner made after the criminal act has been committed in excuse or explanation, at his own instance, will not be received in evidence, unless they constitute part of the *res gestae;* hence, the trial court did not err in excluding statements volunteered to police by the defendant in a murder prosecution where those statements were made some eight hours after the shooting occurred.

3. **Homicide § 20; Criminal Law § 42— clothing worn by defendant — admissibility**

The trial court properly excluded as exhibits clothing given by defendant to police on the morning after the shooting where there was no showing that the clothing in question was the same clothing worn by defendant at the time of the shooting or that, if it was, that it was in the same condition when he delivered it to police as it had been at the time of the shooting.

APPEAL by defendant from *Martin, Judge,* 12 July 1971 Session of Superior Court held in BUNCOMBE County.

Defendant was indicted for the first-degree murder of one Jack Norris. He was placed on trial for second-degree murder and pleaded not guilty. The State presented evidence to show the following: About 11:30 p.m. on 29 April 1971 Norris, Ivy James, and Curtis Tribble were sitting in the living room of James's two-room apartment watching television. Defendant came in and started to argue with Norris concerning defendant's girl friend. Norris got up and started toward the adjoining bedroom. Defendant pulled a pistol from his pocket, and when Norris reached the bedroom door, defendant said, "Don't go in there." Norris turned around and said, "What did you say?"

Defendant then shot Norris. Defendant and Norris grabbed each other and started tussling, defendant still having his gun in his hand. James and Tribble ran from the apartment, and while Tribble went for the police, James remained in the hall outside his apartment. In a few minutes defendant came out of the apartment, told James, "You better go back in there," and then ran from the building. James returned to his apartment and found Norris lying on the floor in the living room, bleeding at the mouth. Norris was taken to the hospital but was dead on arrival at 12:14 a.m. on 30 April 1971. The pathologist who performed an autopsy testified that Norris died from internal bleeding caused by a gunshot wound which penetrated the main artery to his right lung. After the shooting James discovered that a butcher knife which had been on the table in his bedroom was missing.

Defendant did not testify but presented the testimony of a police officer to the effect that defendant had voluntarily surrendered at the police department at 8:15 a.m. on 30 April 1971. At that time he had a wound on the back of his left shoulder. Defendant gave the police a butcher knife which answered the description of the knife which James had testified was missing from his bedroom. There was blood on the blade of the knife.

The jury found defendant guilty of murder in the second degree. From judgment sentencing defendant to prison for not less than 18 nor more than 20 years, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General William F. O'Connell for the State.

Giezentanner & Brock by Floyd D. Brock for defendant appellant.

PARKER, Judge.

[1] During cross-examination of one of the eyewitnesses to the shooting, defense counsel asked the witness if it "would have been possible" for the victim to have had a knife in his hand without the witness seeing it. The court sustained the solicitor's objection to the question, to which action defense counsel excepted and now assigns error. We find this assignment of error without merit. There was no evidence whatsoever even tending to indicate that the victim had a knife or weapon of

any type in his hand prior to the time he was shot. All the evidence was to the contrary. The record reveals that the trial judge did not unduly restrict defense counsel's cross-examination of the State's witnesses. On the contrary, this cross-examination was both searching and thorough, so that the jury was fully apprised both of the events which transpired up to the time of the shooting and of the witnesses' opportunities to see, or to fail to see, the matters concerning which they testified. Moreover, the record does not show what the witness's answer would have been had he been permitted to answer, and the exclusion of testimony cannot be held prejudicial when the record fails to show what the excluded testimony would have been. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416; *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342.

[2] Appellant also assigns error to the actions of the trial judge in excluding testimony concerning statements which defendant volunteered to the police at the time he surrendered on the morning following the shooting. In this there was no error. *State v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250. "It is settled by repeated adjudications that declarations of a prisoner, made after the criminal act has been committed, in excuse or explanation, at his own instance, will not be received; and they are competent only when they accompany and constitute part of the *res gestae.*" *State v. McNair,* 93 N.C. 628. "What a party says exculpatory of himself after the offense was committed, and not part of the *res gestae,* is not evidence for him. Otherwise, he might make evidence for himself." *State v. Stubbs,* 108 N.C. 774, 13 S.E. 90. In the present case the statements of defendant were volunteered to the police some eight hours after the shooting and cannot be considered part of the *res gestae.* Defendant did not testify, and no contention is made that the statements were competent for purposes of corroboration.

[3] Finally, appellant contends the trial judge erred in not permitting him to introduce in evidence as exhibits certain articles of clothing which defendant gave to the police on the morning following the shooting. The proffered exhibits were properly excluded. There was no showing that the clothing in question was the same clothing worn by defendant at the time of the shooting or that, if it was, that it was in the same condition when he delivered it to the police as it had been at the time of the shooting. The exhibits were not relevant to any issue in the case.

It would appear that defendant, without taking the stand and thereby subjecting himself to cross-examination, was attempting to inject into the case some basis for contending that he acted in self-defense. If so, his attempt failed. There was no showing that the small cut which was on defendant's back when he surrendered to the police on the morning following the shooting was inflicted upon him by his victim at the time of the shooting. On the contrary, two eyewitnesses testified that the victim held no weapon and that defendant was the aggressor when the fatal shot was fired.

In the trial and judgment appealed from we find

No error.

Chief Judge MALLARD and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. LUTHER TALMADGE MEDLIN

No. 7214SC462

(Filed 2 August 1972)

1. **Automobiles § 130; Criminal Law § 124— sufficiency of verdict to support judgment**

The jury's verdict of "guilty of driving automobile under the influence" was insufficient to support the judgment against defendant in a prosecution for driving under the influence of intoxicating liquor, second offense, because the verdict neither alluded to the warrant nor used language to show a conviction of the offense charged therein.

2. **Criminal Law § 124— verdict — failure to refer to charge**

The jury should be requested to respond with a simple answer of guilty or not guilty to specifically formulated issues which contain clear and accurate statements of the charge or charges for which defendant is being tried; if the jury undertakes to spell out its verdict without specific reference to the charge, however, it is essential that the spelling be correct.

3. **Criminal Law § 99— objections and questions by trial court — expression of opinion**

The trial judge committed prejudicial error in violation of G.S. 1-180 when he sustained objections during cross-examination of State's witnesses and interposed his own objections to block legitimate lines of cross-examination and when he questioned the State's witness with respect to the number of years the breathalyzer test had been in use and the number of times the witness had administered it.

State v. Medlin

APPEAL by defendant from *Cooper, Judge,* 7 February 1972 Criminal Session of Superior Court held in DURHAM County.

Defendant was charged in a warrant with the offense of unlawfully and willfully operating a motor vehicle on 28 November 1971 on a public highway in Durham County, N. C., "while under the influence of intoxicating liquor this being his second offense as the defendant was convicted of a similar offense in the Superior Court Division of General Court of Durham County on January 27, 1969." After plea of not guilty and trial and conviction in the district court, defendant appealed to the superior court, where he again pleaded not guilty and was tried *de novo.*

The record shows that the jury returned into open court with their verdict and that the following occurred:

> The Court: "How do you find the defendant Luther Talmadge Medlin on the charge of driving under the influence?"
>
> Foreman: "We the jury find the defendant guilty of driving automobile under the influence."

The record shows that judgment was entered as follows:

> "In open court, the defendant appeared for trial upon the charge or charges of Driving Under the Influence, 2nd Offense and thereupon entered a plea of not guilty
>
> Having BEEN FOUND GUILTY of the offense of Driving Under the Influence, 2nd Offense which is a violation of _____ and of the grade of misdemeanor
>
> It is ADJUDGED that the defendant be imprisoned for the term of thirty (30) days in the county jail of Durham County and assigned to work under the supervision of the State Department of Correction."

From this judgment, defendant appealed.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.

Arthur Vann for defendant appellant.

PARKER, Judge.

[1, 2] The warrant in this case was sufficient to charge defendant with committing the offense of driving a vehicle upon the public highways within this State while under the influence of intoxicating liquor, a violation of G.S. 20-138, and to charge commission of a second such offense so as to make defendant punishable under the provisions of G.S. 20-179(a)(2). The verdict, however, neither alludes to the warrant nor uses language to show a conviction of the offense charged therein. No finding was made that defendant drove an automobile on a public highway, or as to what defendant was under the influence of when he drove, or as to commission of any second offense. The verdict rendered may be entirely consistent with the guilt of defendant, but it is not inconsistent with his innocence. Had the verdict been simply "guilty," or "guilty as charged," it would have been sufficient to support the judgment, "but when the jury undertakes to spell out its verdict without specific reference to the charge, as in the instant case, it is essential that the spelling be correct." *State v. Lassiter,* 208 N.C. 251, 179 S.E. 891. This essential for a valid verdict in a criminal case has been pointed out by our Supreme Court many times. *State v. Ingram,* 271 N.C. 538, 157 S.E. 2d 119; *State v. Brown,* 248 N.C. 311, 103 S.E. 2d 341; *State v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9; *State v. Allen,* 224 N.C. 530, 31 S.E. 2d 530; *State v. Cannon,* 218 N.C. 466, 11 S.E. 2d 301; *State v. Lassiter, supra; State v. Barbee,* 197 N.C. 248, 148 S.E. 249; *State v. Shew,* 194 N.C. 690, 140 S.E. 621; *State v. Parker,* 152 N.C. 790, 67 S.E. 35; *State v. Whitaker,* 89 N.C. 472.

In the case last cited, Ashe, J., speaking for the Court, said (p. 474):

> "To avoid embarrassment in cases like this, it would be well to follow the suggestion of Mr. Bishop, 'that in every case of a verdict rendered, the judge or prosecuting officer, or both, should look after its form and its substance, so far as to prevent a doubtful or insufficient finding from passing into the records of the court, to create embarrassment afterwards, and perhaps the necessity of a new trial.' 1 Bish. Cr. Pro., sec. 831."

Trial judges would be well advised to exercise utmost care in accepting verdicts in order to assure that the verdict rendered accurately reflects the jury's findings as to defendant's

guilt or innocence of the exact charge or charges for which he is being tried. This can best be accomplished if the jury is requested to respond with a simple answer of "guilty," or "not guilty" to specifically formulated issues which contain clear and accurate statements of the charge or charges for which defendant is being tried.

[3] Apart from ambiguity in the verdict, defendant is entitled to a new trial in the present case. On several occasions while defendant's counsel was cross-examining the State's witnesses, the trial judge either sustained objections by the solicitor or interposed his own objections to block legitimate lines of cross-examination. In addition, after the State's witness had completed his testimony as to results of the breathalyzer test, the trial judge asked questions of the witness to bring out the fact that the breathalyzer test had been approved for use in this State since 1965 and to bring before the jury that the witness had given the test to persons suspected of driving under the influence of intoxicants for between 900 and 1000 times. By these actions the trial judge, temporarily at least, abandoned his role as an impartial jurist and assumed the role of the prosecutor. In so doing he violated the provisions of G.S. 1-180. While any one of these incidents standing alone, even though erroneous, might not be regarded as prejudicial, when all of them are viewed in the light of their cumulative effect upon the jury, we hold that the cold neutrality of the law was breached to the prejudice of this defendant. *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128.

For the reasons set forth above, defendant is entitled to a

New trial.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. THOMAS CLYDE FLOYD

No. 7221SC350

(Filed 2 August 1972)

1. **Automobiles § 119— reckless driving — sufficiency of evidence to withstand motion for nonsuit**

In a prosecution for reckless driving, defendant's motion for nonsuit was properly overruled where the evidence tended to show that defendant was traveling approximately 70 mph in a 45 mph zone, suddenly braked and then accelerated his engine, causing the car to "fishtail"; such evidence was sufficient for jury determination as to whether defendant was exercising due caution and circumspection and whether his speed, or his manner of driving, endangered or was likely to endanger any person or property. G.S. 20-140(b).

2. **Criminal Law § 113— charge to jury — request for special instructions**

Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contentions of the parties, it complies with G.S. 1-180, and a party desiring further elaboration on a particular point, or of his contentions, or a charge on a subordinate feature of the case, must aptly tender request for special instructions.

APPEAL by defendant from *Kivett, Judge,* 6 December 1971 Criminal Session of Superior Court held in FORSYTH County.

By warrant defendant was charged, in words as set forth in G.S. 20-140(b), with reckless driving on a street or highway in Forsyth County. After being tried and convicted in district court defendant appealed to superior court where a jury found him guilty as charged. From judgment imposing prison sentence, suspended on certain conditions, defendant appealed.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.

Wilson & Morrow by Harold R. Wilson and John F. Morrow for defendant appellant.

PARKER, Judge.

By his first and second assignments of error defendant contends that the court erred in denying his timely made motions for nonsuit.

[1] The evidence, viewed in the light most favorable to the State, tended to show: Stewart Road in Forsyth County is a narrow, two-lane, blacktop road approximately 18 or 19 feet wide. At the area in question there is an open field on the west side of the road and seven or eight residences spaced some 100 to 150 feet apart on the east side of the road. The posted speed limit is 45 m.p.h. About 7:55 p.m. on 11 May 1971 State Highway Trooper Barczy was sitting in his patrol car, which was parked in the driveway of one of the residences. Defendant, accompanied by his passenger, 19-year-old Keith Thomas, drove a 1964 two-door Studebaker into Stewart Road from North Carolina Highway 150 and proceeded north on Stewart Road. As defendant entered Stewart Road his car was making a very loud noise, the motor was roaring, and Trooper Barczy drove his patrol car up to the end of the driveway and looked down Stewart Road. As defendant came over a little knoll in the road, he was traveling approximately 70 m.p.h. While in the area of the residences, he suddenly applied brakes, came down the road sideways with the back end of the car coming across the whole road, and slowed down to about five m.p.h. He then accelerated the engine, causing it to roar, the wheels to spin, and the car to swerve to the left and to the right three or four times, and then entered a driveway some two houses from where Mr. Barczy was sitting. We hold that the evidence was sufficient to survive the motions for nonsuit.

G.S. 20-140(b) provides: "Any person who drives any vehicle upon a highway without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving."

In *State v. Folger,* 211 N.C. 695, 191 S.E. 747, our Supreme Court declared that under this statute a person is guilty of reckless driving "if he drives an automobile on a public highway in this State without due caution and circumspection *and* at a speed or in a manner so as to endanger or be likely to endanger any person or property." Our Supreme Court has also held that the simple violation of a traffic regulation, which does not involve actual danger to life, limb or property, would not perforce constitute the criminal offense of reckless driving. *State v. Cope,* 204 N.C. 28, 167 S.E. 456, and cases therein cited.

Defendant insists that while the evidence in the instant case does show speed (60 to 70 m.p.h. in a 45 m.p.h. zone) and does show a sudden stop and "fishtailing" of defendant's automobile, the evidence does not show that defendant's manner of driving actually endangered or, under the circumstances, was likely to endanger persons or property. We reject this argument. The evidence was sufficient for jury determination as to whether defendant was exercising due caution and circumspection and whether his speed, or his manner of driving, endangered or was likely to endanger any person or property including himself, his passenger, his property, or the person or property of others on or near Stewart Road. Assignments of error 1 and 2 are overruled.

By his assignments of error 3, 4, 5 and 6, defendant contends the trial judge erred in his charge to the jury, defendant's contention being stated in his brief as follows:

> "The trial judge's definition of culpable negligence was inadequate in that it failed to inform the jury that an unintentional or inadvertent violation of a safety standard or statute, standing alone, could not constitute culpable negligence, and that said inadvertent or unintentional violation of a safety standard or statute must be accompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others."

[2] It has been held many times that where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contentions of the parties, it complies with G.S. 1-180, and a party desiring further elaboration on a particular point, or of his contentions, or a charge on a subordinate feature of the case, must aptly tender request for special instructions. 3 Strong, N. C. Index 2d, Criminal Law, § 113, pages 12-13. *State v. Garrett, et al,* 5 N.C. App. 367, 168 S.E. 2d 479. After a careful review of the charge in the case at bar, we conclude that the trial judge complied with G.S. 1-180 and that in the absence of a request to so charge, did not err in failing to instruct the jury with respect to the principle of law set forth in defendant's contention. The assignments of error are overruled.

No error.

Judges BRITT and HEDRICK concur.

T. A. LOVING COMPANY v. JAMES F. LATHAM, BILL PRICE, M. GLENN PICKARD AND HUGH M. CUMMINGS III, INDIVIDUALLY, AND TRADING AS HOLLY HILL REALTY, A PARTNERSHIP; AND THE WESTERN CORPORATION, ET AL

No. 7215SC144

(Filed 2 August 1972)

Judgments § 37— summary judgment based on judicial admissions — matters concluded

In an action by a general contractor against the owners of a shopping center wherein subcontractors who furnished materials and labor in construction of the shopping center were made additional parties defendant, an order of summary judgment dismissing the action as to the subcontractors on the basis of their judicial admissions that they had been paid in full by the general contractor and had no claim against either the general contractor or the owners, although entered in favor of the subcontractors, was binding on them and effectively foreclosed them from asserting in the future any claims against the owners arising out of the matters alleged in the pleadings.

APPEAL by original defendants from *Hobgood, Judge,* 13 September 1971 Session of Superior Court held in ALAMANCE County.

Plaintiff, a general contractor, brought this action against the original defendants, James F. Latham, Bill Price, M. Glenn Pickard and Hugh M. Cummings III, individually and as partners in a real estate partnership trading under the name Holly Hill Realty, and The Western Corporation, seeking recovery of $1,582,276.28 with interest from 25 September 1970, which plaintiff alleged was the balance owed to it by said original defendants by contract under which plaintiff constructed a large shopping center known as Holly Hill Mall on real property of defendants at Burlington, N. C. Plaintiff also seeks to enforce a lien against the property under G.S. 44A-13 and 14. The original defendants answered, setting up various defenses, and alleging counterclaims totaling $1,726,445.23. On the same date the answer was filed, the original defendants filed a motion under Rule 19(b) of the Rules of Civil Procedure praying

the court that all subcontractors of the plaintiff be made additional parties defendant and be required "to assert any claims they have against the plaintiff which they contend to be a lien against either the property or funds of defendants." On this motion an order was entered making thirty-eight named subcontractors additional parties defendant, directing that summons, copy of the complaint and answer, and copy of the order be served on each of them, and providing

> "[t]hat such additional party defendants be, and they hereby are, granted thirty (30) days from date of such service in which to assert any claim they have against the plaintiff which they claim to be a lien against the property or funds of the defendants, or any of them."

In response to this order, sixteen of the named additional parties defendant, who are the appellees on this appeal, responded by filing answers, motions to dismiss, or motions for summary judgment supported by affidavit (or some combination of these), in which they asserted that they had been paid in full by the plaintiff, the general contractor, for all work done or materials furnished by them, and alleged that they had no claim against either the plaintiff or against any of the original defendants. The matter came on for hearing before Judge Hobgood, who entered an order containing the following:

> "[I]t appearing to the Court that the additional defendants named below have filed answer, motion to dismiss, motion for summary judgment, affidavits with motion for summary judgment (the Court finding as a fact and holding as a matter of law that such affidavits constitute answers and judicial admissions) or other pleadings of similar import, all of said pleadings denying any claim against any other party to this litigation;
>
> "And the Court finding as a fact from the pleadings and attachments thereto filed by the individual defendants named below, as well as from representations made by counsel in open Court, that none of the additional defendants named below have or assert any claim against Holly Hill Mall Shopping Center, T. A. Loving Company; Holly Hill Realty; The Western Corporation, or any other person, firm or corporation arising out of matters and things alleged in the pleadings;
>
> "That upon the foregoing facts and the law the original defendants have shown no right to relief against these

additional defendants and there is no genuine issue as to a material fact with respect to these additional defendants, the additional defendants set forth below are entitled to a judgment of dismissal with prejudice as a matter of law, and it is so ORDERED and ADJUDGED."

The order then named the sixteen additional parties defendant to which it is applicable. To the entry of this order, the original defendants excepted and appealed.

Latham, Pickard & Ennis by Spencer Ennis; and Dalton & Long by W. R. Dalton, Jr., for original defendants, appellants.

Sanders, Holt & Spencer by James C. Spencer, Jr., for additional defendants, Owen Steel Company, Inc., and A. B. Whitley, Inc., appellees.

Wardlow, Knox, Caudle & Knox by Lloyd C. Caudle for additional defendants, Rayson Company and Florida Steel Company, Inc., appellees.

Robert N. Robinson for additional defendant, General Specialties Co., Inc., appellee.

Yarborough, Blanchard, Tucker & Denson by Irvin B. Tucker, Jr., for additional defendant, Partitions, Inc., appellee.

Haywood, Denny & Miller by Emery B. Denny, Jr., for additional defendants, James A. Smith & Son, and S. H. Basnight & Sons, appellees.

Brown, Brown & Brown by R. L. Brown, Jr., for additional defendant, Overdoors of the Carolinas, Inc., appellee.

Taylor, Allen, Warren & Kerr by W. Frank Taylor for additional defendants, W. H. Best & Sons, Inc., and Dewey Bros., Inc., appellees.

Adams, Kleemeier, Hagan, Hannah & Fouts by Clinton Eudy, Jr., for additional defendant, W. H. Sullivan Company, appellee.

Allen, Allen & Sternberg by Louis C. Allen, Jr., for additional defendants, Richard A. Robertson t/a Richard A. Robertson, Masonry Contractor, and Overman Cabinet and Supply Co., appellees.

Falk, Carruthers & Roth by Herbert S. Falk, Jr., for additional defendant, Greensboro Concrete & Construction Co., Inc., appellee.

PARKER, Judge.

Appellants contend they are entitled to have the disclaimers of appellees made "irrevocable, permanent, and binding," and that the order appealed from does not have this effect. They reason that the order is in favor of appellees, not against them, and from this somehow arrive at the conclusion that appellees are left free in the future to assert possible claims against them. We agree neither with appellants' reasoning nor with their conclusion.

While Judge Hobgood's order is in favor of appellees in the sense that it was entered in response to their motions made to obtain relief from the unwanted burden of continued participation in someone else's expensive lawsuit, it was nevertheless entirely binding upon them and effectively foreclosed them from asserting in the future any claims against appellants arising out of matters alleged in the pleadings. The order was based on appellees' solemn judicial admissions that they had no such claims. These judicial admissions are binding on appellees, Stansbury, N. C. Evidence 2d, § 116, p. 423, and established that no genuine issue as to any material fact existed insofar as the rights as between appellees and all other parties to the litigation are concerned. As a matter of law, appellees became entitled to an order freeing them from continued involvement, even peripherally, in litigation which promises to be lengthy and expensive and in which they can have no possible interest. Summary judgment granting them this relief was therefore proper. At the same time, the order appealed from adequately protects appellants from the possibility that any appellee might successfully assert against them in the future any claim which such appellee judicially admitted in the trial court and on this appeal continues strenuously to contend it does not have. Based on appellees' admissions, Judge Hobgood found as a fact that none of the appellees has any such claim. This determination was all that appellants were entitled to receive insofar as any rights which they may have against appellees are concerned, and such determination will continue to be binding.

"Matters determined by a summary judgment, just as by any other judgment, are res judicata in a subsequent action." Vol. 3, Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, § 1246, p. 211.

The order appealed from is

Affirmed.

Chief Judge MALLARD and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. RONALD E. GIBSON

— AND —

STATE OF NORTH CAROLINA v. MELVIN DEWALT

No. 7226SC248

(Filed 2 August 1972)

1. **Arrest and Bail § 3— arrest without warrant — misdemeanor in officers' presence**

Police officers had reasonable grounds to believe that one defendant was actively aiding and abetting the second defendant in the misdemeanor of window breaking, and the officers lawfully arrested both defendants without a warrant for a misdemeanor committed in their presence, where the officers observed the second defendant break a window of a clothing store at 1:00 a.m. while the first defendant was standing beside him, both defendants then moved across the street and later returned to the scene of the broken window, both defendants left when a police car appeared, and officers found defendants together in a restaurant some fifteen minutes later. G.S. 15-41, G.S. 15-54(b).

2. **Searches and Seizures § 1— search incident to arrest — continuation at police station**

Where the arrest of defendants without a warrant was lawful, and officers cut short the initial search of defendants at the arrest scene because of a growing and hostile crowd, the quick initial search of defendants at the scene of the arrest and the continuation of that search at the police station were lawful searches incident to defendants' arrest.

APPEAL by defendants from *Fountain, Judge,* 30 August 1971 Schedule "D" Criminal Session of Superior Court held in MECKLENBURG County.

By separate bills of indictment, proper in form, defendants, Ronald E. Gibson and Melvin Dewalt, were each charged with (1) felonious breaking and entering the building occupied by S. N. Hall, a sole proprietor trading as Hall's Clock Shop, 234 North College Street, Charlotte, N. C., and (2) felonious larceny after such breaking and entering. Without objection the

cases were consolidated for trial. Both defendants pleaded not guilty. The State's evidence was in substance as follows: The proprietor of Hall's Clock Shop testified that he locked his place of business about 5:30 p.m. on 2 February 1971. When he returned at 9:05 a.m. the next morning, the lock on the door had been broken, the door cracked open, and certain watches and tools which had been on the premises when he left on the preceding afternoon were missing. He did not know the defendants and had not given either of them permission to enter his place of business. City of Charlotte police officers testified that they arrested the two defendants at approximately 1:15 a.m. in the early morning of 3 February 1971 when the officers observed them sitting together at the counter of the White Tower Restaurant on North Tryon Street. As the officers approached, the defendants stood up and the officers saw a pair of needlepoint pliers and a small screwdriver, later identified as being among the tools missing from Hall's Clock Shop, fall to the floor from underneath defendant Gibson's coat. At the scene of the arrest the officers "patted down" the outside of the defendants' clothing, but did not search them thoroughly, since a crowd quickly gathered and the officers wanted to get the defendants away before the crowd grew larger. As a result of the search made at the scene of the arrest, the officers found an additional screwdriver and two additional pairs of pliers, also later identified as coming from Hall's Clock Shop, on the person of defendant Gibson. After the officers took the defendants to the police station, a search of their pockets resulted in the discovery of watches from Hall's Clock Shop on both defendants.

Both defendants testified and denied any involvement in the break-in at Hall's Clock Shop and denied that any articles from the shop had been found on their persons.

The jury returned verdicts finding each defendant guilty as charged. From judgments on the verdicts imposing prison sentences, the defendants appealed.

Attorney General Robert Morgan by Associate Attorney William Lewis Sauls for the State.

James, Williams, McElroy & Diehl, by William K. Diehl, Jr., for defendant appellants.

PARKER, Judge.

Appellants assign error to the trial judge's ruling that the arrest and search of defendants was lawful and that evidence obtained by the search was admissible. Before so ruling the trial judge conducted a *voir dire* examination at which both the State and the defendants presented evidence. At the conclusion of the *voir dire* examination the trial judge entered an order making full findings of fact on the basis of which he concluded that the search of both defendants was incident to a lawful arrest and that the evidence obtained by the search was admissible in evidence. In this we find no error.

[1] While defendants' testimony was in sharp conflict with that presented by the State, the State's evidence was sufficient to show the following: About 1:00 a.m. on 3 February 1971 three Charlotte police officers, sitting in an unmarked patrol car parked in the back parking lot at the Barringer Hotel, saw the defendants standing in front of the Robert Hall Clothing Store at the corner of 9th and College Streets. This was some three or four blocks from Hall's Clock Shop. At that time no other person was present. Defendant Gibson, with defendant Dewalt standing beside him, took some object about two feet long and with it broke a window in the clothing store. Both defendants then moved across the street but later came back. They left when a marked patrol car came down the street. The officers in the unmarked car next saw the defendants about fifteen minutes later, when the officers observed the defendants sitting together at the counter in the White Tower Restaurant. The officers recognized defendant Gibson as the person they had seen breaking the window at the Robert Hall Clothing Store and recognized defendant Dewalt as the person they had seen with Gibson when he did so. The officers thereupon immediately arrested both defendants. We agree with the trial court's ruling that the officers acted lawfully when they did so.

G.S. 15-41 contains the following:

"A peace officer may without warrant arrest a person:

(1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the

person to be arrested has committed a felony or misdemeanor in his presence; . . ."

Defendant Gibson committed at least a misdemeanor when he broke the window in the clothing store. G.S. 14-54(b). This occurred in the presence of the officers. The only other person present was the defendant Dewalt, who was standing beside Gibson when the latter broke the window, who then moved across the street and back with Gibson, who left the scene with Gibson when the marked police car appeared, and who was still with Gibson some fifteen minutes later when the officers found them together in the restaurant. Under the circumstances, we hold that the officers had reasonable ground to believe that Dewalt was actively aiding and abetting Gibson and was equally guilty with Gibson of at least the misdemeanor of window breaking. In this context, "[p]robable cause and 'reasonable ground to believe' are substantially equivalent terms," *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364, and "[t]he existence of 'probable cause,' justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." 5 Am. Jur. 2d, Arrest, § 48, p. 740. In our opinion, the facts found by the trial judge on competent evidence would warrant legal technicians, as well as reasonable and prudent laymen, in believing both Dewalt and Gibson to be guilty of at least a misdemeanor in the breaking of the window at the Robert Hall Clothing Store. The arrest of both defendants without a warrant was lawful under G.S. 15-41(1).

[2] "A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest." *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440. In the present case, the search which the officers made when they "patted down" the defendants at the scene of the arrest was clearly a lawful incident of the arrest. The officers cut short that initial search because of the growing and hostile crowd. Since the danger from possible concealed weapons was not entirely eliminated by the initial quick search, it was reasonable to continue the search at the police station. In our opinion both the quick initial search at the scene of the arrest and the continuation of that search at the police station were lawful searches incident to the arrest of the defendants. The articles found as a result of such searches were properly admitted in evidence.

Appellants concede that if the evidence obtained as result of the searches was admissible, then *ex necessitate* their motions for dismissal were properly overruled.

We have carefully examined all of appellants' remaining assignments of error and find no prejudicial error such as would warrant the granting of a new trial. Accordingly, in the trial and judgments appealed from we find

No error.

Chief Judge MALLARD and Judge MORRIS concur.

RAY L. SIMPSON, PLAINTIFF v. JOE W. GARRETT, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA, DEFENDANT

No. 7227SC506

(Filed 2 August 1972)

Automobiles § 2— two convictions of reckless driving within twelve months — suspension of license within reasonable time

Where defendant gave notice of revocation of plaintiff's driver's license eleven days after it received notice of plaintiff's second conviction for reckless driving during a period of twelve months but the notice of revocation was issued fifteen months after plaintiff's second conviction, defendant acted within a reasonable time and plaintiff could not complain of the delay, particularly where he could have prevented it by surrendering his license to the clerk of court at the time of his second conviction. G.S. 20-17; G.S. 20-19(f); G.S. 20-24(a).

APPEAL by defendant from *Thornburg, Judge,* 6 December 1971 Civil Session of Superior Court held in GASTON County.

Civil action filed 18 August 1971 seeking to enjoin defendant from revoking plaintiff's operator's and chauffeur's license under a notice and order issued 6 August 1971 and effective 16 August 1971. The notice and order were issued after notice was received by defendant of plaintiff's conviction upon two charges of reckless driving committed within a period of twelve months. G.S. 20-17(6) and 20-19(f).

The complaint alleges that the notice was issued "wrongfully and unlawfully" in that "the plaintiff has not been convicted of two offenses of reckless driving."

A temporary restraining order was issued on 17 August 1971 and thereafter continued. The matter came on for final hearing at the 6 December 1971 Session of Superior Court; however, judgment was not entered until 28 March 1972.

Plaintiff introduced no evidence at the hearing. Defendant offered certified, sealed copies of certain records of the Department of Motor Vehicles and also the record proper in a case in which plaintiff was convicted upon his plea of guilty, 3 October 1969, to reckless driving, reduced from a charge of driving while under the influence of intoxicating liquor.

Based upon this evidence, the court made findings including the following:

"1. Defendant received on 27 October 1969 a record of plaintiff's conviction on 3 October 1969 of reckless driving for an offense committed on 30 August 1969 from the District Court of Gastonia, North Carolina.

2. Defendant received on 26 July 1971 a record of plaintiff's conviction on 28 May 1970 of reckless driving for an offense committed 3 April 1970 from the District Court of Shelby, North Carolina.

3. On 6 August 1971, defendant mailed its official notice and record of revocation of driving privilege received by plaintiff revoking plaintiff's driving privilege for one (1) year effective 16 August 1971 for conviction of two offenses of reckless driving committed within a period of twelve (12) months under the provisions of G.S. 20-17(6) and G.S. 20-19(f).

4. That approximately fifteen (15) months elapsed from the last conviction of reckless driving on 28 May 1970, until the notice of revocation and order of revocation issued by the defendant and mailed to the plaintiff on 6 August 1971; and that plaintiff did nothing to cause the delay of the defendant in taking action against his driving privilege during this period."

The court concluded from the foregoing findings that defendant did not act within a reasonable time after 28 May 1970 to revoke or suspend plaintiff's driving privileges. Judgment was thereupon entered ordering the notice and order of 6 August 1971 set aside and enjoining defendant from revoking

plaintiff's driving privileges based upon said notice and order. Defendant appealed.

Frank Patton Cooke for plaintiff appellee.

Attorney General Morgan by Assistant Attorney General Melvin and Assistant Attorney General Ray for defendant appellant.

GRAHAM, Judge.

The sole ground for relief set forth in plaintiff's complaint is his sworn statement that he has not been convicted of two offenses of reckless driving. Records introduced by defendant show that during the preceding ten years plaintiff was convicted of innumerable traffic offenses, including one conviction for the offense of driving while intoxicated and four convictions for the offense of reckless driving.

The latter two convictions for reckless driving were for offenses committed within a period of twelve months. "Upon receiving a record" of an operator's or chauffeur's conviction upon two charges of reckless driving committed within a period of twelve months, the Department of Motor Vehicles is required to "forthwith revoke" the license of such persons for the statutory period. G.S. 20-17(6); G.S. 20-19(f). The provisions of these statutes are mandatory and not discretionary. *Snyder v. Scheidt, Comr. of Motor Vehicles,* 246 N.C. 81, 97 S.E. 2d 461.

The Department of Motor Vehicles was not authorized to revoke plaintiff's license before it received notice of his second conviction for reckless driving. *State v. Ball,* 255 N.C. 351, 121 S.E. 2d 604. The Department acted within eleven days after it received this notice. This was reasonable compliance with G.S. 20-17. The word "forthwith" in G.S. 20-17 does not require instantaneous action but only action within a reasonable length of time. *State v. Ball, supra.*

The elapse of approximately fifteen months between plaintiff's last conviction for reckless driving and the order of revocation was not caused by defendant or his department. The delay apparently resulted from the failure of the clerk of the court where plaintiff was last convicted to act promptly in forwarding a record of the conviction to the Department of Motor Vehicles. Plaintiff could have prevented any delay in the start of the revocation period by surrendering his license to the

clerk and obtaining a receipt therefor at the time of his second conviction. G.S. 20-24(a) designates clerks of court and assistant and deputy clerks of court as agents of the Department of Motor Vehicles for receipt of driver's licenses in cases where revocation is required. ". . . Any operator's or chauffeur's license, which has been surrendered and for which a receipt has been issued as herein required, shall be revoked or suspended as the case may be as of the date shown upon the receipt issued to such person." Since plaintiff could have prevented the delay about which he now complains, we hold that he is entitled to no injunctive relief. It is further noted that plaintiff neither alleged nor offered proof tending to show that he has been prejudiced by the delay in question.

The judgment setting aside the notice and order of revocation and enjoining defendant from revoking or suspending plaintiff's driving privileges pursuant to the order and notice is reversed.

Reversed.

Judges PARKER and VAUGHN concur.

SAMMY K. FIELDS v. WINFIELD FIELDS, S. KINNON FIELDS, ROBERT EARL BENTON, AND LANEY TANK LINES, INC.

No. 7213SC345

(Filed 2 August 1972)

Automobiles § 53— intersection accident — crossing center line

An issue as to the negligence of the driver of a tanker truck in striking the pickup truck in which plaintiff was a passenger should have been submitted to the jury where some of plaintiff's evidence tended to show that the pickup was stopped in its proper lane at an intersection with its left turn signal on, and that defendant's oncoming tanker truck crossed the center line and struck the pickup truck.

APPEAL by plaintiff and defendants S. Kinnon Fields and Winfield Fields from *Cooper, Judge,* October 1971 Session, Superior Court, COLUMBUS County.

On 14 January 1970, plaintiff was a passenger in a 1969 GMC truck, owned by defendant Kinnon Fields and operated

by defendant Winfield Fields, servant and employee of Kinnon Fields. The truck collided with a 1967 Mack truck owned by defendant Laney Truck Lines and then being operated by Robert Earl Benton, employee of Laney Truck Lines. The collision occurred on U. S. Highway 74 at or near the intersection of Rural Paved Road 1506. Plaintiff seeks to recover damages for personal injuries. He alleged that both drivers were negligent, setting out specific acts of negligence as to each, and that their joint and concurring negligence was the proximate cause of his injuries. Defendants Benton and Laney by answer denied any negligence on their part, admitted allegations of the negligence of defendants Fields, and averred that the sole proximate cause of the collision was the negligence of defendants Fields. Defendants Fields by answer denied negligence on their part, admitted the allegations of negligence of Benton and Laney, and averred that the negligence of Benton and Laney was the sole proximate cause of the collision. After plaintiff presented his evidence, defendants Benton and Laney moved for a directed verdict. The motion was allowed. Plaintiff excepted and gave notice of appeal. At the conclusion of all the evidence, defendants Fields moved that Benton and Laney Tank Lines be made third party defendants and that defendants Fields be allowed to file a third party complaint against Benton and Laney. This motion was denied and the exception to the denial is the basis for defendants Fields' only assignment of error brought forward on appeal.

Williamson and Walton, by Benton H. Walton III, for plaintiff appellant.

Crossley and Johnson, by Robert White Johnson, for appellants Fields.

McGougan and Wright, by D. F. McGougan, Jr., for defendant appellees.

MORRIS, Judge.

Plaintiff's Appeal

Plaintiff brings forward two assignments of error. The first is to the allowing of the motion for directed verdict in favor of defendants Benton and Laney. The second is to the failure of the court to set aside the jury's verdict as to damages.

Officer Byrd testified for plaintiff that U. S. Highway 74 runs east and west and Rural Paved Road 1506 runs generally north and south. When he arrived at the scene of the accident, he found a 1969 model GMC pickup truck just to the west of the intersection on 74 heading south. Most of the vehicle was on the highway. The Laney tanker truck was across the highway lying on its right side in the westbound lane. The cab of the tractor trailer was partially in the eastbound lane. Most of the trailer was in the westbound lane and hanging off the westbound lane onto the shoulder of the westbound lane. The left front bumper and fender was damaged on the tractor trailer. The right front of the pickup was damaged. Glass, dirt and metal were found in the westbound lane, to the north side of the intersection. There were two sets of tire marks made by dual wheels in the westbound lane. The tractor trailer had dual wheels at the rear of the truck. The tire marks stopped where the debris was located. There were solid yellow lines to the east and west of the intersection indicating no passing. There was some debris in the intersection on the south side of Highway 74. This was right around the pickup. Defendant Benton, the driver of the tractor trailer, told the officer he was driving at a speed of approximately 35 miles per hour and was meeting a pickup when it made a left turn in front of him. The posted speed limit was 45 miles per hour for trucks and 55 miles per hour for cars.

Defendant Benton was called to testify for plaintiff. He testified that he was, at the time of the accident, employed by Laney and was working for his employer at the time of the accident. Evergreen is about five or six miles from Boardman, and the accident occurred at the intersection near Boardman. As he left Evergreen he was following a Chevrolet which was traveling about 35 or 40 miles per hour and which he could not pass because of traffic. He was rounding a curve behind the Chevrolet when he saw a pickup truck come from a service station some 300 feet west of the intersection. The curve was some 300 feet east of the intersection. When they got to Boardman, the driver of the Chevrolet gave a left turn signal. Benton geared down to second gear to let the driver make his left turn. As he started to speed up, he saw the truck start to make a left turn in front of him. "I blew the air horns, didn't do no good, so I blew them again and locked the brakes down, and went off the right shoulder of the road. On the right shoulder

of the road, at the intersection, that's where we had the impact." His best estimate of the time elapsing between the time he hit the air brakes and the collision was about three or four seconds. When the Chevrolet made its left turn, Benton was a good "three truck distance" back of the Chevrolet. He did not see a turn signal on the pickup truck nor did it stop at the intersection.

Levonne Mason testified for plaintiff that he was standing on the road across 1506 waiting for the school bus. He did not see the pickup when it left the station, and it was about half way into the intersection on Highway 74 when he first saw it. He recognized the vehicle and whose it was. "When I saw it, it was proceeding Eastward going toward Evergreen. I looked around and seen the truck, when they were crashing, I mean the Fields' truck. In other words, I never saw the tanker, as far as I know, before I heard the collision." He never saw the Fields truck cross the center line of U.S. 74.

Plaintiff testified that he was riding in his father's pickup truck and his brother Winfield was driving. Their father had sent them to get some hogs to sell. They had just left the store operated by him and his father. "We pulled out and started down the highway, you know, we stopped, and there was two cars coming down the highway, there was one of them going on by us and the other one stopped over there on the other side of the road making a turn going down to Masadona. We stopped on our side of the road toward Bladenboro. And all of a sudden, this oil tanker came and hit us and knocked us off the road. I seen the flash of the oil tanker right when he struck us. We were sitting stopped in the road when it struck us." Winfield had the left turn signal on. "The big truck was on our side of the road because we was stopped there waiting to turn off, and we didn't never move. On our side of the road. When I saw the oil tanker, is when he run into us, I didn't see the oil tanker before he run into us but I saw him just as the slam came." "I would say that we sat there before being struck about twenty-five seconds." "We come out the station here and got on the road, we was going about ten or fifteen miles an hour until we got to the intersection, we come down to the stop to make a left turn, and one car went by and there was another that had stopped to go down this way, and that oil tanker come down there and saw this car stopped and was just going around him and knocked us off the road." "After

Winfield brought the pickup truck to a stop, in the right-hand lane, the truck did not move until the accident took place. It sat right there until the truck hit him. Until the truck came over there and hit him."

Viewing plaintiff's evidence in the light most favorable to him, as we must do, *Galloway v. Hartman*, 271 N.C. 372, 156 S.E. 2d 727 (1967), we are of the opinion that there was sufficient evidence of negligence to permit but not compel the jury to find that Benton and Laney were guilty of negligence which was a proximate cause of plaintiff's injury and damage.

We note that in his complaint, paragraph 6(e), plaintiff alleged, albeit inadvertently, that defendant Fields was negligent in failing to see that he could turn his vehicle safely before making a sudden turn across the highway with "plaintiff's (sic) vehicle in full view and coming down its side of the road in lawful fashion." It would seem that plaintiff would be well advised to move to amend.

Since we hold that the issue of the negligence of defendants Benton and Laney should have been submitted to the jury, and a new trial is awarded, we deem it unnecessary to discuss the other question raised by plaintiff and the question raised by the appeal of defendants Fields.

New trial.

Judges BROCK and HEDRICK concur.

JOHN H. MARLOWE, ELLA MARLOWE AND PATRICIA MARLOWE v. RELIANCE INSURANCE COMPANY

No. 7228DC392

(Filed 2 August 1972)

Insurance § 87— drivers insured under policy — social relationship between insured and driver — permission — directed verdict

Where the evidence tended to show that defendant had issued an automobile insurance policy to a wife who was separated from her husband and who did not reside in the same house with her husband, and that the husband had taken the wife's automobile without her permission and contrary to her orders, and that while the husband was unlawfully in possession of the automobile he was involved in

an accident with plaintiffs, directed verdict for defendant was proper since plaintiffs failed to prove that husband was an insured under the provision of the policy issued wife by the defendant insurance company.

APPEAL by plaintiffs from *Allen, Judge,* 14 February 1972 Session of the District Court held in BUNCOMBE County.

These were three separate cases which were consolidated for trial. Each of the three plaintiffs had procured a judgment against Jackie Lee Weaver as a result of an automobile accident which had occurred on 27 July 1968. John Marlowe had procured a judgment in the amount of $950 for property damage to his automobile. Ella Marlowe had procured a judgment in the amount of $1,500 for personal injuries. Patricia Marlowe had procured a judgment in the amount of $400 for personal injuries.

Execution having been issued on each of the three judgments and having been returned unsatisfied, each of the plaintiffs instituted an action against the defendant, Reliance Insurance Company, asserting an obligation on behalf of said insurance company to satisfy and pay the judgments theretofore obtained. Plaintiffs alleged that Jackie Lee Weaver was an insured under the provisions of the policy issued by the defendant insurance company. The defendant insurance company filed an answer in each case denying that Jackie Lee Weaver was an insured person under the provisions of its policy and asserting that Jackie Lee Weaver was not operating the automobile involved with the knowledge, consent or permission of Betty Farmer Weaver and that the said Jackie Lee Weaver was not a member of the household of Betty Farmer Weaver, to whom the policy had been issued.

At the time of trial the parties entered into certain stipulations as to facts and "further stipulate that the Presiding Judge may rule and enter Judgment on said facts and the law applicable thereto." Despite this stipulation the case proceeded with a jury trial. The plaintiffs offered evidence, and at the conclusion thereof, the defendant's motion for a directed verdict was denied. The defendant then introduced evidence, and at the close of all the evidence, the defendant's motion for a directed verdict was allowed.

The trial court entered a judgment finding detailed facts, making conclusions of law, allowing the defendant's motion for

a directed verdict and dismissing the three actions instituted by the plaintiffs.

From the judgment thus entered, the plaintiffs appealed.

Joseph C. Reynolds for plaintiff appellants.

Clarence N. Gilbert for defendant appellee.

CAMPBELL, Judge.

To say the least, the procedure in this case was unusual. After the parties had stipulated that the judge try the case without a jury, they then proceeded with a jury trial. A judgment was entered wherein the trial judge found facts and made conclusions of law as though there had been no jury trial and then allowed a motion for a directed verdict and dismissed the three actions. Thus, a combination trial was conducted, which is novel.

Despite the novel procedure, we do not find any error in the result obtained.

The stipulated facts and the uncontradicted evidence show:

1. Jackie Lee Weaver and Betty Farmer Weaver were married October 11, 1963 and on July 27, 1968 had three children.

2. Some two months before July 27, 1968, Betty Farmer Weaver and Jackie Lee Weaver separated and Betty Farmer Weaver moved into a two-bedroom trailer located on Edward Street in Black Mountain, North Carolina, with her three children. Jackie Lee Weaver paid the rent on the house trailer the first week but had not paid anything thereafter and on 27 July 1968 was not paying the rent or supplying any other support for his wife and children. Jackie Lee Weaver never lived with his wife in the trailer and was living in a different household. They did become reconciled and resumed living together in April 1971.

3. Betty Farmer Weaver owned a 1957 Chevrolet automobile which she had purchased in Hickory, North Carolina, shortly before moving to Black Mountain. The record title to the Chevrolet automobile recorded with the Commissioner of Motor Vehicles of the State of North Carolina was in the name of Betty Farmer Weaver. It was this vehicle which the defend-

ant insurance company had insured under an assigned risk policy, and Betty Farmer Weaver was the named insured in the policy.

4. The insurance policy issued by the defendant insurance company to Betty Farmer Weaver defined an insured, "[w]ith respect to the insurance for bodily injury liability and for property damage liability for unqualified word 'Insured' includes the name Insured and, if the named Insured is an individual, his spouse if a resident of the same household, and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named Insured or such spouse or with the permission of either."

5. During the two months prior to July 27, 1968, that Betty Farmer Weaver was living in the trailer in Black Mountain, she did not know where her husband Jackie Lee Weaver was living, and he was not a member of her household. He did not drive the automobile during that time and had never driven it as he had no driver's license, and Betty Farmer Weaver had told him he could not drive it.

6. On 27 July 1968 Jackie Lee Weaver went to the trailer where Betty Farmer Weaver was living, and while Betty Farmer Weaver was in one of the bedrooms, he took the keys to the automobile which were lying on a table in the living room. After taking the automobile keys he went out to the automobile which was on the street and drove off despite Betty Farmer Weaver's hollering at him not to take it. Betty Farmer Weaver went to her mother's home where there was a telephone and telephoned the North Carolina State Highway Patrol and reported the taking of her automobile. Jackie Lee Weaver thereafter was involved in an automobile wreck in which the three plaintiffs sustained their respective damages. At the time of the accident Jackie Lee Weaver had another woman in the automobile with him.

The trial judge found as a fact that on 27 July 1968 Jackie Lee Weaver and Betty Farmer Weaver were married, but on that date had been living separate and apart for about two months in different households; that on 27 July 1968 Jackie Lee Weaver took the 1957 Chevrolet automobile from the street near his wife, Betty Farmer Weaver's, residence without the owner's permission expressed or implied, contrary to the spe-

cific orders of the owner, and at the time of the accident with plaintiffs, Jackie Lee Weaver was not in lawful possession of said Chevrolet automobile.

The plaintiffs in their respective complaints alleged that Jackie Lee Weaver was an insured under the provisions of the policy issued by the defendant insurance company. This allegation was denied by the defendant.

> "In an action to recover under an insurance policy, the burden is on the plaintiff to allege and prove coverage. . . ." *Brevard v. Insurance Co.*, 262 N.C. 458, 137 S.E. 2d 837 (1964).

In the instant case the plaintiffs' allegations were all right, but their proof was lacking.

There was no evidence at all that Jackie Lee Weaver was driving the automobile with any permission of Betty Farmer Weaver. On the contrary he took the car and was driving it against her express orders not to do so.

Neither was there any evidence that Jackie Lee Weaver was a resident of the same household with Betty Farmer Weaver. "Resident" is a word with varying shades of meaning as pointed out in *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966). In every case, however, it requires some kind of abode. In the instant case Jackie Lee Weaver had no abode whatsoever with Betty Farmer Weaver in the trailer home where she was living and had been living for at least two months before the accident in question.

The plaintiffs failed to prove that Jackie Lee Weaver was an insured and had coverage under the terms of the insurance policy issued by the defendant.

The evidence supported the findings of fact made by the trial judge, and those findings of fact supported the conclusions of law, and the judgment dismissing the causes of action brought by the plaintiffs. The stipulated facts and the evidence, when viewed in the light most favorable to the plaintiffs did not present sufficient evidence to be submitted to the jury to sustain the plaintiffs' position; and, therefore, a directed verdict in favor of the defendant was appropriate.

We have reviewed the various assignments of error presented by the plaintiffs and do not find any merit in any of them.

Affirmed.

Chief Judge MALLARD and Judge BRITT concur.

JAMES H. LITTLEJOHN, FLOYD McCURRY, JOHNNIE MAX BRIDGES, GROVER TAYLOR, BOB QUICK, DEAN WARD, JAMES A. RUPPE, ROY LOWERY, JAMES MORROW, BROADUS GOODE, RAY D. DUNCAN, THEODORE HAMRICK, TED WILLIAMS, BOBBY A. LIBERA, JAMES McCLELLON, CARL LANCASTER, JOHNNY KELLER, R. K. JONES, LARRY TOMBLIN AND C. B. SMITH v. J. AUSTIN HAMRICK, MAUDE HAMRICK, T. K. GUY, JEANETTE H. GUY, RALPH MORROW AND MACIE MORROW

No. 7229SC375

(Filed 2 August 1972)

Appeal and Error § 57— insufficiency of evidence and findings — remand

An action to enforce restrictive covenants is remanded so that proper findings of fact can be entered based upon sufficient evidence where the record contains insufficient evidence to support all of the necessary findings of fact, and the facts found do not support the conclusions of law and the judgment.

APPEAL by defendants from *Ervin, Judge,* 13 September 1971 Session of Superior Court held in RUTHERFORD County.

This action was instituted 25 September 1970 seeking a mandatory injunction requiring the defendants to remove house trailers located within the boundaries of a subdivision known as Piney Ridge Acres Sub-Division. The plaintiffs contended that certain restrictive covenants applicable to the subdivision were being violated by the defendants locating house trailers in the subdivision. Two of the defendants, namely, Hamrick and Guy, in their answer, admitted that they own and had placed house trailers upon their property within the subdivision.

The defendants denied any violation of the restrictions and contended that the restriction prohibiting house trailers within the subdivision had been amended in accordance with the pro-

visions of the restrictions. The plaintiffs in a reply asserted that the amendment to the restrictions was invalid and should be declared null and void.

The case was transferred from the district court division to the superior court division of the General Court of Justice by order of Judge Ervin dated 20 September 1971.

The case was heard by Judge Ervin in the superior court at the 13th September 1971 Session. No evidence was introduced, and the following stipulations were presented to Judge Ervin:

> "1. That if each individual whose name appears as a Grantee in any Deed to the property in this subdivision is counted as one recorded owner of a lot, that is, if the Grantees are counted on a per capita basis, that 60% or more of the 'recorded owners of lots in this subdivision' have executed the purported release of Restriction No. 8 in the document entitled 'Restrictions' and recorded in Book 270, Page 238 in the Rutherford County Registry.
>
> 2. That if each lot is counted as an individual lot and if one lot, regardless of the number of individuals whose names may appear as Grantees in the Deed to said lot, is to be counted as one unit and if this is what is meant by the term 'recorded owners of lots in this subdivision' as used in the restrictions, then 60% or more of the 'recorded owners of lots in this subdivision' have not executed the aforementioned release of restrictions.
>
> 3. It is stipulated and agreed that no house trailer presently located upon said premises has more than 1,000 square feet of heated floor space.
>
> 4. It is stipulated and agreed that the restrictions applying to the Piney Ridge Subdivision and recorded in the Register of Deeds Office, Book 270, Page 238, were prepared by George R. Morrow, Attorney for the Defendants, by and for the benefit of defendants, Ralph and Macie Morrow, J. Austin and Maude Hamrick and other owners."

Judge Ervin entered a judgment dated 14 December 1971, filed 16 December 1971, which recited the above stipulations and then provided:

> "The court found as a fact that the term 'owners of lots' meant stipulation No. 2 was the proper method of

determining recorded owners of lots in this subdivision and therefore 60% or more of the recorded owners of lots in the subdivision have not executed the release of restrictions; that the term 'recorded owners of lots' in this subdivision as stated in covenant No. 12 of the restrictive covenants is ambiguous; that the restrictive covenants should be strictly interpreted against the maker of the instrument and that the ambiguity should be resolved in favor of the plaintiffs; that the proposed amendment should be and is hereby declared null and void; that restrictive covenant No. 8 is in full force and effect; that the defendants should be required to move their mobile homes or house trailers from within the boundaries of the Piney Ridge Sub-Division as they are in violation of restrictive covenant No. 8 and restrictive covenant No. 2 which requires 'all dwelling houses shall not have less than one thousand (1,000) square feet of heated floor space;' that lot No. 27 was purchased by Tyson K. Guy and wife, Jeanette H. Guy, and recorded prior to the recording of the restrictive covenants for the Piney Ridge Sub-Division and is hereby excluded from the terms and conditions of the restrictive covenants.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants remove all their mobile homes or house trailers from within the Piney Ridge Sub-Division boundary, except Lot No. 27, or, if not owned, take whatever action is necessary to enforce the restrictive covenants, within thirty (30) days of the signing of this Judgment and if the defendants fail to comply with this order within the specified time, then the Sheriff of Rutherford County shall remove the mobile homes or house trailers from the boundaries of the Piney Ridge Sub-Division and the defendants shall pay the costs of their removal, the Sheriff shall proceed as in an execution of judgment sale and the proceeds applied first to the costs of the sale, then to the costs of the action and the remainder to the Clerk of the Superior Court to be dispersed to those showing themselves entitled thereto. The Clerk of the Superior Court of Rutherford County, North Carolina, shall tax the costs of this action to the defendants. It is further ordered that a copy of this Judgment be certified to and recorded by the Register of Deeds of Rutherford County, and that said Register of Deeds make an entry on the margin of the

purported release of Restriction No. 8, in Book 331, Page 287, Rutherford County Registry, specifically referring to the Book and Page in which this Judgment is recorded."

From the entry of this judgment, defendants appealed.

Robert G. Summey for plaintiff appellees.

George R. Morrow and James H. Burwell, Jr., for defendant appellants.

CAMPBELL, Judge.

We note that this case was docketed late, but a petition for certiorari in lieu of an appeal has been granted and therefore we will consider the appeal on its merits rather than dismissing it.

The judgment entered in this case does not comply with Rule 52 of the Rules of Civil Procedure (G.S. 1A-1, Rule 52). This Rule provides:

> "In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

As stated in *Coggins v. City of Asheville,* 278 N.C. 428, 180 S.E. 2d 149 (1971):

> "In cases in which the trial court passes on the facts, the court is required '"to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly." . . . Where facts are found by the court, if supported by competent evidence, such facts are as conclusive as the verdict of a jury.'"

In the instant case issues of fact were joined on the pleadings which the stipulations do not cover. For instance, the reply filed by the plaintiffs raised the question of the validity of the amendment to the restrictions. The stipulations do not pertain to this issue, and there is nothing in the judgment determining it.

There was no evidence introduced, and the stipulations being insufficient to support all of the necessary findings of

fact, it is necessary that this case be remanded so that proper findings of fact can be entered based upon sufficient evidence.

Not only does the record in this case contain insufficient evidence to support proper findings of fact, but the facts found do not support the conclusions of law made, and the judgment itself is not supported by findings of fact. For example, the judgment orders all defendants indiscriminately to remove all house trailers or mobile homes from the subdivision with the exception of those on Lot 27. There is no finding that all of the defendants own house trailers or mobile homes. Yet a defendant who does not own a house trailer or mobile home is required to remove them from the subdivision whether such defendant does or does not have an interest in such house trailer or mobile home.

The restrictions referred only to house trailers and yet the judgment, without any evidence or finding of fact, treats house trailers as synonymous with mobile homes. This may or may not be true.

Since this case must go back to the trial court for a new trial, we will refrain from further comment on the judgment entered.

New trial.

Chief Judge MALLARD and Judge BRITT concur.

GLENN E. HELMS v. W. REID REA, ADMINISTRATOR OF THE ESTATE OF MABEL REA, DECEASED

No. 7226SC554

(Filed 2 August 1972)

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

When a case is tried by the judge without a jury, the judge's findings of fact are conclusive on appeal if supported by competent evidence.

2. **Rules of Civil Procedure § 41— motion to dismiss counterclaim made at close of all evidence**

In an action by plaintiff to recover for personal injuries alleged to have been received while a passenger in an automobile being negligently operated by the defendant's intestate, the trial court did not

err in dismissing defendant's counterclaim for wrongful death of defendant's intestate at the close of all the evidence, where it appeared from the findings of fact and from the judgment that the plaintiff satisfied the judge by the greater weight of the evidence that the facts were as contended by plaintiff.

APPEAL by defendant from *McLean, Judge,* 14 February 1972 Schedule C Session of Superior Court held in MECKLENBURG County.

This action was instituted by plaintiff to recover for personal injuries alleged to have been received while a passenger in an automobile being negligently operated by the defendant's intestate, which automobile was involved in a one-car accident on 24 December 1968. Defendant filed an answer, incorporating a counterclaim for the wrongful death of defendant's intestate, alleging that defendant's intestate was fatally injured while riding as a passenger in the automobile being negligently operated by plaintiff.

The case was tried before Judge McLean sitting as the finder of the facts, the parties having waived trial by jury pursuant to G.S. 1A-1, Rule 39(b).

At the close of all the evidence plaintiff made a motion pursuant to G.S. 1A-1, Rule 41(c) to dismiss defendant's counterclaim. Judge McLean entered an order containing the following:

"AND THE COURT having heard the arguments of counsel for the Plaintiff and Defendant with respect to said Motion, being of the opinion and finding as a fact and concluding as a matter of law that the Defendant has failed to introduce sufficient evidence upon which the Defendant's Counterclaim and any issues arising thereon might be submitted to a jury;

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for involuntary dismissal of the Defendant's Counterclaim be and the same is hereby allowed and the Defendant's Counterclaim is dismissed with prejudice, and the costs in connection with the Defendant's Counterclaim are to be taxed by the Clerk against the Defendant."

Thereafter, Judge McLean entered judgment which, except where quoted, he found substantially as follows: That defend-

ant's intestate was the owner of the vehicle involved in the accident. That the accident occurred on Providence Road at about 4:00 a.m. on 24 December 1968.

"7. That the Mercedes automobile was severely damaged about the right-hand side, including the right front fender, right hand door, right quarter panel and the right side of the roof, there being no damage to the left side of the automobile and the left door being closed.

"8. That following the accident the defendant's intestate was found lying in the roadway with her feet approximately three feet from the right side of the Mercedes automobile, on her back and with her head in a northerly direction, her body being generally parallel with the right of way of the roadway.

"9. That following the accident the plaintiff was found lying with the upper part of his body in the roadway and at about a 45 degree angle from the right side of the automobile, his head in a generally northeasterly direction and his legs from a point between his knees and ankles lying on the floor of the automobile inside the right hand door.

"10. That there were no known witnesses to the occurrence of the accident other than the plaintiff and the defendant's intestate."

Judge McLean then found facts relating to plaintiff's injuries, expenses, lost earnings, and life expectancy. He found facts relating to the injuries and death of defendant's intestate. He then continued:

"16. The defendant's intestate was the operator of the Mercedes automobile at the time of the accident on December 24, 1968.

"17. That the plaintiff was a passenger in said Mercedes automobile at the time of the accident on December 24, 1968.

"18. That the defendant's intestate was negligent in the operation of said Mercedes automobile in the following respects:

(a) That she operated the automobile at a speed that was greater than was reasonable and prudent under the circumstances then and there existing.

(b) That she failed to observe the highway and to keep a proper, reasonable and careful lookout.

(c) That she failed to keep the vehicle under proper control.

"19. That such negligence on the part of the defendant's intestate was the proximate cause of the accident and the injuries and damage suffered by the plaintiff."

Judge McLean then concluded as follows and entered judgment accordingly:

"1. The defendant's intestate, being the operator of the Mercedes automobile at the time of the accident on December 24, 1968, and having operated said Mercedes automobile in a negligent manner, which negligence was the proximate cause of the accident and the injuries to the plaintiff, is liable to the plaintiff for his damages resulting from said accident.

"2. That the plaintiff's damages resulting from the accident were in the amount of $55,249.55."

Defendant appealed.

Harkey, Faggart, Coira & Fletcher, by Charles F. Coira, Jr., for plaintiff.

Ervin, Burroughs & Kornfeld; Craighill, Rendleman & Clarkson, by J. B. Craighill, for defendant.

BROCK, Judge.

[1] Defendant argues that the trial judge committed error in his findings of fact and committed error in failing to find other facts. It is familiar learning that, when a case is tried by the judge without a jury, the judge's findings of fact are conclusive on appeal if supported by competent evidence. In our view, all of the judge's findings of fact in this case are based upon competent evidence. He made all the findings necessary to resolve the crucial issues, and the findings support the judgment entered. Even if we were inclined to resolve the factual conflict differently, we would not be at liberty to do so.

[2] At the close of all the evidence, plaintiff moved for involuntary dismissal of defendant's counterclaim. This motion was allowed and defendant contends this was error.

At that point of the trial of the case, all of the evidence was before the judge. If the defendant had carried his burden of satisfying the judge (trier of the facts) by the greater weight of the evidence that the facts were as contended by defendant, then surely the judge would not have dismissed the counterclaim. On the other hand, if defendant had failed to carry his burden of so satisfying the judge, it would not matter that the counterclaim was dismissed, because there would be no finding in defendant's favor anyway. From the findings of fact and from the judgment, it is abundantly clear that the plaintiff satisfied the judge by the greater weight of the evidence that the facts were as contended by plaintiff; therefore, whether defendant's counterclaim was dismissed at the close of all the evidence is immaterial. In our opinion, even if we concede there was technical error in dismissing defendant's counterclaim, it was not prejudicial error.

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

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. BOBBY LEE HOLSHOUSER

No. 7219SC508

(Filed 2 August 1972)

1. Homicide § 6— involuntary manslaughter — elements

Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty.

2. Homicide § 21— accidental shooting — involuntary manslaughter — sufficiency of evidence to withstand motion for nonsuit

In an action charging defendant with the murder of his wife, the trial court erred in not granting defendant's motion for nonsuit when the evidence, considered in the light most favorable to the State, tended to show an accidental shooting, and there was no evidence tending to show that defendant intentionally discharged the gun or that he handled it so recklessly as to constitute culpable negligence.

3. Homicide § 21— statement of deceased — sufficiency to support charge of second degree murder

In a murder prosecution evidence tending to show that the wife said, "Don't shoot me," standing alone, is not sufficient to raise an inference that the defendant husband intentionally pointed the gun at her.

APPEAL by defendant from *Johnston, Judge,* 21 February 1972 Session of Superior Court held in ROWAN County.

The defendant, Bobby Lee Holshouser, was charged in a bill of indictment proper in form with the murder of Letha Eller Holshouser on 21 November 1971.

On the defendant's plea of not guilty, the State offered evidence tending to show that about 9:30 p.m., 20 November 1971, Rowan County Chief Deputy Sheriff Charles E. Herion received a call and went to the Rowan County Memorial Hospital where Dr. Parrott requested him to find Bobby Lee Holshouser and bring him to the hospital for the purpose of giving his consent for surgery to be performed on Mrs. Holshouser. Herion, with some other deputies, arrived at Holshouser's home before 10:00 p.m. where they found the defendant, his sister, and his sister's husband. The deputy told the defendant that he was needed at the hospital to give his consent for his wife to go into surgery. The defendant was seated at the kitchen table with his sister drinking coffee. The defendant hesitated, took a few more sips of coffee, and his brother-in-law said, "Go ahead, Bobby, you are needed." The defendant went out and got in the backseat of the deputy's automobile. The deputy testified he was not at Holshouser's house for more than 3 or 4 minutes. On the way to the hospital the defendant talked about what had happened.

Deputy Sheriff Herion testified:

> "Mr. Holshouser stated that, 'I'm going to get rid of that gun.' He stated he got the gun down from over the top of the closet door and his wife said, 'Don't shoot me.' He then stated, 'The gun went off.' He then stated to us that, 'My wife must have loaded the gun'; we proceeded on and when I was approaching I-85, where I-85 crosses highway 52 down here, he asked me if I could not drive faster that I was a police officer and I could use a blue light and siren of this nature and couldn't I go faster. . . . Mr. Holshouser was highly under the influence, holding

onto the car. In my opinion Mr. Holshouser was highly under the influence of some intoxicating liquor.

. . . .

. . . Bobby Holshouser told me that he was taking the gun off the wall to clean it when it went off, that he and his uncle were going rabbit hunting or something Monday and he said he was taking it down to clean it. . . . He told me his wife was seated on the bed at that time. . . . He made a statement on the way to the hospital something to the effect that he did not intentionally fire the gun. He made the statement to me, 'Lord God, I love my wife, I didn't mean to shoot her.'

. . . Mr. Holshouser wasn't hesitant. . . . He wasn't hesitant about signing the papers. . . . He signed the papers after some little time. That's when they operated on his wife. They took her out of the emergency room at 12:02 in the morning. . . . He went over and set with some of his people in the lobby. . . . We stayed in the surrounding there up until Mrs. Holshouser passed away. . . . This was at 2:40. . . . During this time Bobby stayed there stepping back and forth to ask questions about his wife."

After Mrs. Holshouser's death, the deputy returned to the defendant's home where he found a twenty gauge single barrel shotgun hanging on some nails over a closet door and one spent shell on the dresser. There was a small blood stain on the side of the bed. Mrs. Holshouser's death resulted from a shotgun wound in the abdomen.

The jury found the defendant guilty of involuntary manslaughter and from a judgment imposing a prison sentence of 5 to 8 years, the defendant appealed.

Attorney General Robert Morgan and Associate Attorney Thomas E. Kane for the State.

Robert M. Davis for defendant appellant.

HEDRICK, Judge.

[1] The defendant assigns as error the denial of his timely motions for judgment as of nonsuit.

Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately

resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty. 4 Strong, N. C. Index 2d, Homicide, § 6, p. 198; *State v. Curtis,* 7 N.C. App. 707, 173 S.E. 2d 613 (1970); *State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485 (1959).

The record on appeal is silent as to many of the relevant circumstances surrounding this shooting. For instance, there is no evidence to indicate the approximate time of the shooting; how and by whom deceased was transported to the hospital; what time she arrived at the hospital; when defendant's sister and brother-in-law arrived at defendant's home and whether they witnessed the shooting; and the relative location of the bed and the closet door. Had evidence of these and other surrounding circumstances been brought out it would no doubt have aided in the search for the truth. Whether it would have bolstered the State's or defendant's case, we cannot say; but the record would not be left in such an obviously undeveloped condition.

[2, 3] In our opinion when the evidence adduced at the defendant's trial in the Superior Court is considered in the light most favorable to the State, it tends to show an accidental shooting. There is no evidence in this record tending to show that the defendant intentionally discharged the gun or that he handled it so recklessly as to constitute culpable negligence. *State v. Honeycutt, supra; State v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740 (1948). Evidence tending to show that the wife said, "Don't shoot me," standing alone, is not sufficient to raise an inference that the defendant intentionally pointed the weapon at her, *State v. Head,* 214 N.C. 700, 200 S.E. 415 (1939), or that he handled it in such a careless and reckless manner as to amount to culpable negligence. *State v. Honeycutt, supra.*

On this record we hold the Court erred in not allowing the defendant's motion for judgment as of nonsuit. The judgment is

Reversed.

Judges BROCK and MORRIS concur.

LARRY EDWARD MANESS, BY HIS NEXT FRIEND, BERTHA L. MANESS v. RONALD CLYDE BULLINS AND CLYDE COLUMBUS BULLINS AND DANIEL ALEXANDER MANESS, JR. v. RONALD CLYDE BULLINS AND CLYDE COLUMBUS BULLINS

No. 7219SC466

(Filed 2 August 1972)

Automobiles § 90— incorrect charge on contributory negligence

Upon a jury request for further instructions on contributory negligence in an action to recover damages sustained by passenger in a one-car collision, the trial court erred when it stated that the law was conflicting and that the Supreme Court had held both ways, because this instruction was prone to leave the jury with no guidance upon the crucial issue of contributory negligence.

APPEAL by plaintiffs from *McConnell, Judge,* 3 January 1972 Session of Superior Court held in RANDOLPH County.

These are actions to recover damages resulting from injuries sustained by the passenger in a one-car collision. Issues of negligence and contributory negligence were each answered "yes" by the jury, and plaintiffs appealed.

Ottway Burton for plaintiffs.

Coltrane & Gavin, by W. E. Gavin, for defendants.

BROCK, Judge.

This same case was before this Court in the Spring Session of 1971, at that time a new trial was awarded upon plaintiffs' appeal. *Maness v. Bullins,* 11 N.C. App. 567, 181 S.E. 2d 750, certiorari denied 279 N.C. 395. The crux of this controversy revolves around the question of plaintiffs' contributory negligence. The evidence tends to show that defendant was operating the motor vehicle while under the influence of intoxicating beverage. Also, there is evidence which tends to show that plaintiff knew or should have known that defendant was under the influence.

After the jury had been deliberating upon its verdict for approximately an hour and a half, it returned into open court to ask a question and the following transpired:

"JUDGE: Have you selected a foreman to speak for you?

"FOREMAN: Yes, sir.

"JUDGE: I understand you have a question.

"FOREMAN: Shall I read it or would you like—

"JUDGE: No, you ask your question in open Court so that it can be recorded by the reporter and with all the parties present.

"FOREMAN: Your Honor, the jurors have requested that we get a ruling of the State Supreme Court, a ruling of law of contributory negligence on any passenger in an automobile.

"JUDGE: Well, it is conflicting. As I heretofore stated, ordinary negligence is not imputed. The negligence of the driver is not imputed to a passenger. However, the Court has held that there may be circumstances in which a passenger or guest may be guilty of negligence, depending upon the facts and circumstances involved in the case. A passenger or guest is not absolved from all personal care for his own safety but is under the duty of exercising the reasonable or ordinary care that a reasonably prudent person would exercise under like or similar circumstances to avoid injury. Our Court has held, the Supreme Court, and it all depends upon the facts. Our Court has held both ways, that when there is knowledge that the driver is under the influence of an intoxicating beverage and the passenger voluntarily rides with him, our Court has held that person to be guilty of contributory negligence, but a passenger cannot be held, as a matter of law, where the evidence shows that the driver was driving in a reckless manner and that the passenger repeatedly asked the driver to drive carefully and requested that the driver stop and let him out, and the evidence which discloses that he had drunk an intoxicating beverage prior to the trip without proof of his being under the influence fails to disclose contributory negligence as a matter of law. So it is conflicting.

* * *

"I am sorry, but you asked for the ruling of the Supreme Court. They have ruled, well, not both ways, but they have reiterated that each case depends upon the circumstances of that case. Did the plaintiff act as a reason-

ably prudent person would have acted under the same or similar circumstances, that is, did he exercise due care for his own safety; and that is the only time that the negligence of the driver is imputed to the passenger, that is, that he did not exercise reasonable care for his own safety."

We feel that this additional instruction was confusing to the jury and possibly left them with the feeling that they had no guidance from the law. The trial judge started out by saying: "Well, it is conflicting." Then further on the judge said: "Our Court has held both ways." Then he said again: "So it is conflicting."

Although it seems that the experienced and able trial judge had correctly instructed the jury originally, we feel that this additional instruction, given in an effort to comply with the request of the jury, was extremely prone to leave the jury with no guidance upon the crucial issue involved in the case. It is unfortunate, because the case must now be tried for the third time.

Plaintiffs assign as error that the trial judge allowed defendants' motions to strike portions of plaintiffs' replies. This assignment of error is without merit and is overruled.

Plaintiffs assign as error that the trial judge allowed defendants' motions to quash subpoenas requiring two officials of Nationwide Insurance Company to appear and produce records of payments made to Clarence Ernest Henry, the other passenger in defendants' car at the time of the collision. The evidence plaintiff sought to elicit was incompetent in this trial and this assignment of error is overruled.

For error in the additional instructions to the jury, it is necessary to order a

New trial.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. BURNETT REAVES ALIAS, BURNEY REED

No. 725SC424

(Filed 2 August 1972)

1. **Criminal Law § 66— identification prior to arrest — in-court identification — independent origin**

In an armed robbery prosecution an in-court identification of defendant was proper when that identification was based entirely on the witness's observation of defendant at the scene of the robbery and was not tainted by an out-of-court identification that took place when defendant was not represented by counsel and at a time when he had not waived his right to counsel, particularly since the out-of-court identification did not result from any illegal procedure.

2. **Robbery § 1— armed robbery — allegation and proof of value of property**

It is not necessary in an armed robbery prosecution to allege or prove the particular value of the property taken, provided the indictment and proof show that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value.

3. **Criminal Law § 115— armed robbery — jury instructions — lesser included offenses**

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises only when there is evidence from which the jury could find that such included crime of lesser degree was committed.

APPEAL by defendant from *Hasty, Judge*, 10 January 1972 Session of Superior Court held in NEW HANOVER County.

Defendant was charged in a bill of indictment, proper in form, with the offense of armed robbery.

The State offered evidence tending to show the following: On the night of 29 November 1971, and the early morning hours of the following day, William Page was working alone as operator of Gate's Service Station in New Hanover County. Shortly after midnight two men walked up to the station and went inside. One of the men picked up a red pack of Dentyne chewing gum and asked the price. Page told him. The man then asked if Page had a green package. When Page told him "no," the man put the gum down. Both men then went to the drink box outside the station, but they did not get a drink. Page stood in front of the station and watched them. The men returned to the inside of the station where one of them again

picked up a pack of gum and asked the price. Page testified: "I walked over to him and told him it was 10 cents. At this time both men were standing right at the door of the station, and they were standing together. One of them stuck a gun in my stomach and the other one said, 'This is a stickup'. They then told me to lie down on the floor. I lay down on the floor face down. . . . I don't know what kind of gun it was, it was bright looking. It was a pistol."

While Page was lying on the floor one of the men hit him in the back of the head with the pistol. The men then removed $102.63 from Page's pocket and $33.00 from a changer which was in a desk drawer.

Page identified defendant as one of the two men who entered the station and as the one who "stuck a gun in my stomach."

The jury returned a verdict of guilty of armed robbery. Judgment was entered on the verdict imposing a prison sentence of not less than seven nor more than ten years.

Attorney General Morgan by Associate Attorney Byrd for the State.

Jeffrey T. Myles for defendant appellant.

GRAHAM, Judge

Through his first five assignments of error defendant challenges the court's admission of his in-court identification by the prosecuting witness, William Page.

[1] After an extensive *voir dire* examination the court made findings of fact and concluded that the in-court identification of defendant was based entirely on Page's observation of defendant at the scene of the robbery and was not tainted by an out-of-court identification that took place when defendant was not represented by counsel and at a time when he had not waived his right to counsel. The court's findings, which are supported by the evidence and in turn support the conclusions made, are binding on appeal. *State v. Accor* and *State v. Moore,* 281 N.C. 287, 188 S.E. 2d 332; *State v. Lassiter,* 15 N.C. App. 265, 189 S.E. 2d 798.

Moreover, the uncontroverted evidence elicited on *voir dire* tended to show that the out-of-court identification of defendant by the witness Page did not result from any illegal procedure. The identification took place in District Court when defendant and eighteen or twenty other prisoners entered the prison box to be tried for various unrelated offenses. Page, who was in the courtroom at the time, immediately pointed out defendant as one of the men who had participated in the robbery. Defendant was not under arrest for the armed robbery at that time, nor was he even suspected of involvement in it. Therefore, the identification did not occur during any prosecutive stage, much less during a critical stage at which defendant would have been entitled, as a matter of constitutional right, to counsel. See *Kirby v. Illinois,* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972).

Defendant contends the case should have been nonsuited because (1) the State proved that $135.63 was taken from the prosecuting witness or in his presence; whereas, the bill of indictment stated the amount as $271.26, and (2) the evidence was insufficient to show the use of a pistol or other deadly weapon. These contentions are without merit.

[2] It is not necessary in an armed robbery prosecution to allege or prove the particular value of the property taken, provided the indictment and proof show that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value. *State v. Owens,* 277 N.C. 697, 178 S.E. 2d 442.

As to defendant's second reason for insisting that the case should have been nonsuited, suffice to say the prosecuting witness repeatedly and without objection referred to the instrument stuck in his stomach by defendant as a gun or pistol and described it in detail.

[3] Finally, defendant contends that the court should have submitted to the jury issues relating to his possible guilt of various lesser included offenses. The necessity for instructing the jury as to an included crime of lesser degree than that charged arises only when there is evidence from which the jury could find that such included crime of lesser degree was committed. *State v. Carnes,* 279 N.C. 549, 184 S.E. 2d 235. The evidence in this case tends to show a completed robbery. The court charged the jury that they could return a verdict of guilty

as charged in the bill of indictment, guilty of common law robbery or not guilty. There was no evidence that would warrant or support a finding that defendant was guilty of any other lesser included offense.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. RODERICK LIONEL KIRBY

No. 725SC489

(Filed 2 August 1972)

1. **Criminal Law § 158— validity of amendment to warrant — failure of of record to show amendment**

Contention that the trial court erred in allowing an amendment to the warrant prior to defendant's trial *de novo* in the superior court cannot be considered by the appellate court where it does not appear in the record as stipulated by the solicitor what amendment, if any, was actually made to the warrant in the superior court.

2. **Criminal Law § 154— State's exception to record on appeal — consideration by appellate court**

The appellate court cannot consider the contents of a purported exception by the State to the record on appeal which appears after the stipulation of the solicitor and defense counsel as to the record on appeal and is unsupported by the portions of the case accepted or stipulated to by the solicitor.

3. **Criminal Law § 154— service of case on appeal — extension of time — solicitor's statement**

The trial judge, not the solicitor, has authority to grant extensions of time to serve the case on appeal, and a written statement by the solicitor that service of the case on appeal was accepted "in apt time" was ineffective.

4. **Indictment and Warrant § 12— amendment of warrant in superior court — validity**

Upon defendant's appeal from the district court for a trial *de novo* in the superior court on a charge of assault on a public officer, amendment of the warrant in the superior court to allege the particular duty the officer was attempting to discharge when assaulted did not constitute error because the warrant was sufficient without the amendment, and the amendment did not change the offense charged.

5. **Assault and Battery § 11— assault on public officer — indictment or warrant — duty officer was performing**

In order to charge an offense of *assaulting* a public officer in violation of G.S. 14-33(c)(4), the warrant or indictment need not set out with particularity the duty the officer was attempting to discharge at the time of the offense as is required in charging the offense of *resisting* a public officer in violation of G.S. 14-223, it being sufficient to allege generally that the officer was discharging a duty of his office when assaulted.

6. **Arrest and Bail § 6; Assault and Battery § 4— assault on public officer — resisting public officer — separate offenses**

The trial court did not err in failing to "merge" a charge of resisting a public officer in discharging or attempting to discharge

a duty of his office and a charge of assaulting a public officer while discharging or attempting to discharge a duty of his office, since the two charges constitute separate and distinct offenses.

7. Constitutional Law § 29; Jury § 7— jury list — absence of persons 18 to 21 years old

The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from 21 July 1971, the effective date of the amendment of G.S. 9-3 lowering the age requirement for jurors from 21 years to 18 years, and 6 December 1971, the date of defendant's trial, is not unreasonable and does not constitute systematic exclusion of this age group from jury service.

APPEAL by defendant from *Webb, Judge,* 6 December 1971 Session of Superior Court held in NEW HANOVER County.

The defendant Kirby was charged in a warrant with (1) assaulting a police officer and (2) resisting, hindering, delaying and obstructing a police officer and pleaded not guilty to both charges. At trial in the district court, defendant was found not guilty of obstructing an officer but was found guilty of assaulting an officer, and from judgment that he be committed as a youthful offender and be imprisoned for a period of one year, he appealed to the superior court for trial de novo.

In superior court the defendant, through his counsel, moved (1) in the alternative that the charge of assault be dismissed or that the case be remanded to district court for resentencing, (2) for dismissal on the ground of prior jeopardy and (3) to quash the venire on the grounds that it did not include persons between the ages of eighteen and twenty-one years. These motions, after argument by counsel and before the jury was empaneled, were denied by the trial court. Defendant thereupon pleaded not guilty, was duly tried by jury and convicted of assault on a police officer.

The evidence for the State consisted of the testimony of seven Wilmington City police officers, including the officer asaulted, W. R. Pearson. Most or all of these police officers had been present at the scene of and had witnessed the occurrences that led to the original charges lodged against this defendant. With only minor variations, the testimony of these witnesses tended to show that Pearson and other officers in uniform were, on 1 October 1971, on duty patrolling a stadium and parking lot where a high school football game was being played. Near the conclusion of this game, some disturbances,

which were erupting into fights and were apparently racial in origin, began to take place outside of the stadium. Officer Pearson approached two young Negro males in the stadium parking lot and instructed them to put their belts back into their pants and to buckle them. (The State's evidence tended to show that as the officer approached, one of the youths had his belt wrapped around his hand with the large buckle attached thereto hanging free, ostensibly for use as a weapon, and that the other youth had his belt in his pants but that it was unbuckled.) At this time and after one of the youths had failed, as directed, to put his belt back into his belt loops, the defendant Kirby, whom the officer was not addressing, intervened and announced, "My name is Roderick Kirby. You can't mess with us."

Kirby then stepped in front of the officer and struck or pushed him with his elbow; further blows were struck and by the time other officers could separate them, Kirby was sitting, kneeling or lying on top of Pearson, striking him with his fist in the face repeatedly, scratching him with his fingernails, and inflicting a number of minor injuries.

The defendant's evidence consisted of his own testimony, the testimony of the Reverend John A. Humphrey (as to defendant's reputation) and the testimony of a number of Negro youths, many of whom had been present in the stadium parking lot and who testified that they had witnessed some or all of the occurrences which led to the criminal charges against the defendant. This testimony tended to show that Kirby had offered to assist the officer in persuading the other youths to rebuckle their belts, but that Officer Pearson either accidentally or purposely struck Kirby with his nightstick. Some conversation between Kirby and Officer Pearson took place which, evidently, both found to be objectionable or insulting in part, and the fight thereafter ensued. The defendant Kirby contended that, primarily, he was trying to protect himself from the blows of the officer. Humphrey testified that he was acquainted with Kirby and his parents as "neighbors," that he had officiated at Kirby's wedding ceremony and that he knew the defendant's reputation to be "good."

From the judgment imposed on the verdict in the superior court that he be imprisoned for one year as a youthful offender, defendant appealed to the Court of Appeals, assigning error.

Attorney General Morgan and Associate Attorney Witcover for the State.

Chambers, Stein, Ferguson & Lanning by Melvin L. Watt for defendant appellant.

MALLARD, Chief Judge.

Defendant's first assignments of error relate to the warrant upon which he was tried and convicted. The affidavit portion of the warrant reads as follows:

"The State of North Carolina
v. COMPLAINT FOR ARREST
Roderick Lionell Kirby
Age 18, Race N, Sex M
11 N. Lincoln Ct., City

The undersigned, W. R. Pearson, being duly sworn, complains and says that at and in the county named above and on or about the 1st day of Oct., 1971, the defendant named above did unlawfully, wilfully,

#1. Violate the law by assaulting an officer, to wit: W. R. Pearson by pushing him and striking him with his fist, he at the time knowing (the duty being performed by Officer Pearson consisted of attempting to determine why two young men with the defendant had their belts wrapped around their hands with the buckles loose and requesting that their belts be placed in and through the belt loops in their respective pair of pants), that said officer was a public officer. (Said officer is a member of the Wilmington Police Department and was discharging a duty of his office.)

#2. Roderick Lionell Kirby did further violate the law by resisting, (hindering) ~~honding~~, delaying, and obstructing said officer; to wit: officer W. R. Pearson by fighting said officer while he was arresting or attempting to arrest him for assault on an officer, knowing at the time that said officer was a public officer (and a member of the Wilmington Police Department).

The offense charged here was committed against the peace and dignity of the State and in violation of law G.S. 14-33, G.S. 14-223."

[1] Preceding the affidavit portion of the warrant in the record on appeal is a "typist's note" which states, "Portions in parenthesis are hand written." Following the officer's return is the notation, "To the foregoing amendments to the warrant the defendant objects and excepts." Thereafter, it appears in the record under the heading, "The Following Motions Took Place Without Any Jurors Being Present," at page fourteen, that the solicitor stated ". . . at this time the State would like to move to amend the warrant to allege the duty that was being performed by the officer *at the time the arrest occurred.*" (Emphasis added.) The trial judge stated that he would allow the motion to amend, and on page fifteen of the record the solicitor replied, "Yes, sir. All right, Your Honor, it is being amended to this extent here at the bottom." However, it does not appear in the record as stipulated by the solicitor what amendment, if any, was actually made to the affidavit portion of the warrant upon which the defendant was tried de novo in superior court describing what duties the officer was performing "at the time the arrest occurred." The record as served on the solicitor and stipulated by him does not reveal that the officer involved was attempting to arrest the defendant or anyone else at the time he was assaulted by the defendant, nor does the record so served and stipulated guide us in determining what language, if any, was added to the warrant herein as a result of the allowance of this motion.

There does appear, however, some pertinent language, incorrectly placed in the record reproduced herein and shown in the original record as follows:

"ACCEPTANCE OF SERVICE

Service of the foregoing and within case accepted in apt time.

This 5th day of ~~April~~ May, 1972.

s/ JAMES T. STROUD, JR.
SOLICITOR

STIPULATION OF COUNSEL

The undersigned attorneys for both State and the defendant stipulate that the foregoing is a true and correct

copy of the transcript of the record and the evidence in this case.

s/ JAMES T. STROUD, JR.
SOLICITOR
With one Exception as stated below.

237 W. Trade St. CHAMBERS, STEIN, FERGUSON & LANNING
Charlotte NC 28202 By: s/ MELVIN L. WATT
Phone: (704) 375-8461 Attorney for Defendant

State's Exception # 1: A motion to amend the first count in the warrant (which charged Assault on a Police Officer) was allowed before the Defendant's plea at the initial trial in *District Court* which was: 'Said officer is a member of the Wilmington Police Department and was discharging a duty of his office.' The amendment written in the middle portion of the warrant, to which the arrow points, was allowed at the trial de novo in Superior Court; it explains the duty which the officer was previously alleged to be performing and it does not allege an additional element of the crime or a different offense. The Defendant was adjudged guilty of the offense of Assault on a Public Officer in *District Court,* which is a general misdemeanor."

[2] The above language "With one Exception as stated below" appears in typewritten form *after* the solicitor's signature, and the paragraph appearing after the signature of the defendant's attorney as "State's Exception #1" is also typewritten. In the original record, both of these passages appear to have been written with a different typewriter than were the other portions of the record or on a different occasion when the ribbon on the typewriter was showing some signs of wear (a condition that does not appear in the type preceding the signature of the solicitor). From the language of the acceptance of service of the case and the stipulation as to the transcript of the record by the solicitor, neither of these parts was in the case on appeal as served on the solicitor. Neither is there such a "State's Exception No. 1" appearing at any other place in the record, and the contents of this so-called "State's Exception No. 1" are not supported by the portions of the case accepted or stipulated to by solicitor as being "a true and correct copy of the transcript of the record and evidence in this case." However, even if we assume that the "State's Exception No. 1" is

an exception taken by the State (which we do not because it is not supported by the record preceding it), the time and contents of the amendments to the warrant, if any, are still in a confused state because there are two or more handwritten parts in the middle portion of the photostatic copy of the warrant in the original record filed in this court and two arrows pointing to separate and distinct portions. The "State's Exception No. 1" refers to only one arrow.

> "* * * The record imports verity and the Supreme Court is bound thereby. The Supreme Court can judicially know only what appears of record. There is a presumption in favor of regularity. Thus, where the matter complained of does not appear of record, appellant has failed to make irregularity manifest. * * *" *State v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53 (1967).

See also, *State v. Bethea,* 9 N.C. App. 544, 176 S.E. 2d 904 (1970) and *State v. Hickman,* 2 N.C. App. 627, 163 S.E. 2d 632 (1968).

"After all, there is a presumption of regularity in the trial. In order to overcome that presumption it is necessary for matters constituting material and reversible error to be made to appear in the case on appeal. * * *" *State v. Sanders,* 280 N.C. 67, 185 S.E. 2d 137 (1971). The burden is upon an appellant to show error, and also that the error was prejudicial. *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342 (1955). "Further, it was the duty of the defendant to see that the record was properly made up and transmitted, and when the matter complained of does not appear of record, defendant has failed to show prejudicial error." *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745 (1971); see also, *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453 (1967); *State v. Hickman, supra;* and G.S. 15-180. "It is not the function of this Court to oversee the preparation of the record on appeal; that is the function of counsel." *State v. Waddell,* 3 N.C. App. 58, 164 S.E. 2d 75 (1968).

[3] Moreover, the record on appeal reveals that by order dated 10 December 1971, Judge Webb allowed the defendant 90 days to prepare and serve the case on appeal and the State 30 days after such service to prepare and serve a countercase. Thereafter, on 25 February 1972, Judge Webb entered two orders, in one of which he appears to have modified the appeal entries and reduced the time for the defendant to serve case on appeal

to 75 days and for the State to file a countercase to 15 days. In the other order there appears, "The defendant is hereby allowed an additional forty-five (45) days, making a total of 120 days within which to make up and serve his case on appeal." It therefore affirmatively appears in the record that the case on appeal was not served on the solicitor, but that on 5 May 1972 the solicitor attempted to accept service in the following language, "Service of the foregoing and within case accepted in apt time." May 5, 1972 is over 145 days after the date of the original appeal entries on 10 December 1971. Under G.S. 1-282 and Rule 50 of the Rules of Practice in the Court of Appeals, the trial judge, not the solicitor, has authority to grant extensions of time to serve case on appeal. It thus appears that the case on appeal was not properly served within the time allowed by the trial judge and the statement by the solicitor in accepting service that it was accepted "in apt time" is ineffective. "It is axiomatic among those engaged in appellate practice that a 'statement of case on appeal not served in time' may be disregarded or treated as a nullity." *State v. Moore,* 210 N.C. 686, 188 S.E. 421 (1936).

[4] However, even if we assume that the case is properly before us, which we do not, and if we further assume, as defendant contends, that the State was permitted to amend the warrant (and did so) in the superior court by adding the words "the duty being performed by Officer Pearson consisted of attempting to determine why two young men with the defendant had their belts wrapped around their hands with the buckles loose and requesting that their belts be placed in and through the belt loops in their respective pair of pants," such amendment did not constitute error.

"The power to amend the warrant in the Superior Court is limited to amendments which do not effect a change in the charge." 2 Strong, N. C. Index 2d, Criminal Law, § 18. This amendment would not have effected a change in the charge. Even the defendant does not contend that the warrant upon which he was tried in district court did not charge that "Said officer is a member of the Wilmington Police Department and was discharging a duty of his office." The defendant does argue, however, that this does not sufficiently charge an offense punishable on 1 October 1971 under the provisions of G.S. 14-33 which reads in pertinent part:

"(c) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment if in the course of such assault, assault and battery, or affray he:

(4) Assaults a public officer while such officer is discharging or attempting to discharge a duty of his office."

[5] The clear legislative intent in enacting this provision was to provide greater punishment for those who place themselves in open defiance of duly constituted authority by assaulting public officers who are on duty. In the case before us the affidavit portion of the warrant on which defendant concedes he was tried in the district court contained the language used in the statute, and we think was sufficient. However, the defendant urges that the same rule should apply to assaults on an officer under G.S. 14-33(c)(4) as is applied to resisting officers under G.S. 14-223, both of which contain similar language relating to the officer discharging or attempting to discharge a duty of his office.

The cases cited by defendant are distinguishable. In *State v. Dunston,* 256 N.C. 203, 123 S.E. 2d 480 (1962) and some of the other cases cited by defendant in his brief, the Supreme Court has held that in order to charge the offense of resisting a public officer the warrant or indictment must set out with some particularity the duty the designated officer was discharging or attempting to discharge at the time of the offense. There is a distinction between the two offenses: In the offense of resisting an officer, the *resisting* of the public officer in the *performance* of some duty is the primary conduct proscribed by that statute and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense, while in the offense of assaulting a public officer in the performance of some duty, the *assault* on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance. The legislative intent appears to be that if a public officer is assaulted in performing or attempting to perform *any* duty of his office, the provision of G.S. 14-33(c)(4) is applicable.

We hold that the affidavit portion of the warrant, as it appears in the record of the case before us, was sufficient to charge all of the elements of the offense of which defendant was convicted, to apprise defendant of all the particulars of the offense charged necessary for him to prepare his defense, to place the defendant in position to plead former jeopardy in the event he was again brought to trial for the same offense and to allow the trial judge to pronounce proper judgment upon the jury verdict of guilty. See, *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970), *cert. denied,* 403 U.S. 940; *State v. Dorsett* and *State v. Yow,* 272 N.C. 227, 158 S.E. 2d 15 (1967); and G.S. 15-153. Therefore, we hold that this case was properly before the superior court on appeal from the conviction in the district court and that the trial judge did not err in failing to dismiss the case or to remand it to district court for resentencing, and the defendant's assignments of error in these regards are overruled.

[6] We further hold that the charge of resisting an officer (of which the defendant was acquitted in district court) and the charge of assaulting a public officer while discharging or attempting to discharge a duty of his office are separate and distinct offenses and that the trial judge did not err in failing to "merge" them. See *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967). No actual assault or force or violence is necessary to complete the offense described by G.S. 14-223. *State v. Leigh,* 278 N.C. 243, 179 S.E. 2d 708 (1971). Defendant's contention that this failure to "merge" the two offenses subjected the defendant Kirby to double jeopardy and constituted reversible error is also without merit.

[7] The defendant also contends that the trial court erred by failing to quash the panel of jurors. Prior to the empanelling of the jury in the superior court, defendant moved that the venire be quashed, because, he alleged, it was drawn from a list "which by statute was prohibited from containing the names of persons below the age of twenty-one (21) and was, therefore, not composed of persons who were the peers of the defendant." In regard to this motion, testimony was taken from two witnesses.

Alice Granger testified that she was employed as a Deputy Clerk of Superior Court since 3 June 1971 and that, pursuant to instructions, she normally withdrew a predetermined number of "jury disks" from a box and took them to the Register of

Deeds where the names and addresses were matched to the numbers on the disks. She also testified that "a new list" had been prepared between June 1971 and the time of her testimony, but that the jurors "called for this term of criminal court were called from the old list," that 4 January 1972 would be the first time that "jurors off the new list" would be called and that she did not know "whether or not persons between the age of eighteen and twenty-one have been included on the new list which goes into effect after the first of next year."

The defendant Kirby testified to the effect that he and a number of other persons (some of whom later testified in his behalf) were below the age of twenty-one years.

Even assuming that this evidence did establish that the jury list from which the jury in this case were drawn did not include persons between the ages of eighteen and twenty-one years (which it does not do), there is no sufficient showing that this defendant was denied any constitutional right by the trial court's refusal to quash the jury panel in this case, and defendant's assignments of error in this regard are overruled.

In *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768 (1972), Justice Branch, speaking for the North Carolina Supreme Court, first noted that G.S. 9-3 had been amended, effective 21 July 1971, to make persons eighteen years and older eligible for jury duty, which raised the question in that case of "whether there was intentional, arbitrary or systematic discrimination against this age group in the institution and management of the jury system." He then said:

> "The North Carolina plan imposes a two-years lapse in preparation of new jury lists as opposed to the five-year plan adopted by some federal courts. *United States v. Kuhn,* 441 F. 2d 179 (5th Cir. 1971). We also note, parenthetically, that as of 4 February 1972 the United States Congress had not amended 28 U.S.C.A. § 1865 to require the federal district courts to include the names of persons under twenty-one years of age on their jury lists.
>
> The North Carolina statutory plan for the selection and drawing of jurors is constitutional and provides a jury system completely free of discrimination to any cognizable group.

> The absence from the jury list of the names of persons between the ages of eighteen and twenty-one for the short period of time herein complained of [two months and one day] is not unreasonable, and does not constitute systematic and arbitrary exclusion of this age group from jury service."

Admittedly, the lapse of time between the amendment of G.S. 9-3 and the date of trial is somewhat longer in this case than it was in *Cornell;* nevertheless, there is no evidence in this case that the time elapsed was unreasonable, or that there was any systematic or arbitrary exclusion of persons between the ages of eighteen and twenty-one years from jury service. In fact, it affirmatively appears from the testimony of Alice Granger that the jury commissioners of New Hanover County had begun preparation of a new jury list for the ensuing biennium "at least thirty days" prior to 1 January 1972. See *State v. Cornell, supra.* The defendant Kirby was tried at the 6 December 1971 Session of Superior Court held in New Hanover County. No error in this regard is made to appear.

The remainder of the defendant's assignments of error concern the admission of evidence during the trial and the judge's charge to the jury, and are based upon a total of forty-one exceptions in the record. Specifically, the defendant contends that the following constituted prejudicial error: (1) permitting the State's witnesses to testify and the solicitor to question in certain instances "without corrective instructions," (2) the introduction as exhibits of three photographs of Officer Pearson taken shortly after he was assaulted by the defendant, (3) the trial court's instructions as to self-defense and provocation, (4) the alleged failure of the trial court to give equal stress to the contentions of the State and of the defendant, (5) the alleged invasion by the trial court of the province of the jury in two instances, and (6) the trial judge's alleged intimations, when instructing the jury, that the defendant was not worthy of belief.

Suffice it to say that although we do not deem it necessary to discuss each of these questions in detail here, we have carefully examined the entire record on appeal, the testimony given, the cross-examination of witnesses, the introduction of exhibits and the court's charge to the jury. While some of the defendant's exceptions may have some merit if considered apart from the record as a whole, we do not think prejudicial error appears

warranting a new trial. It affirmatively appears that Judge Webb protected the rights of this defendant, and the defendant's assignments of error insofar as they suggest that he attempted to prejudice the jury against him are specifically overruled. If we assume that the case is properly before us, in the trial in superior court we find no prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

JOHNSTON COUNTY TUBERCULOSIS ASSOCIATION, INC. v. NORTH CAROLINA TUBERCULOSIS AND RESPIRATORY DISEASE ASSOCIATION, INC., AND DOROTHY H. HINSON

No. 7211SC339

(Filed 2 August 1972)

1. **Rules of Civil Procedure § 56— motion for summary judgment — question presented**

   On motion for summary judgment, the question is not whether there is a genuine issue of fact, but whether there is a genuine issue as to any material fact. G.S. 1A-1, Rule 56(c).

2. **Charities and Foundations § 2— action to restrain charitable solicitations — misrepresentations — mere allegation**

   In an action by a local tuberculosis association to restrain a state tuberculosis association, licensed to solicit funds anywhere in the state, from soliciting funds in the county, plaintiff's mere assertion that defendant was misrepresenting itself to county residents as the local county organization, without support in any other form, did not establish a genuine issue as to any material fact or a legal basis for enjoining defendants.

3. **Charities and Foundations § 2— action to restrain charitable solicitations — insufficiency of allegations**

   Allegations by a county tuberculosis association that a state tuberculosis association had no active supporters in the county, had made no accounting to the people of the county, and had expended no funds raised by it in the county or for the benefit of county residents, and that solicitations by the state association had harmed the county association's efforts to solicit funds in the county, *held* insufficient to establish a basis for restraining the state association from soliciting funds in the county.

APPEAL by defendants from an Order entered by *Canaday, Judge,* on 22 December 1971.

Plaintiff, Johnston County Tuberculosis Association, Inc., instituted this action against the defendants, requesting that the court temporarily and permanently restrain and enjoin the North Carolina Tuberculosis and Respiratory Disease Association, Inc., a non-profit corporation with offices in Raleigh, North Carolina, and Dorothy H. Hinson, the Executive Director of the Tar River Tuberculosis and Respiratory Disease Association, Inc., which is a district component of the aforementioned, from soliciting funds for the purposes of the corporate defendant within Johnston County; or, in the alternative, that defendants be temporarily and permanently restrained and enjoined from making certain alleged misrepresentations.

On 21 October 1971, Judge Copeland ordered the defendants to appear before Judge Canaday on 20 November 1971 and show cause why the injunction as prayed for by the plaintiff should not be granted until the final determination of the action.

The defendants in response denied the material allegations of plaintiff's complaint and filed a motion for summary judgment, alleging that there was no genuine issue as to any material fact and that they were entitled to a judgment as a matter of law.

Upon the order to show cause and upon defendants' motion for summary judgment, Judge Canaday held a hearing, wherein he denied the motion of defendants for summary judgment and entered judgment preliminarily enjoining defendants from soliciting monies, by letters, campaigns or personal contact, directly or indirectly, from residents of Johnston County, pending final determination of the action. From the denial of defendants' motion for summary judgment and the entry of an order enjoining the defendants from soliciting funds for their charitable purposes in Johnston County, the defendants appeal to this Court.

Wallace Ashley, Jr., for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr., for defendant-appellants.

BROCK, Judge.

The first assignment of error brought forward on this appeal by defendant-appellants is that the trial judge erred in not granting their motion for summary judgment. The defend-

ants argue that the pleadings and affidavits submitted showed that there was no genuine issue as to any material fact before the court.

The thrust of defendants' argument is that the plaintiff has failed to show any legal or equitable grounds for issuance of an order enjoining defendants' solicitations, as the defendants had a right to solicit funds in Johnston County because they were properly licensed by the State, pursuant to State law, to solicit funds anywhere in the State. They further argue that the plaintiff, through its complaint and affidavits, failed to show any wrongdoing on the part of the defendants and failed to show any material misrepresentations by the defendants.

[1] The trial judge found "that there is a genuine issue of fact in equity raised by the pleadings, and that the motion of the defendants for summary judgment should be denied"; we do not agree. We hold, without considering the meritorious services rendered by each of these non-profit, charitable organizations, that the materials presented in support of defendants' motion for summary judgment showed that plaintiff suffered no compensable injury or damage under principles of law or equity. We note that the trial judge found "there is a genuine issue of fact." Whether there is a *genuine issue of fact* is not the question. The question is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is a *genuine issue as to any material fact.* G.S. 1A-1, Rule 56(c).

The allegations of plaintiff and the accompanying affidavits show that plaintiff has done a good job of raising funds in Johnston County and has performed faithful service to the people of Johnston County in the past; that during the years prior to 1969 the plaintiff cooperated with the defendant corporation in its program; that the plaintiff was opposed to the reorganization of the State Association into districts which took place in the spring of 1967; that the plaintiff withdrew its affiliation from the State Association in 1969; that the corporate defendant through its affiliate, the Tar River Association, conducted mail campaigns to Johnston County residents and received considerable funds in the 1969 and 1970 solicitation campaigns; and that defendants were in the process of mailing into Johnston County appeals for funds in the fall of

1971. However, these allegations do not form a legal basis for relief or a basis for the trial judge to enjoin the defendants from their legitimate solicitations in Johnston County under their right to solicit, pursuant to State law, funds anywhere in the State as provided in their license.

[2] The plaintiff's complaint further alleged that the defendants' solicitations were misrepresenting to the residents of Johnston County that they were the "local" Johnston County association because their mailed letters list "Johnston County" on the letterhead and had imprinted thereon a map of Johnston County which constituted a willful misrepresentation by defendants with the purpose of hurting the fund-raising efforts of the plaintiff. An examination of the record discloses that this is a mere assertion and that even the affidavits tendered by plaintiff fail to show misrepresentation on defendants' part, much less a willful misrepresentation. On the other hand, the defendants offered the affidavit of C. Scott Venable, Executive Director of the North Carolina Tuberculosis and Respiratory Disease Association, Inc., which in pertinent part states as follows:

"That it is not true that the Tar River Association misrepresents itself as the Johnston County Association either in its appeal for funds or in other written materials. The Tar River Association lists Johnston County on its letterhead along with nine other counties in its area and uses a map to show that Johnston County along with nine other counties comprise the area of the Tar River Association."

Although some confusion may have resulted in the solicitations of the two organizations soliciting funds in Johnston County, there is no showing of misrepresentation. Consequently, this mere assertion of misrepresentation, without support in any other form, does not establish a genuine issue as to any material fact or a legal basis for enjoining defendants.

[3] The further allegations of plaintiff's complaint, that defendants had no active local supporters in Johnston County; that neither of the defendants had made any accounting to the people of Johnston County; and that corporate defendant had not expended any funds raised by it within Johnston County or to the benefit of Johnston County residents, were not sufficient to establish a genuine issue as to any material fact or a sufficient basis to deny the defendants their right to solicit

funds in Johnston County for their charitable purpose. In fact, the defendants were under no legal duty to have active supporters or members in Johnston County; or to account to the people of Johnston County for the monies raised there, as long as defendants met the required reports by State law; or to spend their monies within Johnston County. However, we note that the above allegations were negated by the defendants' affidavits of Mr. Venable and Mr. Edgerton.

Finally, the plaintiff's allegation, that the defendants' solicitations had hurt and injured the plaintiff's efforts in soliciting funds in Johnston County, was not sufficient to establish a genuine issue as to any material fact or a basis for restraining the defendants. Even though plaintiff claimed its solicitations were not as successful as it would have desired, it failed to allege and disclose any unlawful activities on the part of the defendants. On the contrary, the record shows that the defendants were acting in accord with law, soliciting funds for their charitable purposes, and expending those funds for the benefit of mankind.

Although competition in this charitable field may not be desirable, we find that the complaint and the plaintiff's affidavits fail to disclose a genuine issue as to any material fact. For the above reasons, the defendants' motion for summary judgment should have been granted.

The question has not been argued by appellee, and we do not decide in this case, whether an appeal lies from a denial of a motion for summary judgment or from the issuance of a preliminary injunction.

Reversed.

Judges PARKER and HEDRICK concur.

VIRGINIA GRIGG, GUARDIAN AD LITEM OF KATHERINE E. GRIGG, EMPLOYEE v. PHARR YARNS, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 7227IC373

(Filed 2 August 1972)

1. **Master and Servant § 97— workmen's compensation — remand for further hearing — belated exception**

Where plaintiff did not except to an order of the Industrial Commission remanding the cause to a deputy commissioner for further hearing until after the deputy commissioner had ruled against her by reducing the amount of the award, the exception was not timely made.

2. **Master and Servant § 97— workmen's compensation — remand for further hearing — waiver of irregularity**

Plaintiff waived any irregularity in the action of the Industrial Commission remanding the cause to a deputy commissioner for further hearing when she stipulated that the only questions to be determined at the further hearing were the amounts of compensation plaintiff was entitled to receive for disfigurement and for permanent partial disability.

3. **Master and Servant § 74— workmen's compensation — award for back injury and disfigurement**

The evidence before the Industrial Commission supported its award to plaintiff of $750 for injury to her back, $1,400 for bodily disfigurement, and $400 for facial disfigurement.

4. **Master and Servant § 99— workmen's compensation — appeal by both parties — costs**

Where both parties appealed to the Full Industrial Commission, the cause was remanded for further hearing, and plaintiff ultimately prevailed against defendants, the Full Commission erred in taxing half of the costs of that appeal to the plaintiff, since costs follow the final judgment.

5. **Master and Servant § 99— workmen's compensation — appeal by plaintiff — attorney's fees**

Where only the plaintiff appealed from an opinion and award of the Industrial Commission which had required defendants to pay $200 as a fee for plaintiff's counsel, the Court of Appeals denied plaintiff's motion under G.S. 97-88 that it award additional fees for plaintiff's counsel.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 21 February 1972.

Defendants and plaintiff appealed from an opinion and award of Deputy Commissioner Dandelake, filed 23 September

1970, to the North Carolina Industrial Commission (Commission). This appeal was set for review before the Commission on 13 November 1970, and subsequently what is denominated "Opinion and Award for the Full Commission," filed 16 December 1970, was entered. The pertinent parts of this "Opinion and Award" are as follows:

> "Inasmuch as the evidentiary record lacks sufficient evidence to support the Findings of Fact of Deputy Commissioner Dandelake, the Full Commission hereby remands the case for a hearing de novo in order that the proper evidence may be placed into the evidentiary record.
>
> Each side shall pay its own costs as the same relate to the appeal."

Thereafter a "Modification of Opinion and Award for the Full Commission," filed 22 December 1970, was entered, modifying the first paragraph of the above-quoted part of the "Opinion and Award" to read as follows:

> "Inasmuch as the evidentiary record lacks sufficient evidence to support the findings of fact of Deputy Commissioner Dandelake, the Full Commission hereby remands the case for a further hearing to take such additional evidence as the parties hereto shall desire to offer."

There were no objections or exceptions at that time by any of the parties to the procedure of "remanding" the matter for further hearing and the taking of evidence, and a hearing was held by Deputy Commissioner Leake on 28 April 1971 pursuant to the above order. At this hearing, the parties made certain stipulations and the plaintiff presented evidence, but the defendant offered none. Among the stipulations entered by the parties at this hearing before Deputy Commissioner Leake was the following:

> "That the only questions to be determined in today's hearing is the amount of compensation the plaintiff is entitled to receive for disfigurement and for permanent partial disability."

In an opinion and award filed 11 May 1971, Deputy Commissioner Leake made findings of fact and awarded plaintiff a total sum of $750.00 for injury to her back, the sum of $1,400.00 compensation for bodily disfigurement, and the sum

of $400.00 for facial disfigurement, in addition to all approved medical expenses incurred by plaintiff as a result of the injury and disfigurement in question. This award for facial and bodily disfigurement was $250.00 less than the amount theretofore awarded by Deputy Commissioner Dandelake in the opinion and award filed 23 September 1970.

Both the defendants and the plaintiff appealed from the opinion and award of Deputy Commissioner Leake. The appeals were heard by the Commission and the exceptions filed by all the parties were overruled. The Commission thereupon adopted as its own the opinion and award filed by Deputy Commissioner Leake, and the plaintiff appealed to the Court of Appeals, assigning error.

Basil Whitener and Anne M. Lamm for plaintiff appellant.

Mullen, Holland & Harrell by James Mullen for defendant appellees.

MALLARD, Chief Judge.

[1, 2] Plaintiff contends that the Commission erred in remanding the proceeding for further hearing in its orders filed 16 December 1970 and 22 December 1970. This contention is without merit. The plaintiff did not except to these orders of remand until after Deputy Commissioner Leake had, in effect, ruled against her by reducing the amount of the award. This exception was therefore not timely made. Moreover, at the hearing before Deputy Commissioner Leake, the plaintiff stipulated that the only questions to be determined at that hearing were the amounts of compensation plaintiff was entitled to receive for disfigurement and for permanent partial disability. If under G.S. 97-85 the action of the Commission in remanding the matter was irregular, such irregularity was waived by the plaintiff when she thus stipulated.

[3] The next contention of the plaintiff is that the Commission erred in adopting as its own the award and opinion of Deputy Commissioner Leake. This contention is without merit. Whether the evidence supported the findings of fact was a proper matter for the Commission to consider. There was competent evidence before the Commission to support its findings of fact, and the facts found justify the conclusions of the Commission and also support the award made. *Perry v. Bakeries*

Co., 262 N.C. 272, 136 S.E. 2d 643 (1964) and *Snead v. Mills, Inc.*, 8 N.C. App. 447, 174 S.E. 2d 699 (1970), *cert. denied*, 277 N.C. 112.

[4] Plaintiff does contend, however, and we agree, that the Commission erred in its "Opinion and Award" filed 16 December 1970 by taxing to the plaintiff one-half of the costs of that appeal to the Commission. From the record it appears that both parties appealed to the Full Commission, and although plaintiff's "Application for Review" is dated prior to the defendants' "Application for Review," plaintiff ultimately prevailed against the defendants and costs follow the final judgment. 2 Strong, N. C. Index 2d, Costs, § 1.

[5] Plaintiff, while this case was pending in the Court of Appeals, filed a written motion pursuant to G.S. 97-88 and requests this court to award reasonable attorney fees. G.S. 97-88 reads:

> *"Expenses of appeals brought by insurers.*—If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs."

In the case before us, both parties appealed to the Commission from the two hearings conducted by the deputy commissioners, but only the plaintiff appealed to this court from the opinion and award of the Commission filed 21 February 1972. It is noted that the Commission in this opinion and award did award costs and counsel fees for plaintiff's counsel as follows:

> "Defendants shall pay all costs incurred, which shall include an additional counsel fee in the amount of $200.00 to be paid directly to counsel for plaintiff by defendants as part of the costs. * * * "

Inasmuch as the hearing and proceedings in this case in the Court of Appeals "were brought by" the plaintiff, the motion of the plaintiff, under the provisions of G.S. 97-88, that this Court allow additional attorney fees for plaintiff's attorney is denied.

The opinion and award of the Commission filed 16 December 1970 and the modification thereof filed 22 December 1970, in which it is provided that "Each side shall pay its own costs as the same relate to the appeal" are modified so as to require the defendants to pay the costs of the appeal.

The opinion and award of the Commission filed 21 February 1972 is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

UNIVERSITY OF NORTH CAROLINA, KNOWN AS THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL v. THE TOWN OF CARRBORO

No. 7215SC435

(Filed 2 August 1972)

1. **Colleges and Universities; Municipal Corporations § 4— authority of U.N.C. to operate water system — rates**

   The University of North Carolina has authority to own, maintain and operate a water system to provide services for itself and any other person, firm or corporation desiring such services, and has the discretionary authority to set the rates which it will charge for such service. G.S. 116-3; former G.S. 160-255.

2. **Municipal Corporations § 22— necessity for written contract — purchase of water from U.N.C.**

   The statute requiring certain contracts of municipal corporations to be in writing, former G.S. 160-279, did not apply to the purchase of water by the Town of Carrboro from the University of North Carolina.

APPEAL by defendant from *Wood, Judge,* 17 January 1972 Session of Superior Court held in ORANGE County.

This is a civil action wherein the University of North Carolina (University) seeks to recover from the Town of Carrboro (Carrboro) the purchase price of water and electricity for the billing period 11 July 1970 through 6 August 1970.

The following facts are uncontroverted. The University owns and operates an electric and water distribution system and has sold water and electricity to the Town of Carrboro, a municipal corporation, continuously since 1922 or 1923. Carrboro resells the said water and electricity to its residents. There has never been a written contract between the parties for this service. The plaintiff has delivered and defendant has accepted and paid for said water and electricity on a monthly basis beginning about 1922 or 1923 and continuing until August 1970. On 14 May 1970 the University notified Carrboro in writing of increases in the rate for water sold the Town as of the meter reading on or after 1 August 1970. Thereafter the University delivered and Carrboro accepted water and electricity for which the University billed the defendant but the defendant refused to pay for said services under the new rates. Carrboro tendered payment on the account under the old rates but the University would not accept such payment. Carrboro made a $90.65 payment on the account which was accepted by the University.

Both parties filed motions for summary judgment along with supporting affidavits under Rule 56. On 20 January 1972 the Court entered summary judgment for plaintiff in the total sum of $8,464.60. The defendant appealed.

Attorney General Robert Morgan and Assistant Attorneys General Millard R. Rich, Jr., and I. Beverly Lake, Jr., for the plaintiff appellee.

William W. Staton and Lowry M. Betts for the defendant appellant.

HEDRICK, Judge.

The pleadings, exhibits, and affidavits show there is no genuine issue as to the amount and price of water and electric service delivered by the plaintiff and accepted by the defendant for the billing period covered by statements mailed 18 August 1970 and 21 August 1970, and that $90.65 was credited to the account. Therefore, since all of the material facts are established by the record, the one question presented on this appeal is whether, on such facts, the University is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56; *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

[1] The main thrust of defendant's argument is that the University lacked authority to set rates for the sale of its water to the Town of Carrboro, and that said rates are "discriminatory per se." We do not agree. G.S. 116-3 in pertinent part provides, "The trustees of the University shall be a body politic and corporate . . . (and) shall be able and capable in law . . . to do all such things as are usually done by bodies corporate and politic. . . . " G.S. 160-255 prior to its repeal by Session Laws 1971, c. 698, s. 2, effective 1 January 1972, in pertinent part provided:

> "A municipality may own and maintain its own light, water, sewer, and gas systems to furnish services to the municipality and its citizens, and to any person, firm or corporation desiring the same outside the corporate limits where the service can be made available by the municipality . . . . "

Thus, it seems clear that the University as a body politic and corporate has authority to own, maintain, and operate a water system to provide services for itself and to any other person, firm, or corporation desiring such services outside the University.

> "A municipality which operates its own water works is under no duty in the first instance to furnish water to persons outside its limits. It has the discretionary power, however, to engage in this undertaking. G.S. 160-255. When a municipality exercises this discretionary power, it does not assume the obligations of a public service corporation toward nonresident consumers. G.S. 62-30(3); 67 C.J., Waters, section 739. It retains the authority to specify the terms upon which nonresidents may obtain its water. *Construction Co. v. Raleigh,* 230 N.C. 365, 53 S.E. 2d 165. In exerting this authority, it 'may fix a different rate from that charged within the corporate limits'. G.S. 160-256" *Fulghum v. Selma* and *Griffis v. Selma,* 238 N.C. 100, 76 S.E. 2d 368 (1953).

Thus, the University is under no obligation to maintain a water system for the Town of Carrboro, Chapel Hill, or any other person, firm, or corporation other than itself; however, having exercised its discretion to do so, we think it likewise has discretionary authority to set the rates which it will charge for such services. The defendant, having accepted these services

for almost half a century is not now in a position to complain about the rates.

[2] Finally, the defendant contends that the Court erred in concluding that G.S. 160-279 does not apply to this action. G.S. 160-279 prior to its repeal by Session Laws 1971, c. 698, s. 2, effective 1 January 1972, in pertinent part provided:

> "*Certain contracts in writing and secured.*—All contracts made by any department, board, or commission in which the amount involved is two hundred dollars or more shall be in writing, and no such contract shall be deemed to have been made or executed until signed by the officer authorized by law to sign such contract, approved by the governing body. Any contract made as aforesaid may be required to be accompanied by a bond with sureties. . . . "

By this contention the defendant attempts to call to its aid to defeat plaintiff's claim a statute which, if applicable, it has openly violated for more than 50 years. It is readily apparent that the statute refers only to "certain contracts" and not to all contracts involving a municipality or one of its agencies. Obviously, the defendant could not have required the University to give a bond with sureties for the faithful performance of its contract to deliver water to the defendant.

We think the trial Court correctly held that the statute has no application under the facts of this case. The judgment appealed from is

Affirmed.

Judges BROCK and MORRIS concur.

In re City of Washington

IN THE MATTER OF THE CITY OF WASHINGTON CLOSING A PORTION OF WEST FOURTH STREET (CASE No. 69-CvS-571) AND IN THE MATTER OF THE CITY OF WASHINGTON CLOSING A PORTION OF WEST FOURTH STREET (CASE No. 69-CvS-718)

No. 722SC475

(Filed 2 August 1972)

1. **Appeal and Error § 41— record on appeal — order of proceedings**

Appeal is subject to dismissal where the proceedings are not set forth in the record on appeal in the order of time in which they occurred. Court of Appeals Rules 19 and 48.

2. **Municipal Corporations § 33— closing of city street — notice of hearing**

G.S. 153-9(17) requires that notice of the hearing on a petition to close a municipal street be given by registered mail to all owners of property on the street sought to be closed who did not join in the request for closing the street, not just to those owners who might suffer some "special consequence" as a result of the closing.

3. **Municipal Corporations § 33— closing of city street — notice of hearing**

Resolutions of a city council closing portions of a city street were null and void where owners of property adjoining the street who did not join in the request for closing were not notified by registered mail of the hearing to be conducted on the petition to close portions of the street.

HEARD on writ of *certiorari* in lieu of appeal by petitioner, City of WASHINGTON, from *Peel, Judge,* at the August 9, 1971 Session of BEAUFORT Superior Court.

On 14 July 1969, J. A. Hackney and Sons, Inc., petitioned the City Council of the City of Washington, North Carolina, that a portion of West Fourth Street in that city from 150 feet west of its intersection with Hackney Avenue to a point 25 feet east of its intersection with New Bern Street be legally closed and withdrawn from dedication. Notice of a hearing before the City Council was published in the Washington Daily News for four consecutive weeks prior to the hearing. No other notice was given.

On August 11, 1969, a hearing was conducted at the regular meeting of the City Council. As a result of the hearing, the Council enacted a resolution closing that portion of West Fourth Street mentioned in the petition.

The F. Ray Moore Oil Company gave notice of appeal to the Superior Court.

On October 1, 1969 J. A. Hackney and Sons, Inc., filed another petition with the City Council and requested that the Council close the portion of West Fourth Street lying between Hackney Avenue and the segment of West Fourth Street closed by the August resolution of the Council. Notice of a hearing on this petition was published in the Washington Daily News for four consecutive weeks prior to the hearing. No other notice was given. The hearing was conducted at the regular meeting of the City Council on 10 November 1969. The Council enacted a resolution closing the above-described portion of the street. The F. Ray Moore Oil Company gave notice of appeal on this resolution also.

Numerous motions to intervene in both appeals were filed by persons owning property on West Fourth Street and others. It is not necessary for the purpose of this decision to enumerate them.

The Superior Court heard evidence on both appeals. Separate judgments were entered declaring null and void the resolutions of the City of Washington purporting to close portions of West Fourth Street.

McMullan, Knott & Carter by Lee E. Knott, Jr., for appellant, City of Washington.

Wilkinson, Vosburgh & Thompson by John A. Wilkinson; Mayo & Mayo by William P. Mayo for appellee, F. Ray Moore Oil Company, Inc.

CAMPBELL, Judge.

[1] Rule 19 of the Rules of Practice in the Court of Appeals of North Carolina requires that the proceedings in the trial court be set forth in the order of time in which they occurred. Failure to comply with the rules subjects an appeal to dismissal. Rule 48, Rules of Practice in the Court of Appeals of North Carolina.

The record in this case fails to comply with the above cited requirements and the appeal is subject to dismissal. We have, however, considered this appeal as if it were in conformity with the rules in order that a decision on the merits might be reached.

Appellant assigns as error the trial court's judgment that the resolutions of the City Council closing portions of West Fourth Street were null and void. The trial court predicated its ruling upon a finding that the City Council had not notified property owners on West Fourth Street of the hearing in the manner required by statute. Appellant contends that the trial court erred in making such a finding.

The procedure a municipality must follow in closing a road or a portion of a road is provided by G.S. 153-9(17). *Town of Blowing Rock v. Gregorie,* 243 N.C. 364, 90 S.E. 2d 898 (1956). The statute provides, in part, the following:

> " . . . Any individuals owning property adjoining said street or road who do not join in the request for the closing of said street or road shall be notified by registered letter of the time and place of the meeting of the commissioners at which the closing of said street or road is to be acted upon. Notice of said meeting shall likewise be published once a week for four weeks in some newspaper published in the county, or if no newspaper is so published by posting a notice for 30 days at the courthouse door and three other public places in the county. . . . " G.S. 153-9(17).

[2] The statute requires notice by registered mail to the owners of property adjoining the street to be closed who did not join in the request for closing the street. Appellant concedes that no such notice was given here, but contends that notice by registered mail is required only to those who might suffer some "special consequence" by the closing. Appellant cites no authority for this argument and we can find none.

We do not agree with appellant's argument. The words of the statute are clear and unequivocal. There is nothing to indicate that only those with a "special interest" must be notified by registered mail. The Supreme Court has stated:

> "[T]hat the true legislative intent is that if a municipality wishes to close a street, or a *part thereof,* the notices required by G.S. 153-9(17) must be given. Such an intent is fair and just, because it affords all *interested parties* an opportunity to be heard. . . . " *Town of Blowing Rock v. Gregorie, supra.* (emphasis added)

Clearly, owners of property on a street which is to be partially closed have an interest in the hearing on the request to close the street.

[3] The trial court found as a fact that owners of property on West Fourth Street had not been notified by registered mail of the hearing to be conducted on the petition to close parts of that street. There was evidence to support the finding of fact and the finding supports the trial court's conclusions of law. We hold that the trial judge was correct in entering the judgment appealed from.

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

The ruling of the trial court is

Affirmed

Chief Judge MALLARD and Judge BRITT concur.

GEORGE C. AND SUSAN M. CHRISTIE v. ALBERT H. POWELL

No. 7214SC358

(Filed 2 August 1972)

1. **Fraud § 12— insufficiency of evidence to support finding of fraud**

The trial judge did not err in finding that there was no fraudulent concealment of any material fact with respect to a foundation wall in premises sold to plaintiffs by defendant where plaintiffs failed to carry their burden of proof in that they failed to satisfy the judge by the greater weight of the evidence that the facts were as they contended.

2. **Appeal and Error § 28— findings of fact**

The trial court's finding that plaintiffs were under a duty to make further inquiry as to the condition of the basement walls before purchasing a home was a finding of ultimate fact and not a ruling as a matter of law.

3. **Appeal and Error § 42— evidence not in record on appeal**

When evidence is not contained in the record on appeal it will be presumed that there was sufficient evidence to support the trial judge's findings of fact.

APPEAL by plaintiffs from a Judgment entered by *McKinnon, Judge,* 15 December 1971, following a hearing at the

8 November 1971 Session of Superior Court held in DURHAM County.

The plaintiffs, George C. Christie and wife, Susan M. Christie, instituted this action against the defendant, Dr. Albert H. Powell, seeking to recover actual and punitive damages for the alleged fraudulent concealment and/or nondisclosure of material conditions with respect to the basement foundation wall in the 16 August 1967 sale of the premises to plaintiffs by defendant.

In their complaint, the plaintiffs alleged that at the time of the sale there existed a crack, approximately fifteen feet in length, in the easterly basement wall of the premises, which indicated the likelihood of a serious structural defect; that the cellar had and continued to admit water; that the defendant knew these facts and concealed from plaintiffs his knowledge of these facts for the purpose of inducing them to purchase the premises; and that they did not apprehend nor have cause to apprehend these aforementioned facts when they inspected the premises before purchase. They further alleged that the aforementioned crack first became visible to them in January 1969 and that they, acting on professional advice, undertook repairs to remedy structural defects existing at the time of sale.

In response, defendant admitted the existence of the crack, but alleged that said crack was not such as to constitute a serious structural defect and that said crack was readily apparent and visible to plaintiffs upon entering and inspecting the basement. Defendant further admitted that water had come into the basement after periods of heavy rain, but he alleged this was not a condition which would constitute a serious problem or indicate any serious structural defect. Also, defendant alleged he informed plaintiff-husband that the basement was not dry and that a dehumidifier had been installed for that reason and was a fixture which went with the house. Defendant denied the remaining material allegations of the complaint.

The case was tried by Judge McKinnon, sitting without a jury. He made findings of fact and conclusions of law, and entered judgment for defendant. Plaintiffs appealed to this Court.

Powe, Porter and Alphin, by James G. Billings, for plaintiff-appellants.

Newsom, Graham, Strayhorn, Hedrick & Murray, by James L. Newsom, for defendant-appellee.

BROCK, Judge.

[1] First, plaintiffs assign as error that the trial court ruled as a matter of law that defendant was under no duty to reveal such knowledge as he did have to the plaintiffs, and had no knowledge of sufficient circumstances to put him on notice of the existence of a potentially dangerous condition in the foundation wall.

The plaintiffs' assignments of error nos. 2 and 3 are based on the following finding by the trial judge:

> "The burden of proof being on the Plaintiffs, the Court is not satisfied by the greater weight of the evidence either that a condition existed in respect to the wall at the time of the sale which the Defendant would have been under a duty to reveal, or that Defendant had knowledge of circumstances sufficient to put him on notice of the existence of a potentially dangerous condition and under a duty to reveal such knowledge to a potential buyer, and the Court does not find that there has been a wilful concealment of any material fact such as to constitute fraud in this transaction."

Although the above finding is couched in negative language, it is nevertheless a finding by the trier of the facts that plaintiffs have failed to carry their burden of proof in that they have failed to satisfy him by the greater weight of the evidence that the facts are as they contend.

In assignment of error number 4, the plaintiffs excepted to the trial court's finding and conclusion that defendant had not fraudulently concealed any material fact known or which he should have reasonably known at the time of the sale, and that plaintiffs had not established that they had been damaged as a proximate result of fraudulent concealment by defendant. Again, the plaintiffs contend that this finding and conclusion was error in that the trial court made its holding as a matter of law. We do not agree. This also is a holding, by the trier of

facts, that the plaintiffs have failed to carry their burden of proof on the ultimate issue. The above assignments of error are overruled.

[2] Secondly, the plaintiffs assign as error that the trial court ruled as a matter of law that they were under a duty to make further inquiry as to the condition of the basement walls.

Plaintiffs' assignment of error number 1 is taken to the following finding by the trial court:

> "The condition existing as of August 1, 1967, was observable to Plaintiffs by any reasonable inspection of the basement walls and sufficient to put them on notice to make any inquiry a prudent purchaser of a house of this age should make."

The above finding is one of ultimate fact and is not a ruling as a matter of law as plaintiffs contend. This assignment of error is without merit and is overruled.

[3] We note plaintiffs do not contend that any of the challenged findings were not supported by competent evidence, nor have they brought forward in the record on appeal any evidence presented before the trial judge. When the evidence is not contained in the record on appeal it will be presumed that there was sufficient evidence to support the findings of fact. 1 Strong, N.C. Index 2d, Appeal and Error, § 42, p. 185.

No error.

Judges MORRIS and HEDRICK concur.

VARIETY THEATRES, INC., A NORTH CAROLINA CORPORATION v. CLEVELAND COUNTY, NORTH CAROLINA; HAYWOOD ALLEN, SHERIFF OF CLEVELAND COUNTY, NORTH CAROLINA, AND ALL HIS DEPUTIES AND BERRY LEE, CHIEF OF POLICE OF SHELBY, NORTH CAROLINA, AND ALL HIS POLICEMEN

No. 7227SC408

(Filed 2 August 1972)

1. **Statutes § 5— drive-in motion picture theaters — screens visible from highways — ordinance authorized by awkwardly worded session law**

Where county commissioners passed an ordinance prohibiting the operation of drive-in motion picture theaters so that the surface of the screen upon which pictures were projected was visible to any person operating a motor vehicle upon nearby streets or roads, and such ordinance was based on an awkwardly worded session law, the trial court did not err in holding that the ordinance was authorized by the session law. G.S. 153-9(55), Chapter 1062, 1971 Session Laws.

2. **Statutes § 5— ambiguous statute — judicial construction — legislative intent**

Resort must be had to judicial construction to determine the legislative intent where a statute is ambiguous, and such intent is to be found from the language of the act, its legislative history and circumstances surrounding its adoption which will throw light upon the evil sought to be remedied.

3. **Constitutional Law § 11— county ordinance regulating drive-in motion picture screens — police power**

A county ordinance prohibiting drive-in motion picture screens from being visible from highways was constitutional as it applied to all drive-in motion picture theaters, it attempted in no way to control the content of what was shown on the screens, and it dealt directly and narrowly with the highway safety hazard involved.

Chief Judge MALLARD dissents.

APPEAL by plaintiff from *Fountain, Judge,* 14 February 1972 Session of CLEVELAND Superior Court.

The Board of Commissioners of Cleveland County passed an ordinance making it unlawful for any person, firm or corporation to operate a drive-in motion picture theater in the vicinity of any public street or highway in Cleveland County and outside of certain municipalities in such a manner that the surface of such theater screen upon which pictures are being projected is visible to any person operating a motor vehicle upon such street or highway. This ordinance was enacted pursuant to Chapter 1062 of the 1971 Session Laws of North Carolina and G.S. 153-9(55).

Plaintiff brought an action seeking a declaratory judgment adjudging the ordinance and session law unconstitutional and applied for a temporary restraining order. At the hearing to determine if a preliminary injunction should issue the court found that both the ordinance and session law were valid exercises of the police power and that the temporary restraining order should be dissolved.

From this judgment plaintiff appealed but defendants were restrained from enforcing the ordinance pending determination of the matter on appeal.

George S. Daly, Jr., for plaintiff appellant.

Horn, West & Horn by C. C. Horn and J. A. West for defendant appellees.

BRITT, Judge.

[1, 2] Appellant contends the ordinance in question is not authorized by the cited session law. We do not agree with this contention. G.S. 153-9(55) concerns the powers of county commissioners in the general exercise of police powers. Pursuant to this statute Senate Bill 888, a local bill, was enacted as Chapter 1062 of the 1971 Session Laws. Admittedly the wording of the session law is somewhat awkward and less than desirable but we hold that it authorizes the ordinance as passed by the Cleveland County Commissioners.

Chapter 1062 of the 1971 Session Laws provides:

> The Board of Commissioners of Cleveland County shall have authority under G.S. 153-9(55) to adopt ordinances regulating any drive-in motion picture theaters which are or shall be established, operated or maintained in the vicinity of any public street or highway in such manner that the surface of such theater screen upon which pictures are being projected is not visible to any person operating a motor vehicle upon such street or highway.

It is settled law that a statute must be construed as written. *State v. Wiggins,* 272 N.C. 147, 158 S.E. 2d 37 (1967), cert. den. 390 U.S. 1028; *In re Duckett,* 271 N.C. 430, 156 S.E. 2d 838 (1967). However, where a statute is ambiguous, resort must be had to judicial construction to ascertain the legislative will.

Young v. Whitehall Co., 229 N.C. 360, 49 S.E. 2d 797 (1948). The courts will control the language to give effect to the legislative intent. *Ikerd v. R.R.*, 209 N.C. 270, 183 S.E. 402 (1936). Where a statute must be construed to carry out the legislative intent, that intent must be found from the language of the act, its legislative history and circumstances surrounding its adoption which will throw light upon the evil sought to be remedied. *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E. 2d 548 (1967); *D & W, Inc. v. Charlotte*, 268 N.C. 577, 151 S.E. 2d 241 (1966). When the session law in the instant case is considered in that light it is obvious that the concluding language, " . . . in such manner that the surface of such theater screen upon which pictures are being projected is not visible to any person operating a motor vehicle upon such street or highway" relates back to the beginning language, "(t)he Board of Commissioners of Cleveland County shall have authority under G.S. 153-9(55) to adopt ordinances regulating any drive-in motion picture theaters . . . . " The concluding language should not be read as referring to the intervening subordinate adjective clause, namely, "which are or shall be established, operated or maintained in the vicinity of any public street or highway . . . " ; such a reference would completely negative the intent of the legislature.

We hold that the session law as above construed fully authorizes the challenged ordinance.

[3] Appellant also contends that the ordinance is unconstitutional on several grounds. We find no basis on any grounds for agreeing with appellant. When the constitutionality of an ordinance is attacked it will not be declared unconstitutional unless clearly so and every reasonable intendment will be made to sustain it. *Cab Co. v. Shaw*, 232 N.C. 138, 59 S.E. 2d 573 (1950). G.S. 153-9(55) delegates to the counties the general police power which would support the ordinance in question. The session law in awkward but reasonably clear language specifically gave the Cleveland County Commissioners authority pursuant to G.S. 153-9(55) to pass such an ordinance. The ordinance was directed specifically at all drive-in motion picture screens in the county and outside of certain municipalities which can be seen from streets and highways. The ordinance in no way directly or indirectly attempted to control the content of what is shown on the screens. It was left entirely to the

theater owners as to how to comply with the law. It dealt directly and narrowly with the highway safety hazard involved. Therefore, appellant's assignments of error as to the constitutionality of the ordinance involved based on unconstitutional censorship, regulation of a preferred freedom and a standardless delegation of authority are not effective on these facts. Assuming, *arguendo,* that the ordinance regulates a preferred freedom it meets the test of *Shapiro v. Thompson,* 394 U.S. 618, 22 L.Ed. 2d 600, 89 S.Ct. 1322 (1969) in being a compelling governmental interest and has accomplished this means without affecting any broader area than necessary for the general well being and safety of the public.

We have carefully considered all of appellant's assignments of error but find them without merit.

The judgment of the superior court is

Affirmed.

Judge CAMPBELL concurs.

Chief Judge MALLARD dissents.

J. MEREDITH JONES AND WIFE, ELVIRA YOUNG CHEATHAM JONES v. GEORGIA-PACIFIC CORPORATION, DEFENDANT, AND FEDERAL LAND BANK OF COLUMBIA, SOUTH CAROLINA, W. O. McGIBONY, TRUSTEE, JOEL CHEATHAM AND J. A. PRITCHETT, TRUSTEE, ROANOKE PRODUCTION CREDIT ASSOCIATION, J. CARLTON CHERRY, TRUSTEE, AND FIRST NATIONAL BANK OF MOBILE, ALABAMA, ADDITIONAL DEFENDANTS

No. 726SC479

(Filed 2 August 1972)

1. Trover § 2; Trespass § 8— damages for timber cut wrongfully — common law and statutory remedies

In an action to recover for cypress timber wrongfully cut from their land, plaintiffs' allegation that they were entitled to double the enhanced value of the timber under G.S. 1-539.1 was properly dismissed because allowing plaintiff to collect double the enhanced value would allow them to proceed under two exclusive remedies, one under the common law theory of an action in trover to recover the value of the goods in their enhanced condition and the other under the statutory remedy provided by G.S. 1-539.1.

2. **Statutes § 5; Trespass § 8— strict construction of statute in derogation of common law or imposing penalty**

It is settled law that statutes in derogation of the common law or statutes imposing a penalty must be strictly construed; hence a strict interpretation of G.S. 1-539.1, which provides for double the value of timber wrongfully cut to be paid the owner by the wrongdoer, requires that the value be doubled before enhancement.

APPEAL by plaintiffs from *Perry Martin, Judge,* 14 February 1972 Mixed Session of BERTIE Superior Court.

In their original complaint plaintiffs alleged that defendant wrongfully cut cypress timber from their land and sought double the value of the timber under G.S. 1-539.1. In an amended complaint plaintiffs repeated their original complaint as Count I and alleged in Count II thereof that defendant's removal of the timber was wilful and intentional and therefore plaintiffs were entitled to recover the timber or the enhanced value of the timber. In paragraph eight of Count II of the amended complaint plaintiffs alleged they were entitled to double the enhanced value under G.S. 1-539.1. Pursuant to G.S. 1A-1, Rule 12, defendant moved to dismiss Count II of the amended complaint in its entirety for failure to state a claim upon which relief can be granted. The trial court entered an order allowing the motion dismissing Count II.

From the order entered, plaintiffs appealed.

Yarborough, Blanchard, Tucker & Denson by James E. Cline for plaintiff appellants.

Pritchett, Cooke & Burch by J. A. Pritchett and White, Hall & Mullen by Gerald F. White and John H. Hall, Jr., for defendant appellee.

BRITT, Judge.

[1] Plaintiffs contend the trial court erred in dismissing Count II of the amended complaint. We hold that Count II except for paragraph eight was properly pleaded and should not have been dismissed.

In McIntosh, North Carolina Practice and Procedure, 2d Ed., § 1134, we find:

> At common law there were different forms of action ex delicto, and the plaintiff might in certain cases have a

> choice as between forms of action. If one entered upon the land of another and cut trees and carried them away, the owner might have several different remedies. He might sue in trespass q.c.f. for injury to the land, in trespass de bonis asportatis for carrying away the trees, in trover for the conversion of the trees, or in replevin for the possession of the trees. The forms of action are abolished, but their substantive law theories of recovery remain, and the plaintiff may recover such relief as the facts alleged will warrant. If the facts stated by the plaintiff would authorize a recovery under any of the old forms of action, he will still be entitled to recover, provided he proves the facts. . . .

When timber is wrongfully cut the owner of the land may recover the difference in value of the land immediately before and immediately after the cutting. This would be the dimunition of value of the land by reason of a trespass. *Jenkins v. Lumber Co.*, 154 N.C. 355, 70 S.E. 633 (1911); *Williams v. Lumber Co.*, 154 N.C. 306, 70 S.E. 631 (1911). The owner may instead choose to recover the value of the timber as timber. *Wall v. Holloman*, 156 N.C. 275, 72 S.E. 369 (1911); *Bennett v. Thompson*, 35 N.C. 146 (1851). See *Bunting v. Henderson*, 220 N.C. 194, 16 S.E. 2d 836 (1941).

The two measures of damages stated above have been enhanced by G.S. 1-539.1 which provides in pertinent part: "Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed."

If the trespasser is an intentional and knowing wrongdoer, the owner of the land may recover the enhanced value of the timber added to it by the labor of the trespasser. *Wall v. Holloman, supra.* 52 Am. Jur. 2d, Logs and Timber, § 129, p. 98 (1970).

Except for paragraph eight, Count II of the amended complaint properly pleaded the enhanced value theory of an intentional wrongdoer. Paragraph eight of Count II attempts to recover double the enhanced value of the timber under G.S.

1-539.1. This is a novel approach but we think an unsound one. While G.S. 1-539.1 provides that the wrongdoer, "shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed," the statute does not indicate when the value should be doubled. To collect double the enhanced value plaintiffs would be proceeding under the common law theory of an action in trover to recover the value of the goods in their enhanced condition as referred to in *Wall v. Holloman, supra,* and at the same time proceeding under the statutory remedy provided by G.S. 1-539.1. We think the two remedies are exclusive and are not to be combined to provide an additional remedy.

[2] It is settled law that statutes in derogation of the common law or statutes imposing a penalty must be strictly construed. *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925 (1955); *Hilgreen v. Cleaners & Tailors, Inc.,* 225 N.C. 656, 36 S.E. 2d 252 (1945); *Simmons v. Wilder,* 6 N.C. App. 179, 169 S.E. 2d 480 (1969). Strict construction of G.S. 1-539.1 requires that everything be excluded from the operation of the statute which does not come within the scope of the language used, taking the words in their natural and ordinary meaning. *Harrison v. Guilford County,* 218 N.C. 718, 12 S.E. 2d 269 (1940). We think that in addition to the common law theory of enhanced value and the statutory remedy of double value being mutually exclusive that a strict interpretation of G.S. 1-539.1 would not permit its application to an enhanced value situation.

For the reasons stated, the order of the superior court dismissing Count II of the amended complaint with the exception of paragraph eight is

Reversed.

Chief Judge MALLARD and Judge CAMPBELL concur.

HOWARD H. BARHAM, EMPLOYEE, PLAINTIFF v. KAYSER-ROTH HOSIERY CO., INC., EMPLOYER; INSURANCE COMPANY OF NORTH AMERICA, CARRIER, DEFENDANTS

No. 7215IC467

(Filed 2 August 1972)

1. **Master and Servant § 91— Industrial Commission — jurisdiction of claim — filing of claim within one year**

The Industrial Commission properly dismissed plaintiff's claim for workmen's compensation for lack of jurisdiction where plaintiff failed to file his claim within two years after the accident in which he sustained injuries, the requirement of timely filing being a condition precedent to the right to compensation and not a statute of limitation. G.S. 97-24(a).

2. **Master and Servant § 85— Industrial Commission — insufficiency of evidence to raise question of estoppel to attack jurisdiction**

The court on appeal did not reach the question of whether under all circumstances a party can or cannot be estopped to attack the jurisdiction of the Industrial Commission because there was insufficient evidence of estoppel to raise the question.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 3 February 1972.

Uncontroverted evidence shows plaintiff was injured on 2 March 1966 in an accident arising out of and in the course of his employment. Plaintiff was employed in a supervisory capacity by defendant Kayser-Roth and was paid his full salary even for the period he was in the hospital and not working. He never received any compensation under the provisions of the North Carolina Workmen's Compensation Act (G.S. 97-1 et seq.) during the time he was injured. The accident was reported by the employer to its insurance carrier, the co-defendant in this case, on 30 March 1966. Plaintiff received medical bills and paid some of the drug bills, "with the understanding that the bills would be paid for through the company . . . " Plaintiff brought the bills to the attention of Mr. Jim Ferrell in the personnel department of Kayser-Roth. "He said well go ahead and pay the bills and bring him the bills and that I would get my money back and all the time telling me with the understanding I had and I think Jim did too that the bills would be taken care of by the insurance company." On 23 March 1967, defendant insurance carrier received notice that the Industrial Commission approved for payment $146.41

of a $165.41 hospital bill, and they paid it later in April. On 1 November 1968, defendant insurance carrier notified the Industrial Commission that they had misplaced plaintiff's file and requested a copy of the Commission's file. Plaintiff did not learn until April of 1971 that he would not be compensated for the medical bills incurred which were still unpaid. Plaintiff finally filed a claim with the Industrial Commission by undated letter which was received by the Commission on 6 April 1971, and there is no evidence that he ever filed a claim at some earlier date.

At a hearing before Commissioner Roney on 9 November 1971, defendants denied liability by reason of G.S. 97-24 and 97-47 and moved to dismiss on the grounds that the Industrial Commission lacked jurisdiction. Based upon his findings of fact and conclusions of law, Commissioner Roney denied plaintiff's claim, and the Full Commission affirmed. Plaintiff excepted and gave notice of appeal to this Court.

Long, Ridge and Long, by George A. Long, for plaintiff appellant.

J. B. Winecoff for defendant appellees.

MORRIS, Judge.

[1] Defendants concede that G.S. 97-47 has no application to the facts of this case so that the only question presented is: Whether the North Carolina Industrial Commission had jurisdiction when plaintiff did not file a claim with the Commission and no claim was filed on his behalf within the time allowed by G.S. 97-24(a)? This question must be answered in the negative. G.S. 97-24(a) provides:

> "The right to compensation under this Article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter."

Plaintiff was injured on 2 March 1966, filed a claim on 6 April 1971, and makes no contention that any claim was filed on his behalf at any earlier date. It is well-settled law in this State, as enunciated most recently in the case of *Montgomery v. Fire Department,* 265 N.C. 553, 144 S.E. 2d 586 (1965), that the

requirement of filing a claim in accord with the provisions of the above statute is a condition precedent to the right to compensation and not a statute of limitation. We cannot, as plaintiff urges, reverse "the narrow and rigid doctrine" under these facts. The voluntary payment of a medical bill by defendant carrier in April of 1967 is not an admission of liability and does not dispense with the necessity of filing a claim with the Industrial Commission within two years of the date of the accident. *Biddix v. Rex Mills,* 237 N.C. 660, 75 S.E. 2d 777 (1953). There is no evidence that the Industrial Commission acquired jurisdiction either by the timely filing of a claim or by the submission of a voluntary settlement agreement to the Commission for approval. *Tabron v. Farms, Inc.,* 269 N.C. 393, 152 S.E. 2d 533 (1967). The Industrial Commission properly dismissed plaintiff's claim for lack of jurisdiction and this assignment of error is overruled.

[2] Plaintiff contends that even though the claim was not timely filed, defendant is estopped to take advantage of his failure to file within the time provided by statute by the actions of its agents and employees. The general rule in this State is stated in *Hart v. Motors,* 244 N.C. 84, 88, 92 S.E. 2d 673 (1956):

> "The North Carolina Industrial Commission has a special or limited jurisdiction created by statute, and confined to its terms. Viewed as a court, it is one of limited jurisdiction, and it is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel. (Citations omitted.)"

However, as in *Hart,* we do not reach the question of whether under all circumstances a party can or cannot be estopped to attack the jurisdiction of the Commission because in this case there is insufficient evidence of estoppel to raise the question.

Further discussion of plaintiff's other assignments is not necessary.

No error.

Judges BROCK and HEDRICK concur.

GEORGE F. LATTIMORE, JR. v. C. WHID POWELL AND GEORGE S. GOODYEAR, INDIVIDUALLY AND C. WHID POWELL AND GEORGE S. GOODYEAR, T/A COLONY COMPANY

No. 7210SC363

(Filed 2 August 1972)

1. **Rules of Civil Procedure § 60— motion to vacate summary judgment — excusable neglect and newly discovered evidence**

Court did not err in denying plaintiff's motion to vacate summary judgment entered against him, the grounds for the motion being that plaintiff's present counsel was unaware of a prior action by plaintiff which constituted excusable neglect and that the existence of the prior action constituted newly discovered evidence.

2. **Limitation of Actions § 12— tolling of statute of limitations — issuance of summons — extension of time to file complaint**

Issuance of summons and application for extension of time to file complaint did not toll the running of the three-year statute of limitations against plaintiff.

APPEAL from Brewer, Judge, 13 December 1971 Session, Superior Court, WAKE County.

On 5 June 1969, plaintiff filed complaint and summons issued in this action by which he seeks to recover $102,000 compensatory damages and punitive damages to be assessed. He alleged that defendants agreed to pay him a commission of 15% of the cost of construction of certain apartment buildings in return for his supervision of the construction. He further alleged that the agreement was made in July or August 1963, and that construction which he agreed to supervise was completed in June 1965. Plaintiff made demand on defendants for his compensation in that month and thereafter, but was advised that the apartments would be refinanced and when this was accomplished plaintiff would be paid. By answer, defendants denied the alleged agreement. By first further answer and defense they averred that Cresmont Builders was employed to construct the apartments and had been fully paid; that if plaintiff was employed on this job it was by Cresmont. Release of Cresmont Builders, Inc., was attached to the answer. By second further answer and defense defendants set up the three-year statute of limitations as a bar to plaintiff's recovery.

Defendants then filed written motion for summary judgment under Rule 56, North Carolina Rules of Civil Procedure.

The motion was based upon the pleadings, affidavit of defendant Goodyear, and affidavit of defendant Powell. The affidavits were to the effect that affiants were partners, trading as Colony Company; that neither had entered into any written agreement with plaintiff regarding the subject of this action; that neither had ever signed any writing setting forth any acknowledgment or promise of any new or continuing contract; that all services of plaintiff in the construction of the apartments were discontinued on or before October 1965. Upon motion of plaintiff's counsel, order was entered allowing counsel to withdraw. The court, on 17 March 1971, entered judgment allowing defendant's motion for summary judgment. On 24 November 1971, counsel for plaintiff moved that the court enter an order vacating the judgment, the grounds for the motion being newly discovered evidence and excusable neglect.

When the motion came on for hearing, plaintiff introduced into evidence the summons, application for extension to file complaint, order extending time to 6 June 1968, and judgment of voluntary nonsuit entered 6 June 1968 in a prior action.

From the order denying his motion, plaintiff appealed.

Carl E. Gaddy, Jr., for plaintiff appellant.

Newsom, Graham, Strayhorn, Hedrick and Murray, by Josiah S. Murray III, for defendant appellees.

MORRIS, Judge.

Although plaintiff's motion to vacate the summary judgment did not state the rule number under which he was proceeding, as required by Rule 6, General Rules of Practice for the Superior and District Courts, adopted by the Supreme Court pursuant to G.S. 7A-34, effective 1 July 1970, we assume he purported to proceed under G.S. 1A-1, Rule 60.

[1] Plaintiff argues that the judgment should be set aside because his present counsel was not made aware of the prior action until after summary judgment was rendered and this is sufficient to establish excusable neglect. Further he contends that the existence of the prior action constitutes newly discovered evidence. It is inconceivable that plaintiff was unaware of the prior action since it was instituted in his behalf and by counsel retained by him. Plaintiff's failure to apprise his

counsel of the prior action is not the attention to his litigation required by our prior decisions. *Meir v. Walton,* 2 N.C. App. 578, 163 S.E. 2d 403 (1968), cert. denied 274 N.C. 518 (1968); *Hodge v. First Atlantic Corp.,* 6 N.C. App. 353, 169 S.E. 2d 917 (1969), cert. denied 275 N.C. 681 (1969).

Nor is the existence of the prior action "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." G.S. 1A-1, Rule 60(b)(2). To say plaintiff was unaware of an action instituted by him would be ludicrous.

[2] However, even if it could be said that error was committed in either of the above two respects, the issuance of summons without filing a complaint would not toll the three-year statute of limitations. Assuming the continued applicability of the provisions of former G.S. 1-25, plaintiff's failure to file a complaint would deprive him of that protection. *Little v. Bost,* 208 N.C. 762, 182 S.E. 448 (1935). There the Court held that application for extension of time within which to file complaint is not admissible to show identity of the causes of action. ". . . [T]he complaint itself is the only evidence of the cause of action alleged, or intended to be alleged." 208 N.C. at p. 763.

Plaintiff's contention that the running of the statute of limitations was tolled by the promise of defendant Goodyear in 1965 to pay him when the apartments were refinanced is also without merit. Plaintiff concedes that there is neither allegation nor evidence of any writing required by G.S. 1-26 to repel the bar of the statute of limitations in an action on a contract. Plaintiff further concedes that there is neither allegation nor evidence that defendants requested plaintiff to delay the institution of the action upon their promise to pay the alleged commission.

Upon the record before us we find no error in the judgment of the trial tribunal.

Affirmed.

Judges BROCK and HEDRICK concur.

MACY ALMOND LONG, JR. v. LINDA KAY LONG

No. 7213DC328

(Filed 2 August 1972)

1. **Rules of Civil Procedure § 56— summary judgment — negligence case — no genuine issue of material fact**

Though summary judgment is an extreme remedy which should be used only where no genuine issue of material fact is presented and negligence cases generally are not proper for granting of summary judgment, the motion may be granted where the moving party shows he is entitled to a judgment as a matter of law.

2. **Negligence §§ 8, 9— proximate cause of injury — foreseeability of injury**

Negligence must be a proximate cause of injury or damage in order to constitute the basis for a cause of action, and foreseeability of injury is an essential element of proximate cause.

3. **Automobiles § 68— summary judgment — allegedly defective automobile — no genuine issue of material fact**

In an action by husband against his wife to recover damages for personal injuries sustained while he was driving her car and it caught fire, defendant wife moved for summary judgment and sufficiently met her burden of proving there was no genuine issue as to any material fact where she introduced depositions of her husband and herself showing that she did not know where the fire came from that injured plaintiff, nor could plaintiff determine where the fire came from.

APPEAL by plaintiff from *Clark, Judge,* 2 December 1971 Session of District Court, COLUMBUS County.

Plaintiff instituted this action against his wife under G.S. 52-5 to recover damages for personal injuries sustained when he was driving her car, and it caught on fire. He alleged that "for a day or two prior to the time herein complained of, June 9, 1970, the defendant while driving her automobile had noticed that it skipped and sputtered from time to time and when said automobile performed in that way she would smell smoke in the passenger compartment; that the defendant knew her automobile was defective and needed repairing." Plaintiff alleged his spouse was negligent in that she "knew of the defective condition of her automobile which caused it to sputter and skip and smoke"; she neglected to use reasonable care to have her automobile repaired and in a safe condition; and she caused the plaintiff to drive her car without warning him about the

unsafe condition when she knew he was likely to be injured and burned by reason of the dangerous defective condition.

Defendant wife answered denying all the material allegations of the complaint, and pleaded plaintiff's contributory negligence as a bar to any recovery.

On 12 November 1971, defendant moved for summary judgment pursuant to G.S. 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure, and hearing was held on 29 November 1971. On 1 December 1971 plaintiff also filed a motion, dated 29 November 1971, for summary judgment on the issue of liability alone. In support of her motion, defendant filed her deposition and that of her husband. Plaintiff filed no counter affidavits or depositions nor any other evidence, but chose to rely on his complaint. From the entry of judgment on 2 December 1971 allowing defendant's motion for summary judgment, denying plaintiff's motion for summary judgment and dismissing the action, plaintiff appealed.

R. C. Soles, Jr., for plaintiff appellant.

Powell and Powell, by Frank M. Powell, for defendant appellee.

MORRIS, Judge.

[1] We are aware that summary judgment is an extreme remedy which should only be used where no genuine issue of material fact is presented, *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); and that it is generally conceded summary judgment will not usually be feasible in negligence cases where the standard of the prudent man must be applied, *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970), and *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147 (1971), cert. denied 279 N.C. 395 (1971). The court's sole function in ruling on a motion for summary judgment is to determine whether their exists any genuine issue of material fact to be tried, not to decide issues of fact. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). Because the burden is on the moving party to establish the lack of a triable issue of fact, the motion may only be granted where he shows he is entitled to a judgment as a matter of law. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). Applying the above-mentioned principles to the facts of the case at bar, we find

no error in granting defendant's motion for summary judgment since it appears that even if the facts as claimed by plaintiff are proved, there can be no recovery.

[2] Negligence must be a proximate cause of injury or damage in order to constitute the basis for a cause of action, and foreseeability of injury is an essential element of proximate cause. 6 Strong, N.C. Index 2d, Negligence, §§ 8, 9, pp. 17, 22; *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

[3] In the case before us, plaintiff testified by deposition that he had enough mechanical knowledge to install a transmission in an automobile but that he did not know what part of the motor the fire was coming from and neither did the defendant. Defendant testified that she had no automobile mechanical training, could not explain the process of internal combustion, did not know how gasoline gets from the tank into the carburetor and the ignition, did not know what a piston was or how a carburetor operates, and could not even change a tire. Defendant in her deposition related how she had trouble starting the automobile about a week before it burned but did not tell plaintiff about it. She could get it "to go" by patting on the gas pedal, and it would "spit and sputter" but didn't catch on fire. "I might have smelled it (smoke) or when I pumped the gas I could smell some gasoline but I didn't pay it too much attention." The trouble defendant experienced and which she described as "spit and sputter" was a noise coming from the motor, and she never saw any fire. As for smoke, "I might have seen some coming up under the hood but it was a little bit, nothing, you know, not thought it was supposed to be anything." Defendant corroborated her husband's assessment that she did not know where the fire came from which caused the injuries ". . . unless it came from under the dash where he said." Under these facts, if presented at trial, defendant would be entitled to a directed verdict in her favor. Thus defendant, as moving party, has sufficiently met her burden of proving there was no genuine issue as to any material fact, and the unsupported allegations in the complaint are not sufficient to overcome the motion for summary judgment.

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. MARVIN LEON STEWART

No. 7221SC556

(Filed 2 August 1972)

1. **Criminal Law § 113— evidence of alibi — failure to charge jury on alibi — prejudicial error**

Since defendant presented evidence tending to show that he was elsewhere at all times when the alleged larceny took place, the trial judge erred in not instructing the jury on the doctrine of alibi, as such instruction is required without the necessity of defendant tendering a special prayer therefor when evidence of alibi is offered.

2. **Larceny § 8— possession of recently stolen property — prejudicial error in charge**

The trial judge's instruction to the jury on the doctrine of "recent possession of stolen property" rather than "possession of recently stolen property" was error where such charge not only was confusing but also was open to interpretation that the burden was on defendant to rebut the presumption of his guilt.

DEFENDANT appealed from *Gambill, Judge,* 3 January 1972 Session of Superior Court held in FORSYTH County.

The defendant was charged in a bill of indictment in proper form with felonious larceny on the 5th day of August 1971 of a 1967 dark blue Chevelle Super Sport automobile of the value of $1,500 belonging to Clifton Lee Burke. There were two other counts in the bill of indictment, but since they were dismissed, they are no longer pertinent to this case. To the charge the defendant entered a plea of not guilty. The jury returned a verdict of guilty; and from a judgment imposing a prison sentence not less than two nor more than four years in the State Department of Corrections, the defendant appealed.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.

White and Crumpler by G. Edgar Parker for defendant appellant.

CAMPBELL, Judge.

The evidence on behalf of the State tended to show that Clifton Lee Burke owned a 1967 blue Chevelle Super Sport automobile on 5 August 1971. On that day Burke drove his automobile to his place of employment with Piedmont Airlines at

the Winston-Salem Airport. He went to work at approximately 6:50 a.m. and when he left work about 4:00 p.m. he found his automobile missing from the parking lot. On 1 September 1971 the defendant was found in possession of the automobile and claimed ownership thereof. There was conflicting evidence as to the identity of the automobile but suffice it to say that the evidence was ample to go to the jury for a decision.

[1] Among other things, the defendant claimed that on 5 August 1971 when the automobile was taken from the parking lot at the airport he was elsewhere. The defendant accounted for his whereabouts, and his evidence tended to show that he was elsewhere at all times when Burke claimed that his automobile had been taken. The defendant asserts that his evidence was sufficient to require an instruction by the trial court on the doctrine of an alibi. The trial judge did not give any instructions to the jury pertaining to the defendant's defense of an alibi. This failure on the part of the trial judge to so instruct the jury has been properly assigned as error.

When evidence on behalf of the defendant in a criminal case presents the defense of an alibi, it is incumbent upon the trial judge to instruct the jury pertaining to the defense without the necessity of the defendant tendering a special prayer to that effect. The trial judge in the instant case did not do so, and this assignment of error is sustained.

[2] The trial judge instructed the jury with regard to what the trial judge referred to as the doctrine of recent possession of stolen property. This is a misnomer, and frequently leads to error. The correct expression is, "possession of recently stolen property." *State v. Jackson,* 274 N.C. 594, 164 S.E. 2d 369 (1968). The charge in the instant case was as follows:

> "Now, ladies and gentlemen of the jury, the State, in this case, is relying on what, in law, is known as recent possession. Under the law, where it is established, that is, where you find beyond a reasonable doubt that somebody stole the automobile as charged in the bill of indictment that a larceny of an automobile as charged in the bill of indictment has been established beyond a reasonable doubt, that there was a larceny of an automobile by someone from Burke on this occasion; that is, on August fifth, 1971, recent possession of the stolen property is very generally considered a relevant circumstance tending to estab-

lish guilt. This presumption is a circumstance for your consideration bearing upon the question of the defendant's guilt, the rule being that such presumption is stronger or weaker as the possession is more or less recent or remote, and the weight you will give such presumption is a matter entirely for you.

And, when the possession is so recent as to make it extremely probable that the holder is the thief, that he probably could not have had possession at that time unless he had stolen it himself, there is a presumption justifying, and in the absence of some explanation, perhaps requiring a conviction.

But, while the recent possession of stolen goods may be of such character as to raise the presumption of guilt on the part of the holder. It is never a presumption of law in the strict sense of the term, shutting out all of the evidence to the contrary, but it is always a presumption of fact open to explanation, and when there are facts in evidence which would afford a reasonable explanation of such possession consistent with the defendant's innocence, and which, if accepted, do explain such satisfactorily, the correct rule does not require the defendant to satisfy the jury that his evidence and explanation is true. But, in such case if the testimony offered in explanation raises a reasonable doubt of guilt, the defendant is entitled to an acquittal."

A similar charge was held to be error in the case of *State v. Hayes*, 273 N.C. 712, 161 S.E. 2d 185 (1968). This case points out that such a charge "is not only confusing but is open to interpretation that the burden was on defendant to rebut the presumption of his guilt."

For errors in the charge defendant is entitled to a

New trial.

Chief Judge MALLARD and Judge BRITT concur.

GERALD D. JAMES v. WAYNE COUNTY BOARD OF EDUCATION

No. 7210SC382

(Filed 2 August 1972)

1. **Administrative Law § 5; Schools § 13— firing of school superintendent — judicial review**

The decision of a county board of education terminating the employment of the superintendent of schools and declaring the office vacant is subject to review under the procedure provided by Article 33 of G.S. Chapter 143 for the review of the decisions of certain administrative agencies.

2. **Administrative Law § 5; Schools § 13— administrative decision — judicial review — summons**

No summons was required in order for petitioner to obtain judicial review of the decision of a county board of education terminating his employment as the superintendent of schools. G.S. 143-309.

3. **Administrative Law § 5; Schools § 13— firing of school superintendent — judicial review — failure to serve petition by registered mail — personal service**

Failure to serve the petition by registered mail on the agency which rendered the decision as is required by G.S. 143-310 did not deprive the superior court of jurisdiction to entertain a petition to review a decision of a county board of education terminating petitioner's employment as superintendent of schools, where the sheriff served a copy of the petition on the chairman and each member of the county board on the day following the decision, petitioner's attorney personally served a copy of the petition on the board's attorney on that same date, and the board filed an answer to the petition in which it responded to each paragraph thereof.

APPEAL by petitioner from *Godwin, Judge,* 31 January 1972 Session of Superior Court held in WAKE County.

On 19 January 1972, after hearing, respondent, Wayne County Board of Education voted to remove petitioner as Wayne County Superintendent of Schools and to declare the office vacant.

On 20 January 1972, petitioner filed a petition in the Superior Court of Wake County seeking judicial review as provided by Article 33 of G.S. Chapter 143. Pursuant to G.S. 143-312 of the article, petitioner applied for a stay order pending judicial review. On 20 January 1972, Judge Copeland signed a temporary stay order and set the cause for hearing on 31 January 1972.

On 31 January 1972, Judge Godwin dissolved the stay order and ordered that the "action" be dismissed for lack of jurisdiction of the person of the respondent and of the subject matter.

Freeman & Edwards by George K. Freeman, Jr., and Young, Moore & Henderson by Charles H. Young, J. Clark Brewer and B. T. Henderson II for respondent appellee.

Sanford, Cannon, Adams & McCullough by J. Allen Adams for petitioner appellant.

VAUGHN, Judge.

[1] Respondent argues, as the trial judge held, that petitioner is not entitled to judicial review under Article 33 of G.S. 143. We concede that precisely which administrative decisions are subject to review under the article is somewhat vague. The special study commission which recommended the legislation to the Governor and the 1953 Session of the General Assembly stated:

> "The act provides general directions as to what kind of agency decisions are subject to the act; but the duty of determining in a specific case whether a decision is reviewable under this act is left with the bar and bench." Report of the Special Commission Created By The 1951 General Assembly to Study Practices and Procedures Before State Administrative Agencies. (1952) Page 22.

We hold, however, that the decision of the Wayne County Board of Education terminating the employment of the Superintendent of Schools and declaring the office vacant is subject to review under Article 33. Although the statute providing for the removal of school superintendents, G.S. 115-42, contains a proviso that "such superintendent shall have the right to try his title to office in the courts of the State," the statute is silent as to the procedure and the scope of review contemplated. We hold that the procedure and scope of review shall be as provided by Article 33 of G.S. Chapter 143.

Appellee argues and the trial judge held that the court had no jurisdiction over the "person of the respondent."

[2] Although not made a part of the record on appeal, petitioner upon filing his petition for review, apparently caused a "summons" to be issued and served on each of the members of the Board. The court held that the summons was fatally de-

fective and that the court, therefore, had no jurisdiction over the person of respondent. We need not discuss the validity of the "summons" for no summons was needed. Petitioner was not instituting any action or proceeding, he was attempting to seek judicial review of a proceeding which respondent had instituted against him. The only question, therefore, is whether petitioner sought review in the manner required by G.S. 143-309. That statute requires that the petition be filed in the Superior Court of Wake County not later than thirty (30) days after a written copy of the Board's decision is served upon him. Although there is nothing in the record to indicate when, if ever, a written copy of the Board's decision was served on petitioner, petitioner's petition for review was filed in the Superior Court of Wake County on the day following the Board's decision.

[3] The only question remaining is, therefore, whether the petition for review must be dismissed for failure to comply with G.S. 143-310. That section provides that "[w]ithin ten days after petition is filed with the court, the person seeking the review shall serve copies of the petition by registered mail, return receipt requested, upon the agency which rendered the decision. . . ." The record before us discloses that the Sheriff of Wayne County served a copy of the petition for review and the restraining order on the Chairman and each member of the Board at 9:12 p.m. on 20 January 1972. An affidavit by one of the attorneys for petitioner, which is part of the record on appeal, discloses that the Board was in session at approximately 9:00 p.m. on that date and that he personally served a copy of the petition on the attorney for the Board. The respondent filed an answer to the petition responding to each and every paragraph thereof. Our Supreme Court has held that the primary purpose of the statute is to confer the right of review and that the statute should be liberally construed to preserve and effectuate that right. *In re Appeal of Harris,* 273 N.C. 20, 159 S.E. 2d 539. We hold that, under the circumstances presented, the court had jurisdiction to entertain petitioner's petition for judicial review.

The judgment is reversed and the cause is remanded to the Superior Court of Wake County for judicial review under the provisions of G.S. Chapter 143, Article 33.

Reversed and remanded.

Judges MORRIS and GRAHAM concur.

JANE RICH; AND VICKY KIM RICH, BY HER GUARDIAN AD LITEM, GEORGE F. TAYLOR v. CITY OF GOLDSBORO

No. 728SC493

(Filed 2 August 1972)

Municipal Corporations § 18— injury in public park — municipal immunity — no relief from liability as a matter of law

The trial court erred in entering summary judgment dismissing plaintiffs' action against defendant city for injuries arising out of the negligent maintenance of playground equipment in one of the city's public parks, because the doctrine of municipal immunity from tort claims, though not completely abolished, is so restricted in its application that the city's operation of a park in the exercise of governmental function does not, as a matter of law, relieve the city from a duty to exercise reasonable care to provide reasonably safe facilities.

APPEAL by plaintiffs from *Cowper, Judge,* 9 February 1972 Session of Superior Court held in WAYNE County.

Action to recover damages allegedly resulting from the negligent maintenance of a defective see-saw in a city park operated by defendant. Defendant's motion for summary judgment was allowed.

Sasser, Duke and Brown by John E. Duke, J. Thomas Brown, Jr., and Herbert B. Hulse for plaintiff appellant.

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

VAUGHN, Judge.

The sole question presented is whether suit lies against the City of Goldsboro for injuries arising out of the negligent maintenance of playground equipment in one of the city's public parks. We hold that the suit may be maintained and that it was error to enter summary judgment dismissing plaintiffs' action. *White v. Charlotte,* 211 N.C. 186, 189 S.E. 492; *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913; *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482.

In *White* the court said "Conceding that Independence Park and its facilities, including the swing from which plaintiff's intestate fell or was thrown . . . are owned, controlled, and operated by the defendants in the exercise of a governmental function, and not for a corporate purpose . . . it does

not follow as a matter of law that defendants owed no duty to plaintiff's intestate and others who had the right to use said facilities for purposes of play or recreation, to exercise reasonable care to provide facilities which were reasonably safe, or that defendants would not be liable to plaintiff for a breach of such duty, if such breach was the proximate cause of injuries which resulted in death of his intestate. . . ."

In the *Glenn* opinions recovery was allowed against the city for damages arising out of the negligent maintenance of one of its public parks. There, as in the case at bar, the city received a small fraction of the total cost of operating its public park system by charging fees for the use of some but not all of its facilities. The opinion seems to hold that the collection of fees results in a pecuniary advantage to the city and thereby removes the shield of governmental immunity. Justice Denny (later Chief Justice), in a concurring opinion, rejected the notion that the incidental charges made for the use of the park facilities were determinative on the question of governmental immunity and was of the opinion that cities should be held liable for negligence in the operation of public parks, just as they had previously been held liable for negligence in the construction of a golf course, a water and light plant, and public streets.

For an interesting review of the development and general demise of the concept of municipal immunity from tort claims, see *Holytz v. City of Milwaukee,* 17 Wisconsin 2d 26, 115 N.W. 2d 618 (1962). In that opinion, the court, speaking through Justice Gordon says:

> "There are probably few tenets of American jurisprudence which have been so unanimously berated as the governmental immunity doctrine. This court and the highest courts of numerous other states have been unusually articulate in castigating the existing rule; text writers and law reviews have joined the chorus of denunciators."

The court then sets out examples of the condemnation of the doctrine by numerous courts and writers. We generally subscribe to the views so expressed. In a concurring opinion, Justice Currie advances the interesting view that legislative action defeating a proposed change of a court-made rule is not a per se expression of legislative acquiescence in the rule. To the contrary, suggests Justice Currie, it may be that the

legislators voted as they did because, inasmuch as the rule sought to be abrogated had been originally created by the court, they deferred to the supposed wisdom of the court, or else determined that the court should correct its own mistakes.

Though declining to abolish the doctrine, our Supreme Court has conceded that "[i]t may well be that the logic of the doctrine of sovereign immunity is unsound. . ." *Steelman v. City of New Bern,* 279 N.C. 589, 184 S.E. 2d 239.

With respect to municipal corporations, our court has specifically recognized merit in the modern tendency to restrict rather than to extend the application of governmental immunity:

> "We again decline to abrogate the firmly embedded rule of governmental immunity. However, we recognize merit in the modern tendency to restrict rather than to extend the application of governmental immunity. This trend is based, *inter alia,* on the large expansion of municipal activities, the availability of liability insurance, and the plain injustice of denying relief to an individual injured by the wrongdoing of a municipality. A corollary to the tendency of modern authorities to restrict rather than to extend the application of governmental immunity is the rule that in cases of doubtful liability application of the rule should be resolved against the municipality." *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897.

In *Koontz,* the City of Winston-Salem was not allowed to avail itself of governmental immunity as a defense in an action alleging negligence in the maintenance of a land fill for garbage disposal.

In keeping with what we believe to be the meaning of these and other decisions of the North Carolina Supreme Court, the judgment from which plaintiff appealed is reversed.

Reversed.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. NATHANIEL RAY JONES

No. 7214SC547

(Filed 2 August 1972)

1. **Homicide § 21— involuntary manslaughter — sufficiency of evidence to withstand motion for nonsuit**

Defendant's motion to dismiss a charge of involuntary manslaughter against him was properly denied where the evidence, taken in the light most favorable to the State, tended to show that defendant and deceased engaged in a bantering conversation, deceased begged to see defendant's gun, defendant pulled his gun out of his pocket, the gun fired, killing deceased, and in order to fire, the gun's trigger had to be pulled or the hammer had to be lowered and released.

2. **Homicide § 23— jury instructions — application of law to facts**

The judge's charge that the jury might find defendant guilty of involuntary manslaughter if they found from the evidence beyond a reasonable doubt that defendant intentionally pointed the gun at deceased or drew a loaded pistol from his pocket under such circumstances as would constitute a criminally negligent manner was a sufficient explanation and application of the law to the facts, as there was some evidence to support an instruction with respect to an intentional pointing. G.S. 1-180.

APPEAL by defendant from *Cooper, Judge,* 14 February 1972 Session of DURHAM Superior Court.

Defendant was charged in a bill of indictment with first-degree murder. After a plea of not guilty and the presentation of the State's evidence, the court allowed defendant's motions to dismiss as to first-degree murder, second-degree murder and voluntary manslaughter but overruled motion to dismiss as to involuntary manslaughter. The jury returned a verdict of guilty of involuntary manslaughter and defendant was sentenced to four years imprisonment with a recommendation by the court for work release.

From the judgment entered defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Christine Y. Denson for the State.

Newsom, Graham, Strayhorn, Hedrick & Murray by E. C. Bryson, Jr., for defendant appellant.

BRITT, Judge.

Defendant contends the court erred in not granting his timely made motions to dismiss as of nonsuit the charge of

involuntary manslaughter. We do not agree with this contention.

[1] We think the evidence viewed in the light most favorable to the State was sufficient to withstand defendant's motions as to involuntary manslaughter. The State's evidence tended to show: The deceased died as the result of a pistol bullet which entered his brain from his forehead. Defendant, deceased and several others were congregated at a residence where deceased roomed. Deceased had been drinking and had a blood alcohol level of .26. While defendant and several companions were sitting at a table in the kitchen and deceased was standing in a doorway near defendant, defendant and deceased engaged in a bantering conversation wherein defendant indicated that he had a gun and deceased indicated that he wanted to buy a gun. Deceased begged defendant to let him see the gun. After defendant pulled the gun out of his pocket it fired and deceased fell on the floor with a bullet hole in his head. The gun involved was a .32 revolver that holds six shots and when found some 50 to 75 feet from the house was loaded and one shot had been fired. In order to fire the gun the trigger had to be pulled or the hammer lowered and released.

Based upon the foregoing evidence defendant's motions for nonsuit were properly overruled. The facts presented a question for the jury as to whether defendant's acts with the loaded gun were unlawful. Any careless and reckless use of a loaded gun which jeopardizes the safety of another is unlawful and if death results therefrom, it is an unlawful homicide. *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963); *State v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564 (1951); *State v. Turnage,* 138 N.C. 566, 49 S.E. 913 (1905).

[2] Defendant next contends that the court erred in failing to explain and apply the law to the facts in the jury charge as required by G.S. 1-180. The charge permitted the jury to find defendant guilty of involuntary manslaughter if the jury found from the evidence beyond a reasonable doubt that defendant intentionally pointed the gun at the deceased or drew a loaded pistol from his pocket under such circumstances as would constitute a criminally negligent manner. Defendant contends that the evidence does not support the instruction with respect to an intentional pointing. "If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such

gun or pistol be loaded or not loaded, he shall be guilty of an assault . . . ", G.S. 14-34, and if the gun accidentally discharges inflicting a fatal wound the person would be guilty of manslaughter. *State v. Currie,* 7 N.C. App. 439, 173 S.E. 2d 49 (1970). In this instance the showing that defendant was seated at a table, deceased was standing near him, defendant pulled the gun from his pocket after which it fired with the bullet striking deceased in the forehead, would certainly be some evidence that defendant intentionally pointed the gun at the deceased even though it may have fired accidentally.

As to the other basis for returning a verdict of guilty there were sufficient facts presented to support the charge concerning whether defendant handled the gun in a criminally negligent manner. In *State v. Griffin,* 273 N.C. 333, 159 S.E. 2d 889 (1968) the court stated: "When the State undertakes a prosecution for unlawful homicide, it assumes the burden of producing evidence sufficient to prove that the deceased died as the result of a criminal act committed by the defendant. (Citations.) Any unjustifiable and reckless or wanton use of a firearm which jeopardizes the safety of another constitutes a criminal act, (Citation.) and, if an unintentional killing results, it is an unlawful homicide. (Citations.)"

We conclude that the court properly applied the law to the evidence as required by G.S. 1-180.

For the reasons stated, we find

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. JOHN STEVEN BAULER AND DANIEL ROBERT EVERETT

No. 722SC528

(Filed 2 August 1972)

Narcotics § 4— insufficiency of evidence to withstand motion for directed verdict

Defendants' motion for directed verdict in a prosecution for possession of marijuana should have been granted where the evidence, taken in the light most favorable to the State, tended to show that a deputy sheriff watched defendants run back and forth between rooms when a policeman knocked on the door of their apartment and the deputy saw a plastic bag, which contained heroin, come "floating down" from the apartment window, though he did not see either of the defendants throw or have in his possession the plastic bag.

APPEAL by defendants from *Cohoon, Judge,* 10 January 1972 Session of Superior Court held in WASHINGTON County.

Defendants were tried under the North Carolina Narcotic Drug Act, Chapter 90, Article 5 of the General Statutes, which was repealed effective 1 January 1972 but which was in full force and effect on the date of the alleged violation thereof. An addendum to the record reveals that each defendant was first tried on a warrant in the district court, and from the verdict and judgment entered, each defendant appealed to the superior court where the trial was *de novo.*

In superior court, they were tried on separate bills of indictment, each reading as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That (name) late of the County of Washington, on the 21st day of October, 1971, with force and arms at and in the County aforesaid did unlawfully and willfully possess and have under his control a narcotic drug in violation of the Uniform Narcotic Drug Act; the drug in question consisted of .55 grams of marijuana, against the form of the Statute in such case made and provided and against the peace and dignity of the State."

Without objection, the cases were consolidated for trial. Both defendants pleaded not guilty in superior court but were found guilty as charged by the jury. From judgments of imprisonment, both defendants appealed to the Court of Appeals, assigning error.

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

Norman, Rodman, Hutchins and Romanet by R. W. Hutchins for defendant appellants.

MALLARD, Chief Judge.

Defendants, who are represented by the same attorney, were sentenced on 12 January 1972. The record on appeal was not filed in this court until 18 May 1972. This was after the period of ninety days had elapsed from the date of the judgment appealed from. Rule 5 of the Rules of Practice in the Court of Appeals requires that the appeal be docketed "within ninety days after the date of the judgment . . . appealed from . . . provided, the trial tribunal may, for good cause, extend the time not exceeding sixty days, for docketing the record on appeal." No extension of time for docketing appears in this record; therefore, inasmuch as the record on appeal was not docketed within the time prescribed by the rules, the appeal should be dismissed. However, we do not dismiss the appeal but consider it on its merits.

The evidence for the State tended to show that on 21 October 1971 about 8:00 p.m., F. M. Woodley of the Plymouth Police Department and Robert Sawyer, a deputy sheriff in Washington County, went to an upstairs garage apartment located at 704½ Washington Street in Plymouth. The officers had gone to this address to deliver an urgent message to a boy named Bobby. While there, the police officer went to the door and knocked while the deputy sheriff remained in the car. The deputy sheriff could see the upstairs apartment which was "lit up" and contained two windows, and he saw four men in the apartment. When the police officer knocked on the door, these men jumped up and began moving around and one came downstairs. The deputy sheriff saw the remaining three men run into the other room, come back into the room with the double windows and immediately thereafter run back; and he identified the men as defendants Everett, Biggs and Bauler. He then saw a plastic bag come "floating down" from the window. No one saw either of these defendants throw or have in his possession the plastic bag which contained marijuana.

At the close of all the evidence, the defendants moved for a directed verdict of not guilty which was denied.

"Upon a motion for judgment as of nonsuit or for a directed verdict at the close of the State's evidence, and renewed by the defendant after the introduction of his own evidence, all the evidence upon the whole record tending to sustain a conviction will be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. (Citations omitted.)" *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169 (1965). See also, *State v. Davis,* 246 N.C. 73, 97 S.E. 2d 444 (1957) and *State v. Gay,* 224 N.C. 141, 29 S.E. 2d 458 (1944).

After careful consideration of all the evidence in this case, we conclude that the evidence against these two defendants (the case of the defendant Biggs is not before us) is insufficient to sustain the verdict rendered in the superior court. Therefore, the judgment entered in the superior court is reversed.

Reversed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. PERRY ELLIS ROBINSON

No. 727SC450

(Filed 2 August 1972)

Homicide § 21— sufficiency of evidence to support verdict of guilty of involuntary manslaughter

Evidence in a second degree murder prosecution was sufficient to sustain the verdict of guilty of involuntary manslaughter where it tended to show that defendant, who had been drinking, drove his car forward over his outstretched wife, though he had been warned that she was lying in front of the car.

APPEAL by defendant from *Martin (Harry C.), Judge,* 21 February 1972 Session of Superior Court held in EDGECOMBE County.

Defendant was tried for murder in the second degree under a bill of indictment charging murder in the first degree. The jury returned a verdict of guilty of involuntary manslaughter and from judgment imposing a sentence of imprisonment defendant appeals.

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

Taylor, Brinson & Aycock by William W. Aycock, Jr., for defendant appellant.

GRAHAM, Judge.

The only question raised in defendant's brief is: "Whether the evidence is sufficient to sustain the verdict of the jury and the judgment and commitment by the court."

The evidence tends to show that on 18 November 1971, defendant and the deceased, his wife, drove in defendant's car to the home of E. C. Powell in Rocky Mount. Both had been drinking wine. Defendant parked the car on the left-hand side of the street and went into the house where he talked with Mr. Powell for a few minutes. While he was in the house deceased got out of the car. Witnesses observed her stumble and fall in front of the car. Defendant returned from the house and got into the car. A witness testified that he said to defendant: " 'Sir, there's a woman lying in front of your car.' He just stared at me. He looked dazed. I said, 'Did you know it?' He said, 'Yeah.' In a second he asked me did I get her. I said 'No, sir, I did not.' I said, 'Just wait, I'm going in here and get some help.' Up to this point he had made no attempt to get out and see about her or anything, and I couldn't figure out what was going on.

When I said, 'Just wait,' he didn't say anything until I had taken a few steps towards the house. Then he raised his voice and asked me not to call the law. He said, 'Don't call the law.' "

Defendant started the car and drove it forward over his outstretched wife. He testified that he remembered nothing from the time he left Mr. Powell until he stopped the car. He stated: "Somehow I stopped the car. I recall what I did after I stopped the car. I got out and Mr. Powell was standing there with a lady. He said, 'There's a woman under that car.' I got down and looked. I hadn't even missed my wife because I didn't remember anything about it. When I got down I talked to her."

Dr. D. E. Scarborough, whom the parties stipulated to be an expert pathologist and medical doctor, testified that he

performed an autopsy on the deceased's body on 19 November 1971. Laboratory tests reveal the presence of a near lethal level of alcohol in her blood. However, Dr. Scarborough expressed the opinion that her death was caused by emboli or fatty tissue entering the lungs as a result of trauma.

Involuntary manslaughter "is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty." 4 Strong, N.C. Index 2d, Homicide, § 6, p. 198; *State v. Lawson,* 6 N.C. App. 1, 169 S.E. 2d 265. The evidence here was plenary to support the jury's verdict of guilty of the offense of involuntary manslaughter.

Defendant's counsel states in his brief that he has carefully reviewed the record and is unable to find any error. We have also carefully reviewed the record and conclude that defendant had a fair trial free from error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIAM FRANKLIN BAXLEY

No. 7216SC548

(Filed 2 August 1972)

1. Criminal Law §§ 23, 140— validity of guilty plea — concurrent prison sentences — harmless error

Where a sentence of six months was imposed upon defendant's plea of guilty to operating a motor vehicle upon the public highways of the State without having a valid operator's license, such sentence to run concurrently with a sentence imposed in a prosecution for unlawfully taking a truck, the failure of the trial judge to find that the plea of guilty was freely, understandingly and voluntarily entered *is held* to be harmless error.

2. Criminal Law § 169— admission of evidence over objection — similar evidence admitted without objection

Error, if any, in the admission of testimony by an arresting officer as to defendant's conduct and statements at the time of his arrest was cured when a second arresting officer was permitted to give similar testimony without objection.

APPEAL by defendant from *Hobgood, Judge,* 4 January 1972 Session of Superior Court held in ROBESON County.

In case No. 71CR12495, the defendant was charged in a warrant, proper in form, with the unlawful taking of a 1964 two-ton truck, in violation of G.S. 20-105. In case No. 71CR12559, the defendant was charged in a warrant, proper in form, with operating a motor vehicle on the public highways without a valid operator's license, in violation of G.S. 20-7. From a verdict of guilty in the district court and the judgment entered therein, the defendant appealed to the superior court where his trial was de novo.

In superior court the defendant pleaded guilty to the count charged in the warrant in case No. 71CR12559 of "unlawfully and willfully operating and driving a motor vehicle upon the public highways of North Carolina without having a valid operator's license." To the charge in case No. 71CR12495, the defendant pleaded not guilty and was tried by a jury. From a verdict of guilty as charged and the judgment imposed in case No. 71CR12495, and the judgment imposed in case No. 71CR12559, the defendant appealed to the Court of Appeals, assigning error.

Attorney General Morgan, Deputy Attorney General Benoy and Associate Attorney Silverstein for the State.

Johnson, Hedgpeth, Biggs & Campbell by Fred A. Rogers III for defendant appellant.

MALLARD, Chief Judge.

It appears from the record that there was another charge against this defendant, one of resisting arrest (in case No. 71CR12496) and that he was found guilty. However, the warrant upon which he apparently was tried does not appear in the record, and the trial judge continued the prayer for judgment on that charge indefinitely. The record is therefore insufficient for this court to review the charge of resisting arrest

in case No. 71CR12496, and the purported appeal as to that count is dismissed.

[1] In case No. 71CR12559, the defendant entered a plea of guilty to operating a motor vehicle upon the public highways of this State without having a valid operator's license. The record does not reveal that this plea of guilty was freely, understandingly and voluntarily made by the defendant; therefore, the record as to the plea is defective. It is noted, however, that the defendant does not contend that the plea was not properly entered, and inasmuch as the sentence of six months imposed therein is to run concurrently with the sentence imposed in case No. 71CR12495, the failure of the trial judge to find that the plea of guilty was freely, understandingly and voluntarily entered is held to be harmless error.

[2] In case No. 71CR12495, the defendant's only assignment of error brought forward and argued in his brief is that the trial judge committed error in the admission of part of the testimony of State's witness W. C. Murchison. The testimony defendant argues was objectionable was that describing the defendant's conduct and the statements made by him at the time of his alleged arrest without a warrant for a misdemeanor not committed in the presence of Murchison. The State contends, however, that the testimony of Murchison as to the defendant's conduct and statements at the time of arrest was not prejudicial and cites in support of its contention the case of *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206 (1967).

It is established law in North Carolina that an arrest without a warrant for a misdemeanor except as authorized by statute is illegal. The question presented in this case is whether the testimony of the witness Murchison as to the conduct and statements made by the defendant during the alleged unlawful arrest were prejudicial. The State's evidence tended to show that at the time of the arrest, there were two officers present, to wit: Officer Murchison, a police officer of the Town of Red Springs, and Frank Fullmore, a deputy sheriff of Robeson County.

The question was asked Murchison while he was being examined as a State's witness: "What, if anything did you say to Mr. Baxley?" Upon defendant's objection to this question, the jury was sent out, Murchison was questioned by counsel for

the defendant and the court, and Murchison stated that he did not have a warrant on his person for the arrest of the defendant. In the absence of the jury, the court denied the following motion of the defendant:

> "MOTION BY DEFENDANT TO SUPPRESS THE EVIDENCE of Officer Murchison leading up to and including testimony of the officer pertaining to the arrest of the defendant and in the pursuing (sic) conduct on the part of the officer, which would have provided a basis for the resisting arrest charge on the grounds that the Officer did not have in his possession any warrant for the arrest of the defendant of any alleged misconduct on the part of defendant; and no misdemeanor was committed in the presence of the Officer, which would have given him the right to arrest."

Thereafter, in the presence of the jury and without further objection, Murchison testified as to what the defendant said and did on this occasion after " . . . Mr. Fullmore stated to Baxley that we had a warrant for him and he was under arrest. He was told that the warrant was for assault on Mr. Sanders."

Mr. Fullmore testified that he was with Murchison on this occasion and, "(w)hen we approached the truck, Mr. Murchison stated he had a warrant for him and told him he was under arrest." Then, without objection, Mr. Fullmore described the defendant's conduct and repeated what the defendant said at the time of his arrest. Even if we assume that neither of the officers had a warrant, that the arrest was illegal, that proper objection was made to the testimony of Murchison, and that that part of his testimony complained of was prejudicial, which we do not, the error, if any, in its admission was cured when Deputy Sheriff Fullmore was permitted to testify, without objection, as to the conduct and statements made by the defendant at the time of his arrest. See *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971) and *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (1971). In addition, we think there is merit in the contention of the State that the error in the admission of Murchison's testimony, if any, was not prejudicial.

In the trial we find no prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

NEW HANOVER COUNTY, A MUNICIPAL CORPORATION v. NATHANIEL HOLMES, SR., AND WIFE, MARGARET WATERS HOLMES, AND WARREN W. LASSITER, AND WIFE, FRANCIS F. LASSITER

No. 725DC286

(Filed 2 August 1972)

Public Welfare; Registration § 2— lien under present name — property under former name

Where a lien for aid to the permanently and totally disabled was docketed under the married name of the recipient as of the time the aid was provided, the fact that the recipient then owned real property under her former name would not, standing alone, bar enforcement of the lien against such property as a matter of law. Former G.S. 108-73.12(a).

APPEAL by plaintiff from *Barefoot, District Judge,* 22 November 1971 Session of District Court held in NEW HANOVER County.

Action to foreclose a lien created under former G.S. 108-73.12(a) providing for liens on the real property of recipients of aid to the permanently and totally disabled. The amount sought to be recovered is $1,769.00. Defendants Lassiter moved for summary judgment. The court proceeded to make "findings of fact," granted the motion and entered judgment dismissing plaintiff's action.

Murchison, Fox & Newton by Joseph O. Taylor, Jr., for plaintiff appellant.

Douglas P. Connor for defendant appellees Warren W. Lassiter and Francis F. Lassiter.

VAUGHN, Judge.

The entry of summary judgment is improper where, as here, genuine issues exist as to the material facts and the judge purports to resolve such issues.

In order to reach the question of law involved we will, however, with some reluctance and for purposes of the appeal only, assume the following facts on which the judge appears to rely, as true:

(1) The property in question is located on 11th Street in Wilmington, North Carolina. Edna Robinson Spears acquired title to the property on 13 October 1956, as the surviving tenant by the entireties upon the death of her husband, Leonard Spears. On 14 March 1959, she married Leroy James. Though both parties to the marriage were residents of Wilmington, North Carolina, the marriage took place in Horry County, South Carolina.

(2) In October 1963, Edna R. James applied for aid to the permanently and totally disabled. The application was approved and the lien against the property of Edna Robinson James was duly docketed and indexed according to the provisions of former G.S. 108-73.12(a).

(3) In June 1966, a deed of trust on the real estate was executed to Lloyd S. Elkins, trustee. The deed of trust was given to secure the payment of a note to Lassiter Home Improvement Company in the amount of $840.00. The name of the grantor in the deed of trust was signed Edna R. Spears.

(4) "Edna" died in in 1967. The death certificate was filed as "Edna Spears James Henry. . . 11th Street, Wilmington, North Carolina. . . " By letter from an attorney dated 11 January 1968, defendant Warren Lassiter was advised that an examination of the record title to the property had been made. The report did not disclose the existence of plaintiff's lien.

(5) By letter from an attorney dated 15 January 1968, the defendant Warren Lassiter was advised of the existence of plaintiff's lien and advised that the appraised value of the property was $2,950.00.

(6) The deed of trust (executed in 1966 to Lloyd S. Elkins, Jr., trustee) was foreclosed. At the foreclosure sale on 1 March 1968, defendants Lassiter purchased the property on their bid of $700.00. Defendants Lassiter later conveyed to defendants Holmes.

Among other things, the court concluded that plaintiff, by filing its lien in the name of "Edna R. James," filed the lien

outside the chain of title of record in New Hanover County and that the lien upon which its claim is based is outside the chain of title and that the same was not a proper and valid encumbrance on the property.

So far as is disclosed by this record, Edna Robinson James was the name of the recipient of the welfare aid. The lien was docketed in that name and from the date of docketing constituted a lien against any real property of the recipient then owned or thereafter acquired by the recipient. G.S. 108-73.12(a) (rewritten by Chapters 546 and 1165, Session Laws of 1969). The fact that property was subsequently acquired or then owned by her in a different name, would not, standing alone, bar enforcement of the lien against such property as a matter of law. In *Henry v. Sanders,* 212 N.C. 239, 193 S.E. 15, judgment was entered against an unmarried woman in her name at that time and docketed shortly after her marriage and subsequent change of name. Thereafter she sold land which she had acquired in her married name. The court upheld the right of the owner of the judgment to subject the land to levy and sale under execution on the judgment. In that case the purchaser knew the name of his grantor prior to her marriage, but did not impart this knowledge to his attorney who examined the title.

As is observed by Professor Webster in his recent book, *Real Estate Law in North Carolina,* at page 628, "the 'record title' to real property is not necessarily 'good title'." Moreover, there is nothing in the record before us to indicate what inquiry defendants made as to the status of the title, record or otherwise prior to the execution of the deed of trust, and nothing to indicate what inquiry, if any, was made as to the true name or marital status of the grantor. If a party fails to make such inquiry as a cautious and prudent man would make, he is nevertheless affected with knowledge of all that such inquiry would have disclosed. *Cotton v. Hobgood,* 243 N.C. 227, 230, 90 S.E. 2d 541, 543-544.

Reversed.

Judges MORRIS and GRAHAM concur.

TRAVELERS INSURANCE COMPANY v. GORMAN Z. KEITH AND NORFOLK SOUTHERN RAILWAY COMPANY

No. 7210DC463

(Filed 2 August 1972)

Insurance § 29— proceeds paid into court for medical bills incurred by employee — error in awarding proceeds to employer

Evidence that defendant employee's medical expenses were paid from funds belonging to him from his attorney's trust account, such funds having come originally from defendant employer, was insufficient upon which to base a finding that the employer paid or was obligated to pay employee's medical bills incurred as a result of injuries sustained by the employee while on duty for employer; hence, the trial court erred in awarding payment to employer in an interpleader action where plaintiff insurance company paid proceeds into court.

APPEAL by defendant, Gorman Z. Keith, from *Preston, District Judge,* 13 December 1971 Session of District Court held in WAKE County.

This is an interpleader action under the provisions of Rule 22 of the North Carolina Rules of Civil Procedure wherein the plaintiff Travelers Insurance Company (insurer) paid into the Court the sum of $3,584.25, asking the Court to determine the respective rights of the defendant Gorman Z. Keith (employee) and the defendant Norfolk Southern Railway (employer) to the said funds under the terms of a group insurance accident policy issued by plaintiff covering the employees of the defendant railroad.

The following facts are not controverted: On 25 July 1966 the defendant employee suffered injuries and incurred medical expenses as a result of an accident while on duty for the defendant railroad company. At the time of the accident, the employee was covered by a group accident insurance policy issued by plaintiff to defendant employer who paid all the premiums. Pursuant to the terms of the policy plaintiff was obligated to pay $3,584.25 on the employee's medical expenses; but since each defendant claimed the insurance benefits, the plaintiff paid the amount of its obligation into Court. Prior to the filing of this interpleader action, the defendant employee instituted a civil action under the provisions of the Federal Employers Liability Act against defendant employer and recovered a judgment in the amount of $33,240.00. The defendant railroad company paid

the principal and interest on said judgment in August, 1970. All of the employee's medical expenses were proven as items of damage in the civil action against the defendant railroad company. After the employer paid the judgment, all these medical expenses were paid on behalf of the employee from his attorney's trust account.

After a trial without a jury, the judge made findings and conclusions which included the following:

> "The medical expenses represented by the sum of $3,584.25 involved in this action were expenses paid by Norfolk Southern Railway Company and which Norfolk Southern Railway Company was obligated to pay."

From a judgment declaring that the defendant employer was entitled to recover from plaintiff the sum of $3,584.25 and that the defendant employee recover nothing, the defendant Keith appealed.

R. Mayne Albright for defendant appellant (Gorman Z. Keith).

Young, Moore & Henderson by Charles H. Young, J. Clark Brewer, and B. T. Henderson II, for defendant appellee (Norfolk Southern Railway Company).

HEDRICK, Judge.

Appellee's motion to dismiss the appeal for failure of appellant to comply with the Rules of Practice in this Court is denied. In order that we may review the case on its merits, we consider the appeal as a petition for writ of certiorari and allow the same.

At the trial in the District Court the crucial question was who paid or who was obligated to pay the employee's medical expenses incurred for the treatment of his injuries resulting from the accident on 25 July 1966. The trial judge's resolution of this question is embodied in his finding and conclusion that: "The medical expenses . . . were expenses paid by Norfolk Southern Railway Company and which Norfolk Southern Railway Company was obligated to pay."

The crucial question on appeal is whether this finding and conclusion is supported by the evidence. The pertinent portion of the insurance policy is as follows:

> "All benefits provided under this Article are payable to or on behalf of the employee, provided that benefits based on expenses paid by the employer or other person or organization (or which an employer shall be obligated to pay) may be paid by the Insurer to such employer or other person or organization."

The employee contends there is no evidence in the record that his employer paid or was obligated to pay his medical expenses. We agree.

The uncontroverted facts clearly establish that the medical expenses were paid from funds belonging to the employee from his attorney's trust account. We think it immaterial and of no legal significance to this case that the funds used to pay the medical expenses might have come originally from the employer. There is nothing in this record to indicate that the employer was obligated to pay the medical expenses or voluntarily made any payments whatsoever to the employee until compelled to do so by virtue of the judgment in the Superior Court. The fact that G.S. 44-50 created a lien on the funds recovered by the employee from the employer to secure the payment of the medical expenses, likewise is not sufficient to support a finding that the employer paid or was obligated to pay the expenses. All of this is made clear when we consider that the employee might have realized nothing from his suit against the employer, in which case the employer would not have been obligated to pay anything to the employee. We hold the trial judge committed prejudicial error in finding and concluding that the employer paid or was obligated to pay the employee's medical expenses. For the reasons stated the defendant Keith is entitled to a new trial.

New trial.

Judges BROCK and MORRIS concur.

ROY HANSEN v. JONAS W. KESSING COMPANY

No. 7215SC393

(Filed 2 August 1972)

1. **Bills and Notes § 20— summary judgment — no genuine issue of material fact with respect to ownership of note**

Summary judgment was properly entered where there was no genuine issue of material fact as to whether plaintiff was the owner and holder of the note in question by virtue of defendant's having executed and delivered it to Roy Hansen Mortgage Company, a sole proprietorship, rather than to Roy Hansen Mortgage Company, a Virginia corporation.

2. **Brokers and Factors § 6— usurious loan — brokerage fee collectible**

Usury statutes will not deny plaintiff his right to collect from defendant his brokerage commission, though earned for negotiating a usurious loan, because such statutes are aimed only at preventing the extraction or reception of more than a specified legal rate for the hire of money. G.S. 24-2.

APPEAL by defendant from *Long, Judge,* 15 November 1971 Session of Superior Court held in ORANGE County.

This is a civil action wherein plaintiff, Roy Hansen, seeks to recover an indebtedness of $9,000 evidenced by a promissory note executed by the defendant dated 30 June 1969.

The defendant filed answer wherein it admitted execution and delivery of the promissory note to Roy Hansen Mortgage Company, but denied that the plaintiff Roy Hansen was the holder and owner of the said note and pleaded in bar of plaintiff's right to recover that the note sued on evidenced a brokerage fee for Roy Hansen Mortgage Company for brokering in behalf of the defendant a usurious equity participation loan in the principal sum of $250,000 from National Mortgage Company. From summary judgment entered in favor of the plaintiff, the defendant appealed.

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

Newsom, Graham, Strayhorn, Hedrick & Murray by Josiah S. Murray III for defendant appellant.

HEDRICK, Judge.

[1] The defendant contends the record shows there is a genuine issue of material fact as to whether the note in question

was executed and delivered by the defendant to Roy Hansen Mortgage Company, a Virginia corporation, or Roy Hansen Mortgage Company, a sole proprietorship. We do not agree.

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." Rule 56(e); *Robinson v. McMahan,* 11 N.C. App. 275, 181 S.E. 2d 147 (1971).

In its answer defendant admits execution and delivery of the note to Roy Hansen Mortgage Company. The plaintiff's motion for summary judgment was supported by Hansen's deposition that Roy Hansen Mortgage Company, a Virginia corporation, had been dissolved and that the plaintiff was operating as Roy Hansen Mortgage Company, a sole proprietorship, when the note in question was negotiated and executed. The defendant filed no affidavits opposing plaintiff's motion. We agree with the ruling of the trial judge that the record shows there is no genuine issue as to whether plaintiff is the owner and holder of the note in question.

[2] The defendant further contends:

> "The subject promissory note is not enforceable since it was taken as compensation for having brokered a usurious equity participation loan prohibited by North Carolina General Statute 24-8."

The record clearly reveals that at least $7,000 of the principal sum of the promissory note was in payment of the plaintiff's fee in brokering a usurious equity participation loan for the defendant from National Mortgage Company, *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971); $2,000 of the indebtedness evidenced by the note was for other services performed for the defendant by the plaintiff and was not connected with the "usurious loan." Narrowly put, the question presented is whether brokerage commissions may be recovered for negotiating a usurious loan. The conduct condemned by our usury statutes is the extraction or reception of more than a specified legal rate for the hire of money, and not for anything else. *Bank v. Hanner,* 268 N.C. 668, 151 S.E. 2d 579 (1966);

Bank v. Merrimon, 260 N.C. 335, 132 S.E. 2d 692 (1963); G.S. 24-2. The charging of usurious interest strips the debt of all interest, and it simply becomes a loan which in law bears no interest. *Kessing v. Mortgage Corp., supra.*

Defendant still enjoys the fruits of plaintiff's services. We do not think he can avoid payment for these services simply because the defendant and the lender chose to enter into an agreement which was in violation of the North Carolina usury statutes. There is nothing in this record to show that the plaintiff did more than bring the borrower and the lender together. He did not make the loan or negotiate its terms. Although the evidence reveals he was present at the closing, he in no way participated either directly or indirectly in the loan proceeds to the borrower or the loan charges paid to the lender.

We think the trial judge correctly held that the pleadings and affidavits on file show there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment on his claim on the promissory note dated 30 June 1969 as a matter of law. The Judgment appealed from is

Affirmed.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. THOMAS HAILSTOCK

No. 725SC541

(Filed 2 August 1972)

1. **Robbery § 5— armed robbery prosecution — failure to instruct as to lesser degrees of crime — no error**

In a prosecution where the State's evidence tended to show an offense of armed robbery and defendant's evidence amounted to a complete denial of the State's evidence, the trial court did not err in failing to instruct the jury as to lesser degrees of the crime charged because such instruction is not required when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees.

2. **Criminal Law § 66— in-court identification of defendant**

Findings made by the trial judge on *voir dire* supported his conclusion that an in-court identification of defendant by an armed robbery victim was not tainted by photographs the victim had seen and was based solely on observation of defendant at the time the crime was committed.

3. Criminal Law §§ 91, 175— motion for recess addressed to judge's discretion — no review on appeal

The trial court's refusal to grant a motion for a second recess for the purpose of allowing defendant to locate a witness who allegedly would have testified as to defendant's alibi could not be reviewed on appeal, since such motions addressed to the sound discretion of the trial judge are subject to review only in case of manifest abuse of discretion.

APPEAL by defendant from *Copeland, Special Judge,* 7 February 1972 Session of NEW HANOVER Superior Court.

Defendant was charged with armed robbery, a jury found him guilty as charged, and from judgment imposing prison sentence of not less than fifteen nor more than twenty years defendant appealed.

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

Jeffrey T. Myles for defendant appellant.

BRITT, Judge.

Defendant contends that the court erred in not instructing the jury as to lesser degrees of the crime of armed robbery. We do not agree with this contention.

[1] The State's evidence tended to show: Defendant entered the Zip Mart on Princess Place Drive in Wilmington, North Carolina, at about 10:30 p.m. on 22 October 1971. When defendant was checking out his purchase and Chester Hayes, the cashier, opened the cash register drawer, defendant drew a sawed-off, double barrel shotgun on Hayes and said: "Hand me all your money. Don't try anything or I'll blow your brains out." Defendant took the money and left the store.

Defendant's evidence tended to show that he was drinking with some companions at a place called the Four Winds at about 10:30 p.m. on the night in question and after that was at another address until about 2:00 or 3:00 a.m. and had nothing to do with the robbery.

The State produced evidence that defendant at the time of the robbery had a firearm in his possession and that with the use or threatened use of said weapon whereby the life of Chester Hayes was endangered or threatened, did unlawfully

take personal property from the said Chester Hayes, in violation of G.S. 14-87. Defendant's evidence amounted to a complete denial of the State's evidence. It is settled law that the trial court is not required to charge the jury upon the question of a defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. *State v. Worthey,* 270 N.C. 444, 154 S.E. 2d 515 (1967); *State v. Jenkins,* 8 N.C. App. 532, 174 S.E. 2d 690 (1970), 3 Strong, N.C. Index 2d, Criminal Law, § 115, p. 21.

[2] Defendant also contends that the in-court identification of defendant by the robbery victim was improperly admitted into evidence. We find no merit in this contention. A voir dire examination was conducted in the absence of the jury to determine if the identification of the defendant had been tainted by prior suggestive photographic identification procedures. Following voir dire the court found no prior suggestive procedures. The findings of fact of the trial judge are conclusive on appeal if supported by the evidence. *State v. Smith,* 278 N.C. 36, 178 S.E. 2d 597 (1971). The victim of the robbery stated on his own initiative that, "(t)he defendant who is in the courtroom is the same man who was in my store." As evidenced by this statement and other competent testimony there was plenary evidence to support the findings of fact of the trial judge. These findings support the conclusion of the trial court that the identification of defendant was not tainted by photographs the victim had seen and was based solely on observation of defendant at the time the crime was committed.

[3] Defendant next contends that the court erred in refusing to grant defendant's motion for a recess to locate a witness sworn the previous day who allegedly would have testified as to defendant's alibi. We find this contention without merit. The court granted a five minute recess to locate the witness. After an unsuccessful attempt defendant moved for a second recess. This motion was denied but the court stated that the witness would be allowed to testify if he appeared before the jury began its deliberations. The jury began its deliberations one hour and twenty minutes after the denial of the motion. There was no indication as to where the witness might be and nothing in the record indicates that the witness had been subpoenaed so as to require his testimony. There is no evidence as to how the witness would have substantiated the defendant's

alibi. Defendant already had alibi witnesses but they had criminal records. The missing witness allegedly did not have a criminal record, however, any additional weight of this testimony would have been conjectural.

Defendant does not cite, and we do not find, any authority in this jurisdiction pertaining to recesses during the course of a trial but we think the same rule applicable to continuances would apply to recesses. It is well settled that a motion for continuance of a trial is addressed to the sound discretion of the trial judge and his ruling thereon is not subject to review on appeal except in a case of manifest abuse. *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386 (1964); *State v. Creech,* 229 N.C. 662, 51 S.E. 2d 348 (1949). There is nothing before the court in this record to indicate any abuse of discretion.

Defendant's other assignments of error have been carefully considered but are found to be without merit.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

ROGER L. CAMPBELL, TRADING AND DOING BUSINESS AS CAMPBELL'S CONTRACTING COMPANY v. SAM McNEIL AND MARY McNEIL

No. 7226DC378

(Filed 2 August 1972)

1. **Appeal and Error § 24— necessity for exceptions**

An assignment of error is ineffectual if not based on a proper exception. Court of Appeals Rules 19(c) and 21.

2. **Appeal and Error § 49— failure of record to show excluded evidence**

The exclusion of evidence cannot be held prejudicial where the record does not reveal what the excluded evidence would have been.

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

Appeal is subject to dismissal where the record on appeal was not docketed within the extended time allowed by the trial court.

4. **Appeal and Error § 39— extension of time to serve case on appeal — effect on docketing time**

An order extending the time to serve the case on appeal did not extend the time for docketing the record on appeal.

Campbell v. McNeil

APPEAL by defendants from *Stukes, District Judge,* 25 October 1971 Session of MECKLENBURG District Court.

Plaintiff seeks to recover for balance allegedly due on a contract entered into by the parties for certain improvements made by plaintiff to a house belonging to defendants. Defendants contend that plaintiff failed to pay for materials used, that the work completed was not done in a workmanlike manner, and that the work was not completed. From a judgment in favor of plaintiff for $4,071.00 plus interest, defendants appealed.

Mraz, Aycock & Casstevens by Nelson M. Casstevens, Jr., for plaintiff appellee.

Olive, Howard, Downer & Williams by Carl W. Howard for defendant appellants.

BRITT, Judge.

For failure to comply with the rules of this court, defendants' appeal is dismissed.

[1] Rule 21 of the Rules of Practice in the Court of Appeals requires that appellants set out in the record on appeal their exceptions to the proceedings, rulings or judgments of the court, briefly and clearly stated and numbered. Defendants failed to do so in this appeal. Rule 19(c) of the Rules of Practice requires that all exceptions relied upon be grouped and separately numbered immediately before the signature to the record on appeal. Defendants did not meet this requirement. An assignment of error is ineffectual if not based on a proper exception. *Bost v. Bank,* 1 N.C. App. 470, 162 S.E. 2d 158 (1968). See *Midgett v. Midgett,* 5 N.C. App. 74, 168 S.E. 2d 53 (1969), cert. den. 275 N.C. 595 (1969).

[2] Even after a meticulous voyage of discovery through the record the only two exceptions noted in the entire record would seem to refer to the court's refusal to admit certain testimony (R. pp. 45, 47) but the record does not reveal what the excluded evidence would have been; therefore, it is impossible for the court to determine if its exclusion was prejudicial. *Gibbs v. Light Co.,* 268 N.C. 186, 150 S.E. 2d 207 (1966); *Payne v. Lowe,* 2 N.C. App. 369, 163 S.E. 2d 74 (1968).

[3, 4] We also note that the judgment in this case was entered on 1 November 1971 and the record on appeal was not docketed

until 21 March 1972, some 141 days later. Rule 5 provides that if the record on appeal is not docketed within 90 days after the date of the judgment appealed from, the case may be dismissed, "provided, the trial tribunal may, for good cause, extend the time not exceeding sixty days for docketing the record on appeal." The record reveals an order extending the time for docketing 20 days but we find no order extending the time to docket the record on appeal 51 days. There are two orders extending the time to serve the case on appeal but an order extending the time to serve case on appeal does not have the effect of extending the time to docket the appeal. *Keyes v. Oil Co.*, 13 N.C. App. 645, 186 S.E. 2d 678 (1972); *Horton v. Davis*, 11 N.C. App. 592, 181 S.E. 2d 781 (1971). For failure to docket within the time permitted by the rules of this court, the appeal should be dismissed. *Owens v. Boling*, 274 N.C. 374, 163 S.E. 2d 396 (1968); *Harrell v. Brinson*, 8 N.C. App. 341, 174 S.E. 2d 142 (1970).

Although for the reasons stated we are dismissing the appeal, we have nevertheless carefully reviewed the record but perceive no prejudicial error.

Appeal dismissed.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. PETE HAMLIN

No. 7217SC470

(Filed 2 August 1972)

1. **Intoxicating Liquor § 13— possession of bootleg liquor — insufficiency of State's evidence to support verdict of guilty**

The evidence was insufficient to support a verdict of guilty in a prosecution for possession of a quantity of alcoholic beverage upon which taxes had not been paid where such evidence tended to show only that officers observed defendant making sales of quantities of whiskey from a gallon plastic jug, and officers detected the odor of bootleg liquor.

2. **Criminal Law § 164— review of sufficiency of State's evidence on appeal**

The sufficiency of the State's evidence could be reviewed on appeal although defendant did not move for nonsuit in the trial court. G.S. 15-173.1.

State v. Hamlin

APPEAL by defendant from *Exum, Judge,* 6 December 1971 Session of Superior Court held in ROCKINGHAM County.

Defendant was charged in a warrant with the possession, on 16 July 1971, of a quantity of alcoholic beverage upon which the taxes imposed by the laws of the United States and the laws of North Carolina had not been paid. G.S. 18-48 (rewritten effective 1 October 1971). Upon conviction in District Court, defendant appealed to the Superior Court where he was tried *de novo,* by a jury, upon the original warrant.

The State's evidence tended to show the following. On 16 July 1971 defendant was under surveillance by law enforcement officers. They observed him selling a clear liquid from a gallon plastic jug. When the officers undertook to surround and apprehend defendant, he ran carrying the gallon plastic jug with him. As defendant ran through the bushes and the woods, he carried the gallon plastic jug upside down, emptying its contents as he ran. The officers were unable to catch him and consequently did not seize the gallon plastic jug or any of its contents. The next day defendant went to the police station to inquire if the officers were looking for him. He was then arrested and the present charges preferred against him.

Deputy sheriff Chaney testified: "Later on I examined the bushes. They were wet and they had the smell of bootleg liquor on them. Nothing else has the smell of bootleg liquor. That is what I am swearing, that it was bootleg liquor. That is when he was pouring the liquor out. Officer Strange and Barker were there when Pete (defendant) left. He ran just a short distance and he was out of sight of us. We tracked him by the way the whiskey was poured out and by the smell of the liquor but that is about as far as we could follow him."

Reserve officer Knight testified: "As to what if anything was coming out of the jug as he ran, well we could smell the odor of bootleg whiskey that is the only way you could track him, I tracked him down through the woods by the odor of the whiskey. I know the difference between store liquor as you refer to it and moonshine. It is easily distinguished. I was not close enough to distinguish the color of the liquid going out of the jar . . . I am positive and satisfied in my own mind this was white non-taxpaid liquor . . . ."

Deputy sheriff Strange testified:

"When they closed in on them they all got close to him and then he started running with the jug, running and pouring it out and he fell and I reached for him and I guess he was running on his knees because I did not get him and all I could see was the liquor going out of the jug and I got his shoes and his hat. I could see the liquor going out. Its color was clear. It had a strong odor of bootleg liquor. I am familiar with the odor of bootleg liquor and what we call store liquor. This was bootleg liquor. I actually saw the liquid going out. The container was a gallon plastic jug. As to whether he had another jug too, that one is the only one that I saw, was the one that he ran with. I followed him about as far as from here to across the street to the jail. As to how he gave me the slip, I was kind of short-winded and he was faster. As to how fast I think he was going, I don't know, about as fast as a reindeer it looked to me, he was traveling pretty fast. As he ran, well he had the jug turned up and the liquor was pouring out as he ran along. He was barefooted, he ran out of his shoes. He lost his hat too. I did not see him at any time after that, I saw him the next day when he came to the station. He came to know what they were looking for him for. I do not think he claimed his shoes. He did not claim his shoes. He did not claim his hat either."

The jury returned a verdict of guilty and defendant appealed.

Attorney General Morgan, by Assistant Attorney General Magner, for the State.

Gwyn, Gwyn & Morgan, by Melzer A. Morgan, Jr., for the defendant.

BROCK, Judge.

[1] Defendant assigns as error that the evidence is insufficient to sustain a verdict of guilty.

Upon the authority of *State v. Smith,* 249 N.C. 212, 105 S.E. 2d 622, we agree that the evidence is insufficient to support a verdict of guilty of the offense with which defendant was charged.

[2] In this case the defendant offered no evidence, and, although defendant did not move for nonsuit, the sufficiency of the State's evidence may be reviewed upon appeal. G.S. 15-173.1.

The officers observed defendant making sales of quantities of the whiskey from the gallon plastic jug. It seems that under the circumstances they would have been well advised to have charged defendant under G.S. 18-50 (rewritten effective 1 October 1971). In that event, it would have made no difference whether the whiskey was "taxpaid" or "non-taxpaid."

The judgment entered in this case is vacated, the verdict of the jury is set aside, and the

Case dismissed.

Judges MORRIS and HEDRICK concur.

DAVID M. BLACKWELL, CLERK OF SUPERIOR COURT OF ROCKINGHAM COUNTY, AND ROCKINGHAM COUNTY, A BODY POLITIC AND CORPORATE v. BERT M. MONTAGUE, DIRECTOR, ADMINISTRATIVE OFFICE OF THE COURTS, JUSTICE BUILDING, RALEIGH, NORTH CAROLINA

No. 7217SC192

(Filed 2 August 1972)

Criminal Law § 145— costs — facilities fee — cases pending at establishment of district court

In criminal cases which were pending at the time the district court was established in the county and in which costs were assessed after the establishment of the district court, the "facilities fee" assessed as part of the costs must be remitted to the State for the support of the General Court of Justice. G.S. 7A-304(a)(2); G.S. 7A-318(c).

APPEAL by plaintiffs from *Crissman, Judge,* 8 November 1971 Session of Superior Court held in ROCKINGHAM County.

McMichael, Griffin & Post, by Hugh P. Griffin, Jr., for plaintiffs.

Attorney General Morgan, by Associate Attorney Kane, for defendant.

BROCK, Judge.

This is an action for declaratory judgment to determine the rights of the parties with respect to the distribution of certain funds in possession of the Clerk of Superior Court of Rockingham County. The funds in controversy represent a portion of the costs in criminal cases pending in Rockingham County at the time the district court was established there, and which costs were finally assessed after the establishment of the district court. The particular portion of the costs so assessed which is in controversy is that portion assessed under G.S. 7A-304(a)(2) as a "facilities fee." Each of the cases involved is a criminal case which was pending on 7 December 1970 (the date the district court was established in Rockingham County, G.S. 7A-131(3)), and which was disposed of and costs assessed after 7 December 1970.

It is clear that costs shall be disbursed according to prior law in cases in which they have been finally assessed according to prior law and before the district court was establihed. G.S. 7A-318(d) and G.S. 7A-318(e).

It is equally clear that in cases which were instituted after the establishment of the district court the costs, including a "facilities fee," shall be assessed according to G.S. Chapter 7A, Article 27, 7A-300 through 7A-317.1. The "facilities fee" assessed in this classification of cases shall be disbursed monthly by the Clerk of Superior Court (G.S. 7A-108, formerly G.S. 7A-103) to the county or municipality providing the "facilities." (G.S. 7A- 302 and G.S. 7A-304(a)(2)).

For the period of transition from the old systems to the district court system in each judicial district, it was necessary for the legislature to determine to whom the "facilities fee" should be disbursed in cases which were pending at the time of the establishment of the district court. This was done by the legislature in G.S. 7A-318. This section clearly provides that in cases pending at the time of the establishment of the district court, in which costs had not been finally assessed according to prior law, the costs shall be assessed as provided in G.S. Chapter 7A, Article 27. This same section also clearly provides that the General Court of Justice fee and the "facilities fee" assessed in this class of pending cases *shall be remitted to the State for the support of the General Court of Justice.* G.S. 7A-318(c). The requirement of the statute is unambiguous and requires no interpretation.

Judge Crissman ordered that the funds in question be remitted to the State for the Support of the General Court of Justice. This disposition is in accord with the legislative mandate.

We note, however, that Judge Crissman's order provides: ". . . [A]fter credit is given for fees, costs and commissions, if any . . . ." This obviously is a reference to the credit to be given parties who have paid fees, costs and commissions to the Clerk under the schedule of costs in force before the statewide uniform schedule of costs became effective. Even so, his provision is incomplete and may create some misunderstanding. Also the credit to the parties is clearly provided for by Statute and should have already been given. G.S. 7A-318(a). Therefore, the words "after credit is given for fees, costs and commissions, if any" should be treated as surplusage and stricken from the judgment, and it is so ordered.

Modified and affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. MELVIN HUNTER CHAVIS

No. 726SC227

(Filed 2 August 1972)

1. **Automobiles § 126— breathalyzer test results — requirements for admissibility**

In a prosecution for operating a motor vehicle on the highways of the State while under the influence of intoxicating liquor, admission into evidence of results of a breathalyzer test administered to defendant constituted prejudicial error where there was no evidence that the test was administered according to methods approved by the State Board of Health and by an individual possessing a valid permit issued by the State Board of Health for that purpose. G.S. 20-139.1.

2. **Automobiles § 127— operating vehicle while under influence of intoxicating liquor — sufficiency of evidence to withstand nonsuit**

State's evidence was sufficient to withstand motion to nonsuit in a prosecution for operating a vehicle while under the influence of intoxicating liquor where such evidence tended to show that defendant weaved back and forth over the center of the street, he smelled of alcohol

and admitted having had one or two beers to the officer who stopped him, and an officer who observed defendant at the police station after his arrest testified that it was his opinion that defendant was under the influence of intoxicating liquor.

APPEAL by defendant from *Parker, Judge,* 18 October 1971 Session of Superior Court held in HERTFORD County.

Defendant was charged in a warrant with operating a motor vehicle on the highways of North Carolina while under the influence of intoxicating liquor. From judgment entered in district court defendant appealed to superior court for a trial *de novo.* The jury returned a verdict of guilty and from judgment entered on the verdict, defendant appealed.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.

Jones, Jones & Jones by L. Herbin, Jr., for defendant appellant.

PARKER, Judge.

[1] In assignment of error 13, defendant contends the court erred in overruling his objection to and subsequent motion to strike testimony that a breathalyzer test was administered and that the reading was .15 percent. This assignment of error is well taken. G.S. 20-139.1(b) in pertinent part reads: "Chemical analyses of the person's breath or blood, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Board of Health and by an individual possessing a valid permit issued by the State Board of Health for this purpose."

In *State v. Caviness,* 7 N.C. App. 541, 173 S.E. 2d 12, the Court in interpreting G.S. 20-139.1(b) stated:

> "This section of the statute requires two things before a chemical analysis of a person's breath can be considered valid. First, it requires that such analysis shall have been performed according to methods approved by the State Board of Health. Second, it requires that such analysis shall have been made by an individual possessing a valid permit issued by the State Board of Health for this purpose."

In *Caviness* a new trial was awarded for failure to comply with either of the two requirements. In *State v. Powell,* 10 N.C. App. 726, 179 S.E. 2d 785, affirmed 279 N.C. 608, 184 S.E. 2d 243, the Court held that the two requirements must be met, but that it is left open for the State to prove compliance in any proper and acceptable manner. See *State v. Mobley,* 273 N.C. 471, 160 S.E. 2d 334, where evidence was held insufficient to meet the requirements of G.S. 20-139.1.

In the case at bar there was no evidence before the court that the test was administered according to methods approved by the State Board of Health. As stated in *Powell,* the manner of proof is left open for the State, but the failure to offer any proof has never been sanctioned by our courts, and in this case such failure resulted in clear and manifest error prejudicial to defendant.

[2] Defendant also contends that absent the presumption raised by the results of the breathalyzer test, it was error to deny his motions for nonsuit. We do not agree, but find that when the evidence of results of the breathalyzer test is excluded, the remaining evidence was still sufficient to withstand the motions for nonsuit. The evidence, other than that relating to the results of the breathalyzer test, tended to show: On 1 July 1971 about 10:30 p.m. in Ahoskie, N. C., Officer Mulder saw defendant back his car out from a filling station, take off at a high rate of speed, spinning his tires, and proceed in a westerly direction on Main Street. Defendant was weaving back and forth over the center of the street. Officer Mulder stopped defendant, and detected a strong odor of alcohol on his breath. Defendant admitted to the officer that he had drunk one or two beers. Officer Mulder then arrested defendant for driving under the influence, and took him to the police station where Officer Willoughby observed him. Mr. Willoughby testified that from his observations of defendant it was his opinion that defendant was under the influence of intoxicating liquor.

When the evidence stated above is considered in the light most favorable to the State it is sufficient to withstand motions for judgment of nonsuit.

Defendant's other assignments of error will not be discussed as they are not likely to recur in a new trial.

For the reasons stated defendant is awarded a

New trial.

Judges BRITT and HEDRICK concur.

EMILY W. DUFFELL v. DANFORD A. WEEKS, EXECUTOR OF THE ESTATE OF MAMIE BARNES WEEKS

No. 726DC436

(Filed 2 August 1972)

1. **Executors and Administrators § 24— sufficiency of complaint to allege quantum meruit**

   Plaintiff's complaint was sufficient to allege a cause of action in *quantum meruit* where it alleged (1) an agreement that plaintiff would render services to defendant's testate at a time when said testate was incompetent; (2) an understanding that plaintiff was to be paid for such services; (3) that the services were performed and were reasonably worth $3819.03; (4) that demand for payment had been made and refused; and (5) that plaintiff was due the amount of $3818.55.

2. **Executors and Administrators § 24— quantum meruit — amount of payment for agreed services not specified**

   Where there is an express agreement to pay for services rendered, but the amount is not specified, the person performing the services is entitled to recover on the theory of *quantum meruit.*

PETITION for *certiorari* was allowed in lieu of an appeal by plaintiff from *Gay, District Judge,* at the November 29, 1971 Session of HALIFAX County District Court.

Plaintiff instituted this action to recover for personal services rendered and funds expended for defendant's testate. The complaint as amended alleged that plaintiff, at the request of defendant's testate, Mamie Barnes Weeks, and her trustees and family, rendered personal services and expended funds for the care of Mamie Barnes Weeks from December 1967 until her death. It was further alleged that plaintiff is a registered nurse and it had been understood and agreed that she would be compensated for her services and expenses incurred. An itemized statement in the total amount of $3,819.03 was shown and plaintiff filed a claim for $3,818.55 with defendant, and

it was refused. She prays for recovery in this amount in this action.

Defendant answered with three defenses: (1) That no contract was alleged nor was there an allegation of an implied contract to support *quantum meruit;* (2) That plaintiff had been paid for her services; (3) That plaintiff did file her claim with defendant, but that every other allegation is denied because they do not relate to any contract between plaintiff and defendant.

On November 22, 1971, defendant filed a motion for judgment on the pleadings. On November 29, 1971, judgment was entered dismissing the action for failure of the complaint to state a claim for relief.

From the judgment of the district court, plaintiff appealed.

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

Claude Kitchin Josey; Dickens & Dickens by Wade H. Dickens, Jr., for defendant appellee.

CAMPBELL, Judge.

[1] Plaintiff assigns as error the entry of judgment on the pleadings. Plaintiff contends that the complaint stated a claim for relief with facts sufficient to put the defendant on notice of the transactions to be proved. We agree.

Plaintiff has alleged, (1) an agreement with all interested parties that she would perform certain services and incur certain expenses for defendant's testate at a time when said testate was incompetent; (2) an understanding that she was to be paid for such services and expenses; (3) that the services were performed and the expenses were incurred and were reasonably worth the sum of $3,819.03; (4) that demand for payment has been made and refused; and (5) that she is due the amount of $3,818.55. The complaint also contained a detailed statement of the amounts claimed.

[2] It is the general rule that if one performs services for another which are knowingly and voluntarily accepted, and nothing else appears, the law implies a promise on the part of the recipient to pay the reasonable value of the services. *Johnson v. Sanders,* 260 N.C. 291, 132 S.E. 2d 582 (1963). Similarly, where there is an express agreement to pay, but the amount

is not specified, the person performing the services is entitled to recover on the theory of *quantum meruit. Beasley v. McLamb,* 247 N.C. 179, 100 S.E. 2d 387 (1957).

> "A promise to pay the reasonable value of services performed by one person for another, although there is no express agreement as to the compensation, will be implied where the circumstances warrant an inference of a promise to pay for such services, as where the conduct of the person for whom the work was done is such as to justify an understanding by the person performing the work that the former intended to pay for it. . . ." 58 Am. Jur., Work and Labor, § 3, p. 512.

Cost of materials and expenses incurred in the performance of such services is also recoverable. 98 C.J.S. Work and Labor, §§ 10 and 67.

Is the complaint sufficient to allege a cause of action in *quantum meruit?* We are of the opinion that it is. Plaintiff has adequately alleged all of the circumstances out of which this cause of action accrues. It was error to dismiss the complaint for failure to state a claim for relief.

The judgment of the trial court is

Reversed.

Chief Judge MALLARD and Judge BRITT concur.

MARY FRANCES JENKINS v. NATIONAL CENTRAL LIFE INSURANCE COMPANY

No. 7227DC510

(Filed 2 August 1972)

Evidence § 33— hearsay evidence — letter describing plaintiff insured's health

In an action to recover on an insurance policy providing for payment upon death of insured resulting from an automobile accident, the trial court erred in admitting into evidence a medical opinion concerning the health of insured in the form of a letter written some four years prior to the accident in question since such medical report, offered and received as direct evidence of the truth of its contents, constituted hearsay evidence.

APPEAL by defendant from *Bulwinkle, District Judge,* 14 February 1972 Session of District Court held in GASTON County.

Civil action to recover under a policy of automobile insurance issued by the defendant insurance company to the plaintiff's father, Harry E. Jenkins. In this insurance policy, the plaintiff was sole beneficiary under that section providing for payment for loss of life of the insured sustained while driving an automobile during the term of the policy, provided that the bodily injuries producing death were solely responsible for that death and resulted directly and exclusively from an automobile accident.

The plaintiff's evidence tended to show that the insured had died shortly after having been involved in an automobile collision on 14 June 1969, a time when the policy in question was in effect. The exact cause of death was not determined and no autopsy was performed. The defendant insurer denied liability and refused to make payment to the plaintiff, and from a verdict and judgment in the district court for plaintiff, the defendant appealed to the Court of Appeals, assigning error.

Mullen, Holland & Harrell by Langdon M. Cooper for plaintiff appellee.

Charles D. Gray III for defendant appellant.

MALLARD, Chief Judge.

The first question presented by appellant is whether the court erred in admitting into evidence over defendant's objection a copy of a statement of a medical opinion concerning the health of Harry E. Jenkins on 25 January 1965 in the form of a letter from a Dr. Charles Pugh (who was dead at the time of this trial in February 1972), "To Whom It May Concern" dated 25 January 1965. This statement had been given to one George Jenkins, an insurance agent, in response to his request to Harry E. Jenkins in connection with the renewal of the latter's auto liability insurance for a statement from his famly doctor as to his health.

The general rule with respect to letters of or to third persons is set forth in 29 Am. Jur. 2d, Evidence, § 881, p. 984, as follows:

> "Generally, correspondence of third persons, where offered as evidence of the facts stated therein, must be

> excluded under the general principle respecting res inter alios acta, unless the party against whom the communications are tendered is in some way connected therewith or knew and approved their utterance. Also, letters of or to third persons, where offered as proof of the facts stated therein, fall within the purview of, and thus may be subject to exclusion under, the hearsay evidence rule. * * *"

In the case of *Potts v. Howser*, 274 N.C. 49, 161 S.E. 2d 737 (1968), it is said:

> "Defendant's cross-examination of plaintiff concerning Dr. Floyd's medical report was for the purpose of showing that plaintiff had been injured and disabled in the Wilmington accident and could not claim damages against defendant for that period of disability. Defendant was not merely seeking to establish the fact that Dr. Floyd rendered a medical report. Rather, he was seeking to establish the *truth* of what the report *said* and was placing its contents before the jury without introducing it. He was doing indirectly what he could not do directly. The medical report itself was clearly hearsay. Dr. Floyd was not in court and subject to cross-examination. It therefore follows that plaintiff's Exceptions Nos. 18, 19 and 20 should have been sustained."

The medical report of Dr. Pugh was offered and received as direct evidence of the truth of its contents. The defendant in this case was not shown to have been in any way connected with this medical statement of Dr. Pugh or to have had any knowledge of its utterance. The circumtances relating to this medical report are substantially similar to those relating to the report held to be hearsay in *Potts v. Howser, supra.* Therefore, it was prejudicial error to admit the medical report of the late Dr. Pugh in this case, not necessarily because it was a copy but primarily because it was hearsay evidence.

The hypothetical question posed to Dr. Glenn was based in part upon the incompetent evidence admitted in the medical report; therefore, the court committed error in admitting the answer to the hypothetical question.

Inasmuch as there must be a new trial because of prejudicial error in the admission of evidence, we do not deem it

necessary or proper to rule on defendant's other assignments of error.

The defendant is entitled to a new trial.

New trial.

Judges CAMPBELL and BRITT concur.

IN THE MATTER OF MADELINE ROLLINS MARK

No. 7212DC429

(Filed 2 August 1972)

Appeal and Error § 6— information to file complaint — interlocutory order — appeal

No appeal lies from an interlocutory order allowing petitioner to examine respondents for the purpose of obtaining information to file a complaint. Court of Appeals Rule 4.

APPEAL by respondents Eddie Lim and Dora Lim from *Herring, Judge,* 28 February 1972 Session, District Court, CUMBERLAND County.

On 2 February 1972, petitioner, proceeding under G.S. 1A-1; Rule 27(b), filed petition requesting that an order issue for the taking of the depositions of Eddie Lim and his wife, Dora Lim, expected adverse parties, to enable petitioner to obtain information for the purpose of preparing a complaint. Notice that petitioner would apply for an order was served on the expected adverse parties. The petition alleged that the nature and purpose of the expected action is to recover of the expected defendants a sum of money alleged to be due petitioner for wages for services rendered the expected defendants in their restaurant business over a period of years. Petitioner alleged that she is unable to prepare a complaint because expected defendants had withheld from her information about her wages, income taxes, social security taxes and any other information which would enable her to prepare her complaint; that she has no access to the information; and that she had requested it of expected defendants but had been refused. She further alleged that she wished to inquire into the amount of hourly wages

paid her, the hours and days she worked, her job duties, amounts reported to Internal Revenue Service by expected defendants for withholding tax and social security, etc. The court allowed the petition on 29 February 1972, and expected defendants appealed.

Anderson, Nimocks and Broadfoot, by Hal W. Broadfoot, for petitioner appellee.

McCoy, Weaver, Wiggins, Cleveland and Raper, by L. Stacy Weaver, Jr., for respondent appellants.

MORRIS, Judge.

On 20 January 1971, the Supreme Court amended Rule 4, Rules of Practice in the Court of Appeals of North Carolina, by striking Rule 4 in its entirety and inserting in lieu thereof the following:

"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."

The order from which the expected adverse parties purportedly appealed was entered subsequent to the amendment of Rule 4. This was not the case in *In re Lewis,* 11 N.C. App. 541, 181 S.E. 2d 806 (1971), cert. denied 279 N.C. 394 (1971). If the expected adverse parties conceived that they would suffer substantial harm from the allowing of the petition, their remedy was to petition for a writ of certiorari within 30 days from the date of the entry of the order. This they failed to do.

While we might agree that the petition should have been denied, we cannot perceive that substantial harm has been done. Had the petition been denied, petitioner surely could have

drafted a skeleton complaint sufficient under G.S. 1A-1, Rule 8, on the basis of which she could have proceeded to make use of the discovery procedure provided for by Article 5, of Chapter 1A, General Statutes of North Carolina, obtaining substantially the same information sought by the procedure adopted.

Appeal dismissed.

Judges BROCK and HEDRICK concur.

SALLIE S. CLARKE v. M. H. CLARKE

No. 7228DC534

(Filed 2 August 1972)

1. **Venue § 2— residency — review of findings**

Facts found by the trial judge in determining questions of residency raised in a motion to remove a case on grounds of improper venue are conclusive on appeal if supported by competent evidence.

2. **Venue § 2— residency — finding by court — evidence**

The trial court's determination that plaintiff was a resident of Buncombe County when she filed this action for alimony and child custody was supported by her affidavit stating that after she and her children moved from defendant's house in Haywood County they resided in a motel in Buncombe County until she could make arrangements for them to move into an apartment, that plaintiff leased an apartment in Buncombe County after the action was begun and she and the children have lived there since that time, that plaintiff left Haywood County with no intention of returning and with the intention of becoming a permanent resident of Buncombe County, that the minor children are enrolled in school and in dancing school in Buncombe County, that plaintiff has changed her mailing address to her apartment address and has had a telephone installed in her name there, and that the Internal Revenue Service and others have been advised of her address change. G.S. 1-82.

3. **Venue § 2— residency — events after action filed**

Events transpiring after the action was filed were properly considered by the court in determining plaintiff's residence for venue purposes.

APPEAL by defendant from *Allen, District Judge*, 20 September 1971 Session of District Court held in BUNCOMBE County.

On 29 June 1971 plaintiff instituted this action in Buncombe County seeking alimony, alimony pendente lite, custody of minor children born of the marriage and counsel fees. She alleged in her complaint that she is a resident of Buncombe County and that defendant is a resident of Haywood County.

On 14 July 1971 defendant filed a verified motion in which he alleged that both parties are residents of Haywood County and requested removal of the action to that county as a matter of right.

In support of his motion, defendant filed an affidavit on 20 September 1971 which alleges: The parties were married on 4 April 1959 and from that time until 8 June 1971 lived together in Haywood County. On that date plaintiff left the home with the minor children born of the marriage and took with her only a portion of her clothing and personal effects. Defendant is informed plaintiff is staying at the Dinkler Motor Inn in Asheville and has no fixed or definite place of abode other than in Haywood County. The affidavit also alleges that the children have always attended school in Haywood County; the parties are registered to vote there; neither party owns property in Buncombe County; plaintiff indicated a Haywood County address on tax returns filed as late as May 1971, and, on 19 June 1971, filed a change of address form with the post office in Waynesville directing that her mail be delivered to a post office box there.

Defendant also filed other affidavits from residents of Haywood County, all of which tend to show that plaintiff lived with her husband in Haywood County until 8 June 1971.

Plaintiff filed a counter-affidavit in which she alleged the following: On 8 June 1971, after being advised of adulterous conduct on the part of her husband, plaintiff and her children moved from the husband's house in Haywood County to Asheville where they resided in a motel until plaintiff could make arrangements for them to move into an apartment. Plaintiff leased an apartment in Asheville on 2 September 1971 and she and the minor children have lived there since that time. Plaintiff left Haywood County with no intention of returning and with the intention of becoming a permanent resident of Buncombe County. The minor children are enrolled in

public school and in dancing school there. Plaintiff has changed her permanent mailing address to her apartment address and has had a telephone installed in her name there. The Internal Revenue Service and others have been advised of her address change. Plaintiff considers herself a permanent resident of Buncombe County.

After considering the affidavits and arguments of counsel the court made findings of fact, concluded from its findings that when plaintiff commenced this action on 29 June 1971 she was a resident of Buncombe County, and denied defendant's motion to remove. Defendant appealed.

Bennett, Kelly & Long by E. Glenn Kelly for plaintiff appellee.

Roberts and Cogburn by Max O. Cogburn for defendant appellant.

GRAHAM, Judge.

[1, 2] Facts found by the trial judge in determining questions of residency raised in a motion to remove a case on grounds of improper venue are conclusive on appeal if supported by competent evidence. *Doss v. Nowell,* 268 N.C. 289, 150 S.E. 2d 394. The findings made by the trial judge in this case are supported by the evidence and support his conclusion that plaintiff was a resident of Buncombe County when she filed this action. Upon this determination, Buncombe County is a proper venue for trial of the case. G.S. 1-82.

[3] Defendant contends it was error for the court to consider evidence of events transpiring after plaintiff filed this action. We disagree. Plaintiff's subsequent conduct in leasing an apartment, changing her mailing address to Buncombe County and enrolling her children in schools there tends to support her contention that she abandoned her former residence in Haywood County on 8 June 1971 and that Buncombe County has been her permanent residence since that time. See *Bixby v. Bixby,* 361 P. 2d 1075 (Okla. 1961).

Affirmed.

Judges CAMPBELL and VAUGHN concur.

LILLIAN BARNES LAUTENSCHLEGER v. ROYAL INDEMNITY COMPANY

No. 7219DC427

(Filed 2 August 1972)

Insurance § 68— automobile policy — medical payments — alighting from vehicle — insufficiency of evidence

Plaintiff's evidence tending to show that she parked her car over a grease pit at a service station, got out of the car, and, while walking toward the rear of the car to open the trunk, fell into the grease pit and sustained injuries, *held* insufficient to show that her fall occurred while she was "in or upon or entering into or alighting from" the automobile within the meaning of the medical payments provision of her automobile insurance policy.

APPEAL by plaintiff from *Warren, District Judge,* 15 November 1971 Session of District Court held in RANDOLPH County.

Civil action to recover under the medical payments provision of a family automobile insurance policy for medical expenses incurred by plaintiff as a result of an accident. Pertinent provisions of the policy provide:

"COVERAGE C — MEDICAL PAYMENTS. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:

DIVISION 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' caused by accident,

(a) While occupying the owned automobile,

* * *

DEFINITIONS. . . . 'occupying' means in or upon or entering into or alighting from."

Plaintiff offered evidence which tended to show that on 16 August 1967, at about 6:00 a.m., she took her car to a service station to have the tires recapped. She parked her car over a grease pit, got out of the car, and, while walking toward the rear of the car to open the trunk, fell into the grease pit

sustaining injuries. Plaintiff testified that at the time she fell she had her hand on the car feeling her way around to the trunk. At one point she said this was because it was dark and she could not see. At another point she stated that it was because lights from the station were shining in her eyes blinding her. In a statement given to defendant before trial she stated, "I shifted the things I was carrying from one arm to another, and I was searching for my keys to open the trunk and walking toward the rear of the car, all at the same time, and I started to the trunk of the car, and that is about all I remember when I woke up at the bottom of the grease pit."

It was as a result of injuries sustained in the fall that plaintiff incurred the medical expenses for which she sues.

At the conclusion of plaintiff's evidence, the court found that her evidence was insufficient to be submitted to the jury and allowed defendant's motion for a directed verdict.

John Randolph Ingram for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Larry B. Sitton for defendant appellee.

GRAHAM, Judge.

We think it clear under any version of plaintiff's evidence that her injuries did not result from an accident while occupying the insured vehicle within the meaning of the medical payments provision of her insurance policy. She has simply failed to show that her fall occurred while she was "in or upon or entering into or alighting from" the automobile. *Jarvis v. Insurance Co.*, 244 N.C. 691, 94 S.E. 2d 843. We affirm the directed verdict entered for defendant.

Affirmed.

Judges MORRIS and VAUGHN concur.

J. A. HOUCK, ASSIGNEE v. MRS. J. B. OVERCASH AND BILL RAMSEY, T/A BILLY'S PLUMBING CO.

No. 7225SC537

(Filed 2 August 1972)

1. **Appeal and Error § 35— failure to serve case on appeal — assignment relating to record proper**

Where appellant's assignments of error all relate to the record proper, it is not necessary that a case on appeal be served on the appellee.

2. **Judgments § 52— assignment of satisfied judgment**

An attempted assignment of a judgment already paid and satisfied of record is of no effect.

APPEAL by plaintiff from *Grist, Judge,* March 1972 Session of Superior Court held in CALDWELL County.

On 27 June 1961 judgment for $9,000.00 was entered in the Superior Court of Caldwell County in favor of Benny Allan Bumgarner, by his next friend, against J. B. Overcash, Mrs. J. B. Overcash and Bill Ramsey, t/a Billy's Plumbing Company. The judgment was duly recorded.

On 22 June 1971 J. A. Houck brought this action to renew the lien of the judgment against two of the defendants named therein. He alleges he is assignee of the judgment.

Defendants moved for summary judgment and the court, "having examined the motion, exhibits, interrogatories and all pleadings" filed in the cause, allowed the motion. Plaintiff appealed.

L. H. Wall for plaintiff appellant.

Wilson & Palmer by Hugh M. Wilson for defendant appellees.

GRAHAM, Judge.

Defendants moved in this Court to dismiss plaintiff's appeal for the reason that no case on appeal was served on them as required by G.S. 1-282. Plaintiff concedes he did not serve a case on appeal on defendants, but contends his only asserted errors are errors appearing on the face of the record.

[1] Where appellant's assignments of error all relate to the record proper it is not necessary that a case on appeal be served on the appellee. *Holsomback v. Holsomback,* 273 N.C. 728, 161 S.E. 2d 99. "In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof." *Machine Co. v. Dixon,* 260 N.C. 732, 133 S.E. 2d 659. Defendants' motion to dismiss the appeal is overruled; however, we limit our review to the record proper.

[2] In its order allowing defendants' motion for summary judgment the trial judge found that plaintiff's claim is based on a purported assignment of the judgment made after the judgment had been paid and satisfied of record. Since our review is limited to matters appearing on the face of the record, we must assume that all of the evidence before the trial court established that there is no genuine issue as to this material fact. The remaining question is whether this finding of fact supports the court's legal conclusion that the purported assignment relied upon by plaintiff was ineffective and conferred on him no right, title or interest in the judgment. We hold that it does. Once the judgment was paid and satisfied of record it was extinguished and nothing remained for plaintiff to assign. An attempted assignment of a judgment already paid and satisfied of record is of no effect. 5 Strong, N.C. Index 2d, Judgments, § 52.

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES KERMIT MIZELLE

No. 721SC555

(Filed 2 August 1972)

1. **Criminal Law § 43— motion pictures — admissibility for purposes of corroboration**

The admission of pornographic movies into evidence in an incest prosecution for the sole purpose of corroborating a witness's testimony did not constitute prejudicial error.

2. **Searches and Seizures § 1— warrantless search of premises not belonging to defendant**

Pornographic movies owned by defendant in an incest prosecution were not the fruits of an unlawful search and seizure where evidence tended to show that the victim concealed the film strips on her mother's property and the mother requested and permitted the sheriff to go upon the property to get the film strips.

3. **Criminal Law § 113— failure of court to give special instructions on corroborative evidence — no error**

It was not error for the trial court in an incest prosecution to allow movies into evidence for the purpose of corroboration without giving the jury special instructions on corroborative evidence, absent a request for such instructions by defendant.

APPEAL by defendant from *Tillery, Judge,* 6 March 1972 Session of Superior Court held in CHOWAN County.

Defendant was charged in a bill of indictment, proper in form, with the felony of carnal intercourse with his natural daughter. G.S. 14-178.

The State's evidence tended to show that defendant first began making sexual advances towards his daughter when she was twelve years of age. At age fifteen he showed pornographic movies to her, and he and she would sometimes participate in the same act as depicted on the film. Defendant had sexual intercourse with his fifteen year old daughter on several occasions. The last occasion was on 14 November 1971.

The daughter related all of the instances to her minister, her minister's wife, and to the sheriff. She turned over to the sheriff the movies which she identified as having been shown to her by defendant, and these movies were shown to the jury at defendant's trial.

Defendant's evidence tended to contradict the material portions of the State's evidence; however, he admitted ownership of the pornographic movies which were offered in evidence.

Upon a verdict of guilty as charged, judgment was entered that defendant be imprisoned for a term of not less than twelve nor more than fifteen years. Defendant appealed.

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

Twiford and Abbott, by Christopher L. Seawell, for the defendant.

BROCK, Judge.

[1] Defendant argues that it was prejudicial error to allow into evidence the pornographic movies and the exhibition of them to the jury. He argues that defendant's possession of these movies is equally as consistent with his innocence as with his guilt. He relies upon *State v. Stone,* 240 N.C. 606, 83 S.E. 2d 543.

The movies were not offered in this case as substantive evidence of defendant's guilt of incest. They were offered to corroborate the testimony of the daughter. For this purpose they were properly admitted.

[2] Defendant argues that it was prejudicial error to allow the movies into evidence because they were obtained by an illegal search and seizure. The trial judge conducted a full evidentiary hearing upon this question. The evidence tended to show that the daughter secured all of the film strips at the suggestion of her minister's wife. Because of their weight, she hid them beside a tree on her mother's property. Her mother thereafter requested and permitted the sheriff to go upon the property to get the film strips. The trial judge ruled, and we agree, that the search and seizure was proper.

[3] Defendant argues that it was prejudicial error for the judge to allow the movies into evidence without giving the jury special instructions on corroborative evidence. If defendant desired such instructions, he should have requested them. It was not error for the court to fail to give the instuctions, absent a request.

No error.

Judges MORRIS and HEDRICK concur.

HUBERT N. TYSON AND WIFE, PEARL W. TYSON v. JAMES EDWARD WINSTEAD

No. 727DC472

(Filed 2 August 1972)

Trespass § 7— wrongful removal of timber — title to property — sufficiency of evidence

In an action to recover damages for the wrongful cutting and removal of timber, plaintiffs' evidence was sufficient to support a jury finding that plaintiffs were the owners of the property in question, and the evidence of trespass and cutting of timber thereon by defendant was sufficient to support an award of double damages to plaintiffs. G.S. 1-539.1.

APPEAL by defendant from *Carlton, District Judge,* 29 November 1871 Session of District Court held in NASH County.

Plaintiffs alleged that during March and April 1968 the defendant entered upon the lands of plaintiffs and cut and removed therefrom wood and timber valued at $350, and asked for the recovery of double that amount in damages under the provisions of G.S. 1-539.1. Defendant answered and denied plaintiffs were the owners of the land in question and also denied cutting timber on such land. Upon the trial, the jury found that the plaintiffs were the owners of the land in question and that the defendant, without the consent of the plaintiffs, had cut and removed timber therefrom of the value of $350. Judgment was entered against defendant for $700 in double damages under the provisions of G.S. 1-539.1 and the defendant appealed to the Court of Appeals.

Fields, Cooper & Henderson by Milton P. Fields for plaintiff appellees.

Moore & Diedrick by George C. Whittaker for defendant appellant.

MALLARD, Chief Judge.

Defendant has four assignments of error, all based upon his contention that the plaintiffs did not introduce sufficient evidence from which it could be found that the plaintiffs were the owners of the property in question. Therefore, the sole question for decision in this case is whether the plaintiffs

offered evidence sufficient to support the finding by the jury that the plaintiffs were the owners of the property in question.

This action was instituted 9 February 1971. Plaintiffs' evidence tended to show, when viewed in the light most favorable to them, a proper identification of the lands involved herein, a trespass and cutting of timber by the defendant, and an unbroken chain of title to the lands involved in this action from 27 January 1939, the date of a deed from I. T. Valentine, Commissioner to G. M. Strickland, which was duly filed for registration in Nash County on 27 January 1939.

All of the deeds in the plaintiffs' chain of title accurately describe the land involved by metes and bounds. The evidence, taken in the light most favorable to plaintiffs, tended to show that the lands were conveyed to the plaintiffs by deed dated 10 January 1963, filed for registration in Nash County on 16 January 1963, and recorded in Book 762, page 181, and that plaintiffs had been in possession thereof since that date. We hold that the evidence of plaintiffs' ownership of the property was sufficient to support a finding by the jury that the plaintiffs were the owners of the property in question and the evidence of the trespass and cutting of timber thereon by the defendant was sufficient to support the award of damages to plaintiffs.

In the trial we find no prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. RUSSELL WENDELL MELSON

No. 721SC501

(Filed 2 August 1972)

Criminal Law § 161— exception to the judgment

Defendant's exception to the judgment in a common-law robbery prosecution must fail where the judgment is supported by plenary competent evidence, the sentence is within statutory limits, and no prejudicial error appears on the face of the record on appeal.

APPEAL by defendant from *Tillery, Judge,* 14 February 1972 Session of Superior Court held in PASQUOTANK County.

The defendant was charged in a bill of indictment, proper in form, with the felony of common-law robbery from the person and possession of one Sam Lee Dance on 19 December 1971. The defendant entered a plea of "not guilty." The evidence for the State tended to show that Dance had fallen asleep in his automobile in the parking lot of a drive-in restaurant and when he awoke, was being beaten by the defendant. The defendant, after he "snatched" Dance out of the car and kicked him while he was on the ground, removed the money from Dance's pockets and pocketbook and the wristwatch from his arm. He then struck Dance several times more with his fist; Dance began to fight back, and the defendant fled.

Dance had ample opportunity to observe the defendant during this time, and testified at the trial he had known the defendant previously for a period of ten years. Dance also testified, "When I turned around the light was behind me and in his face and I saw his face and recognized him. I would know him anywhere I would see him. That is the same man who is here in the Courtroom . . . . "

Defendant presented two witnesses in his defense, his mother and a personal acquaintance, who had seen the defendant on the night in question and had noticed nothing unusual about his manner or appearance.

From a jury verdict of guilty as charged and judgment that he be imprisoned for a term of not less than seven nor more than ten years, defendant appealed to the Court of Appeals.

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

Twiford & Adams by Russell E. Twiford and Christopher L. Seawell for defendant appellant.

MALLARD, Chief Judge.

In his brief, defendant brings forward no assignments of error but urges this court to "examine the record for any error that may appear prejudicial to the appellant." This

constitutes an exception to the judgment and presents the face of the record on appeal for review. 3 Strong, N.C. Index 2d, Criminal Law, § 161, and cases cited therein.

The Attorney General states that he has carefully reviewed the organization of the court, the bill of indictment, the defendant's plea, the verdict and the judgment in the case before us and has found no error.

The judgment in this case was supported by plenary competent evidence, the sentence is within statutory limits, and no prejudicial error appears on the face of the record on appeal. We find no error.

No error.

Judges CAMPBELL and BRITT concur.

CLAUDIE W. LASSITER AND WIFE, SYLVIA P. LASSITER; ANNE L. EMORY AND HUSBAND, EUGENE W. EMORY; MAY L. COLLIER AND HUSBAND, ROBERT L. COLLIER; AND GREY L. BRISTOW AND HUSBAND, I. W. BRISTOW, PETITIONERS v. MILLARD E. LASSITER AND WIFE, AGNES L. LASSITER, MARSH CHEVROLET COMPANY, CARGOCARE TRANSPORTATION, INC., OLIN MATHIESON, ELIZABETH F. FUTRELLE, EXECUTRIX OF THE ESTATE OF W. C. FUTRELLE, GILLIAM BROTHERS PEANUT SHELLER, INC., FARMERS COTTON OIL CO., PLANTERS INDUSTRIES, INC., AND F. S. ROYSTER GUANO COMPANY, (NOW ROYSTER COMPANY), DEFENDANTS

No. 726SC536

(Filed 2 August 1972)

Descent and Distribution § 13— advancement — partition proceeding

In an action to have real property partitioned among tenants in common and to have the interest of one tenant charged with advancements, there was sufficient competent evidence to support the trial court's finding of fact that sums of money given to the tenant were advancements. G.S. 29-24.

APPEAL by Elizabeth F. Futrelle, Executrix of the Estate of W. C. Futrelle, Farmers Cotton Oil Company and Royster

Company, Defendants from *Special Judge Robert M. Martin,* 1 November 1971 Session of Superior Court held in NORTHAMPTON County.

Plaintiffs instituted this action to have real property partitioned among tenants in common and to require that the interest of one of the tenants in common, Defendant Millard E. Lassiter, be charged with advancements received from Eugene Lassiter, the father of the tenants in common who had died intestate. All of the defendants, with the exception of Millard Lassiter and his wife, are judgment creditors of Millard E. Lassiter and in their separate anwers each denied that any sums of money passing from Eugene Lassiter to Millard Lassiter, prior to the former's death, were advancements. Trial by jury was waived. The parties stipulated that the only issue for determination was whether advancements amounting to $13,000.00, or any lesser sum, had been made to Millard E. Lassiter by his father. The judge found as a fact that Millard E. Lassiter had received advancements totaling $13,000.00. Defendant Millard E. Lassiter did not appeal. The appellants are judgment creditors of Millard E. Lassiter.

Cherry, Cherry and Flythe by Joseph J. Flythe for plaintiff appellees.

Lucas, Rand, Rose, Meyer, Jones & Orcutt by William R. Rand and Connor, Lee, Connor & Reece by David M. Connor for defendant appellants.

VAUGHN, Judge.

The questions presented by this appeal, which we answer in the affirmative, are whether there was sufficient, competent evidence to support the trial court's findings of fact and whether the findings of fact support the conclusions of law.

"A gratuitous inter vivos transfer is presumed to be an absolute gift and not an advancement unless shown to be an advancement." G.S. 29-24. Plaintiffs offered evidence by way of testimony from Claudie W. Lassiter, administrator of the estate of Eugene Lassiter and brother of Millard E. Lassiter, testimony from Millard E. Lassiter, and an affidavit made by Millard E. Lassiter, all tending to show that the sum of $13,000.00 received by Millard E. Lassiter from his father was an advancement. Negotiated checks totaling that amount were

found in the father's safe after his death. The sum was treated as an advancement in the settlement of the father's estate prior to the institution of this action. Defendants offered no evidence. We hold this evidence to support the court's findings of fact that Millard E. Lassiter received advancements totaling $13,000.00. Defendants' other assignments of error have been considered and are overruled.

Affirmed.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. BOYCE JAMES SHERRILL

No. 7227SC442

(Filed 2 August 1972)

1. **Automobiles § 126— breathalyzer test given within reasonable time after offense committed**

The elapse of seventy minutes between the time defendant was first seen driving his vehicle and the time a breathalyzer test was given him did not constitute such delay as to render the results of the test inadmissible.

2. **Automobiles § 126— breathalyzer test properly administered — results admissible**

Results of a breathalyzer test were admissbile against defendant in a prosecution for driving upon the highway while under the influence of intoxicating liquor where the evidence showed that the test was administered according to methods approved by the State Board of Health. G.S. 20-139.1.

3. **Criminal Law § 117— instruction on credibility of defendant — no error**

The trial judge did not err in instructing the jury that, should they believe defendant was telling the truth, they should give his testimony the same weight that they would give to testimony of a disinterested, credible witness.

APPEAL by defendant from *Jackson, Judge,* 18 January 1972 Session of Superior Court held in LINCOLN County.

Defendant was convicted of driving a motor vehicle upon the highway while under the influence of intoxicating liquor.

Attorney General Robert Morgan by Associate Attorney William Lewis Sauls for the State.

Max L. Childers and Henry L. Fowler, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant's first contention is that the court erred in admitting testimony as to the results of a breathalyzer test.

The test was administered within seventy minutes of the time defendant was first observed driving his automobile. Defendant's contention that the results were not admissible by reason of the delay is without merit. *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165.

[2] Defendant next argues that his general objection to the admission of the results of the test should have been sustained for the reason that the evidence failed to show that the test was administered according to methods approved by the State Board of Health as required by G.S. 20-139.1.

The evidence discloses that the officer who administered the test met the requirements of G.S. 20-139.1(b). At trial, defendant's counsel stated that he raised no question as to the qualifications of the officer. In addition to other details as to the operation of the machine, the officer testified that he " . . . followed the operational check list on the machine as set up by the State Board of Health." Defendant's counsel was not restricted in his extensive cross-examination of the witness as to the manner in which the test was administered. We hold that the requirements of the statute were met and the results of the test were properly admitted. *State v. Powell,* 279 N.C. 608, 184 S.E. 2d 243.

[3] Defendant's next assignment of error relates to the court's instructions as to the weight to be given defendant's testimony. After proper instructions as to the jury's duty to scrutinize defendant's testimony, the jury was instructed " . . . that after you have so scanned and scrutinized his testimony carefully, if you come to the conclusion that he is telling the truth, then you would give his testimony the same weight that you would give to the testimony of a disinterested, credible witness." Defendant's argument that the quoted portion of the charge "casts

the inference that not only is the defendant interested, but also not credible" is without merit. *State v. McKinnon,* 223 N.C. 160, 164, 25 S.E. 2d 606. Defendant's third assignment of error is without merit and does not require a discussion.

No error.

Judges PARKER and GRAHAM concur.

VIOLA MAE STROUD v. NORTH CAROLINA MEMORIAL HOSPITAL

No. 7215IC460

(Filed 2 August 1972)

1. **State § 10— tort claim — review of findings of fact**

The Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence even though there is evidence which would support contrary findings.

2. **State § 8— tort claim — State hospital — visitor — fall on salad oil on floor**

In an action under the Tort Claims Act to recover for injuries allegedly sustained when plaintiff slipped and fell on salad dressing which had been spilled by an employee of defendant hospital in front of a service elevator, the evidence was sufficient to support findings by the Industrial Commission that plaintiff was an invitee of defendant hospital, that plaintiff was injured by a negligent act on the part of a State employee acting in the scope of her employment, and that plaintiff was not contributorily negligent.

ON writ of *certiorari* to review opinion and award of the North Carolina Industrial Commission filed 20 January 1972.

Appellant failed to docket the appeal within the time allowed by our rules. Prior to argument, appellant requested that the appeal be treated as a petition for writ of certiorari, and plaintiff has filed no objections. We choose to issue the writ and consider the case on its merits.

Plaintiff filed an affidavit with the Industrial Commission claiming that she was injured as a result of the negligent act of an employee of the State and was entitled to recover under the State Tort Claims Act (G.S. 143-291, et seq.). Plaintiff alleged that while visiting her husband who was a patient

in defendant Hospital, she slipped and fell on vinegar and oil salad dressing which had been spilled by an employee of defendant in front of a service elevator.

There was a full hearing before Commissioner Shuford of the Industrial Commission on 26 May 1971 at which time evidence was presented by both plaintiff and defendant. From an order entered by Commissioner Shuford on 2 July 1971 awarding plaintiff $5,000 in damages, defendant gave notice of appeal. The Full Commission made one additional finding of fact and affirmed the earlier decision of the hearing commissioner. The defendant Hospital duly excepted and appealed to this Court.

Attorney General Morgan, by Associate Attorney Conely, for defendant petitioner.

Winston, Coleman and Bernholz, by Barry T. Winston, for plaintiff respondent.

MORRIS, Judge.

[1] Upon appeal from an award of the Industrial Commission, our inquiry is limited to two questions of law: (1) Whether there was any competent evidence before the Commission to support its findings of fact; and (2) Whether the findings of fact of the Commission justify its legal conclusions and decision. *Bailey v. Dept. of Mental Health,* 272 N.C. 680, 159 S.E. 2d 28 (1968). The Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence. G.S. 143-293. This is true even when there is evidence which would support findings to the contrary. *Bailey v. Dept. of Mental Health, supra.*

[2] We hold that the findings of the Commission that plaintiff was an invitee of defendant, that plaintiff was injured by a negligent act on the part of a State employee acting in the scope of her employment, and that plaintiff was not contributorily negligent are supported by competent evidence. See *Crawford v. Board of Education,* 3 N.C. App. 343, 164 S.E. 2d 748 (1968), aff'd 275 N.C. 354 (1969). Similarly we hold that the findings of fact are sufficient to support the Full Commission's conclusion that plaintiff was entitled to recover.

The opinion and award of the Full Commission is

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN HENRY RUSSELL

No. 7219SC543

(Filed 2 August 1972)

Forgery § 2— indictment for forgery and uttering — description of check — "Same as above"

Where, in an indictment for forgery of a check and uttering a forged check, the first count charging forgery set forth the contents of the check with exactitude, reference to the check in the uttering count "Same as above" was sufficient, although it would have been preferable for the uttering count also to have set out in detail the particular check involved.

Chief Judge MALLARD dissenting.

APPEAL by defendant from *Johnston, Judge,* at the 14 February 1972 Criminal Session of ROWAN County Superior Court.

Two bills of indictment were returned against this defendant. Each indictment charged the defendant with the forgery of a check and the uttering of a forged check. One check was for the amount of $28.34 and the other for $28.43. Both checks were drawn on Daniel Construction Co., Inc.

Defendant entered pleas of not guilty to each charge.

Defendant was tried in Superior Court before a jury. The jury returned a verdict of not guilty on each charge of forgery and a verdict of guilty on each charge of uttering a forged check.

Judgment imposing a prison sentence was entered on the verdict.

From the verdict and judgment, defendant appeals.

Attorney General Robert Morgan by Staff Attorney Donald A. Davis for the State.

Burke & Donaldson by George L. Burke, Jr., for defendant appellant.

CAMPBELL, Judge.

Counsel for defendant candidly admits that he can find no error in the trial of this case. The record was submitted in order that we might review it for errors appearing on its face.

In each bill of indictment with regard to the first count, the check was copied in exact detail. With regard to the second count in each bill of indictment, the bill read as follows:

> "AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT, That the said John Henry Russell afterward, to wit, on the day and year aforesaid, at and in the County aforesaid, wittingly and unlawfully and feloniously did utter and publish as true a certain false, forged and counterfeited bank check is as follows, that is to say: Same as above with intent to defraud— . . . "

The question arises as to whether the second count in each bill of indictment is sufficient to charge the offense.

In an indictment containing several counts, each count should be complete in itself. *State v. McKoy,* 265 N.C. 380, 144 S.E. 2d 46 (1965).

Here the first count in each bill of indictment was complete and sufficient as it contained with exactitude the bank check involved. When it came to the second count, however, in each bill of indictment, we find only the following reference with regard to the bank check involved: "Same as above." Unquestionably, it would have been preferable for the second count in each bill to have again set out in detail the particular check involved. We believe, however, that since the check was set out in detail in the first count and that was an integral part of the bill of indictment, the reference to the same check in the second count was sufficient. We hold that the second count in each bill of indictment meets the test indicated in *State v. Sutton,* 14 N.C. App. 422, 188 S.E. 2d 596 (1972).

No error.

Judge BRITT concurs.

Chief Judge MALLARD dissents.

I dissent on the grounds that in an indictment containing several counts, each count should be complete within itself. In my opinion, when the indictment in this case is thus viewed, it is not sufficient to charge the offense of uttering a particular forged check.

STATE OF NORTH CAROLINA v. BOBBY LOWERY

No. 7216SC512

(Filed 2 August 1972)

Assault and Battery § 5— conviction sustained by record

No error appears in the record in this appeal from a conviction of assault with a deadly weapon or other means or force likely to inflict serious injury or serious damage.

ON *certiorari* to review judgment of *Canaday, Judge,* 5 April 1971 Session of Superior Court, ROBESON County.

Defendant was tried in District Court on a warrant charging assault with a deadly weapon or other means or force likely to inflict serious injury or serious damage. G.S. 14-33(b)(1). He entered a plea of not guilty, was convicted, and judgment entered imposing a sentence of four months in the Robeson County jail. He appealed to the Superior Court and was tried de novo. He again entered a plea of not guilty, was convicted by the jury, and judgment was entered imposing a sentence of twelve months. He gave notice of appeal. Petition for writ of certiorari filed by his court-appointed counsel was allowed on 11 April 1972.

Attorney General Morgan, by Assistant Attorney General Walker, for the State.

Neill A. Jennings, Jr., for defendant appellant.

MORRIS, Judge.

Only two witnesses testified in this case—the prosecuting witness and the defendant. The evidence from the prosecuting witness, Fields, was to the effect that he went to a place in Lumberton about seven o'clock on the night of 19 December 1970, to get some beer to take home. Defendant was standing

against the edge of the door and as Fields entered, defendant asked him a question which he answered. He walked past defendant about three feet and came back to the door. Defendant struck him with a bottle and knocked him to the floor. While he was on the floor, defendant kicked him in the face about six times. Defendant was wearing construction boots. Fields was taken to the hospital and "the doctor took seven stitches in his face."

Defendant's testimony was that he was at the place on the night in question but did not see Fields there and did not hit him or kick him in the face.

Defendant's court-appointed counsel conducted vigorous cross-examination. Incompetent and prejudicial evidence was excluded upon his objections, and the jury was instructed not to consider certain evidence upon request of defendant's counsel. No error is assigned to the charge of the court to the jury, and in the charge we find no prejudicial error. The jury simply found that defendant's evidence was not credible. The sentence is within the statutory limits.

It appears that defendant has had a fair and impartial trial free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. TERRELL PHILLIPS

No. 723SC416

(Filed 2 August 1972)

1. **Narcotics § 4— possession of mescaline — no fatal variance in charge and proof**

In a prosecution for possession of narcotic drugs where one witness testified that the narcotic in question was LSD and another that it was mescaline, defendant could not complain of fatal variance between the indictment which charged possession of mescaline and the proof, since there was evidence from which the jury could find the narcotic in question to have been the exact substance described in the indictment.

2. **Narcotics § 1— mescaline — LSD — narcotic drugs**

Mescaline and LSD are narcotic drugs within the meaning of the Narcotic Drug Act. G.S. 90-87(9).

State v. Phillips

APPEAL by defendant from *Rouse, Judge,* 8 November 1971 Session of Superior Court held in CRAVEN County.

Defendant was tried under a bill of indictment providing the following:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Terrell Phillips late of the County of Craven on the 18th day of May 1971 with force and arms, at and in the County aforesaid, did unlawfully, wilfully, and feloniously possess narcotic drugs in violation of the Uniform Narcotic Drug Act. The drugs in question consisted of 99 capsules of Mescaline.
> against the form of the statute in such case made and provided and against the peace and dignity of the State."

Defendant waived his right to counsel and entered a plea of not guilty. The jury found him guilty and judgment was entered sentencing him to imprisonment for a maximum term of eighteen months and ordering that he be committed as a youthful offender.

Notice of appeal was given in open court and the trial judge, after determining defendant to be indigent, appointed counsel to perfect his appeal.

Attorney General Morgan by Associate Attorney Baxter for the State.

Robert G. Bowers for defendant appellant.

GRAHAM, Judge.

[1] Defendant contends that there was a fatal variance between the indictment and proof in that the indictment charged that the narcotics in question were mescaline capsules and the proof was that they were lysergic acid diethylamide (LSD). It is true that one of the State's witnesses identified the capsules in question as containing LSD. However, another witness for the State testified without objection that they were mescaline. Therefore, there was evidence from which the jury could find the narcotics in question to have been the exact substances described in the indictment. Defendant did not except to the court's charge as to what it was necessary for the jury to find in order to find defendant guilty as charged in the bill of indictment. For these reasons we overrule defendant's conten-

tion and do not decide whether a fatal variance would be present if all of the State's evidence had been that the capsules found in defendant's possession were LSD and not mescaline as stated in the bill of indictment.

[2] Defendant also contends that neither mescaline nor lysergic acid diethylamide is a narcotic drug. This contention is without merit. Provisions of the Narcotic Drug Act in effect at the time of defendant's arrest and trial define "Narcotic drugs" to include "mescaline" and "lysergic acid diethylamide," as well as other psychedelic or hallucinogenic drugs. G.S. 90-87(9) (Supp. 1969).

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JIMMY AVERY PRICE

No. 7227SC449

(Filed 2 August 1972)

1. **Criminal Law § 26— former jeopardy — trial by court without jurisdiction**

   A former conviction by a court without jurisdiction will not support a plea of former jeopardy.

2. **Criminal Law § 138— severity of sentence imposed in second trial — no error**

   When a longer sentence is imposed against defendant in a second prosecution by the State than was imposed in the first prosecution for the same offense, defendant cannot complain of error where the court was without jurisdiction in the earlier trial and the judgment was a nullity.

APPEAL by defendant from *Judge Harry C. Martin,* 31 January 1972 Session of Superior Court held in GASTON County.

Defendant was convicted of felonious escape. Judgment imposing an active sentence of twenty-eight months was entered.

Attorney General Robert Morgan by Assistant Attorney General Edward L. Eatman, Jr., for the State.

J. Ben Morrow for defendant appellant.

VAUGHN, Judge.

Defendant contends that court erred in overruling his motion for dismissal upon his plea of former jeopardy. On 18 August 1971, while awaiting trial on the indictment for escape, defendant filed a petition in the District Court of the United States for the Western District of North Carolina seeking removal of the cause to that court pursuant to 28 U.S.C. 1443. a copy of the petition was filed with the Clerk of Gaston Superior Court.

On 7 October 1971, while the petition for removal was pending in the federal court, the State purported to try defendant and sentenced him to a term of two years.

No action was taken by the federal courts until 2 December 1971, at which time an order was entered remanding the cause and dismissing the petition for removal. The order also recited that " . . . the petition having been timely and properly filed, the state court had no jurisdiction to proceed further and its trial and conviction of the petitioner for felonious escape is void."

[1] The present appeal arises from defendant's trial and conviction on 3 February 1972. The first question presented is whether the trial of defendant while his petition for removal was pending constitutes former jeopardy. Judge Martin was correct in ruling that it did not.

The proper filing of the motion to remove the prosecution from the Superior Court of Gaston County to the District Court of the United States for the Western District of North Carolina effected the removal and the state court was thereafter without jurisdiction to proceed until the cause was remanded by the federal court. *State v. Francis,* 261 N.C. 358, 134 S.E. 2d 681.

A former conviction by a court without jurisdiction will not support a plea of former jeopardy. *State v. Cooke, Wolfe, Simkins, Sturdivent, Murray, Herring,* 248 N.C. 485, 103 S.E. 2d 846.

[2] In the trial from which the present appeal arises, the sentence imposed is greater than that imposed on 7 October 1971, while the petition for removal was pending. Defendant assigns this as error. The court was without jurisdiction in the earlier

trial and that judgment is a nullity. The imposition of a sentence of twenty-eight months in this, the first trial of defendant by a court having jurisdiction, was not error. The case of *North Carolina v. Pearce,* 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 2072, has no application. Defendant's remaining assignments of error have been considered and found to be without merit.

No error.

Judges PARKER and GRAHAM concur.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF ROBY A. BRACKETT

No. 7229SC549

(Filed 2 August 1972)

Husband and Wife § 10— validity of separation agreement — acknowledgment by wife

Trial judge erred in holding a deed of separation invalid where the wife's acknowledgment of the deed complied substantially with statutory requirements. G.S. 47-39.

APPEAL by the executrix of the estate of Roby A. Brackett from *Falls, Judge,* 17 April 1972 Session of Superior Court held in RUTHERFORD County.

Beatrice Brackett and Roby A. Brackett entered into a deed of separation on 27 November 1967. Roby Brackett died in 1970 leaving a will in which all of his property was devised to his children.

Beatrice Brackett attempted to dissent. Counsel stipulated that her right to dissent depends upon the validity of the deed of separation. Judge Falls held the deed of separation invalid.

Harry K. Boucher for Beatrice Brackett, widow.

George R. Morrow for the estate of Roby A. Brackett.

VAUGHN, Judge.

The validity of the attack on the deed of separation depends upon whether the wife's acknowledgment, coming as it does under the provisions of G.S. 52-6, complies with that section

in substantially the form required by G.S. 47-39. The acknowledgment is as follows:

"STATE OF NORTH CAROLINA
COUNTY OF RUTHERFORD

I, Monroe Holland, a Justice of the Peace of said county, do hereby certify that Beatrice Brackett personally appeared before me this day and acknowledged the execution of the foregoing deed of separation.

And I do further certify that it has been made to appear to my satisfaction and I do find as a fact, that the said Beatrice Brackett freely executed the said deed of separation and freely consented thereto at the time of her separate examination and that the same is not unreasonable or injurious to her.

Witness my hand and seal, this the 30 day of Nov., 1967.

(SEAL) MONROE HOLLAND
Justice of the Peace"

We hold that the acknowledgment is sufficient to meet the requirements of the statute. Entry of judgment declaring the deed of separation invalid constituted error.

Reversed.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. JOHN LOUIS HARRINGTON

No. 728SC567

(Filed 2 August 1972)

1. **Criminal Law § 23; Indictment and Warrant § 9— guilty plea — claim that indictment is insufficient**

Defendant is not precluded by his plea of guilty from claiming that the facts alleged in the indictment do not constitute a crime.

2. **Burglary and Unlawful Breakings § 3— breaking and entering motor vehicle — indictment — ownership of vehicle**

An indictment charging the offense of breaking and entering a motor vehicle containing things of value with intent to commit larceny therein need not allege the technical ownership of the vehicle, it being

sufficient to allege the ownership of the property contained in the vehicle and that the vehicle was in the possession of a specified person. G.S. 14-56.

APPEAL by defendant from *Cowper, Judge,* 28 February 1972 Session of Superior Court held in WAYNE County.

Defendant was charged in a bill of indictment with breaking and entering a motor vehicle containing goods, wares, and other things of value with intent to commit larceny therein. G.S. 14-56. Defendant was represented by counsel and tendered a plea of guilty which, upon competent evidence, was found by the trial judge to have been freely and voluntarily tendered. The plea of guilty was thereupon ordered to be entered in the record.

Judgment was entered imposing an active prison sentence of not less than four nor more than five years. Defendant appealed.

Attorney General Morgan by Associate Attorney Reed for the State.

Cecil P. Merritt for the defendant.

BROCK, Judge.

Defendant's argument is, in effect, a motion to quash the indictment and arrest judgment. He argues that the bill of indictment does not allege facts sufficient to constitute a criminal offense.

[1] The bill of indictment describes the motor vehicle in detail as "a 1969 Oldsmobile, 4-door Sedan, Aztec Gold in color, Serial No. 364699 D136524, N. C. Motor Vehicle Registration No. HF-3400, in the possesion of one Durwood Emmett Stroud . . . . " It is defendant's argument that the failure to allege technical ownership of the motor vehicle constitutes a fatal defect. Defendant is not precluded by his plea of guilty from claiming that the facts alleged in the indictment do not constitute a crime under the laws of this State. *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330.

[2] Defendant argues that technical ownership of the motor vehicle must be alleged in order to negate ownership in the defendant, because defendant could not be guilty of the offense

if he broke and entered his own vehicle. However, the gravamen of the offense with which defendant is charged is the breaking and entering with *intent to commit larceny*. The bill of indictment in this case specifically lays the ownership of the property contained in the motor vehicle in Durwood Emmett Stroud. It thereby clearly negates the possibility of defendant breaking and entering the vehicle to steal his own property.

The motor vehicle involved is described in detail and its possession is alleged to be in Durwood Emmett Stroud. The technical ownership of the vehicle broken into is immaterial.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD HORTON

No. 7215SC513

(Filed 2 August 1972)

Narcotics § 2— sale of LSD — indictment — name of purchaser — possession of LSD — sufficiency of indictment

Though the second count charging sale of LSD in each of two bills of indictment should be quashed for insufficiency where it failed to allege the name of the purchaser at the sale allegedly made by defendant, the first count of each bill charging possession of LSD was sufficient, upon defendant's plea of guilty, to support the judgment entered.

ON *certiorari* to review defendant's trial before *Copeland, Judge,* 3 January 1972 Session of Superior Court held in ORANGE County.

Defendant was charged in two bills of indictment, each charging (1) possession of a quantity of tablets of lysergic acid diethylamide (commonly known as LSD), and (2) the sale thereof. The charges against defendant grew out of the work of an undercover agent for the police in the town of Chapel Hill.

Defendant tendered pleas of guilty to the two counts in each of the two bills of indictment. He was represented by court appointed counsel and was found by the trial judge, upon

competent evidence, to have freely and voluntarily tendered the guilty pleas before they were allowed to be entered.

After hearing the State's evidence, the trial judge consolidated the four counts for judgment, and adjudged that defendant be imprisoned for a term of not less than two nor more than three years.

Defendant appealed.

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

Rex T. Savery, Jr., for defendant.

BROCK, Judge.

Defendant challenges the sufficiency of the second count in each of the two bills of indictment. The second count in each bill fails to allege the name of the purchaser at the sale allegedly made by defendant. Upon the authority of *State v. Bennett,* 280 N.C. 167, 185 S.E. 2d 147, defendant's assignment of error is sustained.

Although the second count in each bill of indictment should be quashed for insufficiency, the judgment entered should not be arrested. The two sufficient counts were consolidated with the two insufficient counts for judgment. Either one of the two sufficient counts, upon defendant's pleas of guilty, supports the judgment entered. Therefore, the judgment entered will not be disturbed.

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. RALPH L. STIMPSON

No. 7218SC561

(Filed 2 August 1972)

1. **Homicide § 15; Criminal Law § 42— bloodstains — nonexpert testimony**

Nonexperts can testify as to the fact of bloodstains and then it is for the jury to determine the weight to be given to the testimony.

2. **Criminal Law § 168— erroneous instruction — no prejudice**

A new trial will not be awarded for error in the charge which is favorable or not prejudicial to defendant; therefore, defendant in a prosecution for voluntary or involuntary manslaughter is not entitled to a new trial where the trial court erred in charging the jury that one of the elements of involuntary manslaughter involves the intentional killing of a person.

APPEAL by defendant from *Seay, Judge,* 3 January 1972 Criminal Session of GUILFORD Superior Court.

By indictment proper in form defendant was charged with the murder of Lillian Holland on 19 September 1970. He was originally tried for second-degree murder or manslaughter, was found guilty of manslaughter and a prison sentence of 15 years was imposed. On appeal a new trial was ordered by the North Carolina Supreme Court for error committed during the first trial. (See 279 N.C. 716, 185 S.E. 2d 168.) At the second trial defendant was tried for voluntary or involuntary manslaughter. The jury returned a verdict of guilty of involuntary manslaughter and defendant was sentenced to prison for 10 years with credit given for 478 days spent in jail pending trial and appeals.

From this judgment defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General I. Beverly Lake, Jr., for the State.

Public Defender Wallace C. Harrelson and Assistant Public Defender Dale Shepherd for defendant appellant.

BRITT, Judge.

Defendant contends that the court erred in denying his motion for nonsuit. The evidence presented at the second trial was substantially the same as that presented at the first trial

which is fully set forth in the Supreme Court opinion above cited. A restatement of the evidence here would serve no useful purpose. Suffice to say, it was sufficient to survive the motion for nonsuit.

[1] Defendant contends that the court erred in allowing a layman to testify that something appeared to be blood. This contention is without merit and has been answered by this court in *State v. Willis,* 4 N.C. App. 641, 167 S.E. 2d 518 (1969), cert. den. 275 N.C. 501 (1969), where it is stated that nonexperts can testify as to the fact of bloodstains and then it is for the jury to determine the weight to be given to the testimony.

[2] Defendant also contends that the court erred in charging the jury that one of the elements of involuntary manslaughter involves the intentional killing of a person. We concede that this was error but fail to see how it was prejudicial to defendant. The portion of the charge involved stated: "As it relates to involuntary manslaughter, intent is not an issue. The crux of that crime is an accused intentionally killed his victim by a wanton, reckless, culpable use of a firearm or other deadly weapon."

The only effect of such a charge is to place a greater burden upon the State in proving the elements of the lesser offense. A new trial will not be awarded for error in the charge which is favorable or not prejudicial to defendant. *State v. DeBerry,* 228 N.C. 147, 44 S.E. 2d 722 (1947). Since defendant could only have been helped by this instruction, he has no reason to complain and his assignment of error is overruled.

All of defendant's assignments of error have been carefully considered and found to be without merit.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

ERNEST FRANKLIN EDWARDS v. PATRICIA SPRUILL EDWARDS

No 7212DC404

(Filed 2 August 1972)

Venue § 8— denial of change of venue — sufficiency of findings

In a proceeding instituted in Cumberland County to enforce visitation rights granted to plaintiff by a consent judgment entered in that county, the trial court's denial of defendant's motion for a change of venue to Craven County, where defendant and the minor child now reside, was supported by findings that both parties resided in Cumberland County at the time of their separation, that plaintiff resides in Cumberland County, that there is no issue pending as to child custody or support, and that defendant has not shown that the appearance of witnesses from Craven County is necessary.

APPEAL by defendant from *Herring, Judge,* 10 January 1972 Session, District Court, CUMBERLAND County.

Plaintiff instituted an action on 25 March 1971 for divorce from bed and board and for custody of the child born of the marriage between plaintiff and defendant. On 9 June 1971, consent judgment was entered, determining among other things, that defendant was entitled to custody of the child and providing for monthly payments by plaintiff for the child's support. The judgment also provided for visitation rights in the plaintiff. On 20 August 1971, plaintiff served on defendant a notice and order to show cause why she should not be held in contempt for violating the provisions of the judgment with respect to plaintiff's rights of visitation. The defendant answered and moved for change of venue. The court did not act on the motion for change of venue but, by order entered, found the defendant not in contempt and that the original judgment remain in full force and effect. On 6 January 1972, defendant again filed motion for change of venue. On 15 February 1972 the court entered an order finding facts and denying the motion in its discretion. Defendant appealed.

Robert G. Bowers for defendant appellant.

No counsel for plaintiff appellee.

MORRIS, Judge.

Defendant's only assignment of error is that the court erred in denying the motion for change of venue. The grounds

for the motion were that both parties now live in Craven County and it would be more convenient for witnesses to move the action to Craven County.

Among others, the court found as facts that the minor child resides in Craven County with defendant, that plaintiff resides in Cumberland County, that at this time there is no issue pending as to child support or custody, that at the time of the separation between the parties both resided in Cumberland County, and that at this time the defendant has made no showing that appearance of witneses from Craven County is necessary. Defendant did not except to any of the findings of fact. Her only assignment of error is to the denial of the motion. She argues on appeal, however, that the evidence does not support the court's findings. Defendant's failure to except to the findings in this case presents the single question of whether the facts found are sufficient to support the judgment. *Hatchell v. Cooper*, 266 N.C. 345, 146 S.E. 2d 62 (1966); *Roughton v. Jim Walter Corp.*, 8 N.C. App. 325, 174 S.E. 2d 389 (1970).

Defendant concedes that the change of venue is discretionary but argues that the court abused its discretion by failing to find facts upon which properly to make a decision.

The facts found support the judgment.

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOE LEWIS PRICE

No. 7214SC530

(Filed 2 August 1972)

APPEAL by defendant from *Cooper, Judge*, 14 January 1972 Session of Superior Court held in DURHAM County.

Defendant was convicted of possessing narcotic drugs, to wit, thirty bindles of heroin, on 18 November 1971. Judgment was entered imposing an active sentence of thirty months.

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

John E. Bugg for defendant appellant.

VAUGHN, Judge.

Defendant was ably represented at trial and on this appeal by his court-appointed counsel. We have carefully considered the several assignments of error brought forward and find no error which requires a new trial.

No error.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. ALTON LENNON MILLER, JR., GRADY EPPS AND ROBERT HENRY JONES

No. 7212SC511

(Filed 23 August 1972)

1. **Criminal Law § 9— accomplice question left to jury — no error**

In a prosecution for conspiracy to commit armed robbery, it was proper for the trial court by its instructions to leave the question of whether a witness was an accomplice to the jury since he would be an accomplice only if the offenses charged were in fact committed.

2. **Criminal Law § 92— consolidation of cases for trial — no abuse of discretion**

No abuse of discretion was shown in a conspiracy prosecution in the lower court's order consolidating defendants' cases for trial.

3. **Conspiracy § 6— sufficiency of evidence to withstand motion for nonsuit**

State's evidence was sufficient to withstand defendant's motion for nonsuit in a conspiracy prosecution where it tended to show that defendant advised his co-conspirators as to the best way to complete the armed robbery; that defendant unilaterally announced how the proceeds to be obtained from the robbery would be divided; and that defendant accepted his share of proceeds after the robbery.

4. **Conspiracy § 5— acts and declarations of conspirator — competency**

Where sufficient evidence of a conspiracy is introduced, acts and declarations of one conspirator are competent against the other.

5. Conspiracy § 7— erroneous jury instructions — no prejudice

Defendant cannot complain of errors in the judge's charge to the jury which placed a heavier burden of proof upon the State and in no way prejudiced him.

6. Constitutional Law §§ 20, 30— denial of free transcript to indigent — alternative devices available

The trial court did not err in refusing defendant a free transcript of his first trial which resulted in a mistrial where alternative devices that would fulfill the same functions as a transcript were available to defendant.

7. Criminal Law § 66— in-court identification — competency

The trial court's findings and conclusions that an in-court identification of defendant was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification were fully supported by the evidence where such evidence tended to show that the witness observed defendant for some fifteen minutes at the time of the robbery and then observed him for the second time and identified him when he appeared in the courtroom.

8. Criminal Law § 122— further jury instructions — no coercion or intimation of opinion

Additional instructions given by the court after initial retirement of the jury did not constitute error where the court's language in no way tended to coerce or intimate an opinion as to what the verdict should be.

9. Criminal Law § 9— aiders and abettors

One who is present, aiding and abetting in a crime actually perpetrated by another, is equally guilty with the actual perpetrator.

10. Criminal Law § 73— hearsay testimony

If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay.

11. Criminal Law § 169— objection to testimony — similar testimony admitted without objection

Where defendant did not object or move to strike testimony of one witness concerning a telephone call, he was in no position to object when identical testimony was subsequently given by another witness.

12. Robbery § 1— armed robbery — two victims — two offenses

The court's instruction that "armed robbery of one person followed by the armed robbery of another would constitute two separate offenses, although they occurred in the same building or the same dwelling" was an accurate statement of the law and applicable to the facts in a prosecution for two separate offenses of armed robbery, one committed against a husband and the other against his wife.

APPEAL by defendants from *Clark, Judge,* 21 February 1972 Session of Superior Court held in CUMBERLAND County.

Defendants, along with one Charles Allan McElwin, were charged in a single bill of indictment with conspiracy to commit the armed robbery of Charles Glaser and Peggy Glaser.

Defendants Epps and Jones were also charged in separate bills of indictment with two separate offenses of armed robbery; to wit, the armed robbery of Charles Glaser and the armed robbery of Peggy Glaser.

The cases were consolidated for trial.

Rufus L. Chalmers testified for the State in substance as follows:

On 23 September 1971 Chalmers and defendant Epps had a conversation in a Fayetteville poolroom with Lafayette Smith and Charles McElwin. As a result of this conversation, Chalmers went to the Overseas Wig Warehouse the next day where he was introduced to defendant Miller. Chalmers, Miller, Smith and McElwin went into a back room and Miller told them of several people who could be robbed. He mentioned a Mr. Glaser who owned a military store, usually carried large amounts of money, and owned a ring worth from $8,000.00 to $11,000.00. Miller stated that Glaser carried a weapon in a newspaper and that "the best way this job could be done was to get into the Glaser home and be waiting for him either when he got in from work or be waiting outside for him when he came in from the business establishment." He also advised where Glaser lived and the approximate time he usually left his work. Miller stated that half the money would be split between him and McElwin and the other half would go to Chalmers and the people who helped him. The jewelry would be fenced by Miller and he would "bring half of the proceeds back."

Later, on that same day, Chalmers met Epps and Jones and told them Glaser was to be robbed. "They both agreed to go along with the job." Jones, Epps and Chalmers made several trips by the Glaser home and discussed various ways to successfully get into the house.

On the evening of 24 October 1971, these men met with McElwin. It was agreed that McElwin would call the Glaser home at 10:50 p.m. and say that he was from the sheriff's department and that Glaser's place of business had been broken into. Jones, Epps and Chalmers would wait outside the Glaser

home, accost Mr. and Mrs. Glaser as they left their home to go check on their business, and rob them.

In accordance with the plan, the three men went to the Glaser home. They wore nylon stockings over their heads. Epps and Chalmers carried weapons. When Mr. and Mrs. Glaser came out of their house, the men approached them with their weapons and ordered them back into the home. A diamond ring and approximately $1700.00 in cash were taken from the person of Mr. Glaser and he was then tied up in the living room. Mrs. Glaser was taken to a bedroom where a purse containing $120.00 in cash and some jewelry was taken from her. Other items, including a police special pistol and a .38 snub nose pistol were removed from the home.

Jones, Epps and Chalmers left the scene of the robbery and went to Lafayette Smith's house where they met McElwin and Miller and divided the money and other items. Epps kept the .38 caliber pistol. He later told Chalmers that he traded the pistol with his brother. Miller took a portion of the proceeds.

Chalmers was questioned about the robbery by a police lieutenant on 12 November 1971. He promised to give a statement about the robbery and to testify for the State in exchange for immunity from prosecution. The solictior was summoned and expressly agreed to grant Chalmers immunity in consideration for his testimony and cooperation.

Mrs. Glaser pointed out Epps in court as one of the three men who robbed her on 24 October 1971. Her testimony, and that of her husband, tended to corroborate the testimony of Chalmers with respect to events that transpired while the men were at the Glaser home on that date. A pistol and various other items which had been found in the possession of Chalmers were identified by Mr. Glaser as having been removed from his home on 24 October 1971. He also identified a .38 caliber pistol which had been recovered from a car driven by Charles Epps. The pistol was found in the car during a search following the arrest of Charles Epps for driving while under the influence of an intoxicant.

The jury returned verdicts finding Miller guilty of the conspiracy charge and Epps and Jones guilty of each charge of armed robbery. Epps and Jones were acquitted on the charge of conspiracy.

All defendants appeal from judgments imposing sentences of imprisonment.

Attorney General Morgan by Staff Attorney Evans for the State.

Barrington, Smith & Jones by Carl A. Barrington, Jr., for defendant appellant Alton Lennon Miller, Jr.

Neill Fleishman, Assistant Public Defender, Twelfth Judicial District, for defendant appellant Grady Epps.

Barrington, Smith & Jones by Carl A. Barrington, Jr., for defendant appellant Robert Henry Jones.

GRAHAM, Judge.

[1] All three defendants challenge the court's charge with respect to the testimony of the witness Chalmers. The court charged in substance that the uncontradicted evidence tended to show that the witness Chalmers was an accomplice and that he had been granted immunity by the State; that an accomplice or one who has been granted immunity from prosecution is considered to have an interest in the outcome of the case, *and that if the jury found from the evidence* that the witness was an accomplice, or had been granted immunity from prosecution, or both, then it would be the jury's duty to "take these things into consideration and examine every part of his testimony with the greatest care and caution, and closely scrutinize it in the light of his interest and his motives."

Defendants argue that the court erred in these instructions by permitting the jury to decide whether Chalmers was an accomplice and whether he had been granted immunity. They contend the evidence conclusively established both of these facts. We see no prejudicial error. "An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime charged. . . . " 2 Strong, N.C. Index 2d, Criminal Law, § 9, p. 494. Chalmers was an accomplice only if the offenses charged were in fact committed. Thus, we think it proper for the court to leave the question of whether he was an accomplice to the jury.

The court correctly defined accomplice and on two occasions reminded the jury what the uncontradicted evidence

tended to show with respect to Chalmers' status. It is interesting to note that requested instructions, tendered by one of the defendants, also leave to the jury the question of whether Chalmers had been granted immunity. The other defendants did not request a charge on this phase of the case. Generally, instructions to scrutinize the testimony of an alleged accomplice are not required in the absence of a request. 3 Strong, N.C. Index 2d, Criminal Law, § 117, p. 26.

[2] Defendants Epps and Jones assign as error the court's order consolidating the cases for trial. They concede that this is a discretionary matter. 2 Strong, N.C. Index 2d, Criminal Law, § 92, p. 624. All the cases arose out of one transaction. No abuse of discretion in ordering their consolidation has been shown and the assignment of error is overruled.

Since defendants make no other common assignments of error, we consider the remainder of their contentions separately.

Appeal of Miller

Miller contends the State's evidence was insufficient to show that he entered an agreement with any of those named in the conspiracy indictment and that nonsuit should have been entered as to him.

We note that at the outset that Miller does not contend that since his codefendants were acquitted of the conspiracy charge he likewise is entitled to an acquittal. "One person alone may not be convicted of criminal conspiracy, and when all of the alleged conspirators are acquitted except one, the one convicted is entitled to his discharge." *State v. Littlejohn,* 264 N.C. 571, 574, 142 S.E. 2d 132, 134. Here, however, one of the alleged conspirators, McElwin, has not yet been tried. The conviction of an alleged conspirator is not necessarily vitiated because of the possible later acquittal of another co-conspirator who has not yet been tried. 16 Am. Jur. 2d, Conspiracy, § 33, p. 144.

[3] We find the evidence sufficient to support Miller's conviction of conspiracy. A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act or to do a lawful act unlawfully. *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477. Miller argues that his participation, as shown by the evidence, was limited to fur-

nishing information to the alleged co-conspirators about a potentially favorable robbery subject. The evidence shows much more than this. Miller advised the others as to "the best way this job could be done." At the first meeting in the wig warehouse, he unilaterally announced how the proceeds to be obtained from the robbery would be divided and, after the robbery, he accepted a share of the proceeds.

Direct proof of a charge of conspiracy is rarely obtainable. " 'It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.' " *State v. Horton,* 275 N.C. 651, 660, 170 S.E. 2d 466, 472. Here, not only was there plenary "indirect evidence," there was direct evidence that an agreement was entered to rob Mr. and Mrs. Glaser and that Miller was a party to the agreement. In fact, Chalmers testified expressly that when he left the wig warehouse on the first occasion, "[t]here was an agreement to do the Glaser job, just there wasn't an agreement on how."

[4] Miller assigns as error the admission, over his objection, of testimony by Chalmers as to statements made by Chalmers outside Miller's presence. One exception is to Chalmers' testimony that "I told Epps the gentleman in question that was to be robbed. . . . " This statement was made after Chalmers, Miller and others had agreed "to do the Glaser job." In response to the statement, Epps agreed "to go along with the job." It is obvious that this conversation was in the furtherance of the conspiracy. The other statement Miller complains of is McElwin's statement that "maybe he could call and say that he was the sheriff." This statement was made while details of the robbery were being discussed. It was also made in the furtherance of the conspiracy. Where sufficient evidence of a conspiracy is introduced, acts and declarations of one conspirator are competent against the others. *State v. Littlejohn, supra.* This assignment of error is overruled.

[5] Miller assigns as error portions of the court's instructions to the jury, contending that the jury was improperly permitted to find him guilty if they found that he conspired with Chalmers. Chalmers is not named in the bill of indictment as a conspirator, nor does the indictment allege that Miller conspired with persons other than those named therein. In the challenged

portions of the instructions the court charged that to convict Miller of conspiracy, the jury must find from the evidence and beyond a reasonable doubt that "defendant Alton Miller, Jr., Charles McElwin *and* Rufus Chalmers did agree or concur in the plan to rob with firearms. . . . " (Emphasis added.) Under this instruction, in order to convict Miller it was necessary for the jury to find, not only that Miller conspired with Chalmers, but that he also conspired with McElwin, who is named in the indictment as a co-conspirator. Thus, the charge placed a heavier burden on the State than was necessary and was in no way prejudicial to Miller.

Finally, Miller contends that the court should have granted his motion to strike Chalmers' testimony that he and Miller discussed other robberies. This contention has no merit. The evidence indicates that the men discussed various potential robbery victims, and the agreement on Glaser as the one to be robbed arose out of this discussion.

Appeal of Epps

[6] The first trial of this case resulted in a mistrial. Before the case came on for a second trial, the court entered an order denying Epps' request that he be furnished a free transcript of the first trial. Epps, who is conceded to be an indigent, appeals from the order. We find that alternative devices that would fulfill the same functions as a transcript were available to Epps and affirm the order on this ground. *Britt v. North Carolina,* 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed. 2d 400.

[7] Epps next attacks the court's finding and conclusion that his identification by Mrs. Glaser in the courtroom before the trial was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

It was stipulated that *voir dire* evidence from the first trial could be used by the court as a basis for determining the admissibility of Mrs. Glaser's identification of Epps.

Mrs. Glaser testified on *voir dire:* "I did not identify Mr. Epps during any lineup and have only seen Mr. Epps during the robbery and yesterday as he entered this courtroom. This was before court opened and I was sitting out there and different people were coming in and out. As he entered, I immediately said 'That is the third man who came into our

house the night of the robbery.' " On cross-examination Mrs. Glaser stated that to her knowledge she had not seen Epps, except on the night of the robbery and when he walked into the courtroom. She further stated: "I have seen someone dressed in a uniform and I suppose it was him (referring to the courtroom bailiff). I don't recall whether he was the one who I saw with Mr. Epps when I saw him come to the courtroom or not. As soon as my eye hit Epps, I knew it was him. At that point, I didn't see anybody and I was not aware of anything except him. I knew this was the third man who entered our house and the man who went through my pocketbook during the robbery." This evidence fully and convincingly supports the court's findings and conclusions. *Cf. State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50.

The court further found, based upon competent evidence, that Mrs. Glaser had the opportunity to observe Epps for a period of fifteen minutes at the scene of the alleged robbery. The lighting conditions in the home were good and Epps stood a distance of about five feet from the witness for a period of about five minutes while he examined the contents of her purse. She was looking directly at him during this period and, although he was wearing a stocking over his face, his facial features were not distorted or altered, except for his nose. The main thrust of defendant's argument is that "the facts show an extremely unlikely identification." We disagree. Moreover, any lack of positiveness as to the identification went to the weight and not to the admissibility of Mrs. Glaser's testimony. *State v. Bridges,* 266 N.C. 354, 146 S.E. 2d 107.

[8] Epps assigns as error additional instructions given by the court after initial retirement of the jury. He concedes that the form of the instructions given have been approved in this State; however, he argues that the instructions were prejudicial in this case because they were given before there was an indication that the jury was deadlocked.

Without conceding that the instructions would have been error, even if given as a part of the initial charge, we note that the record does not show how long the jury deliberated before the additional instructions were given. It may well be that the court was justified in concluding that the jury was deadlocked and in giving supplementary instructions appropriate under such circumstances. The important fact, however, is that the

court's language in no way tended to coerce or intimate an opinion as to what the verdict should be. See *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652. This assignment of error is overruled.

Appeal of Jones

[9] Jones contends the armed robbery case should have been nonsuited as to him. He argues that although the evidence shows he was at the scene of the robbery, it does not show that he actually participated. This contention is completely without merit. One who is present, aiding and abetting in a crime actually perpetrated by another, is equally guilty with the actual perpetrator. *State v. Garnett,* 4 N.C. App. 367, 167 S.E. 2d 63. Moreover, the evidence shows that Jones actually participated. There was testimony that he went to the scene wearing a stocking over his head, forced Mrs. Glaser back into the house where she was robbed, and tied up Mr. Glaser with a coat hanger. In the face of this evidence it is difficult to see how Jones can seriously argue that he was but an innocent bystander.

[10, 11] Jones argues that the court should have excluded as hearsay testimony by Mr. Glaser that on the night of the robbery he received a telephone call that his place of business had been broken into. This evidence was offered to explain why Mr. and Mrs. Glaser were leaving their home when accosted by Jones and his companions. It was not offered for the purpose of proving the truth of what the caller stated. If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay. Stansbury, N.C. Evidence 2d, § 141, p. 343. Moreover, identical testimony concerning the telephone call was elicited by Jones on cross-examination of Mrs. Glaser, a previous witness. No objection or motion to strike this testimony was made. Consequently, Jones was not in position to object when Mr. Glaser subsequently testified to the same matter. Stansbury, N.C. Evidence 2d, § 30, p. 56.

[12] Jones' remaining assignment of error is to the court's instruction that "the armed robbery of one person followed by the armed robbery of another would constitute two separate offenses, although they occurred in the same building or the same dwelling." This was an accurate statement of law and

applicable to the facts of this case. See *State v. Harris,* 8 N.C. App. 653, 175 S.E. 2d 334.

We have carefully reviewed each of the assignments of error brought forward by all of the appellants, including some which we deem it unnecessary to discuss. In our opinion appellants had a fair trial free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

W. REID REA, ADMINISTRATOR OF THE ESTATE OF MABEL REA, DECEASED v. HARDWARE MUTUAL CASUALTY COMPANY AND GLENN E. HELMS, ORIGINAL DEFENDANTS AND STATE FARM MUTUAL INSURANCE COMPANY, ADDITIONAL DEFENDANT

No. 7226SC532

(Filed 23 August 1972)

1. **Rules of Civil Procedure § 8— sufficiency of complaint to state cause of action**

In a declaratory judgment action to have the rights, duties and obligations of parties under an insurance policy declared, plaintiff's complaint was sufficient to allege coverage of his intestate under the omnibus clause of the policy.

2. **Insurance § 8— ownership of insured vehicle — knowledge of insurer concerning ownership — waiver of policy limitations**

Where the vehicle allegedly covered by the policy in question was owned by the estranged husband of an officer of the named insured and such fact of ownership was known to the insurance representative who handled the application for this particular policy, the insurance company could not escape liability by relying on provision of the policy that only vehicles owned by the named insured were covered and on a condition in the policy that all agreements between insured and the company or any of its agents were embodied therein because an insurer who insures property, notwithstanding knowledge of facts then existing by which the language of the policy defeats the contract of insurance, will be held to have waived the policy provision so far as it relates to the then existing conditions.

3. **Insurance § 5— insured corporation — insurable interest**

Mabel Rea, Inc., the named insured in an automobile liability policy, had an insurable interest in the vehicle in question where said vehicle was habitually used by two people in the business of the corporation.

4. Insurance § 87— omnibus clause — drivers insured

An insured corporation could, through its officer, grant or withhold permission to use its insured vehicle to the officer or to an employee of the corporation though registered ownership of the vehicle was not in the corporation, and such use would be covered under the omnibus clause of the corporation's automobile liability insurance policy.

APPEAL by Hardware Mutual Casualty Company from *Snepp, Judge,* 17 January 1972, Schedule "A" Session, Superior Court, MECKLENBURG County.

This is an action for declaratory judgment. In a one-car collision which occurred on 24 December 1968, defendant Helms suffered serious injuries and Mabel Rea was killed. Helms subsequently brought a suit against plaintiff to recover damages for his injuries alleging that Mabel Rea was driving the car at the time of the accident. W. Reid Rea, administrator of the estate of Mabel Rea, upon being served with a copy of the complaint and summons, notified Hardware Mutual Casualty Company (hereinafter referred to as Hardware) of the suit and requested that they defend the action under the coverage of a policy of insurance issued by it to Mabel Rea, Inc. Hardware declined on the ground that the policy afforded no coverage. Thereupon, the administrator filed an answer to the complaint denying the allegations of negligence and asserting a counterclaim to recover damages for the wrongful death of Mabel Rea resulting from the negligent operation of the automobile by Helms. Helms also requested Hardware to defend on the counterclaim under the coverage of the policy. Hardware declined to do so on the ground that the policy afforded no coverage to Helms. This action was instituted by plaintiff to have the rights, duties, and obligations of the parties under the policy judicially declared. Hardware had State Farm Mutual Insurance Company joined as an additional party in order to have the duties and obligations of State Farm and Helms determined under a policy issued by State Farm to Helms. At trial, upon motion, State Farm was dismissed, and it is not involved in this appeal. The automobile in which Helms and Mabel Rea were passengers was a 1965 Mercedes, registered in South Carolina to John Vergona, estranged husband of Mabel Rea. It was in the lawful possession of Mabel Rea and was described as an insured vehicle in a policy of automobile insurance issued by Hardware to Mabel Rea, Inc., a corporation of which Mabel

Rea was president and treasurer and in which she owned 98% of the stock. Its use was designated as business and pleasure in the policy. The case was tried without a jury. The court found facts and concluded that the policy issued by Hardware did provide coverage for the accident in question. From the judgment Hardware appealed.

Ervin, Burroughs and Kornfeld, by Winfred Ervin, John C. MacNeill, Jr., and Robert M. Burroughs, for plaintiff appellee.

Craighill, Rendleman and Clarkson, by J. B. Craighill, for defendant Hardware Mutual Casualty Company, appellant.

MORRIS, Judge.

Appellant, by its 44 exceptions and 37 assignments of error, excepts to each finding of fact and conclusion made by the court and to the entry of judgment.

[1] By its first two assignments of error, appellant contends that the evidence does not support coverage under the policy for Mabel Rea or Helms under any theory alleged in the complaint nor do the allegations of the complaint support the theory upon which the court apparently decided this case. Appellant's theory is that the complaint in its paragraph 5 uses the language of the "Employers' Non-Ownership Liability" endorsement attached to the policy and plaintiff is, therefore, limited to that basis for coverage. This endorsement provides coverages to named persons when operating a non-owned automobile (defined in the endorsement as a "land motor vehicle, trailer or semi-trailer not owned by, registered in the name of, hired by or loaned to the named insured") when used in the business of the named insured. All parties concede that the automobile at the time of the accident was not being used in the business of the named insured. Appellant says, and we agree, that if any coverage is afforded it is under the omnibus clause; that the court concluded that coverage is afforded under that clause; but the allegations of the complaint do not support this theory. We do not agree. The complaint alleged, after the jurisdictional allegations, that Mabel Rea was an employee, stockholder, director, and president of Mabel Rea, Inc.; that on or about 15 January 1968, Hardware issued its policy No. 32-10540-05, for a valuable consideration, to Mabel Rea, Inc., insuring among other things "damage by collision to the 1965 Mercedes automo-

bile described hereinafter, bodily injuries and property damage caused by the negligent operation of said Mercedes automobile, and insured Mabel Rea, the plaintiff's intestate, as employee of Mabel Rea, Inc., for bodily injury and property damage liability arising out of the use or operation of any automobile not owned by, registered in the name of, hired by, or loaned to Mabel Rea, Inc."; that at all time during the policy period Mabel Rea was in lawful possession of the 1965 Mercedes; that the automobile was registered in the name of John R. Vergona; that the policy and all its attachments are made a part of the complaint as Exhibit A; that the policy was in full force and effect and all premiums paid; that on 24 December 1968 the automobile was involved in a collision; that it was then occupied by Mabel Rea and Glenn Helms; that Mabel Rea was killed and Helms allegedly received serious injuries; that Helms had brought suit against Mabel Rea's administrator; that Hardware, although requested to do so, had failed and refused to defend the action; that though demand had been made, Hardware has refused to pay any amount for collision loss to the 1965 Mercedes. The prayer asked "that the court judicially declare that the defendant, Hardware Mutual Casualty Company, under its policy of automobile insurance number 32-10540-05, has a contractual obligation to the plaintiff to defend the plaintiff in the civil action instituted by the defendant, Glenn E. Helms, and to satisfy any judgment rendered therein up to the limits of its policy and to pay for the collision loss to the 1965 Mercedes automobile, serial number 1279B412003-365; and that defendant, Hardware Mutual Casualty Company, has an obligation to defend Glenn E. Helms in the Cross Action filed by the plaintiff herein."

We note the provisions of G.S. 1A-1, Rule 15(b):

"*Amendments to conform to the evidence.*—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 of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the

> pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

However, in our opinion the aid of the rule is not necessary. The complaint is sufficient to raise the question of the rights, duties and obligations of the parties under all provisions of the policy.

All parties concede that no coverage is afforded under the non-ownership provisions, because it is uncontradicted that the automobile was, at the time of the accident, not being used in the business of the named insured.

[2] But appellant argues that the policy affords no coverage under portions of the policy applying to owned vehicles. It first takes the position that the policy covers vehicles *owned by the named insured,* when operated by the named insured, or operated by others "provided the actual use of the automobile" is by the named insured or his or her spouse, if an individual, "or with the permission of either." The policy declares that ". . . the named insured is the sole owner of the automobile except as herein stated." In this connection, appellant relies on Condition No. 25: "By acceptance of this policy, the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that the policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

The evidence is that Mr. Glenn Krumel handled the application for this insurance. He testified that he had written insurance for Mabel Rea, Inc., and was there "at least probably every two weeks." He had seen the Mercedes at the business location prior to writing this particular policy. He "filled out an application and a binder" and mailed them to Atlanta where the policy itself was produced. He was sales representative for Hardware in Charlotte for five years and had authority, unlimited as to automobile policies, to issue binders. He was aware that the Mercedes had a South Carolina title and knew that the certificate of title was not in the name of Mabel Rea, Inc. He

"advised her to have it changed." Knowing these facts, he went ahead and processed the papers for the automobile liability policy to be issued. He also testified that he wrote limits a lot higher than $100,000, $300,000 and if the binding limit was $100,000, $300,000, the overage would be subject to the underwriter's decision. He testified that he could not say whether he advised the company of the status of the title to the car. Whether he did is immaterial since "a principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends, although the agent does not in fact inform his principal thereof. (Citations omitted.)" *Norburn v. Mackie*, 262 N.C. 16, 24, 136 S.E. 2d 279 (1964).

Hardware cannot rely on Condition No. 25. "If an insurer, notwithstanding knowledge of facts then existing by which the language of the policy defeats the contract of insurance, nevertheless insures property, it will be held to have waived the policy provision so far as they relate to the then existing conditions. (Citations omitted.)" *Fire Fighters Club v. Casualty Co.*, 259 N.C. 582, 585, 131 S.E. 2d 430 (1963).

The facts found, supported by competent evidence, are sufficient to support the court's conclusion: "Hardware's agent, Krumel, while acting as such within the scope of his authority, knew the status of the title to the automobile. Hardware is chargeable with Krumel's knowledge, even though he did not inform Hardware of the true state of facts."

There is no evidence whatever that there was any misrepresentation as to ownership by the named insured.

[3] Appellant urges that the court's conclusion that Mabel Rea, Inc., had an insurable interest in the Mercedes is erroneous. Among the facts found by the court were these: "After January 15, 1968, and to and including December 24, 1968, the said Mercedes automobile was used in the business of Mabel Rea, Inc., and for pleasure, by Mabel. After January 15, 1968, to and including December 24, 1968, Helms drove the said Mercedes, with the permission of Mabel, in the course of the business of Mabel Rea, Inc., and on occasion, and in the company of Mabel, for pleasure."

In its conclusions of law, the court stated: "The evidence also leads to the conclusion that Mabel Rea, Inc., had an in-

surable interest in the Mercedes. The vehicle was habitually used in the business of the corporation, and Hardware insured not only for such use, but also for 'pleasure.' Our Supreme Court has consistently held that any interest is insurable if the peril against which insurance is made would bring upon insured by immediate and direct effect, pecuniary loss." There was evidence from Helms and W. Reid Rea, father of Mabel, that the Mercedes was used in the business of the corporation. The corporate business was a construction project, Swan Run Village, apparently consisting of apartments and houses. Helms testified that he used the Mercedes to go to Thies Realty to pick up papers for Mabel and that it was used for driving around the project on company business, for going back and forth to work. He testified that he had access to the car at any time for business use, that Mabel was usually with him when it was used for business purposes and always with him when it was used for pleasure. Helms was the construction superintendent for the project. Reid Rea also testified that the decedent used the car in her business. The findings are clearly supported by the evidence.

"It is a fixed rule of insurance law that an insurable interest on the part of the person taking out the policy is essential to the validity and enforceability of the insurance contract, . . . (Citations omitted.)" *Guaranty Co. v. Reagan,* 256 N.C. 1, 7, 122 S.E. 2d 774 (1961). The question of the nature and extent of the interest necessary in order to qualify as an insurable interest is not so easily determined. In *King v. Insurance Co.,* 258 N.C. 432, 434-435, 128 S.E. 2d 849 (1962), Parker, J., later C.J., writing for the majority of the Court, said:

> "In general, it is well settled law that a person has an insurable interest in the subject matter insured where he has such a relation or connection with, or concern in, such subject matter that he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against. (Citations omitted.)"

"As a general rule, anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction. 5A Am. Jur., Automobile Insurance, § 11." *Guaranty Co. v. Reagan,* 256 N.C. 1, 8, 122 S.E. 2d 774 (1961).

Also determinative is whether the insured may be charged, at law or in equity, with the liability against which the insurance is obtained. Couch on Insurance 2d, § 24:159, p. 274.

Glenn Helms, employed by Mabel Rea, Inc., as general superintendent used the Mercedes in the business of the insured as its employee. Mabel Rea, an officer, director and owner of 98% of the stock of the insured, used the Mercedes in the business of the insured. Applying the general principles of law to the facts, we are of the opinion that Mabel Rea, Inc., had an insurable interest in the automobile and the court's conclusion was not erroneous.

[4] We turn now to the primary question involved. Was there coverage under the omnibus clause of the policy? The trial court concluded that there was and that Hardware is obligated to defend the plaintiff, administrator, against the claims asserted against him by defendant Helms in the action pending in Mecklenburg County and is also legally obligated to defend defendant Helms against the claim asserted against him by way of counterclaim the same action. We agree.

The omnibus clause is contained in Section a, Item III, "Definition of Insured": "With respect to the insurance—for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and, if the named insured is an individual, his spouse if a resident of the same household, and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either."

In *Underwood v. Liability Co.*, 258 N.C. 211, 218, 128 S.E. 2d 577 (1962), the Court quoted with approval the statement of the Virginia Court in *Nationwide Mutual Insurance Co. v. Cole,* 124 S.E. 2d 203 (Va. 1962):

> ". . . It is well settled that 'permission' to drive a car, within the meaning of the omnibus coverage clause, connotes the power to grant or withhold it. Therefore, in order for one's use and operation of an automobile to be within the meaning of the omnibus coverage clause requiring the permission of *the named insured,* the latter *must, as a general rule, own the insured vehicle or have such an interest*

in it that he is entitled to the possession and control of the vehicle and in a position to give permission. . . ." (Emphasis supplied.)

The statement of the rule in the alternative leaves no room for doubt that registered ownership is not an absolute essential in granting or withholding permissive use. The facts of this case in this respect are uncontroverted. Mabel Rea, Inc., is the named insured. The Mercedes was used in its business by both Mabel Rea and Helms. Helms was authorized to use the car whenever he saw fit. When used by him alone, the use was for business of Mabel Rea, Inc. When used by Mabel Rea, it was business of Mabel Rea, Inc., or for her pleasure. When used by Helms with Mabel Rea, the same was true. Helms was employed as general superintendent of Mabel Rea, Inc. Mabel Rea owned 98% of the stock of Mabel Rea, Inc. Her father owned one share and her mother owned one share. She was president and treasurer of the corporation. Both her father and Helms testified that it was she who ran the business and gave the orders. Under the facts of this case, it would be anomalous to say that Mabel Rea, Inc., through Mabel Rea could not grant or withhold permission to use the car to Mabel Rea or to Helms. "Ordinarily, permission to use the car, granted by an officer of the named insured corporation, is 'permission of the named insured' within the meaning of and effect of the omnibus clause." 7 Am. Jur., 2d, Automobile Insurance, § 115, p. 431.

After the evidence was presented but before the court had made its findings of fact and conclusions of law and before judgment, Hardware moved to reopen the case, amend its pleadings, and present further evidence. Grounds for the motion were that order had been entered in the pending personal injury action that it not be tried until completion of the declaratory judgment action and that defendant Helms in this action had insisted upon trial of that case, had entered into certain stipulations which Hardware contends were in violation of the cooperation provisions of its policy, and that this action constituted additional grounds for denial of coverage to Helms or Mabel Rea's administrator. It argues in its brief that the denial of the motion constituted an abuse of discretion. It appears that Hardware wants to blow hot and cold. It takes the position of denying liability on the ground that the policy afforded no coverage and at the same time insists on the right to control the defense. Defendant cites no authority and has shown no

abuse of discretion. See *Casualty Co. v. DeLozier,* 213 N.C. 334, 196 S.E. 318 (1938). This assignment of error is overruled.

Defendant also assigned as error the court's denial of its motions to dismiss the action as to it. This assignment of error is overruled. We have not discussed all of defendant's assignments of error seriatim, because, in our view of the case, we deem it unnecessary. Suffice it to say, in our opinion, the facts found are supported by competent evidence, and the findings of fact support the conclusions of law and judgment entered by the trial judge.

Affirmed.

Judges BROCK and HEDRICK concur.

ALMA H. SHORE v. E. S. SHORE, JR.

No. 7210DC485

(Filed 23 August 1972)

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

Upon denial of defendant's motion to modify an award of alimony made to plaintiff, the court on appeal will not disturb the trial court's findings of fact or conclusions of law where the record on appeal does not show what evidence, if any, was presented by defendant to the trial court in support of his motion.

2. **Divorce and Alimony § 20— payment of counsel fees — effect of absolute divorce on rights of dependent spouse**

Unless the case falls within one of two exceptions provided by statute, counsel fees may be awarded for services rendered to a dependent spouse subsequent to an absolute divorce in seeking to obtain or in resisting a motion for a revision of alimony or other rights provided under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce. G.S. 50-11.

APPEAL by defendant from *Winborne, District Judge,* 14 January 1972 Session of District Court held in WAKE County.

Plaintiff, formerly the wife of defendant, instituted this action in the Superior Court of Wake County on 4 November 1960 seeking alimony without divorce and support for a minor

child. On 10 August 1961 Judge C. W. Hall entered an order directing defendant to pay plaintiff, during her lifetime or until she remarries, the sum of $125.00 on the first and fifteenth day of each calendar month, and further directing that he pay her $25.00 on the same dates for the support of a minor child, then age 14, until such child should become 21 years old. Thereafter, on motion of defendant to modify the order of Judge Hall, the matter came on for a further hearing and was heard by Judge Hamilton H. Hobgood, who entered an order on 17 February 1964 containing the following:

> "IT IS NOW, THEREFORE, ORDERED BY THE COURT, that the said order of Judge C. W. Hall, is hereby modified to the extent that in lieu of the payments therein provided, defendant, E. S. Shore, Jr., shall pay to the plaintiff, Mrs. Alma H. Shore, the sum of $138.47 commencing on Friday, February 21, 1964, and a like sum of $138.47 on each and every other Friday thereafter, until the further orders of this court."

On 22 December 1971 defendant filed a motion seeking an order terminating his obligation to make further payments to plaintiff, alleging change of circumstances occurring since the date of Judge Hobgood's order. The cause having been transferred to the district court, on 14 January 1972 defendant's motion came on for hearing before District Judge Winborne, who on 3 February 1972 entered an order in which the court found as facts that "no evidence was presented to the court as to the defendant's circumstances as of the date of Judge Hobgood's order" or "as to the defendant's present circumstances, other than evidence to the effect that the defendant recently was relieved judicially of the obligation to support and maintain his present wife, whom he married in 1961, and separated from in March, 1971"; that "the plaintiff's present obligations regarding monthly necessities have increased since the date of Judge Hobgood's order," and that "the plaintiff presently is more dependent upon the defendant for support and maintenance than she was as of the date of Judge Hobgood's order." Upon these findings the court concluded as a matter of law that defendant had failed to show a substantial change of circumstances between the date of Judge Hobgood's order of 17 February 1964 and the date of the hearing on defendant's motion, and ordered defendant to pay plaintiff $138.47 "on each and every other Friday" in accordance with Judge

Hobgood's order, until further orders of the court. Judge Winborne's order also contained findings as to services rendered by plaintiff's attorney in connection with the hearings on defendant's motion, and directed defendant to pay $500.00 to plaintiff's attorney, which amount the court determined to be a reasonable fee.

From this order, defendant appealed.

Carlos W. Murray, Jr., for plaintiff appellee.

Allen Langston for defendant appellant.

PARKER, Judge.

An order of a court of this State for alimony or alimony pendente lite may be modified or vacated upon motion in the cause and a showing of changed circumstances by either party. G.S. 50-16.9(a). However, "[t]he burden of proving, by a preponderance of the evidence, that a material change in the circumstances has occurred is upon the party requesting the modification." 2 Lee, North Carolina Family Law 3d, § 153, p. 230.

[1] The record on appeal in the present case does not show what evidence, if any, was presented by appellant to the trial court in support of his motion. The record does contain a copy of the unverified motion signed by appellant's attorney, in which certain factual statements were made, but "[t]he unverified motion did not prove the matters alleged therein and is not evidence thereof." *Acceptance Corp. v. Samuels,* 11 N.C. App. 504, 181 S.E. 2d 794. When, as here, the evidence is not in the record, it will be presumed that there was sufficient evidence to support the findings of fact necessary to support the judgment. *In re Sale of Land of Warrick,* 1 N.C. App. 387, 161 S.E. 2d 630. Accordingly, appellant's assignments of error directed to the trial court's findings of fact or failure to find facts are overruled and the trial court's conclusion that the defendant failed, as a matter of law, to show a substantial change in circumstances will not be disturbed on this appeal.

Defendant contends that the language in Judge Winborne's order directing him to make payments "on each and every other Friday" is ambiguous. Judge Winborne's order, however, went further and specified that such payments be made "in accordance with Judge Hobgood's order of February 17, 1964." For

many years defendant apparently experienced no difficulty in understanding that order and we perceive no reason why he cannot continue to do so. Appellant's assignments of error directed to that portion of the order appealed from which directs defendant to continue to make the payments to plaintiff in accordance with Judge Hobgood's order are overruled.

[2] Finally, defendant contends there was error in that portion of the order appealed from which directed defendant to pay the fee of plaintiff's attorney for services rendered to the plaintiff in resisting defendant's motion. In the order appealed from Judge Winborne found as a fact that defendant married his present wife in 1961. From this it would appear that the marriage of plaintiff and defendant must have been dissolved by absolute divorce at that time, though the record before us on this appeal does not disclose which party instituted the action in which the absolute divorce was granted, the grounds upon which the decree in that action was based, or in what jurisdiction or court the divorce was obtained. By G.S. 50-16.4 statutory authority is provided for an award of reasonable counsel fees for the benefit of a dependent spouse at any time such spouse would be entitled to alimony pendente lite, but we find no express statutory authorization for an order directing payment of such counsel fees for services rendered subsequent to an absolute divorce of the parties, nor has any controlling decision of our Supreme Court on this question been brought to our attention. Decisions of courts of other jurisdictions on this matter are in conflict. 24 Am. Jur. 2d, Divorce and Separation, § 587, p. 710; Annot.: Rights of former wife to counsel fees upon application after absolute divorce to increase or decrease alimony, 15 A.L.R. 2d, 1252. However, in 2 Lee, North Carolina Family Law 3d, § 153, p. 233, we find the following:

> "Since a court has continuing jurisdiction over its decrees for alimony or support, and most statutes expressly provide that they may be modified from time to time, it would seem that the court could properly allow counsel fees in prosecuting the wife's motion for a modification or in resisting the husband's or *ex-husband's* application for a reduction or vacation of the decree. *The proceeding is not the commencement of a new action. It is simply a motion in the cause of a matter which by the very terms of the statute is subject to modification.*" (Emphasis added.)

Further, in this State it is expressly provided by statute, G.S. 50-11(c), that except in certain designated instances, "a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce." The exceptions specified in the statute are (1) in case of divorce obtained with personal service upon grounds of the adultery of the dependent spouse and (2) in case of divorce obtained by the dependent spouse in an action initiated by such spouse on the ground of separation for the statutory period. Citing G.S. 50-11, our Supreme Court held in *Becker v. Becker,* 273 N.C. 65, 159 S.E. 2d 569, that plaintiff-wife in that case was not entitled to an award of attorney's fees for services rendered to her subsequent to the absolute divorce which had been obtained in an action initiated by her on the ground of separation for the statutory period. Thus that case fell directly within one of the exceptions specified in G.S. 50-11(c). In *Zande v. Zande,* 3 N.C. App. 149, 164 S.E. 2d 523, an allowance of attorney's fees for services rendered to the wife subsequent to an absolute divorce which had been obtained in an action instituted by the husband was held improper, but in that case the judgment which had been rendered in the wife's prior pending action for alimony without divorce expressly provided that no more attorney's fees for the plaintiff were to be paid by the defendant.

Applying G.S. 50-11(c), we are of the opinion, and so hold, that unless the case falls within one of the two exceptions made by that statute, counsel fees may be awarded for services rendered to a dependent spouse subsequent to an absolute divorce in seeking to obtain or in resisting a motion for a revision of alimony or other rights provided under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce. Whether any award of counsel fees for such services should be made in a particular case and the amount of such an award must, of course, remain within the sound discretion of the trial court. In the present case defendant, the former husband, by his own action in seeking to terminate entirely his obligation to make further payments to plaintiff, forced her to incur expenses for attorney's fees simply to preserve rights which were already hers as result of a decree originally entered prior to the divorce. In such a

case, we hold that the trial court had authority, in its sound discretion, to order defendant to pay plaintiff's reasonable counsel fees. Appellant failed to show that the divorce in this case was obtained in a manner which would bring this case within one of the two exceptions set forth in G.S. 50-11(c). Absent such a showing, appellant has failed to show error. The presumption being in favor of the correctness of the judgment of the lower court and the burden being upon appellant to show error, 1 Strong, N. C. Index 2d, Appeal and Error, § 46, p. 189, the order appealed from is

Affirmed.

Judges VAUGHN and GRAHAM concur.

AUTOMOBILE DEALER RESOURCES, INC. v. OCCIDENTAL LIFE INSURANCE COMPANY OF NORTH CAROLINA

No. 7210SC518

(Filed 23 August 1972)

1. **Injunctions § 12— temporary injunction — when granted**

A temporary injunction will ordinarily be granted on the merits (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's rights.

2. **Injunctions § 1— prohibitory injunction**

A prohibitory injunction seeks to preserve the status quo, until the rights of the parties can be determined, by restraining the party enjoined from doing particular acts.

3. **Injunctions § 3— mandatory injunction**

A mandatory injunction is intended to restore a status quo and to that end requires a party to perform a positive act; it is comparable in its nature and function to a writ of mandamus and will ordinarily be granted only where the injury is immediate, pressing, irreparable and clearly established.

4. **Injunctions § 6— enjoining termination of contract — prohibitory injunction**

An injunction restraining defendant from terminating the performance of its duties under a contract with plaintiff is prohibitory where defendant has not ceased the performance of its duties under the contract but has only threatened to do so.

5. Appeal and Error § 58— temporary injunction — appellate review of the evidence

In reviewing orders for temporary injunctive relief, an appellate court may look beyond the findings of fact made by the trial court and determine from the evidence whether a preliminary injunction is justified.

6. Injunctions § 13— preliminary prohibiting injunction — sufficiency of evidence

There was sufficient evidence of an immediate, pressing and irreparable injury to justify a preliminary injunction prohibiting defendant insurance company from refusing to accept credit insurance business generated by plaintiff pursuant to a contract between the parties, where evidence presented by plaintiff tended to show that its business has been almost completely structured around its contract with defendant, that an interruption by defendant in the performance of its duties under the contract would result in an immediate loss of commissions on 90% of plaintiff's credit insurance business, that this would render plaintiff unable to meet its current expenses, cause a $300,000 note to a bank to become due immediately, and result in plaintiff's insolvency, and that plaintiff's network of agents would disintegrate and plaintiff would likely cease to exist as a going business.

7. Contracts § 21; Insurance § 2— credit insurance — agency contract — termination by insurance company

Defendant insurance company was not entitled to terminate unilaterally its contract to accept credit insurance business generated by plaintiff on the ground that plaintiff had failed to respond to defendant's demand that plaintiff reimburse defendant an amount allegedly owed by a company which merged with plaintiff for business closed during 1964 through 1968, where defendant will not be harmed by continuing its business relationship with plaintiff, at least until there can be a legal determination of defendant's claim, and considerable harm could result to plaintiff if it is now put to an election between paying a claim which it questions or immediately suffering disastrous consequences to its business.

8. Contracts § 21; Insurance § 2— credit insurance — agency contract — termination by insurance company

The fact that plaintiff has made arrangements to write credit insurance for a company other than defendant in Florida and is making similar arrangements in other states did not justify defendant in breaching its contract to accept credit insurance business generated by plaintiff where the contract did not create an exclusive relationship.

9. Injunctions § 13; Rules of Civil Procedure § 65— preliminary injunction — specificity of terms

Terms used by the court in a preliminary injunction restraining defendant from refusing to accept credit insurance business generated by plaintiff pursuant to a contract between the parties were sufficiently specific to meet the requirements of G.S. 1A-1, Rule 65(d),

where the terms appear in such contract, especially when the parties functioned under the contract for more than three years and no showing was made as to any difficulty on the part of either party in understanding the language used.

10. Injunctions § 13; Rules of Civil Procedure § 65— injunction — conduct enjoined — resort to other documents

The fact that after a description in a preliminary injunction of each act enjoined, there is added the phrase "pursuant to the contract . . . dated October 1, 1968," or a similar phrase, did not require the enjoined party to resort to documents other than the injunctive order itself to determine what the court was ordering it to do, as such phrases simply show the source of the duty and do not modify in any manner the description of the conduct enjoined. G.S. 1A-1, Rule 65(d).

APPEAL by defendant from *Canaday, Judge,* 1 May 1972 Session of Superior Court held in WAKE County.

Defendant, a North Carolina insurance company, appeals from an order filed 9 May 1972 enjoining it from terminating the performance of its duties under a contract with plaintiff.

Plaintiff is an insurance agency principally engaged in the marketing of credit insurance for defendant under a contract dated 1 October 1968. At the time the contract was entered defendant owned seventy percent of plaintiff's capital stock; the remainder was owned by two individuals. On or about 15 November 1971 defendant sold the stock it owned in plaintiff to one of the individual shareholders. An agreement entered in connection with the stock sale amended the contract of 1 October 1968 by increasing the amount of commissions due plaintiff on sales and providing that plaintiff would place with defendant during each of the next five years credit insurance generating $5,000,000.00 in new premiums, or one-half the total credit insurance produced by plaintiff, whichever was greater.

Under the terms of the 1 October 1968 contract, defendant agreed to maintain licenses in states where its insurance was to be marketed by plaintiff; to license plaintiff's individual agents provided they were of good character and ability and eligible for licensing; to pay commissions due agents under contracts of insurance executed for defendant by plaintiff and approved by defendant; to establish and maintain required reserves and accounts and records necessary for the proper transaction of credit insurance; and to prepare and file all documents, pay all taxes and otherwise perform all functions

required and customary of an insurance company of good reputation and standing. The contract specifies that it is to extend for a period of five years and may be renewed by mutual agreement. It also provides that it may be terminated by mutual consent of the parties expressed in writing.

In a letter dated 24 April 1972, defendant advised plaintiff that effective 1 May 1972 it would be unable to accept new issues of credit insurance generated by plaintiff pursuant to the agreement of 1 October 1968, as amended by the agreement of 15 November 1971.

Plaintiff brought this action 28 April 1972 seeking an order enjoining defendant from terminating the performance of its duties under the contract and requesting a temporary restraining order and a preliminary injunction. A temporary restraining order was entered the day complaint was filed and defendant was ordered to appear on 3 May 1972 to show cause as to why it should not be continued. At a hearing held pursuant to this order, plaintiff offered, in support of its motion for a preliminary injunction, its verified complaint, various exhibits, and an affidavit of one of it officers. This evidence tends to show the following:

In reliance upon its rights under the contract of 1 October 1968, as amended, plaintiff has established a large network of insurance agents throughout southeastern United States. Ninety percent of plaintiff's credit insurance business is placed with the defendant. Plaintiff has no relationship established with any other insurance company which can accept credit insurance business produced by plaintiff. To establish such a relationship would take considerable time since agreements would have to be negotiated and various insurance forms and license applications would have to be approved by insurance departments in the states where plaintiff is engaged in business.

A termination by defendant of its contractual obligations to plaintiff would result in an interruption in plaintiff's ability to place its credit insurance business. Such an interruption would cause plaintiff to lose the confidence and relationship of its agents and would cause an immediate deterioration and loss of plaintiff's agency network. It would also render plaintiff unable to meet its monthly operating expenses or its obligation under a loan agreement under which it borrowed $300,000.00

from North Carolina National Bank for use in the purchase of plaintiff's stock owned by defendant. The bank made the loan and plaintiff and its shareholders agreed to purchase the stock in reliance upon a letter written by defendant's president and dated 15 November 1971. The letter assured plaintiff that defendant would accept credit insurance from plaintiff generating premiums of at least $10,000,000.00 during the year 1972.

Plaintiff contends, through the affidavit of its president, that because of the factors set forth above, a breach by defendant of its contractual obligations would result in plaintiff's immediate insolvency and bankruptcy and would cause irreparable damage not capable of monetary computation.

The trial court made findings of fact consistent with plaintiff's evidence and concluded "that there is probable cause for supposing that the Plaintiff will be able to sustain its primary equity and that there is reasonable apprehension of irreparable loss to the Plaintiff unless a preliminary injunction be granted and that such relief appears reasonably necessary to protect Plaintiff's rights until the controversy between the parties can be determined upon its merits." The court thereupon ordered defendant enjoined, until final determination of the merits of the cause, or until otherwise ordered, from directly or indirectly refusing to accept credit life, credit accident and health insurance business generated by plaintiff pursuant to the contract of the parties dated 1 October 1968, as amended. Defendant was also enjoined from failing to perform other duties specified in the contract.

Hatch, Little, Bunn, Jones & Few by William P. Few and Harold W. Berry for plaintiff appellee.

Smith, Anderson, Blount and Mitchell by John H. Anderson, Henry A. Mitchell, Jr., and Samuel G. Thompson for defendant appellant.

GRAHAM, Judge.

[1] A temporary injunction will ordinarily be granted pending trial on the merits (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's rights.

U-Haul Co. v. Jones, 269 N.C. 284, 152 S.E. 2d 65; *Conference v. Creech and Teasley v. Creech and Miles,* 256 N.C. 128, 123 S.E. 2d 619.

[2, 3] The law recognizes a distinction, however, between prohibitory and mandatory injunctions. A prohibitory injunction seeks to preserve the status quo, until the rights of the parties can be determined, by restraining the party enjoined from doing particular acts. *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452. A mandatory injunction is intended to restore a status quo and to that end requires a party to perform a positive act. 2 McIntosh, N.C. Practice and Procedure 2d, § 2194, p. 404. A mandatory injunction is comparable in its nature and function to a writ of mandamus, *Carroll v. Board of Trade,* 259 N.C. 692, 131 S.E. 2d 483, and will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established. *Highway Com. v. Brown,* 238 N.C. 293, 77 S.E. 2d 780. See also *Huggins v. Board of Education,* 272 N.C. 33, 157 S.E. 2d 703; Annot. Preliminary Mandatory Injunction, 15 A.L.R. 2d 213. "While in the greater number of instances injunction is a preventive remedy, there is no doubt that the court has jurisdiction to issue a preliminary mandatory injunction where the case is urgent and the right is clear; and, if necessary to meet the exigencies of a particular situation, the injunctive decree may be both preventive and mandatory." *Woolen Mills v. Land Co.,* 183 N.C. 511, 513, 112 S.E. 24, 25.

Defendant contends that the injunction granted in this case is mandatory because it requires the performance of positive acts. It argues that the evidence and the court's findings will not support an injunction of this nature.

[4] We are inclined to view the injunction issued here as prohibitory. Defendant has not ceased the performance of its duties under the contract of 1 October 1968, as amended. It has only threatened to do so. The injunction simply prohibits defendant from carrying out this threat. The effect is to continue the status between the parties until trial, and not to impose a new status or to restore a status that has been interrupted.

[5, 6] However, whether the injunction is deemed to be prohibitory or mandatory, we are of the opinion that it is justified. In reviewing orders for temporary injunctive relief an appel-

late court may look beyond the findings of fact made by the trial court and determine from the evidence whether a preliminary injunction is justified. *Owen v. DeBruhl Agency, Inc.*, 241 N.C. 597, 86 S.E. 2d 197. Plaintiff's theory, which is fully supported by the evidence, is that its business has been almost completely structured around its contract with defendant. An interruption by defendant in the performance of its duties under the contract would result in an immediate loss of commissions on ninety percent of plaintiff's credit insurance business. This would render plaintiff unable to meet its current expenses, cause its $300,000.00 indebtedness to the bank to become immediately due, and result in plaintiff's immediate insolvency. Plaintiff's network of agents would disintegrate and plaintiff would likely cease to exist as a going business. This constitutes, in our opinion, sufficient evidence of an immediate, pressing, and irreparable injury to justify the order requiring defendant to continue its business relationship with plaintiff pending a final hearing.

A balancing of the equities involved further convinces us of the appropriateness of the relief granted.

[7] Defendant contends it is entitled to unilaterally terminate the contract for two principal reasons. First, it contends plaintiff has failed to respond to a demand that it reimburse defendant in the sum of $185,324.82, allegedly owed for business closed during 1964 through 1968. This alleged indebtedness apparently arises from guarantees of profit made to defendant by a company which merged with plaintiff in 1969. According to defendant's affidavit, this indebtedness was not discovered until April 1972 after "an intensive review and research of the Occidental credit insurance program." Demand for payment was first made on 13 April 1972.

We fail to see how defendant will be harmed by continuing its business relationship with plaintiff, at least until there can be a legal determination of this claim. On the other hand, considerable harm could result to plaintiff if it is now put to an election between paying a claim which it questions, or immediately suffering disastrous consequences to its business.

[8] Secondly, defendant says it is informed plaintiff has made arrangements to write insurance for a company other than defendant in the state of Florida and that plaintiff is in the process of making similar arrangements in other states. Assuming this to be true, defendant fails to show how this justifies a

breach in the contractual relationship between the parties. The relationship established by the contract of 1 October 1968, as amended, is not exclusive. Defendant is not precluded under the contract from accepting contracts for credit insurance generated by other agencies. Likewise, plaintiff is free to sell insurance for other companies, subject only to the requirement that it place with defendant one-half of all the credit insurance it sells in any one year or $5,000,000.00 in new premiums, whichever is greater.

Defendant contends the preliminary injunction fails to meet the requirements of G.S. 1A-1, Rule 65(d). This rule provides, among other things, that an injunctive order "shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained. . . . "

The first requirement is met by the court's findings of fact and conclusions of law, which show clearly the reason for the order's issuance.

[9] Defendant strenuously argues that the second requirement is not met, contending that many of the terms used in the order are ambiguous and not sufficiently defined. For instance, defendant questions the court's use of the words "to accept" and the word "generated" in enjoining defendant from "refusing to accept credit life, credit accident and health insurance business generated by the Plaintiff. . . . " These exact words were used in defendant's letter of 24 April 1972 wherein plaintiff was advised that defendant "will be unable to accept new issues of credit life and credit A & H insurance generated through Automobile Dealer Resources on and after May 1, 1972. . . . " Other phrases cited by defendant as ambiguous or indefinite are phrases which appear in the contract of 1 October 1968. The parties functioned under the contract, apparently without complaint, for more than three years. Defendant cannot insist now that the court speak with more clarity than did plaintiff and defendant in establishing the relationship which the court now seeks to preserve, especially when no showing is made as to any previous difficulty on the part of either party in understanding the language used.

[10] We find that the order also complies with the third mandate of Rule 65(d). The question in this connection is

whether the party enjoined can know from the language of the order itself, and without having to resort to other documents, exactly what the court is ordering it to do. The acts which defendant is enjoined from ceasing are set forth specifically in the order itself. The fact that after a description in the order of each act enjoined, there is added "pursuant to the contract . . . dated October 1, 1968 . . . , " or a similar phrase, is without significance. This wording simply shows the source of the duty. It does not modify in any manner the description of the conduct enjoined.

Affirmed.

Judges PARKER and VAUGHN concur.

KATIE H. WILLIAMS v. OLIVER HERRING, INDIVIDUALLY AND AS CO-EXECUTOR OF THE ESTATE OF SARA E. HERRING, DECEASED; THEODORE HERRING, INDIVIDUALLY AND AS CO-EXECUTOR OF THE ESTATE OF SARA E. HERRING, DECEASED; ELIZABETH T. HERRING; RETHA MAE SMITH; RUSSELL SMITH; CLARA PEARL LYNN; HERBERT LYNN; VELMA WRAY HOWARD; EDWARD HOWARD; LEWIS S. MILLER; TOMMY MILLER; NANCY D. MILLER; JULIAN D. MILLER; RACHEL A. MILLER; JOHN W. MILLER; DOROTHY C. MILLER; KAY MILLER MASON; A. A. MASON, JR.; JEWELL M. WHITE; IVEY L. WHITE; EDWARD MILLER; CAROL M. MILLER; PATRICIA M. HOWARD; RODNEY C. HOWARD; JACK C. MILLER; ROSE H. MILLER; JACKIE M. STROUD; H. DENNIS STROUD; ARTIE D. MILLER; DENNIS MILLER; RUTH S. MILLER; BOBBY HERRING, AND SHIRLEY HERRING

No. 724SC370

(Filed 23 August 1972)

Deeds § 7— execution and recordation — presumption of acceptance by grantee

Where a deed is executed and recorded, it is presumed that the grantee therein will accept the deed made for his benefit; hence a deed executed by the grantor and recorded conveyed interests to all of the grantees named therein, not just to those who signed the deed in accordance with its provisions since there was no evidence to rebut the presumption of acceptance by recordation with respect to any of the grantees.

Williams v. Herring

APPEAL by some of the respondents from *Webb, Judge,* 13 December 1971 Session of Superior Court held in DUPLIN County.

This action commenced as a petition for partition to make an actual division of land among tenants in common. The tenants in common are the chidren and grandchildren of Sarah E. Herring. (Sometimes referred to as Sarah B. Herring). Sarah E. (B) Herring had seven children: (1) Katie H. Williams, (2) Oliver Herring, (3) Theodore Herring, (4) Retha Mae Smith, (5) Clara Pearl Lynn, (6) Velma Wray Howard, and (7) Flora H. Miller. Flora H. Miller died prior to the execution of the deed in controversy, and left surviving her twelve children.

A controversy developed over whether a deed executed by Sarah E. (B) Herring conveyed interests to all of the grantees named therein, or conveyed only to those who signed the deed in accordance with its provisions. The deed is recorded in Duplin County Deed Book 654, page 161, as follows:

> "THIS DEED, made and entered into this the 24th day of September, 1968, by and between Sarah B. Herring, a widow, of Duplin County, North Carolina party of the first part, to Kate H. Williams, Oliver Herring, Theodore Herring, Retha Mae Smith, Clara Pearl Lynn, Wray Herring Howard, Lewis Stephen Miller, Tommie Miller, Julian Miller, John Miller, Katie Miller Mason, Jewel Miller White, Edward Miller, Patricia Ann Miller Howard, Jackie Miller Stroud, Jack Clifton Miller, Artie Dwight Miller, Dennis Mack Miller, said grantees to hold the lands as hereinafter set out in the proportions as hereinafter set forth, parties of the second part;
>
> "WITNESSETH, that whereas, Sarah E. Herring is the owner of the lands as hereinafter described and that she desires to convey the same subject to her life estate in the following proportions: to Kate H. Williams a 1/7 undivided interest, to Oliver Herring a 1/7 undivided interest, to Theodore Herring a 1/7 undivided interest, to Retha Mae Smith a 1/7 undivided interest, to Clara Pearl Lynn a 1/7 undivided interest, to Wray Herring Howard a 1/7 undivided interest, to Lewis Stephen Miller, Tommie Miller, Julian Miller, John Miller, Katie Miller Mason, Jewel

Miller White, Edward Miller, Patricia Ann Miller Howard, Jackie Miller Stroud, Jack Clifton Miller, Artie Dwight Miller and Dennis Mack Miller a 1/7 undivided interest jointly, all in fee simple, subject to the life estate of Sarah E. Herring;

"And that whereas, the grantees, Kate H. Williams, Oliver Herring, Theodore Herring, Retha Mae Smith, Clara Pearl Lynn and Wray Herring Howard, are the children of Sarah E. Herring; and that whereas, the grantees, Lewis Stephen Miller, Jewel Miller White, Edward Miller, Patricia Ann Miller Howard, Jackie Miller Stroud, Jack Clifton Miller, Artie Dwight Miller and Dennis Mack Miller, are the children of the deceased child of Sarah E. Herring, to wit: Flora Herring Miller;

"And that whereas, said lands as hereinafter set forth are being further conveyed subject to the following provisions: That when said lands are divided between the grantees herein, Clara Pearl Lynn shall be allotted her share from the 46 acre tract of land owned by Sara E. Herring on which Clara Pearl Lynn now lives and resides and which was conveyed by Martha Outlaw by deed recorded in Book 475, page 410, of the Duplin County Registry, together with enough land from other lands owned by Sarah E. Herring to make the share of Clara Pearl Lynn equal in value and equal to a 1/7 undivided interest of the whole; and provided further that Oliver Herring shall be allotted his share from the lands on which he now lives and resides and which was conveyed to the grantor by Flora H. Miller by deed recorded in Book 385, page 201, of the Duplin County Registry, and the dwelling house in which he now lives shall be included as a part of his share;

"And that whereas, all of the lands hereinafter set forth are now being conveyed subject to the life estate of Sarah B. Herring and subject to each and every provision of this deed.

"That whereas, the grantees herein join in the execution of this deed acknowledging and accepting the same to be their reasonable proportion in value of the estate of Sarah E. Herring as to said real estate. (Emphasis Added.)

"NOW THEREFORE, said Sarah E. Herring, for and in the consideration of the sum of Five Dollars to her in hand paid, the receipt of which is hereby acknowledged, does hereby bargain, sell and convey unto the parties of the second part, their heirs and assigns, so that the same shall be owned in the following proportions, to wit: Kate H. Williams shall own a 1/7 undivided interest, Oliver Herring shall own a 1/7 undivided interest, Theodore Herring shall own a 1/7 undivided interest, Retha Mae Smith shall own a 1/7 undivided interest, Clara Pearl Lynn shall own a 1/7 undivided interest, Wray Herring Howard shall own a 1/7 undivided interest, and Lewis Stephen Miller, Tommie Miller, Julian Miller, John Miller, Katie Miller Mason, Jewel Miller White, Edward Miller, Patricia Ann Miller Howard, Jackie Miller Stroud, Jack Clifton Miller, Artie Dwight Miller and Dennis Mack Miller, jointly shall own a 1/7 undivided interest; subject, however, to the life estate of Sarah E. Herring, and further subject to the provisions as hereinbefore set out, all those certain tracts or parcels of land lying and being in Glisson Township, Duplin County, North Carolina, and described as follows:

"Being all the lands which Sarah E. Herring owns in Duplin County, North Carolina, of every type and description, and particularly the lands described in deeds recorded in Book 475, page 410, and Book 385, page 201, of the Duplin County Registry, and so as to include any and all lands of every type and description, regardless of nature or size of said lands.

"TO HAVE AND TO the aforesaid tracts or parcels of land and all privileges and appurtenances thereto belonging to the said parties of the second part, their heirs and assigns, subject to the life estate of Sarah E. Herring, and subject to the provisions hereinbefore set forth for the allotment of said lands, to their only use and behoof forever, so that the same shall be owned in the following proportions: Kate H. Williams shall own a 1/7 undivided interest, Oliver Herring shall own a 1/7 undivided interest, Theodore Herring shall own a 1/7 undivided interest, Retha Mae Smith shall own a 1/7 undivided interest, Clara Pearl Lynn shall own a 1/7 undivided interest, Wray Herring Howard

shall own a 1/7 undivided interest, and Lewis Stephen Miller, Tommie Miller, Julian Miller, John Miller, Katie Miller Mason, Jewel Miller White, Edward Miller, Patricia Ann Miller Howard, Jackie Miller Stroud, Jack Clifton Miller, Artie Dwight Miller and Dennis Mack Miller shall own jointly a 1/7 undivided interest.

"It is agreed and understood that the grantees are executing this deed for the sole purpose of accepting their fair portion of the real estate of Sarah E. Herring and to signify their consent that Sarah E. Herring has power to convey the same; and that all parties are bound by this instrument. (Emphasis Added.)

"And the said party of the first part, for herself and her heirs, executors and administrators, covenants with said parties of the second part, their heirs and assigns, that she is seized of said premises in fee and has a right to convey the same in fee simple; that the same are free and clear from all encumbrances and that she does hereby forever warrant and will forever defend the said title to the same against the claims of all persons whomsoever.

"IN TESTIMONY WHEREOF, the said parties of the first and second parts have hereunto set their hands and affixed their seals the day and year first above written."

Sarah E. (B) Herring died 28 May 1970 leaving a "Last Will and Testament" dated 3 October 1967 (executed prior to the execution of the above deed) wherein she sought to divide all of her realty and personalty one-seventh to each of her surviving children and one-seventh divided jointly among the twelve children of her deceased daughter Flora H. Miller.

After the execution of the above deed by Sarah E. (B) Herring, Theodore Herring conveyed his interest therein to his son Bobby Herring, a grandson, who by virtue of the deed from his father now stands in the place of one of Sarah E. (B) Herring's children.

Judge Webb concluded that it was the intention of the grantor, Sarah E. (B) Herring, to vest title to the real estate described in the deed one-seventh each in her children and one-

seventh divided equally among the twelve Miller children. The interests of the parties to be as follows:

NAME	RELATIONSHIP	INTEREST
Katie H. Williams	Daughter	1/7
Oliver Herring	Son	1/7
Bobby Herring	Grandson	1/7
Retha Mae Smith	Daughter	1/7
Clara Pearl Lynn	Daughter	1/7
Velma Wray Howard	Daughter	1/7
Lewis S. Miller	Grandson	1/84
Tommy Miller	Grandson	1/84
Julian D. Miller	Grandson	1/84
John W. Miller	Grandson	1/84
Kay Miller Mason	Granddaughter	1/84
Jewell M. White	Granddaughter	1/84
Edward Miller	Grandson	1/84
Patricia M. Howard	Granddaughter	1/84
Jack C. Miller	Grandson	1/84
Jackie M. Stroud	Granddaughter	1/84
Artie D. Miller	Grandson	1/84
Dennis Miller	Grandson	1/84

Thereafter Judge Webb directed that the land be divided among the parties in accordance with their respective interests, and remanded the cause to the Clerk of Superior Court for completion of the partitioning proceeding.

Some of the respondents appealed.

Kornegay and Bruce, by George R. Kornegay, Jr., for petitioner-appellee, Katie H. Williams.

Chambliss, Paderick & Warrick, by Benjamin R. Warrick, for respondent-appellee, Bobby Herring.

Vance B. Gavin for respondent-appellee, Oliver Herring.

Rivers D. Johnson, Jr., for respondent-appellants, Retha Mae Smith, Clara Pearl Lynn, and Velma Wray Howard.

Turner & Harrison, by Fred W. Harrison, for respondent-appellants, the Miller children.

BROCK, Judge.

Appellants argue that five of grantor's six living children failed to sign the deed. The record on appeal is conflicting on this point. The copy of subject deed as recorded by the Register of Deeds which is incorporated as an exhibit in the record on appeal fails to reflect a signature for five of the living children of Sarah E. (B) Herring. However, the notary certificate recites that five of the six children appeared on 3 January 1968 and acknowledged the due execution of the deed. The only one of the six children of Sarah E. (B) Herring who failed to acknowledge execution (and whose signature is not reflected on the exhibit) is Oliver Herring.

There is no pleading stipulation, or other explanation of the conflict in the record before us.

Appellants argue that all of the twelve Miller children, with the exception of one, accepted by signing the deed. However, we note from the exhibit in the record on appeal that five of the Miller children's signatures are not reflected, and there is no acknowledgment for these five.

Even if the record bore out appellants' assertion that only one of the six children of Sarah E. (B) Herring signed the deed, and that all but one of the twelve Miller children did sign the deed, appellants' argument blows hot and cold. We understand appellants' argument to be as follows: (1) Because of the failure of five of the six children of Sarah E. (B) Herring to sign the deed, his or her stated interest was not conveyed by Sarah E. (B) Herring; but, (2) even though one of the twelve Miller children failed to sign the deed, this one's stated interest was nevertheless conveyed.

Another point of interest which is not explained by the pleadings, stipulations, or argument relates to the dates of acknowledgments of signatures before notaries public. The dates of the acknowledgments are 18 December 1968, 30 December 1968, 3 January 1968 (sic), and 1 February 1969. The deed was then filed for recording on 3 February 1969. There is no explanation as to by whom or why the deed was filed for recording so immediately after the 1 February 1969 acknowledgment, when signatures were still missing. Did someone cut off the opportunity for the remainder of the grantees to sign the deed?

It appears to us that some of the appellants, namely Retha Mae Smith, Clara Pearl Lynn, and Wray Herring Howard, three of the six children of Sarah E. (B) Herring, are arguing that they are entitled to a judgment which is less favorable to them than the one which was entered. They do not allege, argue, or contend that they wish to refuse or reject benefits which the deed might have granted to them. 23 Am. Jur. 2d, Deeds, § 127, p. 176. Quaere, are they aggrieved parties who are entitled to appeal?

One further observation and we will proceed to a determination of the merits of the appeal. This case was submitted to Judge Webb upon the admissions in the pleadings and formal stipulations filed in the cause. Paragraph 4 of the formal stipulations recites the names of the twelve children of Flora Herring Miller (the deceased child of the grantor in the subject deed). When this stipulation was recited in paragraph 4 of the judgment entered in this cause, the name of Lewis S. Miller, one of the twelve children, was omitted, obviously by inadvertence. Paragraph 4 of the judgment entered in this cause will be modified and amended to add the name of Lewis S. Miller.

The evidence is clear and uncontradicted that the subject deed was executed by the grantor and recorded. "Where a deed is executed and recorded, it is presumed that the grantee therein will accept the deed made for his benefit. This is so, although the transaction occurs without the grantee's knowledge. Such presumption will prevail in the absence of evidence to the contrary." *Corbett v. Corbett,* 249 N.C. 585, 590, 107 S.E. 2d 165, 169; *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316; *Perry v. Suggs,* 9 N.C. App. 128, 175 S.E. 2d 696 (certiorari denied 277 N.C. 253); 23 Am. Jur. 2d, Deeds, § 132, p. 180. In this case there is absolutely no evidence to indicate that any of the grantees who may have failed to sign the deed were aware of its existence or content, or were ever given an opportunity to sign it. There is absolutely no evidence to indicate that anyone refused to sign the deed. There is absolutely no evidence which would tend to rebut the presumption of acceptance. Therefore, we hold that upon the record and evidence in this case acceptance by all grantees is presumed by recordation of the deed; and, absent evidence to rebut the presumption, title is vested in the grantees in the proportions provided in the deed.

In view of this disposition, it is not necessary to determine the effect of the "conditions" in the deed in the event a grantee rejected its benefits by refusing to sign it.

The judgment of the trial court, with paragraph 4 modified and amended as above provided, is correct and is

Modified and affirmed.

Judges MORRIS and HEDRICK concur.

JACK J. CARLISLE AND WIFE, JEANETTE H. CARLISLE v. THE COMMODORE CORPORATION AND KENNETH WOOTEN, JR., SUBSTITUTE TRUSTEE

— AND —

UNIVERSITY GARDEN APARTMENTS, INC. v. KENNETH WOOTEN, JR., SUBSTITUTE TRUSTEE, AND THE COMMODORE CORPORATION

No. 7215SC342

(Filed 23 August 1972)

1. **Mortgages and Deeds of Trust § 1— pre-existing contingent obligation — consideration — sufficiency**

A pre-existing contingent obligation as guarantor on a note is sufficient consideration to support the execution of a mortgage or deed of trust to secure performance of the contingent obligation.

2. **Mortgages and Deeds of Trust § 1— advancement of loan funds — execution of deed of trust — sufficient consideration**

Where lender had the right to discontinue advancement on its loan to borrower if additional guarantee were not furnished in accordance with provisions of the original loan agreement, but such advancements were continued upon the execution of a deed of trust by an affiliate of borrower, there was adequate consideration to support the execution of such deed of trust.

3. **Mortgages and Deeds of Trust § 29— foreclosure sale — failure to allow ten days for filing of upset bids**

The trial court erred in directing a trustee who had been restrained from completing foreclosure proceedings to convey the properties "in accordance with the foreclosure proceeding thus far" where the evidence showed that only nine days had elapsed between the date of the sale of the properties and the date the trustee was restrained, and the evidence did not show when, if ever, the trustee had filed his report of the foreclosure sale with the Clerk of Superior Court.

Carlisle v. Commodore Corp. and Apartments v. Wooten

APPEAL by plaintiffs from a Judgment entered by *Hobgood, Judge,* on 6 December 1971, following a hearing at the 20 September 1971 Session of Superior Court held in ORANGE County.

These two actions, consolidated for trial and appeal, were instituted by plaintiffs, University Garden Apartments, Inc., and Jack Carlisle and wife (respectively), seeking to restrain and enjoin defendants, Kenneth Wooten, Jr., Substitute Trustee, and the Commodore Corporation, from proceeding with foreclosure under the power of sale contained in two deeds of trust upon the plaintiffs' land.

Mr. and Mrs. Carlisle alleged that on 28 July 1969 Diversified Mobile Homes, Inc., (Diversified) executed and delivered to Commodore a promissory note in the sum of $250,000, for which promissory note they signed a guaranty. The said note resulted from a contract or agreement between Diversified and Commodore, in which it was provided that loan funds were to be disbursed in installments by Commodore as follows:

$125,000 on or about August 1, 1969;
$ 50,000 on or about September 1, 1969;
$ 50,000 on or about October 1, 1969;
$ 25,000 on or about November 1, 1969.

All plaintiffs alleged that Commodore disbursed the sum of $175,000 to Diversified according to schedule; that on or about 1 September 1969 Commodore threatened to discontinue the remaining disbursements per scheduled agreement, unless plaintiffs would execute deeds of trust upon their property to the benefit of Commodore; that on or about 21 November 1969 plaintiffs executed the purported deeds of trust as a result of threats and illegal coercion, which execution was without consideration; and that upon alleged default by Diversified on the payment of some portion of the aforementioned note and agreement, defendant trustee commenced foreclosure proceedings and held a foreclosure sale of plaintiffs' properties on 23 September 1970.

Commodore Corporation admitted the loan transaction in the sum of $250,000, with plaintiffs' guarantee, and the note between itself and Diversified, of which plaintiff Jack Carlisle was principal stockholder and President. Commodore admitted disbursements of $175,000 under the said note to Diversified

and admitted the subsequent execution of the deeds of trust by plaintiffs, at which time Commodore further disbursed $75,000 to Diversified. It alleged that Diversified had filed in bankruptcy on 13 August 1970 and that foreclosure on the deeds of trust was begun by the defendant-trustee after due demand for payment of the balance due on the note. The foreclosure proceeding was stayed by temporary restraining order, entered 2 October 1970, and preliminary injunction, entered 10 November 1970, until the cause was heard on its merits by Judge Hobgood at the 20 September 1971 Session. After hearing the evidence Judge Hobgood made findings of fact and conclusions of law. He entered judgment dismissing plaintiffs' actions and directing the substitute trustee to convey the properties "in accordance with the foreclosure proceedings thus far." Plaintiffs appealed.

Hatch, Little, Bunn, Jones & Few, by E. Richard Jones, Jr., for plaintiffs.

Bailey, Dixon, Wooten & McDonald, by Wright T. Dixon, Jr., and Ralph McDonald, for defendants.

BROCK, Judge.

Plaintiffs assign as error that two of the trial court's findings of fact, findings numbers 8 and 10, are unsupported and contrary to the evidence. A review of the record on appeal shows that although the evidence is conflicting there was evidence to support the findings and they will not be disturbed. These assignments of error are overruled.

Plaintiff-appellants assign as error the following conclusions of the trial court:

> "1. That the instruments recorded in Book 223 at page 432 and Book 223 at page 428 of the Orange County Registry are properly executed, acknowledged and registered deeds of trust and are valid conveyances of land for the purposes expressed therein.
>
> "2. That both deeds of trust are under seal and contain recitals of receipt of valuable consideration which are binding upon the original parties thereto.

"3. That both deeds of trust were in fact supported by valuable consideration in that $75,000.00 was advanced by The Commodore Corporation to Diversified Mobile Homes, Inc. in reliance upon the security they provided for personal guaranties of the total obligation of Diversified Mobile Homes, Inc. to The Commodore Corporation.

"4. That the plaintiffs have failed to carry their burden of proof in showing that execution of the deeds of trust was procured by fraud, duress or undue influence.

"5. That a deed of trust is a conveyance and not an executory contract and does not, as between the original parties, require consideration."

Plaintiffs advance no reason or argument, and cite no authority, in support of their assignment of error relative to the court's conclusion that they had failed to carry the burden of proof on their plea of fraud, duress and undue influence. This assignment of error is deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals.

Plaintiffs strenuously argue that the trial court committed error in conclusions numbers 3 and 5. It seems to us that if either conclusion is correct it supports the judgment, and the other conclusion is not necessary. In other words, if the two deeds of trust are supported by valuable consideration, it does not matter if a deed of trust requires none. Conversely, if a deed of trust requires no consideration, it does not matter that the two deeds of trust are supported by valuable consideration.

We do not feel that this case requires a discussion of the distinction between the deed of trust and the obligation it is given to secure. Obviously a contract creating an obligation must be supported by valuable consideration, but it does not seem that an additional consideration is required for the contemporaneous execution of a deed of trust to secure performance of the obligation.

The findings of fact by the trial court establish the following:

The original loan agreement called for the personal guarantee of Mr. & Mrs. Carlisle, and by such of Diversified's subsidiaries or affiliates as Commodore may from time to time request. University Garden Apartments, Inc. is the successor to C. & B. Inc. which was an affiliate of Diversified.

Contemporaneously with the execution by Diversified of the note to Commodore in the amount of $250,000.00, Mr. and Mrs. Carlisle executed a written guaranty of the obligation. Later Commodore called upon Diversified for further guarantee of the loan. As a consequence of Commodore's demand for further guarantee, Mr. and Mrs. Carlisle executed one of the deeds of trust in question, and C. & B. Inc. (predecessor to University Garden Apartments, Inc.) executed the other deed of trust in question.

Plaintiffs argue that both deeds of trust were executed without consideration, and that their foreclosure should be permanently enjoined.

A. The Carlisle Deed of Trust.

[1] It seems clear that a pre-existing debt is sufficient consideration to support a chattel mortgage, *Brown v. Mitchell,* 168 N.C. 312, at 314, 84 S.E. 404; and to support the execution of a mortgage or deed of trust. *Fowle v. McLean,* 168 N.C. 537, at 541, 84 S.E. 852. Does the position of Mr. and Mr. Carlisle as guarantors of a pre-existing debt of a third party constitute a circumstance which would require a new consideration to support their execution of the deed of trust? We think not.

The obligation of Mr. and Mrs. Carlisle as guarantors is very real if the principal fails to pay. The fact that their obligation is contingent does not seem justification for requiring a new consideration. Although we have found no North Carolina cases, and have been cited to none, directly in point, there is secondary authority based upon decisions from other jurisdictions. The following pertinent statement is found in 55 Am. Jur. 2d, Mortgages, § 100, p. 257: "Liability for another on a contract in force is also sufficient consideration for a mortgage, and contingent liability of sureties has been held sufficient consideration for a mortgage given to indemnify them." It seems logical and reasonable to us that contingent liability as surety or guarantor on a pre-existing note is sufficient to support the execution of a mortgage or deed of trust. We hold, therefore, that a pre-existing contingent obligation as guarantor on a note is sufficient consideration to support the execution of a mortgage or deed of trust to secure performance of the contingent obligation. The execution by Mr. and Mrs. Carlisle of the deed of trust in question was supported by adequate consideration.

B. The C. & B., Inc. Deed of Trust.

[2] As a part of the original agreement for the loan from Commodore Corporation to Diversified, Diversified agreed to furnish the guarantee of such of Diversified's affiliates as Commodore may from time to time request. After part of the loan had been advanced according to schedule, Commodore requested that Diversified furnish the guarantee of its affiliate, C. & B., Inc. Diversified secured the execution by C. & B., Inc. of the deed of trust, and Commodore thereafter advanced the remainder of the loan to Diversified.

A sufficient consideration for a mortgage may consist of a forbearance of some legal right by the mortgagee. 55 Am. Jur. 2d, Mortgages, § 100, p. 257. In the instant case Commodore had the right to discontinue the advancements on the loan to Diversified if the additional guarantee were not furnished in accordance with the provisions of the original loan agreement. It is not necessary that consideration flow directly to the mortgagor. The consideration for a mortgage may consist of a loan to a third person. 55 Am. Jur. 2d, Mortgages, § 100, p. 257. In the instant case Diversified received the benefits of the balance of the loan by reason of the C. & B., Inc. deed of trust. We hold there was adequate consideration to support the execution of the deed of trust by C. & B., Inc. We note that the C. & B., Inc. deed of trust was executed by Jack J. Carlisle, as president, and that the instrument recites that Jack J. Carlisle is the sole stockholder in C. & B., Inc.

The assignments of error that the execution of the Carlisle deed of trust and the execution of the C. & B., Inc. deed of trust are not supported by consideration are overruled. The judgment of the trial court dismissing plaintiffs' actions was correct.

[3] Plaintiffs assign as error that the trial judge ordered the substitute trustee to convey the properties described in the deeds of trust "in accordance with the foreclosure proceedings thus far." The parties, as we do, construe this provision to direct the substitute trustee to convey the properties to the person or persons from whom he received bids on 23 September 1970. It is plaintiffs' contention that the bids have not remained open for ten days for an upset bid as required by G.S. 45-21.27.

The trial judge made no findings with respect to when the foreclosure sales were conducted, when the trustee filed his reports of the sales, or how long the bids remained open. However, we find part of this information from the agreed record on appeal. The pretrial stipulations establish that the original foreclosure sales were held on 23 September 1970 at which time the substitute trustee received a high bid of $5,000.00 for the property described in the Carlisle deed of trust and a high bid of $120,000.00 for the property described in the C. & B., Inc. deed of trust. The names of the bidders are not disclosed by this record. The record on appeal establishes that these actions were instituted on 2 October 1970 and temporary restraining orders staying the foreclosure proceedings were entered on 2 October 1970, and the temporary restraining orders were served on the substitute trustee on 2 October 1970.

The issuance and service of the temporary restraining order on the substitute trustee halted all proceedings under the foreclosure and tolled the running of the 10-day statutory period for filing an upset bid. Only nine days elapsed between the date of the sale and the date the substitute trustee was restrained. If the report of sale had been filed on the day of the sale, one day of the statutory 10-day period for filing an upset bid still remains. If the report of sale had been filed on the 5th day after the sale (the maximum time allowed under G.S. 45-21.26), five days of the statutory 10-day period for filing an upset bid still remain. However, there is no evidence of when the substitute trustee filed his report of the 23 September 1970 sale with the Clerk of Superior Court. So far as we can tell from the record on appeal no such report has yet been filed. G.S. 45-21.27 provides that an upset bid may be filed with the Clerk of Superior Court at any time within ten days after the filing of the report of sale. Obviously, if no report of sale has been filed, the ten-day limitation has not begun to run.

Therefore, on the state of this record, the trial court committed error in ordering the substitute trustee to convey the properties "in accordance with the foreclosure proceedings thus far." We hold that the sales made on 23 September 1970 shall remain open for an upset bid for a period of ten days from the date this opinion is certified to the Clerk of Superior Court. If no upset bid is filed within the ten days herein fixed, the

substitute trustee shall proceed to convey the properties as contemplated by G.S. 45-21.29a.

Except as herein modified with respect to holding open the sale for an upset bid, the judgment appealed from is affirmed.

Modified and affirmed.

Judges MORRIS and HEDRICK concur.

DAVID MURRELL v. ROBERT KENNETH JENNINGS AND JIMMY ISIAH JONES

No. 7210SC253

(Filed 23 August 1972)

Automobiles § 56— negligence in striking vehicle that entered highway

In an action by a passenger to recover for personal injuries received when defendant's vehicle struck the rear of a vehicle which had entered the highway in front of it from a servient street, the evidence, including testimony as to the physical facts at the accident scene, was sufficient to be submitted to the jury on the issue of defendant's negligence in failing to keep a proper lookout, failing to keep his vehicle under control, and failing to exercise due care after he had seen or should have seen the other vehicle enter the highway.

APPEAL by defendant Jimmy Isiah Jones from *Braswell, Judge,* 1971 Session of Superior Court held in WAKE County.

Civil action commenced 8 December 1970 to recover damages for personal injuries received by plaintiff on 24 May 1970 as the result of a collision between an automobile operated by the defendant Jennings and an automobile operated by the defendant Jones. In his complaint, plaintiff alleged that at or about 10:10 a.m. on 24 May 1970 he was a passenger in the Jones vehicle, a 1966 Chevrolet, and that they were proceeding in a southerly direction on U. S. Highway 15 in Durham County when the Jones vehicle ran up upon and violently struck from the rear a 1968 Pontiac automobile being operated by the defendant, Jennings, causing plaintiff certain "serious, painful and permanent injuries." It was alleged that just prior to the collision, Jennings had entered U. S. Highway 15 (a four-lane highway divided by a median strip) from Rural Paved Road 1116 (a two-lane road), had made a left turn across the two northbound lanes of Highway 15 and into one of the southbound lanes, and that the rear-end collision occurred "immediately beyond and South" of the intersection of Highway 15 and R.P.R. 1116. The plaintiff also alleged that the collision and the resultant personal injury were proximately caused by the negligence of the defendant Jennings in failing to yield the right-of-way to the traffic on Highway 15, in operating his vehicle in a careless and heedless manner, in failing to keep a proper lookout and in failing to keep his vehicle under control; and by the negligence of the defendant Jones in failing to reduce the speed of his vehicle when approaching an intersection whereat a special hazard

existed, in operating his vehicle at a speed greater than was reasonable and prudent under the conditions, in failing to keep a proper lookout, in failing to keep his vehicle under control and in operating his vehicle in a careless and heedless manner.

Both defendants filed answers denying negligence on their own parts and, as defenses, setting out and alleging that the sole proximate cause of the plaintiff's injury was the negligence of the other defendant and that the plaintiff was contributorily negligent. Jury trial was demanded and had, and the jury answered the following issues as indicated:

"1. Was the plaintiff injured by the negligence of the defendant Robert Kenneth Jennings?

ANSWER: Yes.

2. Was the plaintiff injured by the negligence of the defendant Jimmy Isiah Jones?

ANSWER: Yes.

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

ANSWER: $5,000.00."

From judgment on this verdict, the defendant Jones perfected an appeal to the Court of Appeals.

Yarborough, Blanchard, Tucker & Denson by James E. Cline for plaintiff appellee.

Smith, Anderson, Blount & Mitchell by James D. Blount, Jr., for defendant appellant Jimmy Isiah Jones.

MALLARD, Chief Judge.

As appears in an addendum to the record filed in this appeal, the defendant Jones made a motion for directed verdict at the close of the plaintiff's evidence and renewed at the close of all the evidence (neither defendant presented evidence) and a motion for judgment notwithstanding the verdict, or, in the alternative for a new trial. Jones now assigns the trial court's failure to grant these motions as error; that is, it is this defendant's sole contention that the evidence, even when viewed in the light most favorable to the plaintiff and resolving

all contradictions or inconsistencies in his favor, was insufficient to go to the jury or to support their verdict on the question of his (Jones') actionable negligence. We do not agree.

The duties of motorists, both those on dominant and those on servient highways, when approaching, entering or traversing intersections are familiar law and are covered by a number of statutes in this jurisdiction. See, *e.g.* 60A, C.J.S., Motor Vehicles, § 350(1) *et seq.;* G.S. 20-141(c); G.S. 20-147 and G.S. 20-158. Suffice it to say here that each driver is required to exercise ordinary care under the particular circumstances in which he finds himself and that the failure to do so can constitute actionable negligence where injury results.

In the case before us, the parties stipulated to a number of "undisputed facts," among which were the following:

> "(e) That at a short time prior to the collision the 1966 Chevrolet was being operated by the defendant Jones in a southerly direction along U. S. Highway 15.
>
> (f) That at a short time prior to the collision the 1968 Pontiac was being operated by the defendant Jennings in a westerly direction along Rural Paved Road 1116.
>
> (g) That at the time of the collision, at the point of intersection of U. S. Highway 15 and Rural Paved Road 1116, there was a lawfully erected stop sign facing traffic proceeding westerly along Rural Paved Road 1116. The stop sign was located at the eastern edge of U. S. Highway 15. There was no stop sign erected in the median which divided the northbound and southbound lanes of U. S. Highway 15.
>
> (h) That at the time of the collision, U. S. Highway 15 was straight, level and dry, and the weather was clear.
>
> (i) That at the time of the collision the plaintiff, David Murrell, was riding as a passenger in the rear seat of the defendant Jones' 1966 Chevrolet."

At the trial, plaintiff presented only two witnesses, himself and State Highway Patrolman Walter Parks Upright, who had arrived at the scene shortly after the collision occurred and who testified in some detail as to the relative positions of the

vehicles and physical facts existing at the scene (which testimony was illustrated by photographs admitted without objection as plaintiff's exhibits), as well as to statements made to him by each of the defendant drivers. A lengthy but illustrative portion of this testimony, both on direct and cross-examination, is as follows:

"Mr. Jennings stated to me that he had entered U. S. 15 from Rural Paved Road 1116, which leads from the Town and Campus Apartments where he lived. He stated that he had entered the roadway, crossed the northbound lanes and turned to go South on U. S. 15 when the collision occurred and did not see the car coming down the road.

I talked to Mr. Jones at the scene of the accident where he was incoherent and later talked to him at Duke Memorial Hospital. When I talked with Mr. Jones at the Duke Hospital, he was coherent and he told me that he had been going from Durham toward Chapel Hill and he saw the Jennings vehicle enter the intersection, whereupon he moved to the right lane to try to avoid him and give him a place to go and the Jennings' vehicle then crossed over and into the right lane into his path.

* * * When I arrived at the scene it was a clear day and the sun was shining. The surface of the road was a smooth, asphalt and the road is straight and level at the intersection. Just North of the intersection there is a slight rise in the road and a slight hillcrest, which is not severe.

* * *

I found some skid marks traced to the Jones' vehicle and the total tire impression left by the Jones' vehicle was 351 feet from the place where I found some debris on the highway which I used as a point of demarcation, there were skid marks before the debris and after the debris. From the point where the debris was found, there were skid marks leading up to the Jennings' car after that point, but none before that point.

When I talked with Mr. Jones at Duke Hospital, he was coherent and he told me that he saw Mr. Jennings' car as it came across the intersection and when he came into the southbound lane, Mr. Jones operated his auto-

mobile into the right lane southbound, that is, he continued in the southbound lane. Jennings' vehicle came over into the right lane and he tried to go back to the left to avoid it again, to avoid the Jennings' vehicle again, and an impact occurred. I traced skid marks up to the Jones' vehicle and some of them were before the point on the highway where the two operators told me the cars had collided. The tire marks from the Jones' vehicle led from a point where I found the vehicle back in a northerly direction. At the point where I found the Jennings' skid marks, I measured that distance back to the intersection and it was 61 feet. So from the approximate point of impact to the approximate center of the intersection it was 61 feet. I found the skid marks later traced to the Jones' vehicle beginning North of the intersection in the left-hand, southbound lane of travel as they went on in a southerly direction and as they went through the intersection they were part in each lane and as they left the southern edge of the intersection and continued in a southern direction, they got more in the left-hand lane until they actually left the left-hand lane and went to the rear of the car in the median.

* * *

* * * The marks left by the Jones' vehicle after the point which I believe to be the point of impact were skid marks. Mr. Jones told me he was going approximately 60 miles an hour, which is the posted speed limit in that area, when he was approaching the intersection. Up and until the point of impact, I found no brake marks indicating that a tire was locked in the braking position. Mr. Jennings told me that he was going approximately 10 miles an hour and he said he just pulled out into the intersection.

Tire impressions as distinguished from braking marks can be made by a car that is braking but does not have the wheels locked. The 351 foot marks left by the Jones' car include the entire distance of the tire impressions and the braking marks after the point of impact.

My opinion is that the point of impact was approximately 30 feet South of the end of the North end of the median. An operator of a motor vehicle would have

an unobstructed view entering from the East going West and looking North of approximately ¼ of a mile. * * *

* * *

Of the total 351 feet of braking marks leading up to the Jones' vehicle, 171 feet of those were after the impact. * * *"

We noted in *Rogers v. Rogers,* 2 N.C. App. 668, 163 S.E. 2d 645 (1968), that G.S. 20-141(c) "does not require the driver of a vehicle to reduce the speed of his vehicle in all circumstances when approaching and crossing an intersection"; however, "(t)he fact that the speed of a vehicle is lower than the maximum speed limit at that particular place does not relieve the driver thereof from the duty to decrease speed when approaching and crossing an intersection, *when in the exercise of due care he should decrease his speed in order to avoid causing injury* to any person or property, and a failure to do so is negligence *per se,* and if the proximate cause of an injury would create liability. *McNair v. Goodwin,* 264 N.C. 146, 141 S.E. 2d 22; *Bass v. Lee,* 255 N.C. 73, 120 S.E. 2d 570; *Hutchens v. Southard,* 254 N.C. 428, 119 S.E. 2d 205; *Primm v. King,* 249 N.C. 228, 106 S.E. 2d 223; *Day v. Davis,* 268 N.C. 643, 151 S.E. 2d 556." (Emphasis original.)

We are not unmindful of the rules that evidence that merely establishes that a collision or accident occurred is not, of itself, sufficient to show negligence and that a driver on a dominant highway may assume up until the last moment that an operator of a vehicle on an intersecting servient highway will obey the laws controlling his entry into the dominant highway. In this case, however, we think there was something more than evidence tending to show that a collision occurred.

"Physical facts tell their own story. They may be sufficiently strong within themselves, or in combination with other evidence, to permit the legitimate inference of negligence on the part of the driver. ' . . . Physical facts are sometimes more convincing than oral testimony.' *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88. ' . . . What the physical facts say when they speak is ordinarily a matter for the determination of the jury.' *Jernigan v. Jernigan,* 236 N.C. 430, 72

S.E. 2d 912." *Lane v. Dorney,* 252 N.C. 90, 113 S.E. 2d 33 (1960). See also, *King v. Powell,* 252 N.C. 506, 114 S.E. 2d 265 (1960).

We think that the jury in this case was entitled to consider the testimony of Patrolman Upright on the question of this defendant's actionable negligence, and that they would be entitled, although not compelled, to find that Jones failed to keep a proper lookout, failed to keep his vehicle under control, and failed to exercise due care after he had seen or should have seen the Jennings' vehicle enter the highway to avoid the collision that did occur.

In *King v. Powell, supra,* Justice Bobbitt (later C.J.) quoted the following from the opinion of Johnson, J., in *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373 (1954):

> "However, the driver on a favored highway protected by a statutory stop sign (G.S. 20-158) does not have the absolute right of way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon him in approaching and traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his motor vehicle under control, (3) to keep a reasonable careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered. (Citations omitted.)"

For the foregoing reasons, we think that the trial judge in this case did not err in failing to grant the defendant Jones' motions for directed verdict and judgment notwithstanding the verdict, as the evidence was sufficient to raise a legitimate inference of negligence.

No Error.

Judges MORRIS and PARKER concur.

GLENDA TAPP KENNEY v. EUGENE PATRICK KENNEY AND EUGENE PATRICK KENNEY v. GLENDA TAPP KENNEY

No. 7210DC515

(Filed 23 August 1972)

1. **Divorce and Alimony § 24; Infants § 9— modification of custody order — change in circumstances**

A change in circumstances affecting the welfare of a child must be shown before an order relating to the child's custody may be modified. G.S. 50-13.7.

2. **Divorce and Alimony § 24; Infants § 9— change in custody — changed circumstances — improved health of mother**

There was a sufficient change in circumstances affecting the welfare of the two oldest children of the parties to support the court's order changing their custody from the father to the mother where, at the time custody was awarded to the father, the mother was not capable of providing proper care for all three children of the parties because of her poor physical and emotional condition, but her condition has improved so that she is now physically and emotionally capable of caring for all three children.

3. **Divorce and Alimony § 24; Infants § 9— abandonment of spouse — effect on child custody**

Whether the mother abandoned the father within the meaning of G.S. 50-7(1) is not controlling on the question of child custody.

4. **Evidence § 44— non-expert testimony as to health**

Non-expert witnesses who had observed plaintiff over a period of time were properly allowed to describe the state of plaintiff's health and to compare it with that existing at a prior time.

APPEAL by Eugene Patrick Kenney from *Winborne, District Judge,* 24 January 1972 Session of District Court held in WAKE County.

An order was entered in Wake County District Court on 22 February 1971 awarding the custody of one of three children born of the marriage of the parties to the mother, Glenda Tapp Kenney, and awarding to the father, Eugene Patrick Kenney, the custody of the other two children. The mother was awarded custody of Gerrick Glen Kenney, born 17 August 1970. The father was awarded custody of Gina Ann Kenney, born 13 October 1967, and Gevin Patrick Kenney, born 24 March 1969.

Thereafter both parties moved that the custody order be modified, each requesting custody of all three children. The motions were heard together at the 24 January 1972 Session

of District Court held in Wake County. Based upon evidence offered at the hearing, an order was entered 13 April 1972 modifying the previous order by awarding custody of the two oldest children to the mother. Custody of the youngest child was left with the mother, and the father was given liberal visitation privileges with all three children. The father appealed.

John V. Hunter III for appellee Glenda Tapp Kenney.

Gulley & Green by Jack P. Gulley and C. K. Brown for appellant Eugene Patrick Kenney.

GRAHAM, Judge.

[1] The principal question presented is whether the mother presented sufficient evidence and the court found sufficient facts to show a material change in the circumstances affecting the welfare of the two oldest children. It is well established in this State that a change of circumstances affecting the welfare of the child must be shown before an order relating to the child's custody may be modified. G.S. 50-13.7; *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357; *In re Harrell,* 11 N.C. App. 351, 181 S.E. 2d 188; *In re Poole,* 8 N.C. App. 25, 173 S.E. 2d 545; *Rothman v. Rothman,* 6 N.C. App. 401, 170 S.E. 2d 140.

[2] The order entered by the court consumes twenty-five pages in the record. Among the extensive findings of fact set forth in the order are the following which are summarized, except where quoted:

(1) The mother, presently twenty-eight years of age, and the father, presently forty-four years of age, were married on 17 February 1965.

(2) The parties resided together with their children in Raleigh, North Carolina, for sometime prior to 8 October 1970.

(3) After the birth of the youngest child, the mother was in poor physical condition; she was suffering from phlebitis, cystitis, and kidney stones, and was hospitalized for more than a week.

(4) On 8 October 1970, the mother left Raleigh with the three children and took them to the home of her mother and father in Tuscumbia, Alabama. At this time, "she was in poor

physical condition, and was also in poor emotional condition, being quite nervous and run down." On the following day the father went to Alabama and brought back to Raleigh with him the two oldest children of the parties, leaving the younger child with the mother.

(5) A custody hearing was held in Wake County District Court on January 17, 18, and 19, 1971. At that time the mother "was still in an exhausted condition, in a poor and nervous emotional state, and was not physically or emotionally capable at that time of having the care and custody of all three of the children of the parties."

(6) On 22 February 1971, pursuant to hearings held January 17-19, 1971, an order was entered finding the mother to be a fit and proper person to have custody of the youngest child, finding the father to be a fit and proper person to have custody of the two oldest children, and finding that the best interest and welfare of the children would be promoted by awarding custody of the youngest child to the mother and custody of the two oldest children to the father. At that time no finding was made as to whether the mother was or was not a fit and proper person to have the custody and care of the two oldest children.

(7) There have been substantial and material changes of conditions and circumstances since the entry of the prior order, including: "The physical, emotional, and nervous condition of Glenda Tapp Kenney has improved greatly. She no longer suffers from phlebitis, cystitis, and kidney stones, which previously affected her after the termination of her third pregnancy in four years, and from an emotional and nervous point of view she is much more settled and stable, as is evidenced by the testimony of her pediatrician and various persons who are in frequent contact with her." The mother is now capable, physically and emotionally, of providing proper care for all three children; whereas, at the time of the previous hearing she did not have this capability because of her physical and emotional condition.

Other findings of fact tend to show that living arrangements for the children are adequate in either the home of the father or mother. However, there are several findings which tend to show the basis of the court's conclusion that the inter-

ests of the children will be better served by placing their custody with the mother. The mother is available to care for the children full time; whereas, the father must entrust their care during his working hours to hired persons who change from time to time, or to his mother who is seventy-four years of age, hard of hearing and in poor health. In caring for the children, the mother will have the assistance of her father, age fifty-eight, and her mother, age fifty. The environment provided by the father for the two oldest children, despite his sincere efforts, tends to be cold and sterile in comparison with a warmer and more natural environment in the home of the mother.

In our opinion the court's findings of fact fully support the change in custody which he ordered for the two oldest children.

In the case of *In re Bowen*, 7 N.C. App. 236, 172 S.E. 2d 62, we affirmed an order granting to the mother custody of a child whose custody had previously been placed with the father. The father remained a fit and suitable person for custody; however, the mother's circumstances at the time of the hearing on the motion to modify had changed substantially. She was older and more mature, had established a good and comfortable home, and, for at least a year, she had demonstrated commendable stability. At the first hearing, the age, immaturity, and other circumstances of the mother had rendered her unsuitable for the child's custody.

This case is similar. At the time of the first hearing the poor health and emotional instability of the mother rendered her unsuitable to have custody of the two oldest children. This has now changed. Certainly the court is entitled, in view of these changed circumstances, to inquire again into the matter of custody and to determine whether the welfare of the children would be better served now by placing them in the custody of their mother.

Appellant contends it was improper for the court to consider an improvement in the health of the mother as a change of circumstances since no findings were made in the first order as to the condition of her health at that time. We note, however, that the court did find in the first order that during the marriage the mother "has suffered from various illnesses including cystitis and thrombophlebitis and nervous tension, generally dur-

ing and after her pregnancies." That order also contains a finding that plaintiff was hospitalized with thrombophlebitis from 12 September 1970 until 21 September 1970, shortly after the birth of the youngest child. Absent some indication in the order to the contrary, we think it proper to assume that at the first hearing the court did not overlook the important factor of the health of both parents in determining which was best suited to have custody of the children. It was important for the court at the later hearing to consider this factor, as it existed at the time of the entry of the previous order, in deciding whether conditions have changed to the point where the previous order should be modified. See *In re Marlowe,* 268 N.C. 197, 150 S.E. 2d 204.

[3] Appellant points out that in the first order the court found that the mother wilfully abandoned him within the meaning of G.S. 50-7(1). He says the court erred by failing to make a similar finding here. We do not consider this harmful. It is not contended that the mother has ever abandoned or mistreated any of the children. When she left her husband on 8 October 1970 and went to her parents' home in Alabama, she took the children with her. Whether, in separating from appellant at that time, the mother abandoned him within the meaning of G.S. 50-7(1) is not controlling on the question of custody. "[I]t is not the function of the courts to punish or reward a parent by withholding or awarding custody of minor children; the function of the court in such a proceeding is to diligently act for the best interests and welfare of the minor child." *In re McCraw Children,* 3 N.C. App. 390, 395, 165 S.E. 2d 1, 5.

[4] The record contains plenary evidence to support each of the court's findings of fact. Appellant complains in particular that there was a lack of evidence concerning the mother's health. We disagree. It is true that most of the evidence presented on this question came from non-experts. These lay witnesses, however, by reason of their close association with plaintiff and their opportunity to observe her over a period of time, were well qualified to describe the state of her health and to compare it with that existing at the time of the prior order. "[T]he state of a person's health . . . and other aspects of his physical appearance, are proper subjects of opinion testimony by nonexperts." Stansbury, N.C. Evidence 2d, § 129 at pp. 304, 305.

We have not overlooked appellant's exception to that portion of the court's order relating to the custody of the youngest child. Suffice to say, we find no evidence in the record which would justify removing the custody of this child from the mother.

The trial judge observed the parties and many of the witnesses and had an opportunity to evaluate their testimony first hand. The evidence fully supports his findings which in our opinion support his conclusions and judgment.

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. PAUL RAY ALLEN, JR., LEROY BRYANT AND JOE EARL KING

No. 728SC568

(Filed 23 August 1972)

1. **Arrest and Bail § 3— officer's authority to stop motorist**

Officers had probable cause to stop defendants' vehicle to determine validity of driver's license and registration card where they had observed it parked and unoccupied in a business district at two o'clock a.m. and where they later observed three people in the car, two of whom fit the general description of two men they had previously seen running from behind some businesses into bushes in the direction of the parked car. G.S. 20-183(a).

2. **Searches and Seizures § 1; Arrest and Bail § 3— seizure of plain view items — warrantless arrest — probable cause**

In a prosecution for breaking and entering, larceny and safecracking, the trial court properly held that there was no illegal search where an officer inadvertently discovered a bag of money in plain view in defendants' automobile and that there was no illegal arrest where defendants' behavior, including flight of one upon confrontation with officers, gave officers sufficient probable cause to believe that a felony had been committed. G.S. 15-41(2).

3. **Criminal Law § 84; Searches and Seizures § 1— warrantless search — admissibility of evidence**

Evidence of burglary tools was erroneously admitted into evidence where such evidence was obtained from a warrantless search of defendants' automobile not made incident to defendants' arrest, but made after defendants had been arrested and placed in custody.

State v. Allen

ON *certiorari* to review judgments of *Cohoon, Judge,* 19 April 1971 Session, Superior Court, WAYNE County.

Defendants were charged in separate bills of indictment with breaking and entering, larceny and safecracking. Each defendant was charged with breaking and entering the office building of Weil-Creech Oil Company on 19 January 1971, forcing open a safe and stealing certain personal property including $170 in lawful money. Defendants through their appointed counsel entered pleas of not guilty, and the jury found them guilty of all three offenses. Defendant King moved to set aside the verdict of guilty of larceny due to a misnomer in the indictment. The motion was allowed and judgment was arrested as to larceny. Judgments were entered in accord with the remaining verdicts and defendants appealed. Petitions for certiorari were allowed on 24 September 1971 and 19 January 1972.

Attorney General Morgan, by Associate Attorney Earnhardt, for the State.

George F. Taylor for defendant petitioner Paul Ray Allen, Jr.

Martin Lancaster for defendant petitioner Leroy Bryant.

David M. Rouse for defendant petitioner Joe Earl King.

MORRIS, Judge.

By their first assignment of error, defendants contend that the trial judge erred in denying their motions to suppress all evidence against each defendant. Defendants timely move to suppress at the commencement of trial on the grounds that their arrest was illegal, and the court conducted two thorough voir dire examinations in the absence of the jury. Defendants argue that the findings of fact and conclusions of law based thereon were not supported by the evidence and that the police had no probable cause to stop them. It is well established in North Carolina that the findings of fact by the trial judge on the voir dire examination are binding on the appellate courts if supported by competent evidence. *State v. Accor* and *State v. Moore,* 281 N.C. 287, 188 S.E. 2d 332 (1972). Some of the evidence presented on voir dire does tend to show the following:

Goldsboro Police Officers Bell and Shackleford were patroling at two o'clock a.m. on 19 January 1971 close to several

businesses and in an area where stolen cars had been recovered when they saw a parked car bearing Raleigh city tags. The car was parked approximately a block and a half from the nearest house. The officers received the name and address of the owner upon request to the Department of Motor Vehicles. There was no traffic on the horseshoe shaped street, and no people were seen in the area until a few minutes later when two men were observed running from behind some businesses (including Weil-Creech Oil Company) into bushes in the direction of the parked car. Rather than pursue the men on foot, the officers chose to wait in their patrol car with the lights off. Since there were two possible exits for the parked car to take, the officers requested another patrol car to assist if needed and check the identity of anyone operating the parked car. Some 15 to 30 minutes later Officers Bell and Shackleford observed the previously parked car go by, and two of the three occupants fit the general description of the two men they had previously seen run into the bushes. Officer Bell and Shackleford pulled in behind the car, and cut on their blue light and siren. The car disregarded the blue light and siren, would not stop and instead increased its speed to 40-45 miles per hour in a 35 mile-per-hour zone. When the officers realized the car was not going to stop, they radioed the patrol car stationed ahead to pull out in the road to block its path which it did. The car's occupants were asked to step outside and subsequently frisked for weapons but none was found. Officer Bell requested the driver, defendant King, to show him his driver's license. Defendant King presented his driver's license and stated that the registration card was in the glove compartment of the car. Defendant King told Officer Bell it was all right to get the registration card so he entered the car from the driver's side and leaned over to get to the glove compartment. In doing so, Officer Bell observed sitting on the back seat a paper bag which was opened and leaning towards the front seat. Officer Bell saw that it contained paper money in a clip and coins and that one of the rolls of coins bore the name "Weil-Creech Oil Company." Upon observing the same, Officer Bell picked the bag up and stated, "Here's a bag of money," whereupon defendant King started running. King was apprehended and all three defendants were placed under arrest. There is no evidence that Officer Bell ever opened the glove compartment or saw the registration card. In route to the police station, Officer Bell was advised that the Weil-Creech Oil Company had been broken into. After defend-

ants had been arrested and placed in custody, Officer Bell searched under the hood of the car which had been taken to the police station and found crowbars, hammers, pliers, chisel, etc., lying between the radiator and grille. We opine that there is sufficient evidence to support the court's findings and the conclusion that: "Officer Bell had reasonable grounds to stop the Chevrolet car to check the identify and driver's license of the driver and the registration card thereof"; and "at this time no one had been placed under arrest or charged with any offense."

[1] The suspicious surrounding circumstances coupled with the authority to stop a motor vehicle to determine whether the same is being operated in violation of any of the provisions of Article 3 of Chapter 20 of the General Statutes justified the officers' stopping defendants' vehicle. G.S. 20-183(a); *State v. Eason,* 242 N.C. 59, 86 S.E. 2d 774 (1955); see also *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954). Even if Officer Bell had previously found out the name and address of the car's owner and that it had not been reported stolen earlier, he still had reason to stop the vehicle to determine the validity of the driver's license and registration card at that time.

Defendants' allegation that G.S. 20-183(a) unconstitutionally grants law enforcement officers "blanket authority to stop, search, and inspect" motor vehicles without reasonable cause to believe an offense is being committed is without merit because no search of the car was conducted by Officer Bell until after defendants were arrested. Nor do we believe G.S. 20-49(2) and (4) are irreconcilable with G.S. 20-183 or that the provisions of the former are even applicable in the case at bar. *Person v. Garrett, Comr. of Motor Vehicles,* 280 N.C. 163, 184 S.E. 2d 873 (1971).

[2] There is plenary evidence that defendant King gave Officer Bell permission to retrieve the registration card from the glove compartment of the car. The owner and operator of the automobile by his consent made accessible to the officers that portion of the automobile which was beyond their vision and to which they did not have ready physical access. In this case the initial intrusion need not be supported by a warrant because Officer Bell was not conducting a search of the car at the scene of the arrest. To the contrary, he inadvertently came

across the bag of money which was readily available, in plain view and properly seized under exigent circumstances. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Parks,* 14 N.C. App. 97, 187 S.E. 2d 462 (1972), cert. denied 281 N.C. 157 (1972); *State v. Fry,* 13 N.C. App. 39, 185 S.E. 2d 256 (1971), cert. denied and appeal dismissed 280 N.C. 495 (1972). Discovery of the bag of money, together with the previous observations and defendant King's resulting flight gave the officers sufficient probable cause to believe that a felony had been committed and subsequently to place all three defendants under arrest without a warrant. G.S. 15-41(2). *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971). Thus the trial court's ruling that there was no illegal search nor any illegal arrest was correct, and the contents of the bag was admissible into evidence.

[3] We are not, however, persuaded by the contentions of the State that the burglary tools were seized pursuant to a search incident to arrest and thus admissible into evidence. "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston v. United States,* 376 U.S. 364, 367, 11 L.Ed. 2d 777, 780, 84 S.Ct. 881 (1964). *Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970), held that it was not unreasonable under the facts of that case to conduct a warrantless search of the car at the police station where the police had probable cause to conduct a search at the scene, but it was impractical to do so. "The Court [in *Chambers v. Maroney, supra*] held that where probable cause exists to search an automobile, it is reasonable (1) to seize and hold the automobile before presenting probable cause issue to a magistrate or (2) to carry out an immediate search without a warrant. It was noted that there is little choice in practical consequences between immediate search and immobilization of the automobile until a warrant is obtained." *State v. Jordan,* 277 N.C. 341, 344, 177 S.E. 2d 289 (1970). Under the facts of the case at bar, *Chambers v. Maroney, supra,* does not apply. There was no probable cause to conduct a warrantless search at the scene of the arrest as required under *Carroll v. United States,* 267 U.S. 132, 69 L.Ed. 2d 543, 45 S.Ct. 280 (1925); nor was it impracticable to secure a warrant. The circumstances of the case before us place the case squarely within the holding of *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct.

2022 (1971), where the Court held the evidence seized inadmissible. The evidence of burglary tools was erroneously admitted into evidence as fruits of an illegal search.

No discussion of defendant's assignments of error dealing with the sufficiency of the evidence and the trial judge's instructions to the jury is necessary.

New trial.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. BURL TILLMAN McSWAIN

No. 7227SC558

(Filed 23 August 1972)

1. **Criminal Law § 99— examination of prospective jurors — expression of opinion**

In a first-degree murder prosecution, the trial court committed prejudicial error by expressing an opinion in propounding questions to prospective jurors to determine their views on capital punishment.

2. **Criminal Law §§ 5, 111— insanity as defense — jury instructions**

The trial court did not err in refusing the jury's request that they be informed as to the result of their finding defendant in a first-degree murder prosecution not guilty by reason of insanity.

APPEAL by defendant from *Martin, Judge,* 31 January 1972 Session, Superior Court, GASTON County.

On 1 August 1966, defendant was indicted for murder. He was committed to Dorothea Dix Hospital under the provisions of G.S. 122-91 and, on 21 November 1966, he was declared incompetent to stand trial and was recommitted. On 21 October 1971, defendant was returned to Gaston County, the Superintendent of Dorothea Dix Hospital having found that he was competent to stand trial. On 9 December 1971, while defendant was still in jail, his wife caused to be served on him summons and complaint in an action for divorce. On 11 January 1972, after hearing, defendant was found by the court to be competent to stand trial and the matter came on for trial on 31 January 1972. Defendant entered a plea of not guilty

upon his arraignment on the charge of first-degree murder and was found guilty of voluntary manslaughter. From judgment entered on the verdict, defendant appealed.

Attorney General Morgan, by Assistant Attorney General Jones, for the State.

Tim L. Harris, by Don H. Bumgardner, for defendant appellant.

MORRIS, Judge.

Defendant has failed to assign his exceptions as error as required by our rules. However, he has listed the exceptions upon which he relies under the heading "Grouping of Exceptions and Assignments of Error." Because of the gravity of the charge and the importance of the questions raised, we have chosen to consider the appeal on its merits and will refer to the questions presented as exceptions carrying the numbers given by defendant in the record and in his brief.

[1] By exception No. 1 defendant contends that by certain questions propounded to prospective jurors in determining their views on capital punishment, the court expressed an opinion in violation of G.S. 1-180, thus committing prejudicial error. Eight of the prospective jurors stated that they had conscientious scruples against capital punishment. Each was challenged by the State for cause. Before ruling on the challenge, the court questioned each of the eight. Examples of portions of the colloquy between the judge and some of the jurors, in the presence of the other prospective jurors, follow:

> "COURT: You don't believe in capital punishment; all right; but regardless of what your personal beliefs are, is there any set of facts which could arise in a case in which you would consider returning a verdict of guilty which would require the imposition of the death penalty?
>
> A. No, sir.
>
> COURT: You would not return a verdict requiring the death penalty, regardless of what the facts were in the case?
>
> A. That's right.

COURT: Even if it was your own brother or your mother who was the victim in the case?

A. Yes; that's right.

COURT: So if you were a juror in this case and if you were satisfied beyond a reasonable doubt that the defendant is guilty, you would automatically vote to give him life imprisonment?

A. That's right.

COURT: Regardless of what the facts were?

A. That's right.

. . .

COURT: If you were a juror, is there any fact situation which you would consider bad enough or serious enough for you to consider returning a verdict of guilty which would require the imposition of the death sentence?

A. No, sir.

COURT: Now, you couldn't do this no matter how bad the facts were?

A. No.

COURT: Even if it was your child or your husband who was the victim of the assault?

A. It's true. I could not.

COURT: So, Mrs. McIntosh, if you were on the jury in this case and if you were satisfied beyond a reasonable doubt that the defendant was guilty of first degree murder, then I take it you would automatically vote every time to grant him life imprisonment?

A. That's true.

COURT: Regardless of what the facts are?

A. Yes.

COURT: And you would not consider the death penalty as a verdict?

A. No, sir.

. . .

COURT: Mrs. Jonas, have you heard what I have said so far about this problem?

A. Yes, sir.

COURT: As a juror, is there any case where you would consider the facts to be bad enough or serious enough so if you were a juror, you would consider the possibility of returning a verdict which would require the imposition of the death sentence?

A. No, I don't think I could.

COURT: You say you don't think you could?

A. No, sir.

COURT: You could not do that, no matter what the facts were?

A. No.

COURT: No matter even if it was your husband or your brother who was the victim?

A. No, I couldn't.

. . .

COURT: Mrs. Leonard, let me ask you this: In your mind is there any fact situation that you could think of which you would consider as a juror to be sufficient for you to return a verdict of guilty, requiring a sentence of execution?

A. I couldn't do that.

COURT: Even if someone put a bomb on an airplane and blew up fifty small school children and killed them all and if you were a juror on that case, you would not consider execution?

A. I don't think I could.

COURT: So if you were on the jury in this case, if you were satisfied beyond a reasonable doubt that this defendant was guilty of murder in the first degree, you would always vote for a verdict which would require life imprisonment?

A. That's right.

COURT: Regardless of the facts?

A. Yes, sir."

Defendant argues on appeal that as in *State v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173 (1954), the questions propounded by the trial judge "had a logical tendency to implant in the minds of the trial jurors the convictions that the presiding judge believed that the prisoner had killed . . . (the deceased) in an atrocious manner, that the prisoner was guilty of murder in the first degree, and that the prisoner ought to suffer death for his crime." 240 N.C., at p. 65. We agree that the presiding judge here, as in *Canipe,* "inadvertently over-stepped his self appointed bounds and unintentionally expressed an opinion on the facts adverse to the prisoner." 240 N.C., at p. 65. The State argues that *Canipe* has no application, because there the defendant was convicted of murder in the first degree and sentenced to death; whereas here, the defendant was convicted only of manslaughter, and no prejudice could exist.

[2] We cannot say with such clarity of conviction that defendant suffered no prejudice. After the jury had deliberated for more than an hour they returned to the courtroom and reported that they were "hung up" on question number one, which was whether defendant had sufficient mental capacity or ability to distinguish right from wrong and to understand the nature, quality, and consequences of his act. The court instructed them that if they answered that question " 'No,' that would be a finding that the defendant, McSwain, was insane and it would be your duty then to find him not guilty of all charges." Whereupon the jury asked whether he could be "committed to an institution or . . . turned out free." The court instructed them that that was not a question for their concern. The court no doubt considered himself bound, as do we, by *State v. Bracy,* 215 N.C. 248, 1 S.E. 2d 891 (1939). In *Bracy* the Court held that a defendant charged with a capital felony, whose defense is lack of mental capacity to commit the crime of murder in the first degree, is not entitled to have the jury know the statutory provisions allowing his detention in a State hospital, and that his discharge can only be procured in the manner provided by statute. Though the holding was couched in general terms, we note the court's comment as follows: "All the evidence was to the effect that the defendant was guilty of murder in the first degree. The killing was willful, deliberate and premedi-

tated for the purpose of robbing the deceased. This was so found by the jury beyond a reasonable doubt." 215 N.C., at p. 259. We note also the lack of evidence in that case with respect to insanity. While we may not regard the divulgence of the information requested as informing the jury of the *punishment* for the crime, the imposition of which is the responsibility of the court; nevertheless, on the authority of *Bracy*, we are compelled to overrule defendant's exception to the court's denying the jury's request that they be informed as to the result of their finding defendant not guilty by reason of insanity.

The jury later returned to the courtroom and asked whether they could see a transcript of the questions and answers of the State and the defense with respect to the three psychiatrists. The court advised them that no transcript was available, and they would have to rely on their memories. The jury then asked if they could have read to them the answers the psychiatrists gave to the solicitor. This request was also denied.

The record, it seems to us, speaks clearly of the jury's concern and confusion. They were uninformed as to whether defendant would remain in custody for treatment if found not guilty by reason of insanity. We cannot say that the questions propounded by the court did not implant in their minds a strong inference that the court considered defendant guilty and deserving of punishment even though they might have been convinced of defendant's insanity at the time of the killing.

Although there may be cases in which the type of questions propounded might not be prejudicial, we cannot approve them in any situation. Suffice it to say, we are of the opinion that in this case the probability of prejudice to defendant exists and he must, therefore, be granted a

New trial.

Judges BROCK and HEDRICK concur.

KERRY JO FINLEY v. RONALD S. FINLEY

No. 7215DC191

(Filed 23 August 1972)

1. **Appeal and Error § 41— record on appeal — filing dates of documents**
Appeal is subject to dismissal where the filing dates of the pertinent pleadings, motions, orders and other documents are not shown in the record on appeal. Court of Appeals Rules 19(a) and 48.

2. **Rules of Civil Procedure § 7— motions — failure to state rule number**
Motion in arrest of judgment should have been denied where the movant failed to state the rule number or numbers under which he was proceeding. Rule 6 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure.

APPEAL by defendant from *McLelland, District Judge,* 4 November 1971 Session of District Court held in ALAMANCE County.

Plaintiff in her verified complaint sought to recover of the defendant alimony and support for and custody of the minor child of the parties. Summons was issued herein on 18 December 1969 and was returned unserved on 19 January 1970. Alias and pluries summons were issued on 10 February 1970 and returned on 14 February 1970 with the following "memo": "After due and diligent search Ronald S. Finley is not to be found in Alamance County." On 25 February 1970 an affidavit of W. R. Dalton, Jr., attorney for the plaintiff, was filed wherein service of process by publication was sought. In this affidavit it was asserted that:

"1. That the State has general jurisdiction of the subject matter of the action for that the plaintiff has a good cause of action against the defendant in that he owes her alimony, their child support, she is entitled to an order so providing, and is entitled to have such alimony and support a lien against real property of the defendant in this county.

2. That grounds for personal jurisdiction as provided by G.S. 1-75.4 exist in that the defendant is domiciled in this State and is a resident thereof.

3. That grounds for in rem or quasi in rem jurisdiction exist as provided by G.S. 1-75.8 in that a subject of the

action is real property within this State and the defendant has an interest therein.

4. That grounds for jurisdiction exist as provided by G.S. 98.1 (sic) in that the court has jurisdiction over real property of the defendant and the defendant has departed from this State or keeps himself concealed therein in order to avoid service of process.

5. That service of process by publication is authorized by Rules of Civil Procedure, Rule 4(j) (9) and/or Rule 4(k) in that defendant's address, post office address, whereabouts, dwelling house, and usual place of abode is unknown and cannot with due and reasonable diligence be ascertained. That the Sheriff has returned process not to be found in Alamance County. That the defendant has admitted by telephone that he is avoiding service of process.

6. That the defendant, Ronald S. Finley, is no minor."

Bearing date of 25 February 1970, an order for service of process by publication was entered. A notice of service of process was published for four successive weeks in a newspaper published in Alamance County, and an affidavit to that effect was dated and filed (according to an addendum to the record) on 9 April 1970. The defendant did not appear and did not file answer to the complaint and the cause was calendared for hearing and heard on 9 April 1970. A judgment was entered against the defendant in favor of the plaintiff.

An instrument designated "Special Appearance Making Motion to Arrest Judgment" appears beginning on page 14 of the reproduced record in this case. This instrument is not dated, and on the original record on appeal filed in this court, it bears an illegible filing date. It reads as follows:

"COMES NOW THE DEFENDANT, Ronald S. Finley, and makes a special appearance for the purpose of this motion only, and respectively (sic) shows unto the Court:

That on April 9, 1970 His Honor D. Marsh McLelland signed a purported Judgment ordering certain monies paid and certain transfer and orders concerning certain real estate without having proper jurisdiction.

That the lack of proper jurisdiction appears upon the face of the record.

WHEREFORE, the defendant prays the Court that the Judgment in this matter dated April 9, 1970 be arrested and declared null and void."

Under date of 4 November 1971, the trial judge entered an order (no filing date is shown) denying the motion in arrest of judgment, and the defendant appealed to the Court of Appeals, assigning error.

Dalton & Long by W. R. Dalton, Jr., for plaintiff appellee.

Wade C. Euliss for defendant appellant.

MALLARD, Chief Judge.

Appellant says that "(t)he only question involved in this appeal is whether the trial judge is correct in denying defendant's motion, by special appearance, that the Judgment dated April 9, 1970 be arrested and declared null and void."

[1] Rule 19(a) of the Rules of Practice in the Court of Appeals of North Carolina [see Volume 4A, Appendix 1(4), p. 253, of the General Statutes of North Carolina and pp. 31-32 of the 1971 Supplement thereto] requires that the proceedings shall be set forth in the order of the time in which they occurred, and that every pleading, motion, affidavit or other document included in the record on appeal shall plainly show the date on which it was filed and, if verified, the date of the verification and the name of the person who verified it. This rule also requires that every order, judgment, decree and determination show the date on which it was signed and the date on which it was filed.

In the record before us the foregoing provisions of the rules were ignored in many respects, among which are: The filing dates are absent or illegible on the original record filed in the Court of Appeals and are therefore not shown on the reproduced record of the complaint, the order of publication, the notice of service of process by publication appearing on page 9, the "Supplementary Affidavit for Service by Publication" and the "Affidavit of Publication" on page 10, and the judgment dated 9 April 1970. (Although there is a date appearing after the word "Judgment," the record does not indicate to what this date pertains; however, from an examination of the original record on file in this office, it appears that this may be the

date the judgment was signed and may be the date it was filed, but the record does not show this.) Neither the filing date nor the date of the defendant's "Special Appearance Making Motion to Arrest Judgment" appears, and the filing date on the original filing of this motion is illegible. The judgment dated 4 November 1971 denying defendant's motion to arrest the judgment herein contains a date after the word judgment, but there is nothing to indicate to what this date pertains. Moreover, the "Supplementary Affidavit for Service by Publication" (on page 10), which appears to have been sworn to by plaintiff's attorney on *5 January 1971,* was placed in the original index and record, as well as in the reproduced record, before an affidavit of one Thomas Boney, Publisher, as to the publication of the notice of service of process by publication. This affidavit shows that it was sworn to on *19 March 1970.*

Appellant says in his brief that both the "Supplementary Affidavit" and the affidavit of publication were "filed in this case approximately nine months after the Judge signed the judgment of April 9, 1970." In an addendum to the record, however, there appears to be another "Affidavit of Publication" filed 9 April 1970. The filing date on the original of this "Supplementary Affidavit" filed in this court is almost illegible and there is no filing date on the publisher's affidavit of publication. With some imagination and interpolation, however, this "Supplementary Affidavit" could be interpreted as bearing a filing date of 5 January 1971, which would have been after the signing date appearing on the judgment dated 9 April 1970. This affidavit appears in the original index and in the original record filed in this court by the appellant before the judgment dated 9 April 1970, which judgment (if we again use some imagination and interpolation) could have been, and probably was, filed on 13 April 1970. If our assumption as to the date of the filing of the judgment is correct, we then could logically proceed further and speculate that the "Supplementary Affidavit for Service by Publication" and the affidavit as to publication were both filed before the judgment, because the rules of this court require that in the record on appeal documents appear in the order of filing and the documents referred to appear before the judgment. In this case, we will not indulge in such speculation. The record before us is incomplete, disorganized, and in an obviously disordered condition and some of these filing dates are material to the question appellant seeks to present.

It was the duty of the appellant to cause the record on appeal to be properly made up and transmitted to the Court of Appeals. *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745 (1971); *State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29 (1971); *State v. Thigpen,* 10 N.C. App. 88, 178 S.E. 2d 6 (1970); *State v. Byrd,* 4 N.C. App. 672, 167 S.E. 2d 522 (1969). The appellant has thus failed to comply with the rules of this court, and for failure to comply with the rules, the appeal is subject to be dismissed. See Rule 48 of the Rules of Practice in the Court of Appeals.

[2] Under Rule 6 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure adopted Pursuant to G.S. 7A-34, effective July 1, 1970 [see Volume 4A, Appendix 1(5), p. 271, of the General Statutes of North Carolina], it is provided that all motions, written or oral, shall state the rule number or numbers under which the movant is proceeding. It is noted that the defendant, in addition to failing to date his "Special Appearance Making Motion to Arrest Judgment," also failed to comply with this rule requiring him to state the rule number or numbers under which he was proceeding and therefore this motion was insufficient. See *Clouse v. Motors, Inc.,* 14 N.C. App. 117, 187 S.E. 2d 398 (1972); *Lehrer v. Manufacturing Co.,* 13 N.C. App. 412, 185 S.E. 2d 727 (1972); *Plumbing Co. v. Supply Co.,* 11 N.C. App. 662, 182 S.E. 2d 219 (1971); *Terrell v. Chevrolet Co.,* 11 N.C. App. 310, 181 S.E. 2d 124 (1971); and *Lee v. Rowland,* 11 N.C. App. 27, 180 S.E. 2d 445 (1971).

We hold that the "Special Appearance Making Motion to Arrest Judgment" was incorrectly made, and that on this record the appellant does not present the question sought to be presented. The trial judge could have properly denied defendant's motion by "Special Appearance" that the judgment dated 9 April 1970 be arrested and declared null and void for failure to comply with Rule 6.

For the reasons hereinabove stated, the appeal is dismissed.

Appeal dismissed.

Judges MORRIS and PARKER concur.

GELDER & ASSOCIATES, INC. v. THE CONTINENTAL INSURANCE COMPANY AND UNDERWRITERS ADJUSTING COMPANY

No. 7210SC218

(Filed 23 August 1972)

Contracts § 28— declaration and explanation of law to jury— request for special instructions unnecessary

Whether time was of the essence of the contract between the parties was a substantial feature of the case in an action for damages for breach of contract and the trial judge was required, without a request, to declare and explain the law with respect thereto; hence, the judge's failure to instruct as to time being of the essence on one of the issues and his confusing instruction as to time being of the essence on another issue constituted prejudicial error.

APPEAL by defendant Continental Insurance Company from *Brewer, Judge,* 1 October 1971 Civil Session of Superior Court held in WAKE County.

Action to recover damages alleged to have been sustained by plaintiff as a result of breach of contract. Plaintiff alleged that it was a subcontractor under R. G. Foster & Company (Foster) engaged to perform miscellaneous concrete work under the plans and specifications of the North Carolina Highway Commission (Commission) on its N. C. State Highway Project No. 8.118-2702 (Project). Foster had been the successful bidder for the Project and had subcontracted to plaintiff on "a day to day" or "week to week" basis for the installation of some concrete ditches, curbing and other miscellaneous concrete work on N. C. Highway No. 11 North of Kinston which was a part of the Project. Plaintiff was to be paid for the work it actually performed at the same rate Foster had bid. The defendant, The Continental Insurance Company (Continental), had sold and issued its performance bond regarding the performance of Foster on the Project. During the year 1969, Foster encountered financial difficulties, and it became necessary for Continental to undertake the completion of the Project in accordance with its bond. Continental, through its agent, Underwriters Adjusting Company, then contracted with plaintiff for the construction of the concrete ditches and curbing, and it was alleged that Continental breached its contract with plaintiff and that on account thereof, plaintiff was entitled to recover of Continental the sum of $11,915.25.

Continental denied that it had breached a contract with plaintiff and also filed a counterclaim against the plaintiff for a breach of contract, alleging that it was entitled to recover of the plaintiff on account thereof the sum of $36,496.53.

At the close of plaintiff's evidence, the defendants' motion for a directed verdict as to Underwriters Adjusting Company was allowed, without exception, and it is not a party to this appeal.

The jury answered the issues in favor of the plaintiff, and Continental appealed, assigning error.

Edgar R. Bain for plaintiff appellee.

Teague, Johnson, Patterson, Dilthey & Clay by Robert M. Clay and Robert W. Sumner for defendant appellant.

MALLARD, Chief Judge.

The first question presented in defendant's brief is whether the trial judge erred in failing to instruct as to the first issue that "time was of the essence" of the contract and in instructing the jury on the third issue as to "time being of the essence."

There was evidence introduced by the plaintiff, as well as the defendant, which tended to show that "time was of the essence" of the contract between the parties. Plaintiff's evidence tended to show that Foster, prior to its financial difficulties, had entered into an agreement with plaintiff for the performance, at the bid price, of some of the miscellaneous concrete work on the Project. Foster was furnishing the materials. Prior to September 1970, plaintiff had performed some of this work and was paid on "a week to week" basis. In August 1970, plaintiff decided "to leave the job" due to the fact that it was losing money. Plaintiff's evidence also tended to show that it was only an "hour to hour" employee of Foster. On 5 September 1970 plaintiff and Continental, pursuant to a telephone conversation between their agents, agreed that plaintiff would go back to work on the Project on the same payment basis it had with Foster, except that upon the completion of the Project, plaintiff was to be paid an additional sum of $7,500. It was also agreed as set out in a letter from Continental's agent to plaintiff that "(i)t was understood that if you

do not finish this concrete work as quickly as possible, or if for some reason within your control you do not complete the total work, then it is understood that you will not be paid any additional funds but will only be paid for those concrete items of work which you have performed." Also, plaintiff's witness Clarence Gelder also testified on cross-examination that "(i)n my conversation with Mr. Wilson during September of 1970, it was apparent that he had a problem on his hands. He was in charge of completing this project, and they were under a penalty of $200 a day. Every day that lapsed was costing the Continental Insurance Company and Underwriters Adjusting Company a lot of money. The fact that he had no one doing the concrete work was of great concern to him and he did emphasize this point to me, that he needed to get the job moving. When we reached our agreement around September 5, 1970, I was aware that time was important in the contract. It was very important that the job be finished as soon as possible."

Defendant Continental's evidence tended to show that plaintiff agreed to move its men back onto the job, expedite the job and finish it as quickly as possible, but that no definite date for finishing the work could be set because the State could add to the work under the terms of the Foster contract. Continental's witness testified that plaintiff and defendant "agreed that time was of the essence in the job." Continental's evidence also tended to show that plaintiff's crew did not work on the job on some days that they could have worked, that the failure to expedite the concrete work delayed the progress of the work on the Project and that because of this failure, it was necessary to terminate the contract with plaintiff and secure somebody else to finish the concrete work.

In apt time, Continental submitted to the trial judge a request for special instruction to the jury regarding the legal effect of delay in the performance of a contract wherein time is of the essence. On the first issue, whether or not Continental breached the contract with plaintiff, no instructions were given with respect to the legal effect of evidence that time was of the essence of the contract or with respect to how the jury was to consider such evidence on the first issue. On the third issue the jury was instructed in general terms, without objection, as to the law about time being of the essence of a contract, and then in the final mandate the court said:

"So members of the jury I instruct you that if from the evidence in this case and by its greater weight, that you should find that time was of the essence of the contract entered into between Gelder and Associates and Continental Insurance Company, and that Gelder and Associates did not perform its obligations under the contract within the time or at the speed contemplated by the parties, as set out in the contract, then Gelder and Associates would have breached its contract with Continental Insurance Company and it would be your duty to answer that issue 'no'."

The vice in this instruction is that the jury was instructed that if they found that time was of the essence and if they found that plaintiff had not performed within the time or at the speed contemplated by the parties, then the plaintiff would have breached its contract and that they, the jury, should therefore answer the issue "no." This issue submitted was: "Did the plaintiff Gelder and Associates breach the contract between plaintiff Gelder and Associates, Inc., and defendant Continental Insurance Company?" The jury was thus instructed that if the plaintiff *had* breached its contract because of time being of the essence, it should answer the issue "No" and find that it *had not.* We think this, in addition to the fact that no mention was made in the instructions relating to the first issue about how the jury was to consider the evidence as to time being of the essence of the contract, tended to confuse the jurors, and was prejudicial error, entitling Continental to a new trial.

G.S. 1A-1, Rule 51(a) requires the judge to declare and explain the law arising on the evidence in the case. Whether time was of the essence of the contract between the parties was a substantial feature of this case and the trial judge was required, without a request, to declare and explain the law with respect thereto. *Turner v. Turner,* 9 N.C. App. 336, 176 S.E. 2d 24 (1970).

Defendant has other assignments of error to the charge of the court to the jury in this case and to the admission and exclusion of evidence, some of which have merit, but inasmuch as a new trial is being awarded and such alleged errors may not recur on a new trial, we do not deem it necessary to discuss them.

New trial.

Judges MORRIS and PARKER concur.

DUPLIN COUNTY BOARD OF EDUCATION v. BLAND CARR, MACK HERRING AND W. G. BRITT, TRUSTEES OF THE EASTERN BAPTIST ASSOCIATION OF NORTH CAROLINA; FRANK STEED, H. C. ALLEN AND D. HUGH CARLTON, TRUSTEES OF THE FIRST BAPTIST CHURCH OF WARSAW, NORTH CAROLINA

No. 724SC566

(Filed 23 August 1972)

Deeds § 12— terms of deed — determinable fee

Grantors in a deed intended to vest plaintiff with a determinable fee and not a fee simple absolute where the deed's granting clause recited that the property in question was sold to the Board of Education by "School committeemen" for "use and benefit of Special Tax District in the town of Warsaw for white people" for a nominal consideration, where there was a specific provision for reverter to defendant Association upon abandonment of the property for school uses in the habendum clause, and where there was a reference to the "reversion or proviso" in the warranty clause; hence, the trial court did not err in holding that the property in question should automatically revert to defendant Association.

APPEAL by plaintiff from *Wells, Judge,* 3 June 1972 Session of Superior Court held in DUPLIN County.

This is a civil action, heard and decided under the provisions of G.S. 1-253, the Declaratory Judgment Act, to determine the rights of the parties under a deed dated 18 September 1906 from H. L. Stevens, L. P. Best and M. E. Hobbs to the Board of Education of Duplin County.

The facts, stipulated by the parties and found by the trial judge, are summarized as follows: On 18 September 1906, H. L. Stevens, L. P. Best, and M. E. Hobbs, School Committeemen of District No. 1, Warsaw Township, executed and delivered a deed to the Board of Education of Duplin County purporting to convey the land in question and which, in pertinent part, is as follows:

> "(S)aid parties of the first part, in consideration of One Hundred Dollars, ($100.), to them paid by the County Board of Education of Duplin County . . . have bargained and sold and by these presents doth bargain, sell and convey to the County Board of Education of Duplin County and its successors and assigns, for the use and benefit of Special Tax District in the town of Warsaw for white people, a certain town lot or parcel of land

within the corporate limits of the town of Warsaw, said County and State, and bounded as follows. . . . To Have And To Hold the aforesaid lot or parcel of land, together with all privileges and appurtenances thereto belonging to the County Board of Education of Duplin County, its successors and assigns, for the use and benefit of Special Tax District No. 1 in said township for white people, to their only use and behoof forever,—Provided that when the said property shall cease to be used for a non-denominational school it shall revert to the Eastern Association. And the said parties of the first part covenant, subject to the aforesaid reversion or proviso, that they are seized of said premises in fee and have a right to convey the same in fee-simple; that the same are free and clear from all incumbrances. . . ."

The Eastern Association referred to in the Deed in question is the Eastern Baptist Association of North Carolina. On 17 April 1972, the Duplin County Board of Education adopted a resolution in pertinent part as follows:

"(W)hereas, it has now been determined by the Board of Education that the aforesaid real estate and building thereon is not now needed by the Board for public school purposes and that the same is unnecessary and undesirable for public school purposes, and that it would be to the best interest of the Board of Education for said property to be sold in accordance with Section 115-126 of the General Statutes of North Carolina;

NOW, THEREFFORE, BE IT RESOLVED that H. E. Phillips, Attorney for the Duplin County Board of Education . . . shall cause said property to be advertised for sale in accordance with Section 115-126 of the General Statutes of North Carolina, for and on behalf of the Board of Education."

On 31 January 1972 the defendants Bland Carr, Mack Herring, and W. G. Britt, Trustees of the Eastern Baptist Association, acting pursuant to a resolution of the Eastern Baptist Association of North Carolina and G.S. 39-6.3, executed and delivered a deed conveying all of their right, title, and interest in and to the property described in the complaint to the defendants Frank Steed, H. C. Allen, and D. Hugh Carlton,

Trustees of the First Baptist Church of Warsaw, North Carolina. Based on findings of fact, substantially as set out above, the trial judge concluded:

> "That from the language used by the grantors in the Deed from H. L. Stevens and others . . . it clearly appears to this Court that it was the intent of the grantors in said Deed to convey title to said property . . . to the Duplin County Board of Education to the end that said property might be used by said plaintiff Board of Education for school purposes, and that when said property ceased to be used for school purposes, it should revert to the . . . Eastern Baptist Association of North Carolina, and that by the language contained in said Deed there was created a determinable fee in said lands and . . . upon failure of the property to be used for school purposes, it should revert to the Eastern Baptist Association of North Carolina, its successors or assigns.
>
> (F)rom the resolution adopted by the Duplin County Board of Education on the 17th day of April, 1972, that it has been determined by said Board of Education that the real estate which is the subject of this controversy is not now needed by the Board for school purposes and that the same is not necessary and is undesirable for public school purposes . . . and . . . that said property is no longer to be used for school purposes, which amounts to a breach of the condition on which said property was conveyed to the plaintiff Board of Education, and that upon breach of said condition, the right, title and interest of said plaintiff Board of Education is automatically terminated.
>
> That in accordance with the provisions contained in Section 39-6.3 of the General Statutes of North Carolina, which said Statute expressly authorizes the conveyance of a possibility of reverta (sic), the trustees of the Eastern Baptist Association of North Carolina, have executed a Deed conveying all of the right, title and interest of said Eastern Baptist Association to the Trustees of the First Baptist Church of Warsaw, North Carolina.
>
> . . . .
>
> (T)he title to the property described in the Complaint be, and the same is hereby declared to be vested in the First

Baptist Church of Warsaw, North Carolina, and that title to the said property is now held for the use and benefit of said First Baptist Church of Warsaw, North Carolina, by its Trustees Frank Steed, H. C. Allen and D. Hugh Carlton."

From a judgment declaring that the title to the property is now vested in the defendants Frank Steed, H. C. Allen, and D. Hugh Carlton as Trustees for the First Baptist Church of Warsaw, North Carolina, the plaintiff appealed.

H. E. Phillips for plaintiff appellant.

Rivers D. Johnson, Jr., for defendant appellees.

HEDRICK, Judge.

The one question presented on this appeal is whether the plaintiff Duplin County Board of Education now owns the property in controversy in fee simple or whether title thereto reverted to the Eastern Baptist Association of North Carolina, its successors or assigns, when the Board of Education abandoned the property for school purposes.

Plaintiff contends that the Board of Education became vested with the fee simple absolute title to the property in controversy by the deed dated 18 September 1906 from H. L. Stevens and others. Plaintiff argues:

"The fee or whole interest having been conveyed in the premises to the Board of Education of Duplin County, but attempted to be limited in the habendum clause to the Eastern Association, one is repugnant to the other and the latter becomes void. *Blackwell v. Blackwell,* 124 N.C. 269."

This principle of law has no application under the facts of this case. In *Lackey v. Board of Education,* 258 N.C. 460, 128 S.E. 2d 806 (1963), Chief Justice Denny wrote:

"In the interpretation of a deed, the intention of the grantor or grantors must be gathered from the whole instrument and every part thereof given effect, unless it contains conflicting provisions which are irreconcilable or a provision which is contrary to public policy or runs counter to some rule of law."

The intention of the grantors H. L. Stevens and others to vest the Board of Education with a determinable fee in the land conveyed by the deed dated 18 September 1906 is manifest in the whole instrument. The granting clause recites that the property was sold to the Board of Education by "School committeemen" for "use and benefit of Special Tax District in the town of Warsaw for white people" for a nominal consideration. Clearly this indicates the grantors intended that the property be used for school purposes and is in complete harmony with the specific reverter provision in the habendum clause. Moreover, the reference to the "reversion or proviso" in the warranty clause leaves no doubt that the grantors intended that the property would revert automatically to the Eastern Association, if and when, the Board of Education ceased to use the property for school purposes.

We agree with the ruling of the trial judge that when the plaintiff Board of Education abandoned the use of the property for school purposes by the resolution adopted 17 April 1972, title to the property in controversy automatically reverted to the First Baptist Church of Warsaw, the assignee of the Eastern Baptist Association of North Carolina.

The judgment appealed from is affirmed.

Affirmed.

Judges BROCK and MORRIS concur.

T. W. ROSE v. VULCAN MATERIALS COMPANY

No. 7221SC349

(Filed 23 August 1972)

1. **Contracts § 7; Monopolies § 2— sale of stone — contract in restraint of trade**

A contract wherein plaintiff leased his quarry to defendant and defendant agreed to sell stone to plaintiff at specified prices and to sell stone to others at no less than specified higher prices violated state and federal antitrust laws and was void. G.S. 75-5(b)(5); Robinson-Patman Act, 15 U.S.C.A. § 13(A).

2. **Contracts § 7; Monopolies § 2— breach of contract violating antitrust laws**

A party cannot recover damages for breach of a contract which violates antitrust laws.

Judge BRITT dissents.

APPEAL by defendant from *Long, Judge,* 1 November 1971 Session of Superior Court held in FORSYTH County.

This is a civil action wherein plaintiff, T. W. Rose, seeks to recover damages from breach of contract from the defendant, Vulcan Materials Company. After a trial without a jury, the court made findings of fact which, except where quoted, are summarized as follows:

Plaintiff, T. W. Rose, is a resident of Yadkin County, North Carolina. In December, 1958, and continuing until his retirement in 1969, plaintiff was engaged in the ready mix cement business. Defendant, Vulcan Materials Company (Vulcan), is a corporation doing business in several states, including North Carolina.

Plaintiff owned a stone quarry in Yadkin County. In January 1959, plaintiff entered into two agreements (Exhibits A and B) with J. E. Dooley & Sons, Inc. (Dooley). In essence, Exhibit A was a lease agreement under which plaintiff leased his quarry in Yadkin County to Dooley for ten years. To supplement the lease agreement (Exhibit A) and as an integral part of the total agreement between the parties, plaintiff and Dooley executed a contract (Exhibit B) whereby, "Plaintiff also agreed that he would not engage in the rock crushing business, nor permit anyone else to do so, in his quarry site, described in Exhibit A, other than J. E. Dooley and Son, Inc., or the Stone

Mining Company," and "Dooley agreed to furnish the plaintiff stone F.O.B. the quarry site at Dooley's quarry in Cycle, North Carolina, at the price specified in the contract." Plaintiff and Dooley complied with the terms of their contract from 1 January 1959 until April 1960 when Dooley advised plaintiff that he had an offer to sell his quarry operation to defendant and requested that plaintiff release Dooley from the terms of the two contracts. Plaintiff agreed to do so on condition that defendant, Vulcan, agree in writing to comply with all of Dooley's obligations under the contracts. On 12 April 1960 Vulcan executed a written agreement to assume and discharge all of Dooley's obligations. On 25 April 1960, Vulcan wrote plaintiff and acknowledged purchase of the stone crushing operation of Dooley and that it had in its possession the two contracts between plaintiff and Dooley. The letter also stated, "This is to advise that Vulcan Materials Company assumes all phases of these contracts and intends to carry out the conditions of these contracts as stated."

From April 1960 until May 1961, Vulcan continued to sell stone to plaintiff at the specified contract prices. On 11 May 1961 defendant increased the price of stone to the plaintiff to a level in excess of the prices specified in the contracts. Plaintiff threatened suit should the price of stone be increased but continued to purchase stone from Vulcan because he had no other practical source. "In this action, he seeks to recover the difference between the prices set forth in the contracts, and the prices actually paid by him. The total amount of this differential is $25,231.57 which represented payments by plaintiff to defendant over the period from May, 1961 through December, 1968."

Based on its findings of fact, the court, among other things, concluded as a matter of law that "The contracts, plaintiff's Exhibits A and B, were valid contracts and at all times complained of, were binding on the defendant, at least with respect to the specified prices to plaintiff for stone and the obligation of defendant to sell stone to plaintiff at such prices."

From a judgment that plaintiff have and recover of the defendant the sum of $25,231.57 with interest at the rate of 6% per annum from the date of each payment, the defendant appealed.

Hudson, Petree, Stockton, Stockton & Robinson by W. F. Maready for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by Charles F. Vance, Jr., and John L. W. Garrou for defendant appellant.

HEDRICK, Judge.

Plaintiff's claim is based on defendant's alleged breach of the following portion of Exhibit B:

> "Witnesseth, that the seller agrees to furnish the buyer stone F.O.B. the quarry site at Cycle, North Carolina at the following prices:
>
> | | | |
> |---|---|---|
> | Crusher run stone | @ | $1.25 per ton |
> | Clean concrete stone | @ | 1.60 per ton |
> | No. 11 stone | @ | 2.00 per ton |
>
> It is mutually agreed that the seller of this stone will keep someone at Cycle, North Carolina, at least five days a week to weigh and load the stone the buyer should need.
>
> . . . .
>
> J. E. Dooley & Son, Inc., agree that they will not sell any stone to anyone other than the State Highway Commission for prices less than the following from the Cycle Quarry:
>
> | | |
> |---|---|
> | Crusher run stone | $1.50 per ton |
> | Clean Concrete stone | 1.80 per ton |
> | No. 11 stone | 2.00 per ton |
>
> The above restrictions shall apply only to an area of an eight mile radius of Elkin, North Carolina, and shall apply for a period of ten years from the date of this contract."

Defendant assigns as error the court's conclusion of law that the two agreements (Exhibits A and B) between the plaintiff and Dooley were valid contracts and at all times complained of, were binding on the defendant, at least with respect to the specified prices to plaintiff for stone and the obligation of defendant to sell stone to plaintiff at such prices.

Defendant contends " . . . that each of these contracts was illegal and void on its face and that the Plaintiff may not main-

tain an action for breach of these contracts in order to recover the difference between the specified prices at which he was to be sold stone under the contracts and the prices he was charged when the Defendant became aware that the contracts were illegal."

The question thus presented for our determination is whether the contract sued on (Exhibit B) is in fact "illegal and void on its face."

G.S. 75-5(b) provides:

"In addition to the other acts declared unlawful by this chapter, it is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to do, any of the following acts:

(5) While engaged in dealing in goods within this State, at a place where there is competition, to sell such goods at a price lower than is charged by such person for the same thing at another place, when there is not good and sufficient reason on account of transportation or the expense of doing business for charging less at the one place than at the other, or to give away such goods, with a view to injuring the business of another."

The Robinson-Patman Act, 15 U.S.C.A. § 13 (A) provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

[1] It seems clear that the contract on which plaintiff bases his action violates both state and federal statutes.

The contract contains discriminatory and preferential prices which, if enforced, could have had the deleterious and illegal effect of harming or destroying plaintiff's competition. Such is clearly forbidden by G.S. 75-5(b)(5) and the Robinson-Patman Act, 15 U.S.C.A. § 13(A).

With the exception of "#11 stone" the rates to be charged to plaintiff under the contract were at least $.20 per ton less than that charged to plaintiff's competitors. Plaintiff's claim and the court's findings and conclusions amply illustrate the significance of these preferential prices. Had defendant honored the provisions of these illegal contracts, plaintiff would have benefited to the extent of $25,231.57 over his competitors.

The discriminatory pricing cannot be justified under the exception contained in G.S. 75-5(b)(5) " . . . on account of transportation . . . " since the stone was to be furnished to plaintiff " . . . F.O.B. the quarry site at Cycle, North Carolina. . . . "

The contract relied upon is clearly illegal and unenforceable.

The trial court's findings that the agreements were supported by consideration has no legal significance in determining whether the agreements were in violation of the antitrust laws.

It is the rule in North Carolina that in the case of an illegal contract the courts will leave the parties as it finds them and will do nothing to enforce the agreement. *Marshall v. Dicks,* 175 N.C. 38, 94 S.E. 514 (1917); *Florsheim Shoe Co. v. Leader Department Store,* 212 N.C. 75, 193 S.E. 9 (1937). The court will not adjudge liability against a defendant for refusing to do that which the law makes it illegal for him to do. *Hanauer v. Doane,* 12 Wall. 342, 20 L.Ed. 439 (1871); *Continental Wall Paper Company v. Louis Voight & Sons Co.,* 212 U.S. 227, 29 S.Ct. 280, 53 L.Ed. 486 (1908).

[2] It is clear that an agreement that violates the antitrust laws is void and unenforceable and that the illegality of a contract on the grounds that it violates the antitrust laws is a defense against a suit for damages. *Standard Fashion Company v. Grant,* 165 N.C. 453, 81 S.E. 606 (1914); *Florsheim Shoe Co. v. Leader Department Store, supra; Arey v. Lemons,* 232 N.C. 531, 536, 61 S.E. 2d 596 (1950); *Electronics Co. v. Radio Corp.,* 244 N.C. 114, 92 S.E. 2d 664 (1956).

In the last cited case, Bobbitt, J., now C.J., stated, "If the contract is illegal, either at common law or by reason of statutory provisions relating to monopolies and trusts, G.S. 75-1 *et seq.*, plaintiff cannot recover damages for breach thereof."

For the reasons stated the judgment is

Reversed.

Judge PARKER concurs.

Judge BRITT dissents.

WALTER W. LOWMAN AND WIFE, MARY ALICE LOWMAN v. HOUSTON T. HUFFMAN, CHARLES VAN HUFFMAN, A MINOR BY HOUSTON T. HUFFMAN, GUARDIAN AD LITEM, BEN S. WHISNANT, TRUSTEE, AND BURKE COUNTY SAVINGS & LOAN ASSOCIATION

No. 7225SC356

(Filed 23 August 1972)

Mortgages and Deeds of Trust § 40— action to set aside foreclosure — default on note — genuine issue of fact

In an action to set aside the foreclosure of a deed of trust, a genuine issue of material fact existed as to whether plaintiffs were in default on the note secured by the deed of trust, and the trial court erred in the entry of summary judgment in favor of defendants.

APPEAL by plaintiffs from *Snepp, Judge,* 18 November 1971 Session of Superior Court held in BURKE County.

This is a civil action wherein plaintiffs Walter W. Lowman and wife, Mary Alice Lowman, seek to recover $13,000 in damages from the defendant Burke County Savings and Loan Association (Savings and Loan Association) and to have the following declared null and void: (1) a deed of trust dated 6 May 1965 executed and delivered by plaintiffs to the defendant Ben S. Whisnant, trustee for the defendant Savings and Loan Association, securing a loan to plaintiffs in the amount of $4,500; (2) all proceedings with respect to the foreclosure of said deed of trust; and (3) the bid of the defendant Houston T. Huffman and the deed of the defendant trustee to the defendants Houston T. Huffman and Charles Van Huffman.

Plaintiff's complaint, except where quoted, is summarized as follows: On 6 May 1965 plaintiffs obtained a loan from defendant Savings and Loan Association in the amount of $4,500 which was secured by a real estate deed of trust, executed and delivered by plaintiffs to the defendant trustee for the defendant Savings and Loan Association; and they "have made sufficient payments to keep same in good standing." The property conveyed in the deed of trust was the same property the plaintiffs received by warranty deed dated 23 February 1956 from Joseph G. Burns and wife, Augusta Burns, which deed contained the following condition:

> "It is understood and agreed by all parties concerned that the above described tract of land is not to be traded or sold during the life time of Joseph G. Burns and wife, Augusta Burns, the grantors hereto. If for any reason this clause is violated this deed becomes null and void otherwise in full force and effect."

Plaintiffs alleged that because of the foregoing condition their deed of trust was "invalid and subject to being declared void."

The plaintiffs had certain life and health insurance "in legal effect" in connection with the loan which protected and indemnified the Savings and Loan Association "by failure of the plaintiffs to make the required payments." Both plaintiffs were physically and mentally ill "to such an extent that they were not competent to attend to business matters" during "all of the months of 1970 down to the latter part of July 1970"; and the defendant Savings and Loan Association was advised of these facts and "could have assisted plaintiffs to have reported same and to obtain proper insurance benefits to cover any payments due."

On 21 April 1970 the defendant trustee and defendant Savings and Loan Association "wrongfully declared plaintiffs' note and said deed of trust to be delinquent, due in full and accelerated" and "caused foreclosure advertisements to be posted at the courthouse and in a newspaper but same were not in accordance with law, and they failed to so notify plaintiffs." A purported sale was conducted by the defendant trustee on 23 April 1970 following which a report was made to the Clerk of Court that Houston T. Huffman was the last and highest bidder at $2,000.

> "This was not considered nor approved by the Clerk, nor was any order made that deed be made to him and certainly not to others. That the final report of the trustee Defendant, does not comply with the Statutes covering same, and therefore any further, and purported attempts to complete foreclosure, being based upon the same are void."

On 13 July 1970 the defendant trustee executed and delivered his deed to the defendants Houston T. Huffman and Charles Van Huffman. The property embraced in the deed of trust had a fair market value of $15,000.

> "(T)he Defendant, Houston T. Huffman, who is the father of the Defendant, Charles T. Huffman, minor, fraudulently procured the trustee's deed to them, in the following respects. . . ."

The defendants Ben S. Whisnant, Trustee, and Burke County Savings and Loan Association filed answer admitting the execution and delivery of the deed of trust securing the loan to plaintiffs in the amount of $4,500 and admitting the foreclosure and sale of the property under the deed of trust to the defendants Houston T. Huffman and Charles Van Huffman for $2,000. They denied all of the other material allegations of the complaint.

The record does not indicate whether the defendants Houston T. Huffman and Charles Van Huffman filed answer. The defendant trustee and the defendant Savings and Loan Association filed a motion for summary judgment in their favor and supported their motion with numerous affidavits and exhibits relating to the execution and delivery of plaintiffs' deed of trust securing the loan of $4,500 and the foreclosure and sale of the property under the deed of trust.

The plaintiffs filed numerous affidavits in opposition to the defendants' motion.

On 9 December 1971 after making "findings of fact" and "conclusions of law," the trial judge allowed the defendants' motion for summary judgment and dismissed plaintiffs' action as to the defendant trustee and the defendant Savings and Loan Association. Plaintiffs appealed.

Edward M. Hairfield and L. M. Abernathy by Edward M. Hairfield for plaintiff appellants.

Byrd, Byrd, Ervin & Blanton by John W. Ervin, Jr., for defendant appellees.

HEDRICK, Judge.

The question presented on this appeal is whether the Court erred in allowing the defendants' motion for summary judgment. The standard for summary judgment is fixed by Rule 56(c). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). "The rule does not contemplate that the court will decide an issue of fact, but rather will determine whether a real issue of fact exists." Gordon, The New Summary Judgment Rule in North Carolina, 5 Wake Forest Intra. L. Rev. 87 (1969). "The determination of what constitutes a 'genuine issue as to any material fact' is often difficult. It has been said that an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail." 3 Barron and Holtzoff, Federal Practice and Procedure, § 1234 (Wright Ed. 1958), at page 131.

In their complaint the plaintiffs allege they made sufficient payments on the $4,500 loan from the defendants "to keep the same in good standing." Although the defendants' in their answer denied this allegation and supported their motion for summary judgment with evidence tending to show that the plaintiffs were delinquent in their payments 43 out of 60 months and that when the foreclosure proceeding was commenced, they were three payments in arrears, the evidence of the plaintiff by the affidavit of Walter W. Lowman tended to show that the plaintiffs had made payments from 6 May 1965 until 13 July 1970, which were more than sufficient to cover the indebtedness secured by the deed of trust.

Obviously whether the plaintiffs had paid the indebtedness secured by the deed of trust is a material issue of fact in

this action attacking the defendants' right to sell the property given as security for the indebtedness. The trial judge actually determined this material fact when he found:

> "At the time of the foreclosure plaintiffs were in default two monthly payments as called for by the terms of the deed of trust. . . ."

and concluded:

> "There is no substantial issue of fact as to whether or not the plaintiffs were in default in their payments under the deed of trust at the time of the foreclosure. . . ."

The resolution of this issue by the trial judge against the plaintiffs made it impossible for them to prevail and clearly affected the result of their action.

The very fact that the trial judge apparently felt compelled to make findings of fact in ruling on a motion for summary judgment indicates that the record shows there are genuine issues of material fact to be resolved before the rights of the parties can be finally adjudicated.

We hold the pleadings, affidavits, and exhibits on file show there are genuine issues of material fact which can only be resolved by a trial of the action. This summary judgment in favor of the defendants is reversed.

Reversed.

Judges BROCK and MORRIS concur.

CHRYSLER REALTY CORPORATION AND GLOVER MOTORS, INC. v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 7228SC550

(Filed 23 August 1972)

Eminent Domain § 2— construction of median strip — dead-ending of abutting street — exercise of police power

The construction of a median strip on the east-west highway abutting the front of plaintiffs' property so as to prevent direct access to and from the westbound lanes, and the dead-ending of one of two abutting north-south streets at its intersection with the

east-west highway were legitimate exercises of the police power for which plaintiffs are not entitled to compensation where plaintiffs still retain access to and from all abutting streets and highways.

APPEAL by plaintiffs from *Thornburg, Judge,* 28 February 1972 Session of Superior Court held in BUNCOMBE County.

This is an action by the plaintiffs, against the North Carolina State Highway Commission, seeking to recover damages for an alleged compensable taking resulting from the change of traffic flow in front of plaintiffs' property and for a change in access to certain portions of their property, all resulting from the construction of Highway Project 8.3023208.

Based on the stipulations of the parties, the trial judge made findings of fact in pertinent part as follows:

"1. The plaintiff, Chrysler Realty Corporation, was on the 13th day of November, 1969, the owner of a tract of land, as shown on Exhibit 1, located within the City of Asheville, and Glover Motors, Inc., the other plaintiff, had a long term lease with respect to the property. After acquiring the property, buildings were constructed on the property, access to which was had from Patton Avenue, which ran east and west in front of plaintiffs' property. Traffic traveling east on Patton Avenue could turn directly onto plaintiffs' property from Patton Avenue and traffic traveling west on Patton Avenue could turn directly from Patton Avenue onto plaintiffs' property by driving across the eastbound lane. There was also access to the property from Clingman Avenue.

2. That after the construction of the said project, Patton Avenue in front of plaintiffs' property was widened and a median or safety strip was erected which divided the highway, as shown on Exhibit 1, and which resulted in westbound traffic on Patton Avenue not being able to turn left directly onto the property as before construction. After construction, eastbound traffic on Patton Avenue had the same direct access to plaintiffs' property as before construction. However, a fence was erected, as part of the project, which prevents access from any direction onto West Haywood Street, said street having been dead-ended and no longer accessible to Patton Avenue, as shown on Exhibit 1."

West Haywood Street abutted plaintiffs' property on the west side and ran generally north and south at the point where it intersected Patton Avenue (Exhibit A).

"3. After construction of project, westbound traffic along Patton Avenue has access to plaintiffs' property by turning right, after going through the intersection of Patton and Clingman Avenues, following a circular road and onto Clingman Avenue and thence onto plaintiffs' property. Access from Clingman Avenue to plaintiffs' property remains the same after construction as it did before construction.

4. Plaintiffs' used car lot . . . is partially along Patton Avenue and West Haywood Street.

5. As part of this project, in order to provide access to West Haywood Road, Hilliard Street Extension was constructed and this extension runs off of Clingman Avenue, in the rear or south of plaintiffs' property (and not abutting it) and extends generally westerly until it connects with West Haywood Road. Traffic then can turn . . . right onto West Haywood Road and once on this road has access to plaintiffs' property. It is a greater distance to follow this route than it was going directly onto West Haywood Road from Patton Avenue, as was possible before construction.

6. There were controlled electrical traffic signals at the intersection of Patton and Clingman Avenues immediately prior to the construction and they existed immediately after construction. Immediately prior to construction of this project, westbound traffic on Patton Avenue could not turn left onto Clingman Avenue at the above-mentioned intersection and the same is true immediately after the construction of the project."

Based on its findings of fact the Court made the following pertinent conclusions of law:

"2. That the construction of the median strip dividing east and west bound lanes of traffic on Patton Avenue was a proper exercise of the police power and if any damage resulted from such exercise, which has not been shown, it is not compensable.

3. That after the construction of the project and the changes in the flow of traffic in front of plaintiffs' property and the change of a part of their access, plaintiffs still have full, reasonable, and convenient access to all portions of their property and therefore, no compensable taking exists.

4. Reasonable access to plaintiffs' property exists after construction and there is no compensable taking merely because of circuity of travel to reach a particular destination."

From a judgment dismissing the action, the plaintiffs appealed.

H. Kenneth Lee and Herbert L. Hyde for plaintiff appellants.

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

HEDRICK, Judge.

Appellants contend the Court erred in "failing to conclude that plaintiffs' property abutted on West Haywood Street" and concluding as a matter of law "that the construction of the median strip dividing east-westbound lanes on Patton Avenue was a proper exercise of police power, and any damages resulting therefrom was not compensable." We do not agree.

The stipulations of the parties, found as facts by the trial judge (Exhibit 1, a map depicting the roads and highways surrounding plaintiffs' property) clearly show that West Haywood Street abuts plaintiffs' property on the West, Clingman Avenue abuts the property on the east, and plaintiffs' property is abutted on the north by Patton Avenue between Clingman Avenue and West Haywood Street.

We are referred by plaintiffs to G.S. 136-89.53, which in pertinent part provides:

"When an existing street or highway shall be designated as, and included within a *controlled-access facility,* the owners of the land abutting such existing street or highway, shall be entitled to compensation for the taking of, or injury to, their easements of access." (Our italics.)

Citing *Smith Co. v. Highway Comm.*, 279 N.C. 328, 182 S.E. 2d 383 (1971), plaintiffs argue that the dead-ending of West Haywood Street as part of the project, which included the construction of the median strip dividing the lanes of traffic on Patton Avenue and the extension of Hilliard Street from Clingman Avenue to West Haywood Street was such a taking or injury of their easement of access as entitles them to compensation within the meaning of G.S. 136-89.53. It seems clear that none of the streets abutting plaintiffs' property was or is a "controlled access" facility. The facts in *Smith Co. v. Highway Comm., supra,* are clearly distinguishable. There the plaintiffs owned a 13-acre tract of land abutting North Carolina Highway 191. Prior to the construction of the highway project, plaintiffs had an abutter's full right of access to the highway. The project complained of made Highway 191 a controlled access facility and completely fenced off all of plaintiffs' immediate access to the highway. After the construction of the project,

> ". . . the only available access to and from *any portion* of plaintiff's property and 'controlled-access' Highway 191 is by circuitous travel over residential streets. . . ." *Smith Co. v. Highway Comm., supra.*

The uncontroverted facts in the present case show that after the dead-ending of West Haywood Street at its intersection with Patton Avenue and the construction of the median, dividing lanes of traffic on Patton Avenue, the plaintiffs retained full right of access to all streets and highways abutting their property. In *Highway Comm. v. Yarborough,* 6 N.C. App. 294, this Court speaking to this matter said:

> "(W)hile a substantial or unreasonable interference with an abutting landowner's access constitutes the taking of a property right, the restriction of his right of entrance to reasonable and proper points so as to protect others who may be using the highway does not constitute a taking. Such reasonable restriction is within the police power of the sovereign and any resulting inconvenience is *damnum absque injuria.*"

The construction of a median strip so as to limit landowner's ingress and egress to lanes for southbound travel when he formerly had direct access to both the north and southbound lanes has been held to be a valid traffic regulation adopted by the Highway Commission in the exercise of the police power

vested in it by statutes. *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732 (1962). When a road or street is closed or abandoned so as to leave the landowner's property on a *cul-de-sac* and increase the distance one must travel to reach points in one direction, such inconvenience is not compensable. *Wofford v. Highway Commission,* 263 N.C. 677, 140 S.E. 2d 376 (1965); cert. denied; 382 U.S. 822; *Snow v. Highway Commission,* 262 N.C. 169, 136 S.E. 2d 678 (1964). Thus, since plaintiffs retain full right of access to and from all abutting streets and highways, we agree with the trial judge's ruling that the construction of the median strip on Patton Avenue and the dead-ending of Haywood Street was a legitimate and proper exercise of the police power of the State not entitling the plaintiffs to damages.

For the reasons stated we hold the facts found support the conclusions of law which in turn support the judgment entered.

Affirmed.

Judges BROCK 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. 7226SC563

(Filed 23 August 1972)

Appeal and Error § 68— summary judgment affirmed on appeal — law of case on subsequent appeal

A former appeal affirming summary judgment for plaintiff establishing defendant's liability on a contract constituted the law of the case in defendant's subsequent appeal from summary judgment as to the amount plaintiff was entitled to recover on the contract, and the defendant on the subsequent appeal presented no issues that had not already been determined by the Court on defendant's prior appeals.

APPEAL by defendant from judgment entered in the Superior Court held in MECKLENBURG by *Snepp, Judge,* in chambers, 18 February 1972.

Defendant, Virginia Iron, Coal and Coke Company, appeals from a summary judgment that plaintiff recover $590,-920.33 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.

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 (1969); cert. denied, 275 N.C. 596. Reference is made to that opinion for a more detailed statement of facts. This case was again before this Court at the Spring Session 1971 on an appeal by the defendant from a summary judgment in favor of the plaintiff on the question of defendant's liability only. This Court affirmed. *Peaseley v. Coke Co.*, 12 N.C. App. 226, 182 S.E. 2d 810 (1971); cert. denied, 279 N.C. 512. Reference is made to that opinion for a more detailed statement of the facts and law of the case.

On 1 December 1971 plaintiff made a motion for summary judgment as to the amount she was entitled to recover on the contract. On 13 January 1972 the defendant filed a response to plaintiff's motion for summary judgment and filed a cross motion praying "that summary judgment be entered in its favor dismissing the action." On 26 January 1972 the parties entered into the record the following stipulations:

> "The number of tons of coal shipped by the defendant to Duke Power Company from May 12, 1965, through the month of October, 1971, under the terms of the contract between the defendant and Mill-Power Supply Company dated June 19, 1963, as amended, on which the defendant has paid no commission either to the plaintiff or to the Estate of Robert H. Peaseley is 4,831,800 tons.
>
> If the plaintiff is entitled to commissions at the rate of ten (10¢) cents for each of the aforesaid 4,831,800 tons of coal, which the defendant does not admit but expressly denies, then the principal amount of such commissions would be $483,180.00."

On 18 February 1972 the parties entered into the following additional stipulation:

> "If the plaintiff is entitled to commissions of ten (10¢) cents for each of the 4,831,800 tons of coal, referred to

in the aforesaid Stipulation of the parties, dated January 20, 1972—and the defendant does not admit but expressly denies that the plaintiff is so entitled—then the interest on said commissions to the present date at six (6%) per cent per annum is $107,740.33."

From summary judgment entered 18 February 1972 that plaintiff have and recover of defendant $590,920.33 with interest thereon at the rate of 6% per annum until paid, the defendant appealed.

Blakeney, Alexander & Machen by Whiteford S. Blakeney for plaintiff appellee.

Helms, Mulliss & Johnston by E. Osborne Ayscue, Jr., for defendant appellant.

HEDRICK, Judge.

In its brief defendant asserts:

"The prior decisions of the Court of Appeals having been interlocutory and the defendant having preserved its position by petitioning for Writ of Certiorari, all issues in the cause are before the Court on appeal from a final judgment."

We do not agree. The decision on a former appeal is the law of the case upon the facts then presented both upon the subsequent hearing and upon subsequent appeal. 1 Strong, N. C. Index 2d, Appeal and Error, § 68, pp. 244-5. On the second appeal, this Court affirmed the "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 . . . before his death but delivered after his death." *Peaseley v. Coke Co.*, 12 N.C. App. 226, 182 S.E. 2d 810 (1971); cert. denied, 279 N.C. 512. The decision of this Court is the law of this case as to the question of defendant's liability to the plaintiff.

We are advertent to defendant's contention that because Peaseley had not purchased the "coal and coke dealer" license required by section 105-44 of the North Carolina General Statutes, the contract sued on was "therefore, illegal and unenforceable and the plaintiff is not, therefore, entitled to recover compensation for any services performed pursuant to any such contract."

The judgment appealed from contains the following pertinent recital:

"On December 17, 1971 . . . the Court held a hearing upon the plaintiff's motion and the defendant's cross motion.

On January 13, 1972, the Court held a supplementary hearing in chambers upon the said motions.

. . . .

Further hearing was held on January 20, 1972. The Court informed the parties that having considered the pleadings, depositions, affidavits, stipulations, and all other matters of record herein, and the arguments and authorities presented by the parties, it found and concluded that there was no genuine issue as to any material fact in this case, or as to any fact essential to the rendering of a final monetary judgment in this case.

Thereafter, before a judgment was actually signed, the defendant, on January 26, 1972, filed a 'Motion To Amend' its 'Answer' in the case. The defendant, without leave of Court, also filed, on the same date, an 'Amendment to Defendant's Cross Motion For Summary Judgment' and an 'Amendment To Defendant's Opposition To Plaintiff's Motion For Summary Judgment.' As to the subject matter of such motion and amendments—namely, the payment of certain 'license' taxes by the plaintiff's testator and his non-payment of certain other 'license' taxes—the parties, on January 31, 1972, filed a stipulation with the Court. Subsequently, on February 4, 1972, the defendant filed a 'Motion For A New Trial And Alternative Motion For Relief From Judgment' and an 'Affidavit In Support Of Motion For New Trial And Alternative Motion for Relief From Judgment.'

Notwithstanding that it was determined by judgment entered almost a year ago that the plaintiff is entitled to recover of the defendant in this case, which judgment was affirmed on appeal, and notwithstanding that the motions, amendments and affidavit filed by the defendant since January 20, 1972, are addressed to that previously adjudicated issue, and although the Court therefore deems these filings to be now untimely, the Court has neverthe-

less this day conducted a full hearing upon the matter raised in such motions, amendments and affidavit, filed by the defendant since January 20, 1972, and has considered the facts set forth in the stipulation of the parties relative to such matter, and the arguments and authorities presented by both parties with respect thereto.

The Court again finds and concludes:—That there is no genuine issue as to any material fact in this case, or as to any fact essential to the rendering of a final monetary judgment in this case; that, specifically, the matter dealt with in the motions, amendments and affidavit filed by the defendant since January 20, 1972, raises no genuine issue as to any material fact in this case or as to any fact essential to the rendering of a final monetary judgment in this case, and presents nothing which alters the finding and conclusion that the plaintiff is entitled to recover of the defendant as hereinafter set forth."

We agree with the ruling of the trial judge. The only question before Judge Snepp on 18 February 1972 was whether the pleadings, affidavits, exhibits, and stipulations on file showed there was a genuine issue as to any material fact with respect to the amount of defendant's liability to the plaintiff. The *material* facts necessary to determine the amount of defendant's liability to plaintiff were: (1) what was Peaseley's commission on one net ton of coal shipped and (2) how many tons of coal were actually shipped under the contract negotiated by Peaseley. The letter agreement dated 30 August 1960 clearly provided the defendant would pay Peaseley a commission of ten cents per net ton for coal "actually shipped." According to the stipulation dated 13 August 1972, defendant actually shipped in accordance with the contract 4,831,800 tons upon which the defendant had paid no commissions. The pleadings and stipulations show clearly there are no genuine issues of material fact, and the amount plaintiff is entitled to recover was a simple matter of calculation. The parties stipulated as to the amount of the interest due on the unpaid commissions to the date of the judgment. The judgment appealed from is

Affirmed.

Judges BROCK and MORRIS concur.

GARLAND THOMAS JONES, JR., AND WIFE, LANA HOLMES JONES v. THE CITY OF ASHEVILLE, NORTH CAROLINA, A MUNICIPAL CORPORATION

No. 7228DC553

(Filed 23 August 1972)

1. **Municipal Corporations § 28— estoppel to deny validity of lien for street improvements — purchaser with notice**

Where a realty company petitioned the city to grade and pave a street abutting its property and agreed in the petition to pay the city one dollar per foot for the paving, the work was completed by the city and the realty company accepted the benefits of the street improvements, the realty company is estopped to deny the validity of an assessment lien on its property to pay for the improvements; and a subsequent purchaser taking with notice of the assessment is likewise estopped to deny the validity of the assessment.

2. **Municipal Corporations § 28— lien for street improvements — notice — card file**

A purchaser of property was given constructive notice of a city's assessment lien on the property by a card file kept by the city in the office of the Register of Deeds as an alternative to the preparation of a special assessment book. Former G.S. 160-100.

APPEAL by defendant City of Asheville from *Winner, District Judge,* 24 April 1972 Session of District Court held in BUNCOMBE County.

This is a civil action wherein plaintiffs, Garland Thomas Jones, Jr., and wife, Lana Holmes Jones, seek to have an assessment lien for street paving in favor of the defendant City of Asheville, North Carolina, declared null and void and stricken from the record. The facts stipulated by the parties and found by the trial judge, except where quoted, are summarized as follows: On 5 June 1963 Dent Realty Company, the fee simple owner of the property designated on the city tax map as Lot 10, Sheet 29, Ward 8, along with others whose property abutted Pressley Road filed a petition (Exhibit A) with the City of Asheville to have Pressley Road graded and paved. On 1 August 1963, pursuant to the petition, the defendant City of Asheville adopted a resolution (Exhibit D) to grade and pave Pressley Road and caused the resolution to be published in a newspaper, The Asheville Times.

"6. That no assessment roll was ever made nor was there any notice nor was there a meeting to hear objections to the

assessment and to the assessment roll; that no assessment roll was ever delivered to the tax collector.

7. That no special assessment book was prepared but that the City of Asheville did file the card, a copy of which is attached as Exhibit F to the stipulation between the parties, in a card file which the City of Asheville kept and presently maintains in the Office of the Register of Deeds of Buncombe County.

8. That the City of Asheville never published or posted a notice to pay.

9. That there was no provision for judicial review of the assessment.

10. That the City of Asheville has not been paid by anyone the amount assessed ($291.08) against Lot 10, Sheet 29, Ward 8."

After the petition (Exhibit A) was filed and after the grading and paving was completed in August of 1963, Dent Realty Company subdivided its property abutting Pressley Road into 32 residential lots and on 3 March 1969 plaintiffs became owners of one of these lots which they afterwards sold by warranty deed recorded in Deed Book 1029 at page 238.

The trial judge concluded as a matter of law that because the defendant City failed to comply with the provisions of G.S. 160-85 et seq. a valid lien was never created on the said property and the plaintiffs, as successors in title to the property from Dent Realty Company, are not estopped to contest the validity of the lien. From a judgment declaring the paving assessment lien on Lot 10, Sheet 29, Ward 8, null and void, the defendant appealed.

Carl A. Hyldburg for plaintiff appellees.

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

HEDRICK, Judge.

The questions presented upon this appeal are (1) was a valid lien for street paving created on the property owned by

Dent Realty Company and (2) are plaintiffs, successors in title to a portion of said property, estopped to deny the validity of the lien?

The trial judge's conclusion that a valid lien was never created because the defendant failed to comply with the provisions of G.S. 160-85 et seq. fails to consider the proposition that:

> "There is no valid reason why citizens who wish to have their property improved by street paving may not expressly waive the charter restrictions and contract with the city to pay the actual cost. There is nothing against public policy in such agreement. On the contrary, it conduces to the general improvement of the municipality. When such contracts are entered into with full knowledge by the property owner the law will not permit him to repudiate it after the work is done and he has received the benefits. . . . In our opinion, it is both good morals and sound law to hold that when a person has accepted the benefits of a contract, not *contra bonos mores,* he is estopped to question the validity of it." *Charlotte v. Alexander,* 173 N.C. 515, 92 S.E. 384 (1917); *Insurance Co. v. Charlotte,* 213 N.C. 497, 196 S.E. 809 (1938).

The petition (Exhibit A) signed by Dent Realty Company in pertinent part provides:

> "WE, the undersigned owners of property abutting on PRESSLEY ROAD do hereby petition the City of Asheville to grade said street, place a stone base course 20 FEET IN WIDTH and apply an approved asphalt top on the street, pursuant to provisions of Chapter 160, Article 9 of the North Carolina General Statutes.
>
> In consideration of the above improvement, we the undersigned do hereby agree to pay to the City of Asheville the sum of ONE ($1.00) DOLLAR PER FRONT FOOT FOR 20 FOOT PAVING immediately adjacent to our respective properties."

[1] By this petition Dent Realty Company, in effect, contracted to pay the City of Asheville to grade and pave that portion of Pressley Road abutting its property; and having accepted the benefits of the street improvements, it would have been estopped

to deny the validity of a lien created on its property to pay for the improvements. If the person who owned the property when the assessment was made is estopped from contesting the validity of the assessment, a subsequent purchaser taking with notice of the assessment will be deemed to have taken the property subject to the consequent burden, and cannot question the validity of the assessment. *Insurance Co. v. Charlotte, supra.*

Thus, in the instant case, since the petition, the consequent grading and paving of Pressley Road, and the acceptance of the benefits of the street improvements created a valid lien against the property owned by Dent Realty Company, then the lien would be good as to all subsequent owners of the property with notice.

[2] Defendant contends notice of the lien was afforded plaintiff by its compliance with G.S. 160-100 which, prior to its repeal by Session Laws 1971, c. 698, s. 2, effective 1 January 1972, in pertinent part provided:

> "As an alternative to preparation of a Special Assessment Book, the governing body may in its discretion cause the information required by this section to be recorded or stored on any ledgertype cards or machine cards or similar cards, or on magnetic or other recording tape, or on or in any machine or device or system of machines or devices, designed for and capable of the accurate storage and retrieval of intelligence or information."

The alternative to the preparation of a special assessment book, as a method of maintaining records, was added to G.S. 160-100 by Chapter 763 of the Session Laws of 1967, which also stated:

> "The prior use by any municipality of any method authorized by this act for recording or storing the information required by G.S. 160-100 is hereby in all respects validated."

The trial judge's finding ". . . that the City of Asheville did file the card, a copy of which is attached as Exhibit F to the stipulation between the parties, in a card file which the City of Asheville kept and presently maintains in the Office of the Register of Deeds of Buncombe County" is sufficient to support a conclusion that the defendant complied with the provisions of G.S. 160-100, and Exhibit F, thus filed, gave con-

structive notice to the plaintiffs that the defendant City had and claimed a valid lien on the property in question in the amount of $291.08.

We hold the plaintiffs, like their predecessor in title, Dent Realty Company, are estopped to deny the validity of the lien. The judgment is

Reversed.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. MELVIN EZELL EDWARDS

No. 7210SC199

(Filed 23 August 1972)

1. **Burglary and Unlawful Breakings §§ 5, 10; Safecracking— sufficiency of evidence to withstand motion for nonsuit**

In a prosecution for safecracking, breaking and entering, and possession of burglary tools, evidence, when taken in the light most favorable to the State, was sufficient to withstand defendant's motion for nonsuit where it tended to show that an officer found defendant in the driver's seat of a vehicle with its trunk toward the platform of a distributing company, that the company had been broken into and its safe had been removed to the platform, and that burglary tools were found upon a search of defendant's car.

2. **Searches and Seizures § 3— admissibility of seized items — validity of search warrant**

The trial court did not err in allowing into evidence certain tools and other items found in defendant's automobile where a search warrant was lawfully issued and the search itself was lawfully made.

3. **Criminal Law §§ 112, 168— charge on reasonable doubt — favorable to defendant — no error**

The charge that says reasonable doubt is a possibility of innocence places a greater burden on the State than is required; but since it is more favorable to the defendant than is required, the defendant cannot object.

APPEAL by defendant from *Braswell, Judge,* at the 2 September 1971 Regular Session of WAKE County Superior Court.

Defendant was charged in three separate bills of indictment, proper in form, with safecracking, breaking and enter-

ing, and possession of burglary tools. The cases were consolidated for trial and defendant entered pleas of not guilty to each charge.

At the trial, Officer J. W. Howard of the Raleigh Police Department, testified that at about 1:00 a.m. on June 14, 1971, he observed a 1967 Ford traveling west on Davie Street in Raleigh. His attention was attracted to the car by its low rate of speed. He followed the car at some distance and saw it turn right onto Harrington Street. The officer testified that as he turned onto Harrington Street he saw the Ford stopped in the middle of the street with its lights off in front of James B. Batts, Jr., Distributors. The automobile was positioned so that its trunk was toward a platform at Batts Distributors. The officer testified that he saw two men and what appeared to be a safe on the platform. One of the men yelled something and then the two men fled from the scene. The officer then pulled up beside and blocked the automobile and found defendant in the driver's seat. He placed the defendant under arrest and took him to the police station. The officer obtained a search warrant and returned to the scene with defendant and opened the trunk of the automobile with a key given him by defendant. The trunk contained a pry bar, sledge hammer, tire tools, gloves, socks, a screwdriver and a flashlight. Upon investigating the premises of Batts Distributors, the officer found that the knob and dial had been torn from the safe and the safe had been moved from a location inside the building to the platform on which it was found.

Mr. Jack McIver, an employee of Armour Meat Company on Davie Street, testified that he had seen the defendant's automobile parked on Davie Street with three black men standing behind it at about 12:30 a.m. that morning. He noticed later that the automobile was still parked on Davie, but the three men had left. He saw the automobile a third time as it drove along Davie Street.

Mr. W. E. Weathersbee of the City-County Identification Bureau, testified that he investigated the premises of Batts Distributors and found that the glass in the front door had been broken and the door forced open.

Mr. Walter Corbett, an employee of Batts Distributors, testified that he had locked the building at about noon on Saturday and that the glass was not broken and the door was

not damaged when he left. He also testified that the safe was inside the office when he left work on Saturday.

The defendant presented no evidence.

The jury returned a verdict of guilty on each charge and judgment was entered imposing a prison sentence.

From the verdict and judgment, defendant appealed.

Attorney General Robert Morgan by Associate Attorney (Miss) Ann Reed for the State.

Tharrington & Smith by Roger W. Smith for defendant appellant.

CAMPBELL, Judge.

[1] The defendant assigns as error the failure of the trial court to grant his motion for nonsuit made at the conclusion of the State's evidence and renewed at the close of all the evidence.

The evidence has been set forth in the preceding portion of the opinion and it is not necessary to repeat it here. We are of the opinion that the evidence, although circumstantial in part, when viewed in the light most favorable to the State, as it must be in ruling on a motion for nonsuit, was sufficient to support the verdicts returned by the jury. This assignment of error is overruled.

[2] The defendant next assigns as error the admission into evidence of certain tools and other items found in defendant's automobile. Defendant contends that the affidavit of the officer did not contain sufficient information for the Magistrate to find that probable cause existed and therefore the warrant was improperly issued. With regard to the search warrant and the adequacy of the affidavit upon which it was issued, the trial judge conducted a voir dire. Thereafter the trial judge entered an order finding facts that the affiant had personal knowledge as to the facts set forth in the affidavit and that based upon those facts the magistrate had probable cause to issue the search warrant and the trial judge concluded as a matter of law that the search warrant was lawfully issued and the search itself was lawfully made and that the tools taken from the trunk

of the automobile were competent evidence. The record adequately supports the action of the trial judge and the order entered. This assignment of error is overruled.

[3] The defendant's final assignment of error is to the following portion of the trial court's charge to the jury.

> "The State must prove to you that the defendant is guilty beyond a reasonable doubt. When I speak of 'reasonable doubt,' I mean a possibility of innocence based on reason and common sense arising out of some or all of the evidence that has been presented or lack of evidence as the case may be."

Defendant contends that use of the phrase, "a possibility of innocence," falls short of the required definition of reasonable doubt.

The instruction in question was followed with: "If after weighing and considering all of the evidence you are fully satisfied and entirely convinced of the defendant's guilt, then you would be satisfied beyond a reasonable doubt. . . ." in accordance with *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954).

While we have previously failed to approve the use of the phrase "a possibility of innocence," we have found no error in its use. *State v. Perry,* 13 N.C. App. 304, 185 S.E. 2d 467 (1971), appeal dismissed, 280 N.C. 724. *State v. Chaney,* filed 28 June 1972. Defendant cites no case, and we find none, holding that use of this phrase is error.

On the contrary, the authorities indicate that a charge containing this phrase is favorable to defendant.

> "There is a difference between a possibility and a probability of innocence, and it is proper to refuse an instruction directing an acquittal if from the evidence there is a reasonable possibility of innocence, as well as one directing an acquittal 'if there is a probable doubt of guilt.' . . ." 53 Am. Jur., Trial, § 752, p. 563.

> "It is proper to instruct that a reasonable doubt to authorize an acquittal is not a mere possibility of innocence, and that, if the jury believe from all the evidence beyond a reasonable doubt that accused is guilty, although they

> might believe it possible that he is not guilty, they must convict him. . . . An instruction that a reasonable doubt may exist even though there is no possibility of innocence from the evidence is properly refused." 23A C.J.S., Criminal Law, § 1273, p. 668.

A long line of Missouri cases approves a charge, that doubt must be a substantial doubt and not mere possibility of innocence. *State v. Deutschmann,* 392 S.W. 2d 279 (Mo. 1965). The charge before us says that reasonable doubt is a possibility of innocence. A number of Alabama cases have approved a charge that the jury must convict if they believe beyond a reasonable doubt that defendant is guilty, although they may believe it is possible that he is not guilty. *Frost v. State,* 225 Ala. 232, 142 So. 427 (1932).

The charge before us is more favorable to defendant than the charges approved in Missouri and Alabama.

A correct charge has been set out in *Hammonds, supra,* and no improvement or further discussion is required. We think the trial judges should use it and not introduce novel changes placing an unnecessary burden on the State. Nevertheless, the Superior Court Judges have seen fit to prepare this pattern charge using the phrase "a possibility of innocence" which we have refused to approve. We think it places a greater burden on the State than is required; but since it is more favorable to the defendant than is required, the defendant cannot object. The assignment of error of the defendant is overruled.

In this trial we find

No error.

Chief Judge MALLARD and Judge BROCK concur.

DULAN P. SELLERS AND GRACE W. SELLERS v. FRIEDRICH REFRIGERATORS, INC., AND J. L. NICHOLS AND CECIL WALLACE, PARTNERS, T/A COMMERCIAL EQUIPMENT COMPANY

No. 724SC163

(Filed 23 August 1972)

1. **Limitation of Actions § 4— defective heating and cooling system — six-year statute of limitations**

An action to recover damages for the destruction of plaintiffs' home by a fire allegedly caused by the negligence of defendants in the construction and installation of the heating and cooling system in the home is an action to recover damages arising out of a defective improvement to real estate which is governed by the six-year statute of limitations provided by G.S. 1-50(5).

2. **Limitation of Actions § 4— defective improvement to realty — action by owner**

In the statute providing a six-year limitation period for actions arising out of a defective improvement to realty, the provision that "This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement" at the time the defect caused an injury does not exclude from the operation of the statute actions *by* owners or others in possession, but prevents owners and others in possession from using the statute as a defense to an action *brought against* them for damages resulting from the defective improvement when the owner or person in possession performed or furnished the design, planning, supervision of construction or construction more than six years prior to the institution of the action.

APPEAL by plaintiff from *Hubbard, Judge,* 27 September 1971 Session of Superior Court held in DUPLIN County.

Plaintiffs instituted this action on 8 October 1968 to recover damages for the destruction of their home on 25 January 1967 by a fire allegedly resulting from a defective heating and cooling system. Plaintiffs allege that the fire was proximately caused by the negligence of defendants in the construction and installation of the system. The parties stipulated that the installation of the system was completed more than three years prior to the commencement of this action. Defendants moved for summary judgment on the grounds that the action is barred by G.S. 1-52. Plaintiff contended that the action was instituted in apt time having been instituted within the six years allowed by G.S. 1-50(5).

From judgment allowing defendant's motion for summary judgment, plaintiffs appealed.

Crossley & Johnson by Robert White Johnson for plaintiff appellants.

Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for defendant appellee Friedrich Refrigerators, Inc.

Charles E. Nichols; Blossom & Burrows by William C. Blossom for defendant appellee Commercial Equipment Company.

VAUGHN, Judge.

The determination of this controversy requires consideration of G.S. 1-50(5) which was enacted in 1963 and is as follows:

> "(5) No action to recover damages for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be *brought against* any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance or furnishing of such services and construction. *This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.*" (Emphasis added.)

[1] Plaintiffs allege damages arising out of a defective improvement to real estate. The action is against those who allegedly furnished and constructed the defective improvement. The pleadings, therefore, clearly place the action within the purview of the first sentence of G.S. 1-50(5). The trial judge's ruling that the statute is inapplicable was obviously based on the second sentence, which we have underscored for emphasis. The question thus presented is whether the statute is inapplicable to the plaintiffs' action by reason of the fact that they are the owners who were in possession of the improved premises at the time the alleged defective improvement constituted the proximate cause of the injury.

[2] We hold that the last sentence of the statute does not exclude from its provisions action *by* owners or others in possession. The effect of the second sentence is to prevent owners and others in possession from using this statute as a defense to an action *brought against* them for damages resulting from the defective improvement when the owner or person in possession performed or furnished the design, planning, supervision of construction or construction more than six years prior to the institution of the action.

Statutes of like import have been adopted in a number of other states. In New Jersey, New Hampshire, Utah and Wisconsin the wording of the comparable statute is almost identical to that of G.S. 1-50(5). Our decision in the present case is consonant with the language of a New Jersey court as it applied a statute almost identical to G.S. 1-50(5). *Gilliam v. Admiral Corporation,* 111 N.J. Super. 370, 268 A. 2d 338.

In an even larger number of states having comparable statutes, the exceptive clause, such as that which constitutes the last sentence of G.S. 1-50(5), expressly provides that the limitation shall not apply to "actions against" the person in actual possession. We believe that to have been the legislative intent here.

Appellees contend that the trial judge's decision is supported by a number of opinions of our Supreme Court including *Matthieu v. Gas Co.,* 269 N.C. 212, 152 S.E. 2d 336, and *Jewell v. Price,* 264 N.C. 459, 142 S.E. 2d 1. In *Matthieu* plaintiff abandoned all causes of action except one for alleged negligent inspection of a furnace. It was this action for "negligent inspection" that the court held to be barred by the three year statute of limitation. The court also held that there was no evidence to support a jury-finding that plaintiffs were damaged by reason of negligent inspection by defendant. In *Matthieu* the controversy was over when the cause of action accrued and not which statute was applicable. (For recent legislation on when causes of action accrue, see G.S. 1-15(b), enacted in 1971.)

In *Jewell v. Price (supra)* the action was by the owners of a residence against their general contractor who was alleged to have been negligent in the installation of a furnace. The court held that the cause of action accrued on 15 November 1958 when plaintiffs accepted delivery of the structure, not on 18 January 1959 when the same was destroyed by fire. The court held that the action was barred by the three year statute,

suit not having been instituted until 12 January 1962. Instead of supporting the position that the three year statute should also be applied to bar the present action, we find, in *Jewell,* oblique support to the contrary in the following language of the court, speaking through Justice Sharp:

> "Plaintiffs rightly allow that subsection (5) of G.S. 1-50, enacted in 1963, after the institution of this suit, has no application. If this action was already barred when it was brought on January 12, 1962, it may not be revived by an act of the legislature, although that body may extend at will the time for bringing actions not already barred by an existing statute. . . ."

Appellees also rely on *Lewis v. Oil Company,* 1 N.C. App. 570, 162 S.E. 2d 135, which was an action for the recovery of damages sustained as the result of a fire which destroyed a tobacco barn and a quantity of tobacco. The action was based upon a breach of warranty of fitness and safety of a tobacco curer. This court sustained the trial court's adjudication that the claim was barred by the three year statute of limitations. The cause of action arose after the enactment of G.S. 1-50(5). We think that the questions presented in the case at bar may be distinguished from the one resolved in *Lewis.* That case discloses no suggestion by the court or in the briefs of the parties that G.S. 1-50(5) might be applicable. That action was based on a breach of warranty of a tobacco curer and was not based upon a defective improvement to real property. The tobacco curer is not described. It may well be that some tobacco curers are so installed as to constitute an improvement to real property but it does not appear that this was suggested to be so in the *Lewis* case.

We have not ignored the contention of the corporate defendant that, as the manufacturer of the heating system, it enjoys a status different from that of its co-defendant. It suffices to say that the pleadings are cast so as to allege a cause of action against the corporate defendant which may be brought within six years as provided by G.S. 1-50(5).

For the reasons stated, the judgment from which plaintiff appealed is reversed.

Reversed.

Judges MORRIS and GRAHAM concur.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. FOREST LAWN CEMETERY, INC., JOSEPH G. McCRACKEN, TRUSTEE, C. M. McCRACKEN AND WIFE, MRS. C. M. McCRACKEN

No. 7228SC247

(Filed 23 August 1972)

1. **Eminent Domain § 6— purchase price of entire property — admissibility**

In a proceeding to condemn a portion of defendants' property for highway purposes, the trial court did not err in the admission of evidence of the purchase price of the entire property where evidence of changes in the nature of other property in the immediate vicinity of defendants' property shows that such changes occurred after the taking.

2. **Eminent Domain § 6— opinion testimony — highest and best use — explanation of reasons**

The trial court in a highway condemnation proceeding properly allowed an appraiser to state why he considered the highest and best use of the property to be residential.

3. **Trial §§ 42, 54— quotient verdict — motion for new trial — insufficiency of evidence**

The trial court did not err in the denial of defendants' motion to set aside the verdict on the ground that it was a quotient verdict where the basis for the motion was a paperwriting found in the jury room after the verdict was returned, and there was no evidence as to how long the writing had been in the jury room, whose handwriting it was, or whether a juror wrote on the paper, and there was no evidence that the jurors agreed in advance to accept as their verdict one-twelfth of the aggregate of their individual estimates of damages.

APPEAL by defendants from *Martin, Harry C., Judge,* second week of the 16 August 1971 two week Session of Superior Court held in BUNCOMBE County.

This action was instituted by plaintiff pursuant to Article 9, Chapter 136 of the General Statutes for the appropriation of a portion of defendants' lands for highway purposes. The appropriation was for the widening and straightening of U.S. 19-23 west of Asheville, under State Highway Project 6.8410019, Buncombe County.

Immediately prior to the taking on 5 August 1968, defendants were the owners of a tract of land containing approximately 5.41 acres. The taking consisted of approximately 0.19 acres for right of way and approximately 0.35 acres for a con-

struction easement. Also within the area of the taking was an old unoccupied house.

All issues raised by the pleadings were determined by consent order except the issue of just compensation to defendants. The jury answered the damage issue in the sum of $3,000.00. Defendants moved for judgment notwithstanding the verdict, a new trial, and to set aside the verdict; these motions were denied. Judgment was entered in accord with the verdict, and defendants appealed.

Attorney General Morgan, by Assistant Attorney General Hamlin, for the State.

Cecil C. Jackson, Jr., for defendant-appellants.

BROCK, Judge.

[1] Defendants assign as error the admission of evidence of the purchase price of the entire property. Their argument is that it was error to admit evidence of the purchase price, because there was evidence that between the time the property was purchased and the time of taking there had been changes in the nature of other property in the immediate vicinity of defendants'. However, the record on appeal does not give foundation to defendants' contention. We note that defendants' evidence, through Mr. DeBruhl, Mr. Liles, and Mr. Gooch, tends to show that all changes in the nature of other property in the immediate vicinity of defendants' property took place after the date of the taking, except for the Coble Dairy property which was approximately a quarter mile off the highway in question.

This Court held in *Highway Commission v. Moore,* 3 N.C. App. 207, 164 S.E. 2d 385, that evidence of the purchase price may be brought out on cross-examination where there is no evidence that the sale was involuntary and where there was no evidence of change of the area in the immediate vicinity of the property in question between the date of purchase and the date of taking. The admission of the purchase price into evidence was proper in this case. Defendants' assignments of error numbers 1, 2, and 4 are without merit and are overruled.

[2] The defendants next assign as error that the trial court allowed Mr. Redmon, an appraiser, to state the reasons why he

considered the highest and best use of the property to be residential.

It is generally desirable and proper for an expert witness to give the reasons upon which he based his opinion, and we note that defendants do not show in what way they were prejudiced. This assignment of error is overruled. See *City of Statesville v. Bowles,* 6 N.C. App. 124, 169 S.E. 2d 467.

[3] In defendants' assignment of error number 6, they maintain that the trial court erred in not granting their motion to set aside the verdict on the grounds that it was a quotient verdict.

Upon defendants' motions, the trial judge conducted a hearing at which time the defendants' attorney testified in pertinent part as follows:

"If Your Honor please, I am referring to Defendant 1 on motion and exhibit of a paperwriting found in the jury room after the verdict was returned and after a juror told me of how the verdict was arrived, and that the juror did explain that the jury did take into consideration the fact that the property owner had removed dirt from the property in question to his property on the other side of the road, and that they did divide the damages by twelve and come up with apparently a quotient."

On cross-examination, his testimony tended to show that he did not know how long the paper had been in the jury room, whose handwriting it was, or whether a juror wrote on the paper. There was no evidence that the jurors agreed in advance to accept as their verdict one-twelfth of the aggregate of their individual estimates of damages. Therefore, under the principles enunciated by Chief Judge Mallard in *Highway Commission v. Matthis,* 2 N.C. App. 233, 163 S.E. 2d 35, the motions were properly denied. This assignment of error is overruled.

Defendants' other assignments of error relate to the charge of the court. These exceptions do not point out the specific portions of the charge excepted to and are therefore broadside. A broadside exception to the charge is improper and will not be considered. In any event, the charge correctly and accurately stated and applied the law arising on the evidence in this case. These assignments of error are overruled.

We have carefully examined all of the assignments of error

and the exceptions properly brought forward and are of the opinion that the defendants had a fair trial, free from prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

L. BERTRAM RUPERT III v. CAROL PRESSER RUPERT

No. 7218DC295

(Filed 23 August 1972)

1. **Divorce and Alimony § 13— absolute divorce — one year's separation — abandonment as defense**

Where the husband sues the wife under G.S. 50-6 for an absolute divorce on the ground of one year's separation, she may defeat his action by alleging and proving that the separation was caused by his abandonment of her.

2. **Divorce and Alimony § 13— absolute divorce — one year's separation — abandonment as jury question**

In an action for absolute divorce on the ground of one year's separation, the testimony of plaintiff and defendant raised a jury question as to abandonment and gave the jury ample latitude for answering the question of abandonment in favor of defendant who had the burden of proof.

3. **Divorce and Alimony § 13— absolute divorce — alleged agreement of separation — exclusion of evidence — no error**

The trial court did not err in an absolute divorce action in excluding evidence with respect to the terms of an alleged agreement of separation where there was nothing to indicate that those terms had been reduced to writing and the wife's privy examination taken as required by G.S. 52-6.

4. **Trial § 11— restrictions upon argument of counsel — no abuse of discretion**

Conduct of the trial, including proper supervision over the argument of counsel, is a matter largely within the discretion of the trial judge, and defendant cannot complain of restrictions upon argument in this absolute divorce case where no abuse of discretion is shown.

5. **Judgments § 2— judgment signed out of term — consent of parties**

Though the judgment was not signed at the trial session, defendant was bound where the judgment itself stated that counsel for plaintiff and defendant had agreed that judgment could be signed out of term.

6. Judgments § 3— failure of judgment to deny prayer for relief

Defendant was not prejudiced where the judgment failed specifically to deny his prayer for absolute divorce.

APPEAL by plaintiff from *Alexander, District Judge,* 1 November 1971 Session of District Court held in GUILFORD County.

Plaintiff brought this action for absolute divorce on the ground of separation for one year. Defendant by further answer and cross-claim alleged that plaintiff abandoned her and asked for child custody and support, alimony, and counsel fees.

The jury found in favor of defendant and from judgment awarding defendant the relief prayed, plaintiff appealed.

Alston, Pell, Pell & Weston by E. L. Alston, Jr., for plaintiff appellant.

Wallace S. Osborne for defendant appellee.

PARKER, Judge.

First, plaintiff contends that under the evidence presented in this case he was entitled to a divorce as a matter of law. We disagree.

[1, 2] This contention is directed primarily to the fourth issue submitted to the jury, namely, was the separation due to the abandonment of defendant by plaintiff as alleged by defendant. It is well settled that where the husband sues the wife under G.S. 50-6 for an absolute divorce on the ground of one year's separation, she may defeat his action by alleging and proving that the separation was caused by his abandonment of her. *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562. In *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923, the court stated that it has never undertaken to formulate any all-embracing definition or rule of general application respecting what conduct on the part of one spouse will justify the other in withdrawing from the marital relation, and each case must be determined upon its own circumstances. We do not depart from that reasoning here. The testimony of plaintiff and defendant raised a jury question as to abandonment and gave the jury ample latitude for answering the question of abandonment in favor of defendant who had the burden of proof.

[3] Plaintiff contends that the court erred in excluding evidence with respect to the terms of a mutual agreement of separation. This evidence was properly excluded as there was nothing to indicate that those terms had been reduced to writing and the wife's privy examination taken as required by the provisions of G.S. 52-6. The agreement would have been void *ab initio* if not in compliance with G.S. 52-6 (formerly G.S. 52-12). *Davis v. Davis,* 269 N.C. 120, 152 S.E. 2d 306; *Bolin v. Bolin,* 246 N.C. 666, 99 S.E. 2d 920.

Defendant contends the court erred in excluding from evidence a portion of a temporary order entered pending the trial of the action. This contention is without merit. Clearly, the order was temporary, pending trial, and could have no bearing upon the results to be reached at the trial of the case.

We have carefully considered plaintiff's other contentions pertaining to the exclusion or admission of evidence but find them to be without merit.

[4] The assignment of error dealing with restricting the argument of counsel is also overruled. Conduct of the trial, including proper supervision over the argument of counsel, is a matter largely within the discretion of the trial judge. *Hamilton v. Henry,* 239 N.C. 664, 80 S.E. 2d 485. There is nothing in the record to indicate an abuse of discretion in restricting the argument in this case.

[5] Plaintiff contends the court erred in entering judgment for that the judgment was not entered "in term time." It is conceded that the judgment was not signed at the trial session and the record does not contain a stipulation consenting to such a signing. Defendant insists that because of G.S. 1A-1, Rule 6(c), plaintiff's contention is without merit and cites § 1624 of the 1970 Supplement to McIntosh, N. C. Practice and Procedure. However, in the present case we find it unnecessary to reach the question raised by defendant, since in the case before us the judgment itself recites: ". . . counsel for plaintiff and defendant having further agreed that the judgment to be entered in this cause could be signed out of term. . . ." In *Killian v. Chair Co.,* 202 N.C. 23, 161 S.E. 546, our Supreme Court held that "when the judge finds as a fact that consent (that judgment be rendered out of term) was actually given, whether in writing or not, and this finding is set out in the

judgment, it is binding upon the parties in the absence of fraud or collusion."

[6] Finally, plaintiff contends that the judgment does not reflect the issues presented and the verdict returned upon the issues. It is true that the judgment would have been more complete had it specifically denied plaintiff's prayer for an absolute divorce, but plaintiff has failed to show how he has been prejudiced by the failure of the judgment to specifically deny his prayer for relief. Where the judgment is in conformity with the ultimate rights of the parties it will not be disturbed due to a mere technicality. *Abdalla v. Highway Commission,* 261 N.C. 114, 134 S.E. 2d 81.

For the reasons stated we find

No error.

Judges BRITT and HEDRICK concur.

CHRISTOPHER C. CHOW v. WALTER G. CROWELL, AND WIFE, FLORENCE S. CROWELL, C. A. ANDERSON, ANDERSON DETECTIVE AGENCY, INC., AND ANDERSON SALES AUDIT, INC.

No. 7228SC28

(Filed 23 August 1972)

1. **Venue § 2— nonresident plaintiff — resident defendant — removal as matter of right**

Where plaintiff is a nonresident and defendants are residents of North Carolina, the proper venue for trial of an action is a county in this State in which the defendants, or any of them, reside at its commencement, and removal to the county of defendant's residence may be had as a matter of right. G.S. 1-82, G.S. 1-83.

2. **Venue § 9— two motions to remove — hearing of motions at same time — no error**

Where two defendants made motions, one after the other, to remove an action to their respective counties of residence, the trial court did not err in considering the two motions at the same time since it was not required to give precedence to one motion or the other because of the order in which they were filed, but was required to exercise discretion in choosing between the two.

3. Venue § 9— unverified motion to remove— insufficient evidence to support order of removal

The trial court erred in ordering the removal of a case to Transylvania County on the basis of one defendant's unverified motion that he was a resident of said county because the unverified motion did not prove the matters alleged therein and was not evidence thereof, nor was there any affidavit or other evidence to support the unverified motion.

APPEAL by defendants C. A. Anderson and Anderson Sales Audit, Inc., from *Falls, Judge,* September 1971 Session of Superior Court held in BUNCOMBE County.

Plaintiff instituted this civil action in the Superior Court of Buncombe County on 17 May 1971 seeking to recover damages for false arrest, false imprisonment and malicious prosecution. In his complaint plaintiff alleged that he is a resident of California, that the individual defendants are residents of North Carolina, and that the corporate defendants are incorporated under the laws of North Carolina and have their principal offices in Guilford County, N. C. Summons was served on defendants C. A. Anderson and Anderson Sales Audit, Inc., on 21 May 1971 by the Sheriff of Buncombe County and upon Walter G. Crowell and wife, Florence S. Crowell on 27 May 1971 by the Sheriff of Transylvania County.

On 16 June 1971 defendants C. A. Anderson and Anderson Sales Audit, Inc., filed a verified motion to remove this action to Guilford County, alleging that C. A. Anderson is and was at the time the action was instituted a resident of Guilford County, that Anderson Sales Audit, Inc., is a North Carolina corporation with its principal office in Guilford County, that defendants Crowell are residents of Macon County, and that neither the plaintiff nor any of the defendants are residents of Buncombe County. By unverified motion dated 28 June 1971 signed by the attorneys for the defendants, Walter G. Crowell and wife, Florence S. Crowell, said defendants prayed for an order removing this action to Transylvania County. This unverified motion contained a statement that defendants Crowell are and were at the time of institution of this action citizens and residents of Transylvania County.

After several continuances of the hearing on these motions to remove, both motions were heard before Judge Falls, who entered an order dated 7 September 1971, the pertinent part of which is as follows:

"It further appearing to the Court from an examination of the Complaint and the motions of the respective defendants that Buncombe County is not the proper county for the trial of this cause, and it further appearing to the Court that the proper venue of this action is either Guilford County or Transylvania County, and the Court in the exercise of its discretion, and in order to promote the ends of justice, ORDERS that this action be and the same is hereby removed from the Superior Court of Buncombe County to the Superior Court of Transylvania County."

To this order the defendants C. A. Anderson and Anderson Sales Audit, Inc., excepted and appealed, assigning as errors the failure of the trial court to grant their motion to remove this case to Guilford County and the granting of the motion to remove to Transylvania County.

Roberts & Cogburn; and Bennett, Kelly & Long by Robert B. Long, Jr., for plaintiff appellee.

Williams, Morris & Golding by James N. Golding for defendant appellants.

Uzzell & Dumont by Harry Dumont for defendant appellees.

PARKER, Judge.

[1] Plaintiff being a nonresident and defendants being residents of North Carolina, the proper venue for trial of this action is a county in this State in which "the defendants, or any of them, reside at its commencement." G.S. 1-82. None of the defendants resided in Buncombe County, in which this action was commenced. Under G.S. 1-83 each defendant had the right, by written motion made before time for answering expired, to demand that the action be removed to the county of his own residence.

[2] Appellants contend that their motion to remove to Guilford County having been filed before the filing by their codefendants of the motion to remove to Transylvania County, the trial court should have considered their motion first. They contend that, had the court done so, it would have been required to grant their motion as a matter of right, the case would then have been transferred to Guilford County, which was a "proper county" within our statutes relating to venue, and the subse-

quently filed motion to remove to Transylvania County would have failed as a matter of law. In this case, however, both motions were made upon the same grounds and as a matter of right, and we find nothing in our established practice or procedure which required the trial court to consider the motions separately and in the order in which they were filed. Moreover, the record before us fails to disclose any timely objection noted by appellants to the action of the trial court in considering the two motions at the same time. Under the circumstances of this case, therefore, we hold that the trial court committed no error in considering the two motions at the same time and that the court was not required to give precedence to one motion or the other because of the order in which they may have been filed, but was necessarily required to exercise discretion in choosing between the two.

[3] We find error, however, in the trial court's order removing this case to Transylvania County, as nothing in this record supports the court's determination that proper venue of this action is in that county. The unverified motion signed by the attorneys for defendants Crowell contained a statement that they were residents of Transylvania County at the time of the institution of this action, but "[t]he unverified motion did not prove the matters alleged therein and is not evidence thereof." *Acceptance Corp. v. Samuels,* 11 N.C. App. 504, 181 S.E. 2d 794. No affidavit or other evidence appears in the record to support the unverified motion. On the contrary, the motion filed by appellants and verified by C. A. Anderson states that defendants Crowell were residents of Macon County. The fact that summons was served on defendants Crowell by the Sheriff of Transylvania County did not establish that they were residents of that county.

The order appealed from being unsupported by the record, the same is vacated, and this cause is remanded to the Superior Court of Buncombe County for further proceedings as provided by law.

Vacated and remanded.

Chief Judge MALLARD and Judge MORRIS concur.

LEONARD FISHER v. G. A. JONES, JR., COMMISSIONER, NORTH CAROLINA DEPARTMENT OF REVENUE

No. 724SC557

(Filed 23 August 1972)

1. **Taxation § 31— sales tax — coin-operated laundry**

A coin-operated laundry is a "launderette" or "launderall" as those terms are used in the sales tax statute, G.S. 105-164.4(4).

2. **Taxation § 31— sales tax — coin-operated laundry — due process — equal protection**

Retail sales tax imposed by G.S. 105-164.4(4) on the operator of a coin-operated laundry does not deprive such operator of property without due process and equal protection on the ground that "there is no means by which to effect collection," the tax being a privilege or license tax on retailers and not a tax on purchasers and consumers.

APPEAL by plaintiff from *Rouse, Judge,* 28 February 1972 Session, Superior Court, ONSLOW County.

Plaintiff operated a coin-operated laundry at the New River Shopping Center in Jacksonville, North Carolina. On 2 April 1971, plaintiff filed his sales and use tax report for the month of March, 1971 reporting gross receipts subject to sales tax of $6,143.69. He paid a 3% retail sales tax on this amount, less a "merchant's discount," or a total of $178.78. At the same time plaintiff made demand upon defendant for a refund of said amount and following its denial, plaintiff instituted this action pursuant to G.S. 105-267. Plaintiff alleged that the levy of a 3% sales tax on gross receipts received from "businesses known as launderettes and launderalls" as provided under G.S. 105-164.4(4) was unconstitutional. Pursuant to Rule 16, G.S. 1A-1, a pretrial conference was held wherein certain stipulations were entered into including the following: "The plaintiff owns and operates a 'coin-operated laundry,' a commercial estabment in which automatic washing machines, dryers and dry-cleaning machines are installed for the use and convenience of the general public." Upon completion of the trial without jury, the court entered certain findings of fact and concluded as a matter of law:

> "1. The plaintiff's business, referred to in paragraph 3 of the Findings of Fact, above, as a 'coin-operated laundry' is a 'launderette' or 'launderall' as those terms are used in G.S. 105-164.4(4) and is subject to the tax levied upon laundries in G.S. 105-164.4(4);

2. Section 105-164.4(4) of the North Carolina General Statutes does not violate either the 'due process' or 'equal protection' provisions of the Constitution of North Carolina or of the Constitution of the United States, as the same apply to the plaintiff in this action."

Plaintiff excepted to the dismissal of his action and appealed.

Worth B. Folger for plaintiff appellant.

Attorney General Morgan, by Assistant Attorney General Banks, for the State.

MORRIS, Judge.

[1] Plaintiff contends that his "coin-operated laundry business" is not included within the definition of "launderette" or "launderall," and the trial court erred in finding his business subject to a sales tax under G.S. 105-164.4(4). G.S. 105-164.26 provides that "to prevent evasion of the retail sales tax, it shall be presumed that all gross receipts of . . . retailers are subject to the retail sales tax until the contrary is established by the proper records. . . ." Webster's Third New International Dictionary (1968) defines launderette as "a commercial establishment in which automatic washing machines are installed for the use of individual customers." The language is almost identical to that of plaintiff's stipulation describing the nature of his business.

Abiding by the elementary rule of statutory construction that words must be given their common and ordinary meaning, we deem the trial court's conclusion inescapable. *Duke Power Co. v. Clayton, Comr. of Revenue,* 274 N.C. 505, 164 S.E. 2d 289 (1968). (See also the annotation in 87 A.L.R. 2d 1007 where in the words "automated self-service laundries," "laundromats" and "launderettes" are used interchangeably.) The catch-all provision of G.S. 105-164.4(4) "or any similar type business" would encompass plaintiff's "coin-operated laundry" conceding, *arguendo,* that plaintiff's business was not otherwise subject to the sales tax. This assignment of error is overruled.

[2] It is exceedingly difficult to determine from plaintiff's brief on what grounds he wishes to base his attack of the con-

stitutionality of Section 105-164.4(4) of the General Statutes. *Sykes v. Clayton, Comr. of Revenue,* 274 N.C. 398, 163 S.E. 2d 775 (1968). It does appear, however, that plaintiff's main contention is the sales tax as provided under said statute deprives him of property without due process and equal protection because "there is no means by which to effect collection." Plaintiff erroneously contends that G.S. 105-164.4 imposes a tax on purchasers or consumers when by its very language, it explicitly states that it is a "privilege or license tax" upon retailers. *Canteen Service v. Johnson, Comr. of Revenue,* 256 N.C. 155, 123 S.E. 2d 582 (1962). The tax may be passed on to the purchaser by adding it to the purchase price which constitutes a debt from purchaser to retailer until paid; but failure to charge or collect the tax from purchaser does not relieve the retailer of any tax liability. G.S. 105-164.7. Justice Moore, speaking for the Supreme Court in *Canteen Service v. Johnson, Comr. of Revenue, supra,* with respect to vending machine sales said:

> ". . . The retailer is not to be excused from liability merely because it is to his advantage to make use of a method of selling which will not permit him to keep a proper record of sales or to make the collections required by law." 256 N.C., at pp. 163-164.

The Court in that case went on to say that a sales tax on retailers who sell merchandise through vending machines (including items sold for less than ten cents where it is impossible to recoup the tax from the purchaser) did not violate constitutional provisions relating to due process and equal protection (Constitution of North Carolina, Article I, Section 19; Constitution of the United States, Amendment XIV).

> "The North Carolina law imposes the sales tax on all retailers, as a class, and applies it alike in its exactions and exemptions to all persons belonging to the prescribed class. Perfect equality in the collection of the tax by retailers from consumers is, as a practical matter, impossible as between almost any two or more retailers by reason of the differences in types of merchandise sold and selling methods. '. . . If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict.' *Fox v. Standard Oil Co.,* 294 U.S. 87, 102." 256 N.C., at pp. 165-166.

The same must be held true in this case, and plaintiff's assignment of error cannot be sustained.

Upon careful review of the evidence presented herein, all other things notwithstanding, plaintiff has failed to meet his burden of showing financial loss by reason of the retail sales tax as administered. For all the above mentioned reasons, the decision of the trial court must be

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION v. UNITED TELEPHONE COMPANY OF THE CAROLINAS, INC., AND ATTORNEY GENERAL

No. 7210UC492

(Filed 23 August 1972)

Telephone and Telegraph Companies § 1; Utilities Commission § 6— extended area calling service — order — absence of notice to parties or customers

The Utilities Commission erred in requiring a telephone company to install extended area calling service for its Goldston and Bonlee exchanges to its Siler City exchange and to file tariffs making the Siler City rates applicable to the Goldston and Bonlee exchange customers where no party to the proceeding and no customer to be affected by the change had any notice that such a change in service was being considered.

APPEAL by United Telephone Company of the Carolinas, Inc., and Attorney General from order of the North Carolina Utilities Commission in Docket No. P-9, Sub 113 dated 10 December 1971.

On 27 January 1971, United Telephone Company of the Carolinas, Inc. (United) filed application with the North Carolina Utilities Commission (Commission) for adjustment of certain local rates and charges for telephone service rendered by it within the State of North Carolina. On 16 February 1971 the Attorney General, pursuant to G.S. 62-20, filed notice of intervention on behalf of the using and consuming public and was made a party of record. The Commission entered an order

declaring the proceeding to be a general rate-making case and suspended the effective date of the proposed rates until further order of the Commission.

After conducting a series of hearings, the Commission issued an order determining, among other things, that the increases proposed by United were unjust and unreasonable, but finding that existing rates were insufficient to produce a fair return. The Commission ordered rate increases which amounted to 74.48% of the total rate increase filed. The Commission found that United's overall service was good but directed specific improvements in particular areas, as set out in Appendix "C" of the Commission's order. United did not except to or appeal from the foregoing portions of the order. The Attorney General did except to and appeal from the foregoing portions of the order.

The Commission ordered United to install extended area calling service for its Goldston and Bonlee exchanges to its Siler City exchange and to file tariffs with the Commission making the Siler City rates applicable to the Goldston and Bonlee exchange customers. United excepted and appealed from the entry of this part of the order.

Joyner & Howison by Robert C. Howison, Jr., for applicant appellant United Telephone of the Carolinas, Inc.

Robert Morgan, Attorney General by Assistant Attorney General I. Beverly Lake, Jr., for the Using and Consuming Public appellant.

Edward B. Hipp and William E. Anderson, attorneys for the North Carolina Utilities Commission appellee.

Joyner & Howison by Robert C. Howison, Jr., for appellee United Telephone of the Carolinas, Inc.

VAUGHN, Judge.

We have carefully reviewed the record on appeal as well as the well-reasoned briefs of the parties. In this particular case, however, we do not feel that any useful purpose would be served by lengthy recital of the findings of the Commission and an analysis of the arguments in support of or in opposition to such findings and conclusions.

With the exception of that portion of the order requiring the installation of extended area calling service for the Goldston and Bonlee exchanges to the Siler City exchange and the filing of new tariffs upon completion of such installation, no error in law appears and the order of the Commission is affirmed.

Although it is clearly within the power of the Commission upon proper notice, and upon findings supporting such action, to require changes in the classes of service, such as extended area calling service, the record in this case does not support such an order. At no time prior to the entry of the order of the Commission does it appear that any party to the proceeding or any customer to be affected by the change had any notice that the Commission was considering requiring such a change in service. That portion of the order requiring extended area service between the Goldston, Bonlee and Siler City exchanges is reversed.

Reversed in part, affirmed in part.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. TOMMY LEE McBRIDE

No. 7217SC497

(Filed 23 August 1972)

1. **Perjury § 2— subornation of perjury — elements of offense**

The crime of subornation of perjury consists of two elements: the commission of perjury by the person suborned, and the suborner wilfully procuring or inducing him to do so; hence, the guilt of both the suborned and the suborner must be proved on trial of the latter.

2. **Perjury § 2— subornation of perjury — requirement of two witnesses — inapplicability to procurement element**

The falsity of the oath of the alleged perjurer must be established in a prosecution for subornation of perjury either by the testimony of two witnesses, or by one witness and corroborating circumstances; however, the same requirement of proving by independent circumstances the commission of perjury does not apply to the procurement element of the offense of subornation of perjury.

3. Perjury § 5— subornation action — sufficiency of evidence to withstand motion for nonsuit

State's evidence was sufficient to withstand defendant's motion for nonsuit in a subornation action where two witnesses whose testimony was identical in a prior trial testified that their previous testimony had been false and where there was plenary evidence that defendant had suborned the witnesses to commit perjury.

4. Criminal Law § 168— jury instructions favorable to defendant — no error

Defendant in a subornation action cannot complain of jury instructions which place a greater burden of proof on the State than is required by law and consequently are not prejudicial to him.

APPEAL by defendant from *Crissman, Judge,* 12 January 1972 Criminal Session of Superior Court, SURRY County.

On 12 August 1971, a highway patrolman observed defendant operating an automobile in the opposite direction and, knowing that the operator's driver's license had been suspended, made a U-turn and gave pursuit. Defendant accelerated rapidly and never slowed down until he reached his own driveway, some mile and a half away. Defendant ran to the front porch of his house where he was apprehended, placed under arrest, and charged with reckless driving and driving while his license was revoked. At trial on 31 August 1971 in district court, defendant entered pleas of not guilty. John Henry Smith testified under oath on behalf of the defendant that he, not defendant, was driving defendant's automobile at the time in question. Smith further testified that he drove the automobile into defendant's driveway, exited from the vehicle, ran around the house, jumped a fence and escaped through a field. Another witness for defendant, Calvin L. McQueen, testified that he saw Smith drive defendant's automobile into the driveway and then run. Defendant was subsequently charged under separate bills of indictment with suborning Smith and McQueen to commit perjury, and it is from this conviction that defendant appealed.

Attorney General Morgan, by Associate Attorney Ricks, for the State.

John H. Blalock, Jr., and Franklin Smith for defendant appellant.

MORRIS, Judge.

[1, 2] The crime of subornation of perjury, punishable under G.S. 14-210, consists of two elements: the commission of perjury by the person suborned, and the suborner willfully procuring or inducing him to do so. Since the commission of the crime of perjury is the basic element in the crime of subornation of perjury, both the guilt of the suborned and the suborner must be proved on trial of the latter. *State v. Sailor,* 240 N.C. 113, 81 S.E. 2d 191 (1954). The falsity of the oath of the alleged perjurer must be established in a prosecution for subornation of perjury either by the testimony of two witnesses, or by one witness and corroborating circumstances, sometimes called admicular circumstances. *In re Roberts,* 8 N.C. App. 513, 174 S.E. 2d 667 (1970), and authorities cited therein. The requirement in our law of proving the falsity of the oath by two witnesses or by one witness and corroborating circumstances is well established, and the reasons for its existence sound. *State v. King,* 267 N.C. 631, 148 S.E. 2d 647 (1966); *In re Roberts, supra.* However, the same requirement of proving by independent circumstances the commission of perjury does not, as defendant contends, apply to the procurement element of the offense of subornation of perjury.

[3] The evidence that Smith's testimony was false was proven: by his admission, "[t]he testimony that I gave in the trial of this case was false. I knew it was false. Tommy McBride knew that it was false"; and by McQueen's admitting that his testimony at the first trial—identical in content to Smith's—was false. There was also plenary evidence that defendant suborned Smith to commit perjury. There was then sufficient evidence to survive defendant's motion for nonsuit, and this assignment of error is overruled.

The evidence that McQueen's testimony was false was proven: by his admission, "[t]he testimony that I gave in the District Court after having been sworn was false. I know that it was false"; and by Smith's admission that his testimony at the first trial—identical in content to McQueen's—was false. There was sufficient evidence that defendant suborned McQueen to commit perjury, and thus the trial court properly denied defendant's motion for nonsuit. This assignment of error is likewise overruled.

[4] Defendant's other assignments of error are directed to the trial judge's instructions to the jury. Although defendant failed to make timely objection to the judge's statement of the parties' contentions, we have considered them and believe them to be a fair and accurate statement of the evidence. *State v. Brown,* 13 N.C. App. 280, 185 S.E. 2d 486 (1971). Defendant further contends the trial judge erred in charging the jury that the falsity of the oaths by Smith and McQueen and the procurement of the perjured testimony by defendant must be proved by the testimony of two witnesses or by one witness and corroborative circumstances. Certainly defendant cannot now on appeal complain of a charge which, as previously discussed, places on the State an extra burden of proof not required under our law. The error if any was not prejudicial. We find

No error.

Judges BROCK and HEDRICK concur.

LIBERTY LOAN CORPORATION OF NORTH CHARLOTTE v. DONALD E. MILLER AND WIFE, BEVERLY MILLER

No. 7226DC352

(Filed 23 August 1972)

Bills and Notes § 18— action on note — authenticity of signature — genuine issue of fact

In an action to recover on a promissory note, the pleadings of the parties and affidavit of femme defendant show that there is a genuine issue of fact as to whether femme defendant's signature on the note was authentic or forged.

APPEAL by plaintiff from *Stukes, Judge,* 24 January 1972 Session of District Court held in MECKLENBURG County.

Plaintiff commenced this civil action on 18 March 1971 by filing a verified complaint alleging in substance that defendants executed and delivered to plaintiff a promissory note and chattel mortgage for $744.76 on or about 17 May 1967; that plaintiff has made demand for payment of $666.86 which remains due and owing from the time of default on 9 February 1970; and that defendants have failed and refused to pay the sum due. Plaintiff prays for judgment against defendants for said sum which remains due and owing. Defendant, Beverly Miller, filed answer first alleging that the complaint failed to

state a claim upon which relief could be granted and then denying all the material allegations of the complaint. On 27 October 1971, pursuant to G.S. 1A-1, Rule 56, defendant, Beverly Miller, filed a motion for summary judgment in her favor on the ground that "the document upon which this action is predicated was not signed by this defendant and that any purported writing on the document which is alleged to be her signature is false and forged." The motion was supported by an affidavit of defendant stating that the signatures on the note and the chattel mortgage were not hers, and that she neither signed them nor gave anyone else authority to sign her name. The plaintiff did not respond to the motion for summary judgment by opposing affidavits.

A hearing on the motion was held on 24 January 1972 where in counsel for both plaintiff and defendant, Beverly Miller, appeared. Following the conclusion of the hearing, the trial court found as a fact that no genuine issue of material fact existed as to the signature of defendant, Beverly Miller, and concluded as a matter of law that no genuine issue of material fact existed in the action. From judgment entered allowing defendant's motion for summary judgment and dismissing its claim, plaintiff gave notice of appeal.

James L. Roberts for plaintiff appellant.

Carpenter, Golding, Crews and Meekins, by James R. Carpenter, for defendant appellee.

MORRIS, Judge.

Summary judgment may be granted 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).

The party moving for summary judgment has the burden of clearly showing there is no genuine issue of material fact, and in ruling on his motion, the moving party's papers are carefully scrutinized while those of the opposing party are to be indulgently treated. *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972); *Miller v. Snipes,* 12 N.C. App. 342, 183

S.E. 2d 270 (1971), cert. denied 279 N.C. 619 (1971). In the case at bar, defendant's affidavit in support of her motion for summary judgment merely reiterates the allegations in her answer denying the execution of the note. Although plaintiff did not respond to the motion for summary judgment by affidavit, its verified complaint, when viewed in the light most favorable to plaintiff, shows a triable issue does exist. *Brevard v. Barkley,* 12 N.C. App. 665, 184 S.E. 2d 370 (1971). We hold that the pleadings and affidavit clearly show the existence of a genuine issue of material fact, that defendant was not entitled to judgment as a matter of law, and that summary judgment was improperly entered.

Reversed.

Judges BROCK and HEDRICK concur.

MRS. BONITA WALL v. MRS. CHARLES Z. FLACK, SR.

No. 7229SC48

(Filed 23 August 1972)

Limitation of Actions § 18— date of accident — genuine issue of fact

In an action to recover for personal injuries received in an automobile accident, the pleadings of the parties and affidavits presented by defendant show that there is a genuine issue of fact as to when the accident occurred and whether it is barred by the statute of limitations.

APPEAL by plaintiff from *Ervin, Judge,* 15 September 1971 Session, Superior Court, RUTHERFORD County.

Plaintiff instituted this action by filing a complaint on 20 October 1970 seeking to recover damages for personal injury allegedly sustained on 4 November 1967 when her car was hit by defendant's car in a parking lot. Plaintiff alleged that defendant was negligent in that she failed to keep a proper lookout and failed to keep her automobile under proper control. Defendant answered, denying the material allegations of the complaint and affirmatively pleading the statute of limitations by asserting the accident occurred on 4 October 1967. On 15 January 1971, defendant moved for summary judgment on the ground that the action was filed more than three years from the

date of the accident and submitted the affidavits of E. S. Ducker, claims manager of Iowa National Mutual Insurance Company and Charles Z. Flack, agent of the insurance company, in support of her motion. Charles Z. Flack stated in his affidavit that the accident was reported to him on 4 October 1967 and that he in turn notified Iowa National Mutual Insurance Company by letter dated 7 October 1967. Mr. Flack stated that two estimates of damages to plaintiff's car were also turned into his office on 4 October 1967. Copies of his letter and the two estimates were attached to his affidavit. The affidavit of E. S. Ducker stated that the Iowa National Mutual Insurance Company received Mr. Flack's letter dated 7 October 1967 on 9 October 1967 and that their records show the accident occurred on 4 October 1967. The plaintiff did not respond to the motion for summary judgment with opposing affidavits.

On 15 September 1971, the trial judge granted defendant's motion for summary judgment and from entry of the judgment for defendant, plaintiff appealed.

Hamrick and Hamrick, by J. Nat Hamrick, for plaintiff appellant.

Hamrick and Bowen, by Fred D. Hamrick, Jr., for defendant appellee.

MORRIS, Judge.

The sole question presented by this appeal is whether the record discloses that the plaintiff's claim is barred by the running of the statute of limitations. G.S. 1-52(5). If so, defendant was entitled to judgment as a matter of law and summary judgment pursuant to G.S. 1A-1, Rule 56, was appropriate. *Brantley v. Dunstan,* 10 N.C. App. 706, 179 S.E. 2d 878 (1971).

> " 'The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded.' (Citations omitted.)" *Singleton v. Stewart,* 280 N.C. 460, 465, 186 S.E. 2d 400 (1972).

The affidavits supporting defendant's motion for summary judgment merely reiterate the allegation contained in her an-

swer as to when the accident occurred, and viewing the record in the light most favorable to plaintiff, clearly show the existence of a triable issue of material fact. *Loan Corp. v. Miller,* 15 N.C. App. 745, 190 S.E. 2d 672 (1972). To resolve the issue of when this accident occurred would have required a "trial by affidavits" at hearing on the motion for summary judgment which is clearly impermissible. *Lee v. Shor,* 10 N.C. App. 231, 178 S.E. 2d 101 (1970).

The entry of summary judgment dismissing plaintiff's action constituted error.

Reversed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. ELWOOD MITCHELL AND HERMAN RAY LEWIS

No. 7211SC502

(Filed 23 August 1972)

Robbery § 5— attempted armed robbery — failure to charge on lesser included offenses — no error

Where all of the State's evidence tended to show defendants guilty of attempted armed robbery and defendants' evidence tended to show that they were elsewhere on the night of the offense, the trial court did not err in an attempted armed robbery prosecution in failing to instruct the jury on lesser included offenses of the crime charged.

APPEAL by defendants from *Brewer, Judge,* 7 February 1972 Session, Superior Court, JOHNSTON County.

Defendants were charged, in valid bills of indictment, with attempted armed robbery. From judgments entered on the jury verdict of guilty as to each defendant, defendants appealed.

Attorney General Morgan, by Assistant Attorney General Jones, for the State.

T. Yates Dobson, Jr., and Wiley Narron for defendant appellants.

MORRIS, Judge.

Defendants bring forward two assignments of error, both directed to the charge of the court to the jury. They contend that the court's failure to instruct the jury on assault constituted reversible error.

The evidence for the State tends to show that defendants with two others planned to rob the prosecuting witness of a large sum of money they understood he had at his home. Defendants and another of the planners went to the home of the prosecuting witness. The defendants were driven there by Terry Barnum. They had a .22 caliber gun and some rope. Barnum parked a short distance from the house and waited. Defendants got out and went to the house. They returned in a very few minutes and told Barnum, "Terry, let's go, the man slammed the door in our face and he has done called the law." The prosecuting witness testified that the front door and storm door were both closed and locked. When the doorbell rang, he went to the front door, turned on the light on the front porch, and opened "the big door." "There were two fellows standing there in front of the door . . . I did not open the other door, I asked the boys who they were looking. The boys were standing together right in front of me and I was standing inside the house. Defendant Lewis asked defendant Mitchell 'Is this the man?' Then Lewis came out with a gun. My wife was standing there. I slammed the door in his face. . . . The gun was pointed right at me. Elwood Mitchell was standing by his side, pretty near touching one another . . . "

The State correctly concedes that assault is a lesser included offense of the crime charged [*State v. Duncan,* 14 N.C. App. 113, 187 S.E. 2d 353 (1972); *State v. McNeely,* 244 N.C. 737, 94 S.E. 2d 853 (1956)], but argues that the evidence will not support a verdict of guilty of assault.

Defendants did not testify but all the evidence in their behalf tended to show that they were elsewhere on the night of the attempted armed robbery. The case is not distinguishable from *State v. Lentz,* 270 N.C. 122, 153 S.E. 2d 864 (1967). There defendants were charged with and convicted of armed robbery. The evidence for the State was that defendants entered a supermarket and stole at gun point $850.19 belonging to the owner of the store. Three witnesses identified the defend-

ants. Evidence in behalf of defendants placed them elsewhere. On appeal, defendants excepted to the failure of the court to charge that they might be found guilty of some lesser degree of the offense charged: common law robbery, attempted robbery, assault with a deadly weapon or simple assault. A unanimous Court said:

> "Upon the evidence of the State, which was uncontradicted as to the event, and questioned only as to the perpetrators, all of the elements of the offense of armed robbery were clearly shown, and there was no evidence to indicate that any person committing the acts alleged by the State was guilty of any lesser offense, and the exception is overruled."

The same circumstances exist here, and we think the case is controlled by *Lentz*. We, therefore, find

No error.

Judges VAUGHN and GRAHAM concur.

SHELIA KAREN KORNEGAY v. WILLIAM BURTON KORNEGAY

No. 725DC481

(Filed 23 August 1972)

Divorce and Alimony § 18— award of alimony pendente lite — counsel fees — failure to make findings of fact — error

The trial court erred in awarding plaintiff alimony *pendente lite* and counsel fees without making findings that plaintiff was a dependent spouse or that she was entitled to relief under G.S. 50-16.3(a)(1).

APPEAL by defendant from *Barefoot, Judge,* 7 February 1972 Session, District Court, NEW HANOVER County.

Plaintiff-wife filed complaint in this action on 28 January 1972 seeking alimony without divorce, alimony pendente lite and counsel fees. She alleged that defendant was an excessive user of alcohol, physically abused her on numerous occasions so as to endanger her life, and generally rendered her life intolerable and burdensome. Defendant denied the material allegations of the complaint, and a hearing was subsequently conducted

wherein the trial court heard testimony from plaintiff, defendant and their witnesses. Defendant appealed from the entry of an "Order for Alimony and Counsel Fees Pendente Lite" entered 17 February 1972 which contained the following:

"Upon the evidence presented, the court finds the following facts:

1. That the plaintiff and the defendant were married on the 29th day of January, 1971 and have lived together in New Hanover County, North Carolina, with the exception of several brief separations, since that date as husband and wife until January 21, 1972, at which time they ceased living together as husband and wife.

2. That the plaintiff is a dependent spouse and is entitled to reasonable support and maintenance for herself pendente lite.

3. That the plaintiff does not have sufficient means to support herself and to defray the expense of prosecuting this action and is thereby entitled to have the defendant pay her attorney's fees pendente lite.

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW: That the plaintiff is entitled to reasonable support and maintenance for herself pendente lite and counsel fees pendente lite.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendant pay to the plaintiff the sum of Five Hundred ($500.00) Dollars for the separate maintenance and support of the plaintiff pending the final trial of this action, said Five Hundred ($500.00) Dollars to be payable One Hundred Fifty ($150.00) Dollars on March 1, 1972, One Hundred Fifty ($150.00) Dollars on April 1, 1972, One Hundred Fifty ($150.00) Dollars on May 1, 1972 and Fifty ($50.00) Dollars on June 1, 1972.

IT IS FURTHER ORDERED that the defendant pay to Robert White Johnson, counsel for the plaintiff, the sum of Two Hundred Fifty ($250.00) Dollars to apply upon attorney's fees pendente lite to be paid in the amount of Twenty-five ($25.00) Dollars on the 1st day of March, 1972 and a like amount to be paid on the 1st day of each

successive month thereafter until this amount has been paid in full."

Crossley and Johnson, by Robert White Johnson, for plaintiff appellee.

James L. Nelson for defendant appellant.

MORRIS, Judge.

The circumstances of this case are controlled by the previous decision of this Court in *Presson v. Presson,* 13 N.C. App. 81, 185 S.E. 2d 17 (1971). In order to avoid useless repetition, suffice it to say: the finding that plaintiff-wife was a "dependent spouse" amounted to a mere conclusion unsupported by a finding of fact; even if there had been, *arguendo,* sufficient findings to conclude plaintiff was a "dependent spouse," there were no findings upon which to conclude she was entitled to the relief demanded under G.S. 50-16.3(a)(1); and finally, since the order appealed from was deficient in findings to entitle plaintiff to alimony pendente lite, the award of counsel fees under G.S. 50-16.4 is also unsupported.

For erroneously failing to make specific findings, the order appealed from is vacated and the cause remanded.

Error and remanded.

Judges BROCK and HEDRICK concur.

AMENDMENTS TO COURT OF APPEALS RULES

ANALYTICAL INDEX

WORD AND PHRASE INDEX

AMENDMENTS TO THE RULES OF PRACTICE IN THE COURT OF APPEALS

Rules 5, 6, 7, and 28 of the Rules of Practice in the Court of Appeals, as published in 1 N. C. App. 634 et seq., are hereby amended as follows:

Rule 5 is amended by deleting "twenty-eight" from line 3 (exclusive of caption) and by substituting "thirty-five" in lieu thereof.

Rule 6 is amended by deleting "twenty-eight" from lines 1 and 4 (exclusive of caption) and by substituting "thirty-five" in lieu thereof.

Rule 7 is amended by deleting "twenty-eight" from line 33 (exclusive of caption) and substituting "thirty-five" in lieu thereof.

Rule 28 is amended by deleting "third" from line 18 (exclusive of caption) and substituting "fourth" in lieu thereof.

The foregoing amendments shall become effective on and after July 1, 1973.

Adopted by the Court in Conference this 31st day of August, 1972.

MOORE, J.
For the Court

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

Defendant's answer was sufficient to plead the defense of accord and satisfaction. *Packaging Co. v. Stepp*, 64.

Plaintiff's acceptance of defendant's check containing a notation that, by endorsement, the check when paid is accepted in full payment of defendant's account did not constitute an accord and satisfaction. *Ibid.*

ADMINISTRATIVE LAW

§ 5. Review of Administrative Orders

Decision of county board of education terminating the employment of school superintendent is subject to review under statutes relating to review of decisions of certain administrative agencies. *James v. Board of Education*, 531.

ADVERSE POSSESSION

§ 3. Belief that Land is Included in Description of Claimant's Deed

Claimant's possession of land was not adverse to true owner where claimant believed the land was included in his deed. *Garris v. Butler*, 268.

APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

Defendant cannot appeal from mere oral expression of opinion by trial court that it had jurisdiction to rule on a show cause order after the cause had been removed to a federal court. *Munchak Corp. v. McDaniels*, 145.

No appeal lies from denial of defendant's motion to dismiss the action on the ground that he had not been properly served with process. *Dennis v. Ross*, 228.

No appeal lies from an interlocutory order allowing petitioner to examine respondents for the purpose of obtaining information to file a complaint. *In re Mark*, 574.

§ 7. Party Aggrieved

Where a claim has been dismissed, based upon a jury verdict, the party against whom the claim was asserted is not an aggrieved party. *Electric Co. v. Robinson*, 201.

§ 16. Jurisdiction and Powers of Lower Court After Appeal

Trial court was without authority to consider motion to set aside a default judgment filed after appeal had been taken. *Equipment, Inc. v. Lipscomb*, 120.

§ 26. Assignments of Error to Judgment

Assignment of error to the entry of judgment presents only the face of the record for review. *Lamb v. McKibbon*, 229.

APPEAL AND ERROR — Continued

§ 28. Objections to Findings of Fact

Trial court's finding that plaintiffs were under duty to make further inquiry as to condition of a home before purchasing was finding of fact. *Christie v. Powell,* 508.

§ 35. Necessity for Case on Appeal

It is not necessary that a case on appeal be served on the appellee when all assignments of error relate to the record proper. *Houck v. Overcash,* 581.

§ 39. Time for Docketing Record on Appeal

Appeal not docketed in apt time was treated as a petition for certiorari and considered on its merits where error was apparent on the face of the record. *Choate v. Choate,* 89.

Trial court has no authority to extend the time for docketing the record on appeal after the original 90-day period has expired. *Simmons v. Textile Workers Union,* 220.

Order extending time for serving case on appeal did not extend time for docketing the record on appeal. *Campbell v. McNeil,* 559.

§ 41. Form and Requisites of Transcript

Appeal is subject to dismissal where proceedings are not set forth in the record on appeal in order of time in which they occurred. *In re City of Washington,* 505.

Appeal is subject to dismissal where the filing dates of the pertinent documents are not shown in the record on appeal. *Finley v. Finley,* 681.

§ 42. Presumptions in Regard to Matters Omitted from Record on Appeal

Appellate court cannot consider contention with respect to trial court's consideration of affidavits and exhibits in ruling on motion for summary judgment where affdavits and exhibits were not made a part of the record on appeal. *Tomlinson v. Brewer,* 142.

When evidence is not contained in record on appeal, it will be presumed there was sufficient evidence to support trial judge's findings of fact. *Christie v. Powell,* 508.

§ 49. Harmless Error in Exclusion of Evidence

Exclusion of evidence was not prejudicial where record does not show what excluded evidence would have been. *Campbell v. McNeil,* 559.

§ 50. Harmless Error in Instructions

Error in portions of charge relating to issues answered in favor of the party asserting the error is harmless. *Electric Co. v. Robinson,* 201.

APPEAL AND ERROR — Continued

§ 57. Review of Findings or Judgments on Findings

Trial court erred in entering judgment for plaintiff based on a finding of fact not supported by the evidence. *Davis v. Chauffeurs, Teamsters & Helpers Local 391*, 286.

Judge's findings of fact are conclusive on appeal if supported by competent evidence. *Helms v. Rea*, 465.

A finding is conclusive on appeal when the evidence on which the finding was based is not in the record. *Greene v. Greene*, 314.

Action to enforce restrictive covenants is remanded so that proper findings can be entered based upon sufficient evidence. *Littlejohn v. Hamrick*, 461.

Court on appeal will not disturb trial court's findings of fact or conclusions of law where record on appeal does not include evidence presented in trial court. *Shore v. Shore*, 629.

§ 58. Review of Injunction Proceedings

Appellate court may look beyond findings of fact made by trial court in injunctive proceeding and determine from the evidence whether a preliminary injunction is justified. *Resources, Inc. v. Insurance Co.*, 634.

§ 68. Decision of Appellate Court as Law of Case

Decision on former appeal is the law of the case upon the facts then presented. *Bass v. Mooresville Mills*, 206.

Defendant's appeal presented no issues that had not already been determined by the Court on defendant's prior appeals. *Peaseley v. Coke Co.*, 709.

ARREST AND BAIL

§ 3. Right of Officer to Arrest without Warrant

Arrest of defendant for misdemeanor by officers who knew warrant had been issued but who did not have warrant in their possession was unlawful. *S. v. Robinson*, 155.

Police officer had probable cause to arrest defendants without a warrant for armed robbery where the officer had received a radio transmission advising him of the robbery and describing the suspects and their automobile. *S. v. Westry*, 1.

Police officers had reasonable grounds to believe one defendant was actively aiding and abetting the second defendant in the misdemeanor of window breaking, and the officers lawfully arrested both defendants without a warrant for a misdemeanor committed in their presence. *S. v. Gibson*, 445.

Officers had probable cause to stop defendant's vehicle. *S. v. Allen*, 670.

§ 6. Resisting Arrest

Charge of resisting a public officer and charge of assaulting a public officer are separate offenses. *S. v. Kirby*, 480.

ARSON

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for jury in prosecution for felonious burning of a building. *S. v. Russell*, 277.

ASSAULT AND BATTERY

§ 4. Criminal Assault in General

Charge of resisting a public officer and charge of assaulting a public officer are separate offenses. *S. v. Kirby*, 480.

§ 11. Indictment and Warrant

In order to charge an offense of assaulting a public officer, the warrant or indictment need not set out with particularity the duty the officer was attempting to discharge at the time of the offense. *S. v. Kirby*, 480.

§ 14. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury in felonious assault case. *S. v. Hollis*, 242.

ATTORNEY AND CLIENT

§ 7. Compensation and Fees

Attorney's claim for services rendered to an insolvent corporation was not entitled to priority status. *Trust Co. v. Archives*, 186.

AUTOMOBILES

§ 2. Procedure for Revocation of Driver's License

Where defendant gave notice of revocation of plaintiff's driver's license eleven days after it received notice of plaintiff's second conviction for reckless driving but notice of revocation was issued 15 months after plaintiff's second conviction, defendant acted within a reasonable time. *Simpson v. Garrett*, 449.

§ 46. Opinion Testimony as to Speed

Weight to be given opinion testimony as to speed of defendant's automobile was for the jury. *Harrison v. Lewis*, 26.

§ 53. Failing to Stay on Right Side of Highway in Passing Vehicles Traveling in Opposite Direction

Issue as to negligence of the driver of a tanker truck in crossing the center line and striking a pickup truck waiting to make a left turn should have been submitted to the jury. *Fields v. Fields*, 452.

AUTOMOBILES — Continued

§ 56. Following too Closely

Evidence was sufficient for the jury on the issue of defendant's negligence where it tended to show that defendant was distracted when a cake on the seat behind her started to slip from the seat, and that defendant ran into the rear of plaintiff's vehicle which had stopped ahead of her. *Haynes v. Busby*, 106.

§ 58. Negligence in Turning

Defendant's evidence would support but not compel a finding that she was negligent in turning from a direct line without first seeing that the movement could be made in safety. *Hudgens v. Goins*, 203.

§ 59. Entering Highway

Evidence was sufficient to be submitted to the jury on issue of defendant's negligence in striking an automobile which had entered the highway in front of defendant's car from a servient street. *Murrell v. Jennings*, 658.

§ 62. Striking Pedestrians

Evidence was insufficient to be submitted to the jury on the issue of automobile driver's negligence in striking a pedestrian. *Thompson v. Coble*, 231.

§ 73. Nonsuit on Ground of Contributory Negligence

Plaintiff's evidence did not show him contributorily negligent as a matter of law where defendant collided with the rear end of plaintiff's car as he had completed backing out of a parking space. *White v. Reilly*, 331.

§ 80. Contributory Negligence in Hitting Turning Vehicle

Trial court properly submitted issue of contributory negligence of driver of left turning automobile which was struck by defendant's automobile while he was attempting to pass plaintiff's vehicle. *Barfield v. Fortine*, 178.

§ 87. Intervening Negligence

Automobile driver's negligence in causing a collision with another automobile was not a proximate cause of injuries suffered by plaintiff when he was struck by a third vehicle while directing traffic at the scene of the collision. *McNair v. Boyette*, 69.

§ 89. Sufficiency of Evidence of Last Clear Chance

Doctrine of last clear chance was properly submitted to the jury in an action by a pedestrian to recover for personal injuries received when struck by defendant's automobile while attempting to cross the highway. *Harrison v. Lewis*, 26.

AUTOMOBILES — Continued

§ 90. Instructions in Automobile Accident Cases

Evidence did not support instruction on careless and reckless driving. *Haynes v. Busby*, 106.

Trial court erred in instructing on contributory negligence when it stated the law was conflicting and that the Supreme Court had held both ways. *Maness v. Bullins*, 473.

§ 94. Contributory Negligence of Guest or Passenger

Plaintiff was contributorily negligent as a matter of law in riding in an automobile operated by an intoxicated driver. *Wardrick v. Davis*, 261.

§ 119. Prosecutions for Reckless Driving

Defendant's motion for nonsuit in prosecution for reckless driving was properly overruled where evidence tended to show defendant was traveling 70 m.p.h. in 45 m.p.h. zone, and that defendant suddenly braked and then accelerated his engine, causing the car to "fishtail." *S. v. Floyd*, 438.

§ 121. "Driving" within Purview of G.S. 20-138

"Driving" when used in statutes prohibiting the operation of a motor vehicle while under the influence of intoxicating liquor is construed as requiring that the vehicle be in motion. *S. v. Carter*, 391.

§ 126. Competency of Evidence in Prosecutions Under G.S. 20-138

Results of breathalyzer test are admissible only where State shows that test was administered according to methods approved by State Board of Health and by individual possessing permit issued by State Board. *S. v. Chavis*, 566; *S. v. Sherrill*, 590.

Seventy minutes is not such delay as to render result of breathalyzer test inadmissible. *S. v. Sherrill*, 590.

§ 127. Sufficiency of Evidence and Nonsuit in Prosecutions Under G.S. 20-138

Circumstantial evidence was sufficient for jury to find that defendant who was found asleep at the wheel of his car with the motor running was guilty of drunken driving. *S. v. Carter*, 391.

§ 130. Verdict in Prosecutions Under G.S. 20-138

Jury verdict of "guilty of driving automobile under the influence" was insufficient to support judgment against defendant. *S. v. Medlin*, 434.

BANKS AND BANKING

§ 1. Control and Regulation in General

Statute does not require that an applicant bank establish the existence

BURGLARY AND UNLAWFUL BREAKINGS — Continued

§ 8. Sentence and Punishment

Sentence of two years as a youthful offender imposed for six offenses of unlawful entry into coin-operated machines was not excessive. *S. v. Lee*, 234.

§ 10. Prosecutions for Possessing Housebreaking Implements

State's evidence was sufficient to withstand defendant's motion for nonsuit. *S. v. Edwards*, 718.

CHARITIES AND FOUNDATIONS

§ 2. Operation and Appropriation of Funds

Summary judgment was properly entered in favor of a state tuberculosis association in an action by a local tuberculosis association to restrain the state association from soliciting funds in the county. *Tuberculosis Assoc. v. Tuberculosis Assoc.*, 492.

COLLEGES AND UNIVERSITIES

University of N. C. has authority to own and operate a water system for itself and others, and has discretionary authority to set rates it will charge for such services. *University v. Town of Carrboro*, 501.

CONSPIRACY

§ 5. Competency of Evidence

General rule that one spouse is not a competent witness against the other in a criminal prosecution did not apply where wife was tried for conspiracy to murder her husband. *S. v. Robinson*, 362.

§ 6. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to withstand motion for nonsuit in prosecution for conspiracy to commit armed robbery. *S. v. Miller*, 610.

CONSTITUTIONAL LAW

§ 11. Police Power in General

County ordinance prohibiting drive-in motion picture screens from being visible from highways was constitutional. *Variety Theatres v. Cleveland County*, 512.

§ 22. Religious Liberty

Trial court could properly determine that local church had been dissolved and that title to its real property had vested in the parent church organization under a provision of the parent organization's constitution as set forth in its book of order. *Wyche v. Alexander*, 130.

CONSTITUTIONAL LAW — Continued

§ 29. Right to Trial by Duly Constituted Jury

Absence from jury list of names of persons between the ages of 18 and 21 did not constitute systematic exclusion of this age group from jury service. *S. v. Kirby,* 480.

§ 30. Due Process in Trial

Defendant waived his right to assert that he had been denied a speedy trial by reason of the time lapse between his arrest and first trial when he abandoned such contention upon his appeal from the first trial. *S. v. Melton,* 198.

There is no inference of denial of a speedy trial by the delay between April 1971 appellate court opinion granting defendant a new trial and his trial in November 1971. *Ibid.*

Denial of free transcripts to indigent defendant is not error where alternative devices are available to defendant. *S. v. Miller,* 610.

§ 32. Right to Counsel

Trial court properly denied defendant's motion made at the close of all the evidence to dismiss his court-appointed counsel. *S. v. Wooten,* 193.

Trial judge did not err in concluding after voir dire that defendant properly waived constitutional rights to counsel. *S. v. McCray,* 373.

§ 37. Waiver of Constitutional Guaranties

Defendant could not claim unreasonable search and seizure after he voluntarily consented to search of premises. *S. v. McCray,* 373.

CONTEMPT OF COURT

§ 5. Orders to Show Cause

Notice and hearing were required in order for the court to hold a person in contempt for perjury committed in a bond forfeiture hearing held three weeks previously. *In re Edison,* 354.

CONTRACTS

§ 7. Contracts in Restraint of Trade

Contract wherein plaintiff leased his quarry to defendant who agreed to sell stone to plaintiff at a specified price and to others at a higher price violated state and federal antitrust laws. *Rose v. Materials Co.,* 695.

§ 21. Performance, Substantial Performance and Breach

Defendant insurance company was not entitled to terminate unilaterally its contract to accept credit insurance business generated by plaintiff. *Resources, Inc. v. Insurance Co.,* 634.

CONTRACTS — Continued

§ 27. Sufficiency of Evidence and Nonsuit

Evidence supported findings by trial court that defendant breached a contract with plaintiff by refusing to redeem trading stamps sold to plaintiff grocer. *Piggly Wiggly v. Sales Co.*, 411.

§ 28. Instructions

Judge's failure to instruct as to time being of the essence on one issue and his confusing instruction as to time being of the essence on another issue constituted prejudicial error. *Gelder & Associates v. Insurance Co.*, 686.

§ 31. Interference with Contractual Rights by Third Persons

A power company is not liable for malicious interference with plaintiff's contract of employment by reason of the termination of his employment at will after the power company advised plaintiff's employer that plaintiff could no longer work on its power lines. *Snyder v. Power Co.*, 211.

CRIMINAL LAW

§ 9. Aiders and Abettors

Court did not err in leaving question of whether witness was an accomplice to the jury. *S. v. Miller*, 610.

§ 11. Accessories After the Fact

State's evidence was sufficient to sustain defendant's conviction of being an accessory after the fact of larceny of copper wire. *S. v. Chaney*, 166.

§ 18. Jurisdiction on Appeals to Superior Court

Failure of district court to sign the judgment in a misdemeanor case did not deprive superior court of jurisdiction to try defendant upon his appeal from that court. *S. v. Oakley*, 224.

§ 23. Plea of Guilty

Defendant's plea of guilty waived all right to question the legality of a search without a warrant. *S. v. Hegler*, 51.

There is no merit in defendant's contention that his plea of guilty of second degree murder was invalid because the indictment under which he entered his plea was based on a statute involving the death penalty. *Ibid.*

Defendant's guilty plea not rendered invalid where court failed to inform defendant that he could be subject to a fine as well as to imprisonment. *S. v. Barnes*, 280.

Defendant is not precluded by his plea of guilty from claiming insufficiency of indictment. *S. v. Harrington*, 602.

CRIMINAL LAW — Continued

Failure of judge to find plea of guilty freely and understandingly entered is harmless error where sentence imposed upon plea of guilty runs concurrently with another sentence validly imposed. *S. v. Baxley*, 544.

§ 26. Plea of Former Jeopardy

Defendant was not subjected to double jeopardy where he was charged with breaking and entering and larceny of personal property, although both offenses arose out of the same transaction. *S. v. Caldwell*, 342.

Former conviction by a court without jurisdiction will not support a plea of former jeopardy. *S. v. Price*, 599.

§ 42. Articles and Clothing Connected with the Crime

Stolen television set and vacuum cleaner, and a toaster found on the floor of a burglarized store, were sufficiently identified for admission in evidence. *S. v. Phillips*, 74.

Defendant cannot contend that burglary tools are improperly identified where the tools were seized and tagged at the time of arrest and identified by arresting officers as they were introduced into evidence. *S. v. Brooks*, 367.

Trial court properly excluded as exhibits clothing given by defendant to police on morning after the shooting where there was no showing that the clothing in question was the same clothing worn by defendant at time of the shooting. *S. v. Mitchell*, 431.

Nonexpert could testify as to fact of bloodstains. *S. v. Stimpson*, 606.

§ 43. Maps and Photographs

Admission of pornographic movies for purpose of corroboration was not prejudicial. *S. v. Mizelle*, 583.

§ 51. Qualification of Experts

Trial court's failure specifically to find witness an expert before he gave opinion testimony did not constitute error where there was plenary evidence that the witness was fully experienced in his field. *S. v. Tessenar*, 424.

§ 60. Fingerprint Evidence

Fingerprint evidence was sufficient for the jury in prosecution for breaking and entering and larceny. *S. v. Phillips*, 74.

§ 66. Evidence of Identity by Sight

Robbery victims' in-court identifications of defendants were not tainted or rendered inadmissible by reason of their having viewed and identified defendants at the scene of defendants' arrest while defendants were unrepresented by counsel. *S. v. Westry*, 1.

CRIMINAL LAW — Continued

Trial court did not err in denying counsel for one defendant the right to cross-examine a State's witness during a voir dire to determine whether the witness' identification of the other defendants was tainted by out-of-court identification procedures. *Ibid.*

In-court identification of defendant was proper when that identification was based entirely on the witness's observation of defendant at the scene of the robbery. *S. v. Reaves*, 476.

In-court identification of defendant was proper. *S. v. Miller*, 610; *S. v. Hailstock*, 556.

§ 73. Hearsay Testimony

Testimony of assertions of third persons is competent as exception to the hearsay rule for purpose of showing state of mind of the witness in consequence of such assertions but not for the purpose of proving the matters asserted. *S. v. Brooks*, 367.

Police officer could properly testify to what he overheard defendant say while defendant was making a telephone call after he had been taken into custody. *S. v. McCray*, 373.

§ 74. Confessions

Permitting officer to whom it was given to read defendant's confession to the jury did not constitute prejudicial error. *S. v. Caldwell*, 342.

§ 75. Voluntariness and Admissibility of Confessions

Defendant's statement to a deputy sheriff that he had never been in the burglarized store was an exculpatory statement, not an admission, and testimony of the statement was properly admitted in evidence even though defendant had not executed a written waiver of counsel as required by former statute. *S. v. Phillips*, 74.

Incriminating statements made voluntarily and not as the result of custodial interrogation are admissible though Miranda warnings were not given. *S. v. Murphy*, 420.

Defendant's volunteered statement made before arrest that he was "the man who did it" was admissible. *S. v. Tessenar*, 424.

§ 76. Determination of Admissibility of Confessions

Trial court's determination that defendant's in-custody statement was admissible was supported by the evidence. *S. v. Lassiter*, 265.

The admissibility of a confession is for the judge to determine unassisted by the jury. *S. v. Caldwell*, 342.

Trial court's findings with respect to voluntariness of confessions are conclusive on appeal when supported by competent evidence. *Ibid.*

§ 77. Admissions and Declarations

Declarations of prisoner made after criminal act has been committed in excuse or explanation and at his own instance will not be received in evidence unless they constitute part of the res gestae. *S. v. Mitchell*, 431.

CRIMINAL LAW — Continued

§ 84. Evidence Obtained by Unlawful Means

Defendant's plea of guilty waived all right to question the legality of a search without a warrant. *S. v. Hegler,* 51.

Search of defendant at scene of his arrest for misdemeanor was unlawful where arresting officers knew a warrant had been issued but did not have warrant in their possession. *S. v. Robinson,* 155.

The trial court did not err in failing to conduct a *voir dire* hearing on the admissibility of evidence which defendant moved to suppress where defendant's challenge to the evidence was based on the sufficiency of the affidavit in support of a search warrant. *State v. Altman,* 257.

Defendant was not entitled to hearing before trial on his motion to suppress evidence obtained from an allegedly unlawful search. *S. v. Thompson,* 416.

Evidence of burglary tools was erroneously admitted where evidence was obtained from warrantless search not made incident to an arrest. *S. v. Allen,* 670.

§ 86. Credibility of Defendant and Parties Interested

Verdict of guilty constitutes a conviction for purposes of impeachment even though judgment has not been entered on such verdict. *S. v. Bandy,* 188.

§ 88. Cross-Examination

Trial court did not err in denying counsel for one defendant the right to cross-examine a State's witness during a *voir dire* to determine whether the witness' identification of the other defendants was tainted by out-of-court identification procedures. *S. v. Westry,* 1.

§ 89. Credibility of Witnesses

Trial court did not err in including defendant's prior criminal record in its instructions without instructing the jury to consider it only for the specific purpose of impeachment. *S. v. Richards,* 163.

§ 91. Continuance

Motion for continuance based on a constitutional right presents a question of law, and the order of the court is reviewable. *S. v. Dameron,* 84.

Trial court did not violate defendant's constitutional right to a reasonable time to prepare his defense when it denied his motion for continuance made on ground that the State had violated a court order relating to defendant's right to examine the State's witnesses before trial. *Ibid.*

Trial court did not err in denial of defendant's motion for continuance made on the ground that defendant's wife was ill. *S. v. Roberts,* 237.

Motion for recess is addressed to judge's discretion. *S. v. Hailstock,* 556.

CRIMINAL LAW — Continued

§ 92. Consolidation

Court did not abuse discretion in conspiracy prosecution in consolidating defendants' cases for trial. *S. v. Miller*, 610.

§ 98. Presence of Defendant

Defendants who were tried "in a grey shirt and grey trousers" were not required to stand trial in prison clothes where they refused to accept the State's offer to return to them the clothes they had on when arrested or to obtain other attire. *S. v. Westry*, 1.

§ 99. Expression of Opinion by Court

Trial court did not express an opinion by asking a witness questions as to how the prosecuting witness received acid burns. *S. v. Howard*, 148.

Trial court's questions to a witness came within the rule of clarification. *S. v. Chaney*, 166; *S. v. Wooten*, 193.

Judge committed prejudicial error in sustaining objections during cross-examination of State's witnesses and interposing his own objections and questioning the State's witnesses with respect to breathalyzer test. *S. v. Medlin*, 434.

Judge's instructions to defendant about where to place pistol and how to stand during courtroom demonstration did not constitute expression of opinion. *S. v. Brooks*, 367.

Trial court expressed an opinion in questioning jurors to determine their views on capital punishment. *S. v. McSwain*, 675.

§ 102. Argument and Conduct of Counsel or Solicitor

It was not error for the solicitor to urge the jury to believe part of the testimony of the State's main witness and to disbelieve other parts thereof. *S. v. Chaney*, 166.

§ 103. Function of Jury

It is within the province of the jury to resolve conflicts between witnesses' testimony. *S. v. McSwain*, 293.

§ 106. Sufficiency of Evidence

Where there is evidence outside defendant's confession that crimes have been committed by someone, defendant's confession is sufficient to sustain the jury's finding that he is the perpetrator of the crimes charged. *S. v. Thomas*, 289.

§ 111. Form and Sufficiency of Instructions

Trial court did not err in refusing to instruct jury as to result of their finding defendant in murder prosecution not guilty by reason of insanity. *S. v. McSwain*, 675.

CRIMINAL LAW — Continued

§ 112. Instructions on Burden of Proof and Presumptions

Trial court's instructions on aiding and abetting and felonious intent were free from prejudicial error. *S. v. Westry*, 1.

Instruction in which "reasonable doubt" was defined as a "possibility of innocence" did not constitute error. *S. v. Chaney*, 166.

§ 113. Statement of Evidence and Application of Law Thereto

Where charge fully instructs jury on all substantive features of the case, defines and applies the law thereto, and states the contentions of the parties, a party desiring further instructions must tender request therefor. *S. v. Floyd*, 438.

Special instructions on corroborative evidence must be requested. *S. v. Mizelle*, 583.

Instruction on alibi is required without necessity of request for special instructions. *S. v. Stewart*, 528.

§ 117. Charge on Credibility of Witness

Absent a request, the trial court is not required to charge on the weight and credibility of an accomplice's testimony. *S. v. Wooten*, 193.

Trial judge did not err in instructing on credibility of defendant. *S. v. Sherrill*, 590.

§ 122. Additional Instructions

Trial court did not err in giving jury additional instructions after jury announced that it had not agreed on a unanimous verdict. *S. v. Lassiter*, 265.

§ 124. Sufficiency of Verdict

If the jury undertakes to spell out its verdict without specific reference to the charge, it is essential that the spelling be correct. *S. v. Medlin*, 434.

§ 128. Discretionary Power of Trial Court to Set Aside Verdict and Order Mistrial

Trial court properly denied motion for mistrial made on ground that defendant was prejudiced by questions asked him on cross-examination. *S. v. Daye*, 233.

Motion for mistrial after verdict and judgment comes too late. *Ibid.*

§ 138. Severity of Sentence

Trial court, in hearing evidence after defendant entered a plea of guilty of second degree murder, did not err in the admission of evidence of defendant's prior record. *S. v. Hegler*, 51.

Superior court could impose a greater sentence than that imposed in district court. *S. v. Oakley*, 224.

CRIMINAL LAW — Continued

A defendant convicted of the offense of possession of marijuana committed prior to the effective date of the Controlled Substances Act is not entitled to the benefit of the more lenient punishment provisions of that Act. *S. v. Robertson*, 223; *S. v. Oxendine*, 222.

Trial judge acted in the exercise of his discretion in imposing an active sentence for felonious escape and did not hold that an active sentence was required as a matter of law. *S. v. Mackey*, 291.

§ 140. Concurrent Sentences

Failure of judge to find plea of guilty freely and understandingly entered is harmless error where sentence imposed upon plea of guilty runs concurrently with another sentence validly imposed. *S. v. Baxley*, 544.

§ 142. Suspended Judgments

Where prayer for judgment is continued and no conditions are imposed, there is no judgment and no appeal will lie. *S. v. Caldwell*, 342.

§ 145. Costs

The "facilities fee" assessed as part of the costs in criminal cases which were pending at time the district court was established in the county must be remitted to the State for the support of the General Court of Justice. *Blackwell v. Montague*, 564.

§ 148. Judgments Appealable

Appeal does not lie from refusal to grant a new trial for newly discovered evidence. *S. v. Gordon*, 141.

§ 154. Case on Appeal

Written statement by solicitor that service of the case on appeal was accepted "in apt time" was ineffective. *S. v. Kirby*, 480.

§ 155.5 Docketing of Record in Court of Appeals

Appeal is subject to dismissal for failure to docket on time. *S. v. Thompson*, 243; *S. v. Lee*, 234; *S. v. Oxendine*, 222.

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted

Contention that trial court erred in allowing an amendment to the warrant prior to defendant's trial de novo in superior court cannot be considered where it does not appear in the record as stipulated by the solicitor what amendment, if any, was actually made to the warrant in superior court. *S. v. Kirby*, 480.

§ 162. Objections, Exceptions and Assignments of Error to Evidence, Motions to Strike

General motion to strike will be denied when some of the testimony objected to is clearly competent. *S. v. McCray*, 373.

CRIMINAL LAW — Continued

Exclusion of testimony cannot be held prejudicial when record fails to show what excluded testimony would have been. *S. v. Mitchell,* 431.

§ 163. Assignments of Error to Charge

Assignment of error that the court erred in failing to explain the law arising on the evidence is broadside and ineffectual. *S. v. Riggsbee,* 218.

§ 164. Assignments of Error to Refusal of Motion to Nonsuit

Sufficiency of evidence could be reviewed on appeal although defendant did not move for nonsuit in trial court. *S. v. Hamlin,* 561.

§ 166. The Brief

Appeal is subject to dismissal for failure to file a brief when due. *S. v. Thompson,* 243.

No brief or written argument will be received after a case has been argued or submitted except upon leave granted in open court after notice to opposing counsel. *S. v. Brooks,* 367.

§ 168. Harmless and Prejudicial Error in Instructions

Any error resulting from the court's reading of the armed robbery statute to the jury, including the punishment provision, was not prejudicial. *S. v. Westry,* 1.

Trial court's omission of one element of crime of armed robbery in one paragraph of the charge was not prejudicial error. *S. v. Richards,* 163.

Trial court's mistaken reference to the State's witness in charging about one defendant and his alibi was not prejudicial error. *Ibid.*

Court on appeal must consider the trial court's entire charge to the jury contextually in determining whether it contains prejudicial error. *S. v. Robinson,* 362.

New trial will not be awarded for error in charge which is favorable or not prejudicial to defendant. *S. v. Stimpson,* 606; *S. v. McBride,* 742.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Error, if any, in admission of testimony objected to by defendant was cured when similar testimony was given subsequently without objection. *S. v. Baxley,* 544.

Where defendant did not object to testimony of one witness, he could not object to identical testimony subsequently given by another witness. *S. v. Miller,* 610.

CRIMINAL LAW — Continued

§ 175. Review of Discretionary Orders

Motion for recess is addressed to judge's discretion. *S. v. Hailstock*, 556.

DAMAGES

§ 11. Punitive Damages

The evidence was insufficient to show that plaintiff was injured by the willful and wanton conduct of defendant driver, and the trial court properly refused to submit an issue as to punitive damages. *Roberts v. Davis*, 284.

DECLARATORY JUDGMENT ACT

§ 2. Proceedings

Complaint need not make specific reference to the Declaratory Judgment Act. *Langdon v. Hurdle*, 158.

DEEDS

§ 7. Acceptance

Where a deed is executed and recorded, it is presumed that grantee therein will accept the deed made for his benefit. *Williams v. Herring*, 642.

§ 12. Estates Created by Construction of the Instrument in General

Deed vested plaintiff with a determinable fee and trial court properly held that property in question automatically reverted to defendant. *Board of Education v. Carr*, 690.

DESCENT AND DISTRIBUTION

§ 13. Advancements

Trial court's finding that sums of money given to tenant were advancements was supported by competent evidence. *Lassiter v. Lassiter*, 588.

DIVORCE AND ALIMONY

§ 4.5 Connivance

Connivance is a defense not only to a plea of adultery but also to other charges of sexual misconduct. *Greene v. Greene*, 314.

Evidence was sufficient to support the court's findings that defendant husband was guilty of connivance in the sexual misconduct of plaintiff wife. *Ibid.*

§ 13. Separation for Statutory Period as Ground for Divorce

Abandonment is a valid defense in action for absolute divorce on ground of one year's separation. *Rupert v. Rupert*, 730.

DIVORCE AND ALIMONY — Continued

Question of abandonment in action for absolute divorce was properly submitted to jury. *Ibid.*

§ 14. Adultery as Ground for Divorce

Trial court in an action for alimony without divorce properly struck admissions of plaintiff on cross-examination that she had committed adultery during the marriage. *Greene v. Greene*, 314.

§ 16. Alimony without Divorce

Trial court erred in awarding permanent alimony to the wife and ordering the husband to pay counsel fees of the wife absent sufficient findings that the wife is the dependent spouse. *Smith v. Smith*, 180.

Alimony is not payable when an issue of adultery pleaded in bar thereto is found against the spouse seeking alimony. *Greene v. Greene*, 314.

§ 17. Alimony Upon Divorce from Bed and Board

Evidence supported judgment granting the wife a divorce from bed and board, permanent alimony and counsel fees. *Fore v. Fore*, 226.

To obtain award of permanent alimony, plaintiff need not show that she did not have sufficient means whereon to subsisit during prosecution of the suit and to defray the necessary expenses thereof. *Ibid.*

§ 18. Alimony and Subsistence Pendente Lite

Trial court erred in awarding alimony pendente lite to the wife absent a finding that the wife is entitled to the relief demanded in the action in which the application for alimony pendente lite was made. *Whitney v. Whitney*, 151.

Trial court erred in awarding plaintiff alimony pendente lite and counsel fees without making findings that plaintiff was a dependent spouse. *Kornegay v. Kornegay*, 751.

§ 20. Decree of Divorce as Affecting Right to Alimony

Counsel fees may be awarded for services rendered to dependent spouse subsequent to an absolute divorce. *Shore v. Shore*, 629.

§ 22. Jurisdiction and Procedure in Actions for Child Custody and Support

Trial court erred in finding that children of the parties who were 18 years of age were either minor or dependent children of the husband. *Choate v. Choate*, 89.

Where order had been entered awarding the wife alimony pendente lite and child custody and support, permanent alimony was only question before the court when wife's action for alimony without divorce came on for trial, and trial court could not modify the previous child custody and support order absent a showing of changed circumstances. *Smith v. Smith*, 226.

DIVORCE AND ALIMONY — Continued

§ 23. Child Support

Trial court did not base amount of child support on defendant's capacity to earn rather than his actual earnings. *Faggart v. Faggart,* 214.

§ 24. Child Custody

Finding that plaintiff mother had been guilty of an indiscretion did not prohibit the trial court from awarding child custody to the mother. *Savage v. Savage,* 123.

Whether the mother abandoned the father is not controlling on the question of child custody. *Kenney v. Kenney,* 665.

Improvement in the mother's physical and emotional condition was a sufficient change in circumstances to justfy changing the custody of two children from the father to the mother. *Ibid.*

EMBEZZLEMENT

§ 6. Sufficiency of Evidence and Nonsuit

Defendant's motion for nonsuit was properly overruled where evidence tended to show that defendant who was responsible for depositing funds of his employer failed to do so but locked up funds in room on employer's premises and funds disappeared from the room though defendant had the only key and the room had not been broken into. *S. v. Smithey,* 427.

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking"

Construction of a median strip on the east-west highway abutting the front of plaintiffs' property so as to prevent direct access to and from the westbound lanes, and dead-ending one of two abutting north-south streets at the intersection with the highway were legitimate exercises of the police power for which plaintiffs are not entitled to compensation. *Realty Corp. v. Highway Comm.,* 704.

§ 6. Evidence of Value

Appraiser was properly allowed to state why he considered the best use of the property to be residential. *Highway Comm. v. Cemetery, Inc.,* 727.

Trial court properly admitted evidence of purchase price of entire property where changes in the nature of other property in the vicinity occurred after the taking. *Ibid.*

ESTATES

§ 4. Termination of Life Estates

Life tenant who allows property to be sold to satisfy an encumbrance cannot acquire title adverse to the remaindermen by purchasing at the foreclosure sale. *Thompson v. Watkins,* 208.

EVIDENCE

§ 12. Communication Between Husband and Wife

Trial court in an action for alimony without divorce properly struck admissions of plaintiff on cross-examination that she had committed adultery during the marriage. *Greene v. Greene,* 314.

§ 14. Communications Between Physician and Patient

Trial judge properly refused to find that privileged testimony sought to be elicited from a psychiatrist was necessary to a proper administration of justice. *Greene v. Greene,* 314.

§ 19. Evidence of Similar Facts and Transactions

Trial court did not err in exclusion of testimony by defendant's witness that he went to the accident scene the day after the accident and observed glass all over the place and spots of blood around the white line. *Vanhoy v. Phillips,* 102.

§ 32. Parol Evidence Affecting Writings

Parol evidence rule did not preclude plaintiffs' evidence that defendant agreed orally on a sales price of $275 per acre for a guaranteed 400 acres and agreed orally to refund $275 per acre for any shortage of acreage, although a written memorandum stated the sales price was $110,000 and that the property contained 400 acres more or less. *Hoots v. Calaway,* 346.

§ 33. Hearsay Evidence

Medical opinion concerning health of insured in the form of a letter was hearsay evidence which should have been excluded. *Jenkins v. Insurance Co.,* 571.

§ 44. Nonexpert Opinion Evidence as to Health

Nonexpert witnesses were properly allowed to describe the state of plaintiff's health and to compare it with that existing at a prior time. *Kenney v. Kenney,* 665.

§ 45. Nonexpert Opinion Evidence as to Value

Weight to be given nonexpert plaintiff's opinion as to fair market value of his automobile before and after the accident was for the jury. *White v. Reilly,* 331.

§ 47. Expert Testimony as Invasion of Province of Jury

Testimony by an expert in structural engineering that faulty construction caused sagging of floors and certain cracking in a house did not invade the province of the jury. *Lindstrom v. Chesnutt,* 15.

EXECUTORS AND ADMINISTRATORS

§ 24. Right of Action Against Estate for Personal Services Rendered Decedent

Plaintiff's complaint was sufficient to allege cause of action in quantum meruit. *Duffell v. Weeks,* 569.

FORGERY

§ 2. Prosecution

Where first count in indictment charging forgery set forth the contents of the check with exactitude, reference to the check in the second count charging uttering as "Same as above" was sufficient. *S. v. Russell,* 594.

FRAUD

§ 12. Sufficiency of Evidence and Nonsuit

Plaintiffs failed to produce evidence sufficient to support finding of fraud. *Christie v. Powell,* 508.

HOMICIDE

§ 15. Competency of Evidence

Nonexpert could testify as to fact of bloodstains. *S. v. Stimpson,* 606.

§ 20. Demonstrative Evidence

Trial court properly excluded as exhibits clothing given by defendant to police on morning after the shooting where there was no showing that the clothing in question was the same clothing worn by defendant at time of the shooting. *S. v. Mitchell,* 431.

Photograph depicting body of deceased was competent for the purpose of illustrating witnesses' testimony. *S. v. Tessenar,* 424.

§ 21. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to withstand motion to nonsuit in prosecution for involuntary manslaughter. *S. v. Jones,* 537.

Evidence was sufficient to sustain verdict of guilty of involuntary manslaughter. *S. v. Robinson,* 542.

State's evidence did not establish that defendant acted in self-defense as a matter of law and was sufficient to require submission of the case to the jury on the charge of second degree murder. *S. v. Barr,* 116.

Trial court erred in not granting defendant's motion for nonsuit when the evidence, considered in the light most favorable to the State, tended to show an accidental shooting. *S. v. Holshouser,* 469.

§ 28. Instructions on Defenses

Trial court's instruction in a manslaughter case that to claim a right of self-defense defendant must be in a place where he had a right to be and a defendant living in a woman's apartment in adultery had no right to be there was improper. *S. v. Taylor,* 303.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

Trial court did not err in failing to submit an issue of involuntary manslaughter to the jury. *S. v. Dameron,* 84.

INFANTS — Continued

§ 9. Hearing and Grounds for Awarding Custody of Minor

Trial court erred in finding that children of the parties who were 18 years of age were either minor or dependent children of the husband. *Choate v. Choate*, 89.

Whether the mother abandoned the father is not controlling on the question of child custody. *Kenney v. Kenney*, 665.

Improvement in the mother's physical and emotional condition was a sufficient change in circumstances to justify changing the custody of two children from the father to the mother. *Ibid.*

INJUNCTIONS

§ 4. Injunction for Particular Purposes

State may obtain injunctive relief against pyramid, chain and referral schemes. *Morgan v. Dare To Be Great*, 275.

§ 12. Issuance of Temporary Orders

Affidavits may be considered by the trial court in a show cause hearing for a preliminary injunction. *Morgan v. Dare To Be Great*, 275.

§ 13. Grounds for Issuance of Temporary Orders

Evidence was sufficient to support preliminary injunction prohibiting defendant insurance company from refusing to accept credit insurance business generated by plaintiff pursuant to a contract between the parties. *Resources, Inc. v. Insurance Co.*, 634.

INSURANCE

§ 2. Brokers and Agents

Defendant insurance company was not entitled to terminate unilaterally its contract to accept credit insurance business generated by plaintiff. *Resources, Inc. v. Insurance Co.*, 634.

§ 4. Binders

Extension of credit to insured for the insurance premium does not destroy the effectiveness of a binder. *Mayo v. Casualty Co.*, 309.

Insurance agent's contract providing for notice to be given the company by an agent on or before the date on which the insurance is effective places a duty on the agent to give notice after he has already committed the company to an insurance contract. *Ibid.*

§ 5. Insurable Interest

The named insured in automobile liability policy had insurable interest in vehicle in question. *Rea v. Casualty Co.*, 620.

INSURANCE — Continued

§ 8. Waiver

Insurer who insures property notwithstanding knowledge of facts then existing which would defeat contract of insurance will be held to have waived policy provision so far as it relates to the then existing conditions. *Rea v. Casualty Co.*, 620.

§ 29. Right to Proceeds

Evidence was insufficient to support trial court's finding that employer paid or was obligated to pay employee's medical bills. *Insurance Co. v. Keith*, 551.

§ 68. Automobile Personal Injury Policies

Plaintiff had not incurred dental expenses within a year after the accident within the meaning of a medical payments provision where plaintiff and a dentist had agreed that certain dental work would be performed in the future but plaintiff was not legally obligated to pay the dentist. *Atkins v. Insurance Co.*, 79.

Plaintiff's fall into a grease pit at a service station after she had parked her car over the grease pit did not occur while she was "in or upon or entering into or alighting from" the car within the meaning of the medical payments provision of her insurance policy. *Lautenschleger v. Indemnity Co.*, 579.

§ 87. "Omnibus" Clause; Drivers Insured

Directed verdict for defendant insurance company was proper where plaintiff failed to prove that husband driver was an insured under provisions of policy issued wife by defendant insurance company. *Marlowe v. Insurance Co.*, 456.

Officer and employee of corporation were insured drivers within meaning of omnibus clause of corporation's automobile liability policy. *Rea v. Casualty Co.*, 620.

INTOXICATING LIQUOR

§ 2. Beer and Wine Licenses

Evidence was sufficient to support a finding that licensee allowed intoxicated person to consume beer on licensed premises. *Bergos v. Board of Alcoholic Control*, 169.

§ 13. Sufficiency of Evidence and Nonsuit

Evidence was insufficient to support verdict of guilty of possession of bootleg liquor. *S. v. Hamlin*, 561.

JUDGMENTS

§ 2. Time and Place of Rendition

Defendant was bound where judgment stated that counsel for plaintiff and defendant had agreed that judgment could be signed out of term. *Rupert v. Rupert*, 730.

JUDGMENTS — Continued

§ 3. Conformity to Verdict and Pleadings

Defendant was not prejudiced where judgment failed specifically to deny his prayer for absolute divorce. *Rupert v. Rupert,* 730.

§ 25. Setting Aside Judgments—What Conduct Justifies Relief

Defendant was not entitled to have default judgment set aside on ground of excusable neglect where defendant delivered suit papers to his employer who thereafter falsely told defendant the papers had been delivered to an attorney and answer had been filed. *Equipment, Inc. v. Lipscomb,* 120.

§ 37. Matters Concluded by Judgment

Summary judgment entered in favor of subcontractors who were additional parties defendant effectively foreclosed the subcontractors from asserting in the future any claims against the original defendants arising upon matters alleged in the pleadings. *Loving Co. v. Latham,* 441.

§ 40. Conclusiveness of Judgment as of Nonsuit

Although two actions brought by plaintiffs against defendant arose out of the same foreclosure sale, the second suit was not based upon the same claim as the first, and the trial court erred in dismissing the second action on the ground that plaintiff had not paid the costs of the first action. *Britt v. Allen,* 196.

§ 52. Assignment of Judgments

Attempted assignment of a judgment already paid and satisfied of record is of no effect. *Houck v. Overcash,* 581.

JURY

§ 7. Challenges

Absence from jury list of names of persons between the ages of 18 and 21 did not constitute systematic exclusion of this age group from jury service. *S. v. Kirby* 480.

LABORERS' AND MATERIALMEN'S LIENS

§ 8. Enforcement of Lien

Plaintiff could not enforce against a home owner a lien for electrical materials and services furnished in the construction of the home where the evidence showed that plaintiff's contract was with the general contractor employed to build the home. *Electric Co. v. Robinson,* 201.

LANDLORD AND TENANT

§ 19. Rent and Actions Therefor

Trial court erred in entry of summary judgment in favor of defendants on their counterclaim for rents allegedly due. *Tomlinson v. Brewer,* 142.

LARCENY

§ 7. Sufficiency of Evidence and Nonsuit

Fingerprint evidence was sufficient for jury in prosecution for larceny resulting from a breaking and entering. *S. v. Phillips*, 74.

State's evidence was sufficient to sustain defendant's conviction of being an accessory after the fact of larceny of copper wire. *S. v. Chaney*, 166.

State's evidence was sufficient to take case to jury where it tended to show stolen television sets were found in defendant's car. *S. v. McCuien*, 296.

State's evidence was sufficient to withstand nonsuit where it tended to show defendant admitted having stolen goods found in his home. *S. v. McCray*, 373.

§ 8. Instructions

Instruction on doctrine of possession of recently stolen property was error. *S. v. Stewart*, 528.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time from which Statute Begins to Run

Action to recover damages for negligent repair of a furnace transformer and for breach of a warranty in the repair contract was governed by the three-year statute of limitations, not the six-year statute, and the limitation period began to run when the transformer was delivered to the owner's agent, a railroad. *Commercial Union Co. v. Electric Co.*, 406.

An action to recover damages for destruction of a home by a fire allegedly caused by the negligence of defendants in the construction and installation of the heating and cooling system is governed by the six-year statute of limitations. *Sellers v. Refrigerators, Inc.*, 723.

§ 12. Institution of Action and Discontinuance

Although two actions brought by plaintiffs against defendant arose out of the same foreclosure sale, the second suit was not based upon the same claim as the first, and the trial court erred in dismissing the second action on the ground that plaintiff had not paid the costs of the first action. *Britt v. Allen*, 196.

Three year statute of limitations is not tolled by issuance of summons and application for extension of time to file complaint. *Lattimore v. Powell*, 522.

§ 18. Sufficiency of Evidence and Nonsuit

Genuine issue of fact was presented as to when an accident occurred and whether it was barred by the statute of limitations. *Wall v. Flack*, 747.

MASTER AND SERVANT

§ 10. Duration of Employment and Wrongful Discharge

State court has jurisdiction of action brought by meat market managers who are classified as supervisors to recover damages for their discharge because of union membership. *Beasley v. Food Fair*, 323.

Supervisors come within the purview of the statute giving the right to recover damages to any "person" whose continuation of employment has been denied because of union membership. *Ibid.*

§ 13. Interference with Contract of Employment by Third Persons

A power company is not liable for malicious interference with plaintiff's contract of employment by reason of the termination of his employment at will after the power company advised plaintiff's employer that plaintiff could no longer work on its power lines. *Snyder v. Power Co.*, 211.

§ 22. Liability of Contractor to Contractee in Performance of Work by Subcontractor

Trial court properly refused to instruct the jury that the builder-vendor would not be liable for any negligent acts or omissions on the part of the subcontractors who were independent contractors. *Lindstrom v. Chesnutt*, 15.

§ 57. Injuries Compensable Under Workmen's Compensation—Intoxication of Employee

There was sufficient evidence to support a finding by the Industrial Commission that death of a municipal employee whose body was crushed by the packing mechanism of a sanitation truck was not occasioned by intoxication, even though decedent had sufficient alcohol in his body at the time of his death to be intoxicated. *Lassiter v. Town of Chapel Hill*, 98.

§ 62. Injuries on Way to Work Compensable Under Workmen's Compensation

Death of employee who was crushed by the dump body of his employer's truck while warming up the truck preparatory to going to the job site arose out of and in the course of his employment. *Battle v. Electric Co.*, 246.

§ 63. Injuries on the Highway

Deceased employee's fatal automobile accident while returning home on a weekend from his job site in another state did not arise out of and in the course of his employment. *Gay v. Supply Co.*, 240.

§ 66. Pre-Existing Physical Conditions

Evidence supported Industrial Commission's determination that the accident in which plaintiff received acid burns on his left foot did not aggravate or accelerate a pre-existing condition of the right foot so as to necessitate its amputation. *Hudson v. Stevens and Co.*, 190.

MASTER AND SERVANT — Continued

§ 68. Occupational Diseases

Findings by the Industrial Commission were sufficient to support Commission's conclusion that plaintiff was totally incapacitated because of silicosis, notwithstanding medical committee rated plaintiff only 40% disabled. *Mabe v. Granite Corp.*, 353.

If an industrial disease renders an employee actually incapacitated to earn wages, the employer may not ask that a portion of the disability be charged to the employee's advanced age and poor education. *Ibid.*

§ 74. Recovery for Disfigurement

Evidence supported award to plaintiff for injury to her back and for facial and bodily disfigurement. *Grigg v. Pharr Yarns*, 497.

§ 79. Persons Entitled to Payment

Evidence was sufficient to support finding by Industrial Commission that a separation agreement between deceased employee and his wife had been rescinded and that at the time of the husband's death they were living separate and apart for justifiable cause. *Bass v. Mooresville Mills*, 206.

§ 91. Filing of Claim for Workmen's Compensation

Industrial Commission properly dismissed plaintiff's claim for workmen's compensation for lack of jurisdiction where plaintiff failed to file claim within two years. *Barham v. Hosiery Co.*, 519.

§ 97. Disposition of Appeal and Appeal to Supreme Court

Plaintiff waived any irregularity in action of Industrial Commission remanding cause to a deputy commissioner for further hearing when she stipulated as to the questions to be determined at the further hearing. *Grigg v. Pharr Yarns*, 497.

§ 99. Costs and Attorney's Fees

Where both parties appealed to the Full Industrial Commission and plaintiff ultimately prevailed against defendants, Commission erred in taxing half of the costs of that appeal to the plaintiff. *Grigg v. Pharr Yarns*, 497.

Where only plaintiff appealed from an opinion and award of the Industrial Commission, Court of Appeals denied plaintiff's motion that it award additional fees for plaintiff's counsel. *Ibid.*

MONOPOLIES

§ 2. Agreements and Combinations Unlawful

Contract wherein plaintiff leased his quarry to defendant who agreed to sell stone to plaintiff at a specified price and to others at a higher price violated state and federal antitrust laws. *Rose v. Materials Co.*, 695.

MORTGAGES AND DEEDS OF TRUST

§ 1. Mortgages in General

A pre-existing contingent obligation as guarantor on a note is sufficient consideration to support execution of deed of trust to secure performance of the contingent obligation. *Carlisle v. Commodore Corp.*, 650.

§ 2. Purchase-Money Mortgages

The doctrine of instantaneous seizin under a purchase money deed of trust does not override a statutory provision that the owner of the equity of redemption is considered the owner of the real estate for the purpose of assessing taxes. *Powell v. County of Haywood,* 109.

§ 28. Parties Who May Bid in and Purchase Property at Foreclosure Sale

Life tenant who allows property to be sold to satisfy an encumbrance cannot acquire title adverse to the remaindermen by purchasing at the foreclosure sale. *Thompson v. Watkins,* 208.

§ 29. Bids and Rights of Bidders at Foreclosure Sale

Trial court erred in directing trustee in foreclosure proceedings to act without providing for 10 days allowance for filing upset bids after foreclosure sale. *Carlisle v. Commodore Corp.*, 650.

§ 40. Suits to Set Aside Foreclosure

Genuine issue of material fact existed as to whether plaintiffs were in default on a note secured by a deed of trust. *Lowman v. Huffman,* 700.

MUNICIPAL CORPORATIONS

§ 4. Powers of Municipalities in General

University of N. C. has authority to own and operate a water system for itself and others, and has discretionary authority to set rates it will charge for such services. *University v. Town of Carrboro,* 501.

§ 18. Injuries in Public Parks and Playgrounds

Entry of summary judgment was improper in action against city for injury arising out of negligent maintenance of playground equipment. *Rich v. City of Goldsboro,* 534.

§ 21. Injuries in Connection with Sewers and Sewage Disposal

Plaintiff's evidence was insufficient for jury in action to recover damages allegedly sustained when a municipal sewer line became clogged and sewage backed up and flowed into plaintiff's residence. *Johnson v. Winston-Salem,* 400.

§ 22. Contracts

Statute requiring certain contracts of municipal corporations to be in writing did not apply to the purchase of water by the Town of Carrboro from the University of N. C. *University v. Town of Carrboro,* 501.

MUNICIPAL CORPORATIONS — Continued

§ 28. Payment and Enforcement of Assessment or Lien for Public Improvements

Realty company which petitioned the city to grade and pave a street abutting its property was estopped to deny the validity of an assessment lien on its property to pay for the improvements; and a subsequent purchaser taking with notice of the assessment is likewise estopped to deny the validity of the assessment. *Jones v. City of Asheville,* 714.

Purchaser of property was given constructive notice of a city's assessment lien on the property by a card file kept by the city in the office of the register of deeds. *Ibid.*

§ 33. Control, Location and Regulation of Streets

Resolutions of a city council closing portions of a city street were void where adjoining property owners were not notified by registered mail of the hearing to be conducted on the petition for closing. *In re City of Washington,* 505.

§ 42. Actions Against Municipality for Personal Injury

Compliance with city charter requirement that notice of any claim for damages for personal injury be given the governing body of the city within a specified time is a condition precedent to the right to institute action against the city to recover such damages. *Short v. Greensboro,* 135.

Knowledge by some municipal employees of the incident in question did not constitute a waiver by the municipality of a city charter provision requiring that written notice of a tort claim be given to the mayor or board of aldermen. *Johnson v. Winston-Salem,* 400.

NARCOTICS

§ 2. Indictment

Indictment charging sale of narcotics must allege the name of the purchaser. *S. v. Martindale,* 216.

Count in bill of indictment charging possession of LSD was sufficient to support judgment. *S. v. Horton,* 604.

§ 4. Sufficiency of Evidence and Nonsuit

There is sufficient evidence of constructive possession of marijuana by defendant to be submitted to the jury where the marijuana is found in defendant's backyard. *S. v. Summers,* 282.

State's evidence was sufficient to show that defendant had constructive possession of narcotics found in house rented by defendant. *S. v. Hamlet,* 272.

State's evidence was sufficient to support finding that defendant was in possession of heroin and hypodermic needles and syringes found in a bathroom of house occupied by defendant. *S. v. Crouch,* 172.

NARCOTICS — Continued

Evidence that hypodermic needles and syringes were found in close proximity to heroin residue was sufficient to support a finding they were possessed for the purpose of administering habit forming drugs. *Ibid.*

State's evidence was sufficient to withstand nonsuit where it tended to show officers with valid search warrant found defendant and a brown paper bag containing heroin in the bathroom. *S. v. Murphy*, 420.

Defendant's motion for directed verdict in prosecution for possession of marijuana should have been granted. *S. v. Bauler*, 540.

There was no fatal variance between indictment charging possession of mescaline and proof. *S. v. Phillips*, 597.

§ 4.5. Instructions

Trial court erred in its instructions on inference from evidence that heroin was found in house rented by defendant. *S. v. Hamlet*, 272.

§ 5. Verdict and Punishment

A defendant convicted of the offense of possession of marijuana committed prior to the effective date of the Controlled Substances Act is not entitled to the benefit of the more lenient punishment provisions of that Act. *S. v. Robertson*, 223; *S. v. Oxendine*, 222.

NEGLIGENCE

§ 1. Acts and Omissions Constituting Negligence

A violation of the N. C. Building Code is negligence per se. *Lindstrom v. Chesnutt*, 15.

§ 7. Wilful or Wanton Negligence

Evidence was insufficient to support a finding that plaintiff was injured by the willful and wanton negligence of defendant driver when she was allegedly dragged beside defendants' truck while trying to persuade a passenger of the truck to ride with her. *Roberts v. Davis*, 284.

§§ 8, 9. Proximate Cause and Foreseeability

Negligence must be proximate cause of injury, and foreseeability of injury is an essential element of proximate cause. *Long v. Long*, 525.

§ 10. Concurring and Intervening Negligence

Test of intervening negligence. *McNair v. Boyette*, 69.

§ 12. Last Clear Chance

Doctrine of last clear chance must be pleaded, and plaintiff has the burden of proof on such issue. *Harrison v. Lewis*, 26.

NEGLIGENCE — Continued

§ 29. Sufficiency of Evidence

Evidence of the original defendants was insufficient to support their claim that the third party defendant was guilty of joint and concurring negligence in improperly installing the furnace system in a house so that it vibrated and caused damage to the house. *Lindstrom v. Chesnutt,* 15.

§ 36. Nonsuit for Intervening Negligence

Automobile driver's negligence in causing a collision with another automobile was not a proximate cause of injuries suffered by plaintiff when he was struck by a third vehicle while directing traffic at the scene of the collision. *McNair v. Boyette,* 69.

§ 37. Instructions on Negligence

Trial court properly instructed the jury that the N. C. Residential Building Code does not give building inspectors discretion to permit alternative materials or methods of construction where the Code is specific as to the materials or type of construction required. *Lindstrom v. Chesnutt,* 15.

§ 57. Sufficiency of Evidence and Nonsuit in Actions by Invitees

Operator of a warehouse breached no duty it owed to the driver of a truck delivering merchandise to the warehouse when a wooden pallet the driver was using to gain access to the loading dock fell from under him, and the truck driver was contributorily negligent in failing to use the steps provided by the warehouse operator and in failing to determine whether he could safely use the pallet. *Keith v. Reddick, Inc.,* 94.

Court's instructions were proper in action to recover damages for alleged assault on plaintiff by an employee of a rest home. *Sale v. James,* 238.

PARTIES

§ 2. Parties Plaintiff

Defendant could not assert on appeal that plaintiff had no right to bring action because it is not the real party in interest. *Piggly Wiggly v. Sales Co.,* 411.

PARTNERSHIP

§ 8. Death of Partner

Trial court properly determined that surviving partners were personally liable to the estate of the deceased partner for payments required by the partnership agreement without the partnership assets first having been exhausted. *Langdon v. Hurdle,* 158.

PERJURY

§ 2. Subornation of Perjury

Subornation of perjury consists of the commission of perjury by person suborned and the suborner wilfully procuring or inducing him to do so. *S. v. McBride,* 742.

PERJURY — Continued

Proof of procurement element of offense of subornation of perjury does not require testimony of two witnesses or testimony of one witness and corroborating circumstances. *Ibid.*

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to withstand defendant's motion for nonsuit in subornation action. *S. v. McBride,* 742.

PLEADINGS

§ 37. Issues Raised by the Pleadings and Necessity for Proof

Husband's authority to act as agent for the wife in entering the contract in question will be deemed established where answer signed and sworn to by the wife admitted she was a party to the contract. *Markham v. Johnson,* 139.

PROCESS

§ 16. Service on Nonresident for Negligent Operation of Automobile in this State

Trial judge properly determined that defendant motorist was not a resident of this State and was subject to substituted service on the Commissioner of Motor Vehicles. *Lamb v. McKibbon,* 229.

PUBLIC WELFARE

Fact that lien for aid to permanently and totally disabled was docketed under the married name of the recipient and recipient then owned real property under her former name would not, standing alone, bar enforcement of the lien against such property as a matter of law. *New Hanover County v. Holmes,* 548.

RECEIVERS

§ 12. Priorities and Payment

Attorney's claim for services rendered to an insolvent corporation was not entitled to priority status. *Trust Co. v. Archives,* 186.

REGISTRATION

§ 2. Sufficiency of Registration

Fact that lien for aid to permanently and totally disabled was docketed under the married name of the recipient and recipient then owned real property under her former name would not, standing alone, bar enforcement of the lien against such property as a matter of law. *New Hanover County v. Holmes,* 548.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 1. Nature and Functions

A member of an unincorporated church or religious society is engaged in a joint enterprise and may not recover from the church or religious society for damages sustained through the tortious conduct of another member thereof. *Goard v. Branscom,* 34.

RELIGIOUS SOCIETIES AND CORPORATIONS — Continued

§ 2. Government, Management and Property

Trial court could properly determine that local church had been dissolved and that title to its real property had vested in the parent church organization under a provision of the parent organization's constitution as set forth in its book of order. *Wyche v. Alexander*, 130.

§ 3. Actions

The fact that oil may have been on a church driveway, and the fact that cars were allowed to park on the driveway did not constitute negligence on the part of the church. *Goard v. Branscom*, 34.

ROBBERY

§ 1. Nature and Elements of the Offense

It is not necessary in an armed robbery prosecution to allege or prove the particular value of the property taken, provided the indictment and proof show that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value. *State v. Reaves*, 476.

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence in armed robbery prosecution was sufficient for submission to the jury as to the guilt of all four defendants. *S. v. Westry*, 1.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Any error resulting from the court's reading of the armed robbery statute to the jury, including the punishment provision, was not prejudicial. *S. v. Westry*, 1.

Trial court's omission of one element of crime of armed robbery in one paragraph of the charge was not prejudicial error. *S. v. Richards*, 163.

No error in failure to instruct as to lesser degrees of offense of armed robbery. *S. v. Hailstock*, 556.

Trial court did not err in attempted armed robbery prosecution in failing to instruct on lesser included offenses. *S. v. Mitchell*, 749.

RULES OF CIVIL PROCEDURE

§ 7. Form of Motions

Motion in arrest of judgment should have been denied where the movant failed to state the rule number under which he was proceeding. *Finley v. Finley*, 681.

§ 15. Amended Pleadings

Trial court did not abuse its discretion in denial of defendant's motion to amend his answer to conform to the evidence. *Markham v. Johnson*, 139.

RULES OF CIVIL PROCEDURE — Continued

§ 50. Motion for a Directed Verdict and Judgment NOV

Cause was remanded for entry of judgment on the verdict rendered by the jury where the trial court erred in allowing judgment NOV. *Hoots v. Calaway*, 346.

§ 56. Summary Judgment

An immaterial question of fact does not preclude summary judgment. *Keith v. Reddick, Inc.*, 94.

Summary judgment is proper in negligence cases where it appears that there can be no recovery even if the facts as claimed by plaintiff are true. *McNair v. Boyette*, 69.

An unsworn letter should not be considered by the court in ruling on a motion for summary judgment. *Short v. Greensboro*, 135.

Motion for summary judgment may be granted in negligence cases where moving party shows he is entitled to judgment as a matter of law. *Long v. Long*, 525.

§ 60. Relief from Judgment

Defendant was not entitled to have default judgment set aside on ground of excusable neglect where defendant delivered suit papers to his employer, who thereafter falsely told defendant the papers had been delivered to an attorney and answer had been filed. *Equipment, Inc. v. Lipscomb*, 120.

Plaintiff's motion to vacate summary judgment on ground of excusable neglect and newly discovered evidence was properly denied. *Lattimore v. Powell*, 522.

§ 65. Injunctions

Terms used in preliminary injunction proceeding were sufficiently specific, and order did not require enjoined party to resort to documents other than the injunctive order itself to determine what the court was ordering it to do. *Resources, Inc. v. Insurance Co.*, 634.

SAFECRACKING

State's evidence was sufficient to withstand defendant's motion of nonsuit. *S. v. Edwards*, 718.

SALES

§ 17. Sufficiency of Evidence of Breach of Warranty

Evidence of the original defendants was insufficient to support their claim that the third party defendant was guilty of joint and concurring negligence in improperly installing the furnace system in a house so that it vibrated and caused damage to the house. *Lindstrom v. Chesnutt*, 15.

Evidence was sufficient to allow the jury to find an express warranty as to the quality of materials and workmanship in a house and a breach thereof. *Ibid.*

SALES — Continued

§ 18. Issues and Instructions

Trial court properly instructed the jury that the N. C. Residential Building Code does not give building inspectors discretion to permit alternative materials or methods of construction where the Code is specific as to the materials or type of construction required. *Lindstrom v. Chesnutt,* 15.

SCHOOLS

§ 13. Principals and Teachers

Decision of county board of education terminating the employment of the school superintendent is subject to review under statutes relating to review of decisions of certain administrative agencies. *James v. Board of Education,* 531.

SEARCHES AND SEIZURES

§ 1. Search without Warrant

Search of defendant at scene of his arrest for misdemeanor was unlawful where arresting officers knew a warrant had been issued but did not have warrant in their possession. *S. v. Robinson,* 155.

Initial search of defendants at the scene of the arrest and the continuation of that search at the police station were lawful searches incident to defendants' arrest. *S. v. Gibson,* 445.

No warrant is required for officer lawfully to seize items in plain view. *S. v. Thompson,* 416.

Movies owned by defendant but seized from property of third person were admissible. *S. v. Mizelle,* 583.

Evidence of burglary tools was erroneously admitted where evidence was obtained from warrantless search not made incident to arrest. *S. v. Allen,* 670.

Officer could properly seize a bag of money in plain view. *Ibid.*

§ 2. Consent to Search

Defendant could not claim unreasonable search and seizure after he voluntarily consented to search of premises. *S. v. McCray,* 373.

§ 3. Requisites and Validity of Search Warrant

Affidavit for search warrant contained a sufficient statement as to the time of the occurrence of the material facts relied on to support finding of probable cause for issuance of a warrant to search for narcotics. *S. v. Bandy,* 175.

Affidavit based on information supplied by confidential informant was sufficient to support issuance of a search warrant for narcotics. *S. v. Altman,* 257.

SEARCHES AND SEIZURES — Continued

The trial court did not err in failing to conduct a *voir dire* hearing on the admissibility of evidence which defendant moved to suppress where defendant's challenge to the evidence was based on the sufficiency of the affidavit in support of a search warrant. *Ibid.*

Statement in an affidavit to obtain a search warrant that a confidential informant "has proven reliable and credible in the past" meets minimum standards for setting forth circumstances from which the affiant concluded that the informant was reliable. *Ibid.*

Warrant issued for search of defendant's home was valid where affidavit incorporated into warrant described with reasonable certainty premises to be searched, sufficiently indicated basis for finding of probable cause and sufficiently described contraband for which search was to be conducted. *S. v. Murphy*, 420.

Trial court properly allowed into evidence items found in defendant's automobile pursuant to search under valid warrant. *S. v. Edwards*, 718.

STATE

§ 8. Negligence of State Employee and Contributory Negligence of Person Injured

Evidence supported award of damages in action under Tort Claims Act to recover for injuries sustained when plaintiff slipped and fell on salad dressing which had been spilled by an employee of defendant hospital. *Stroud v. Memorial Hospital*, 592.

STATUTES

§ 5. General Rules of Construction

Statutes in derogation of common law or statutes imposing a penalty must be strictly construed. *Jones v. Georgia-Pacific Corp.*, 515.

Resort must be had to judicial construction to determine legislative intent where statute is ambiguous. *Variety Theatres v. Cleveland County*, 512.

Trial court did not err in holding county ordinance authorized by session law. *Ibid.*

TAXATION

§ 25. Ad Valorem Taxes

The doctrine of instantaneous seizin under a purchase money deed of trust does not override a statutory provision that the owner of the equity of redemption is considered the owner of the real estate for the purpose of assessing taxes. *Powell v. County of Haywood*, 109.

§ 31. Sales Tax

A coin-operated laundry is a "launderette" or "launderall" as those terms are used in the sales tax statute. *Fisher v. Jones*, 737.

TAXATION — Continued

§ 33. Tax Liens on Personalty

Lien for taxes on personal property of a corporation attached to real property of which the corporation owned the equity of redemption under a purchase money deed of trust, and cestuis who purchased said real property at a foreclosure sale purchased it subject to the lien for personal property taxes. *Powell v. Town of Canton,* 113; *Powell v. County of Haywood,* 109.

§ 38. Remedies of Taxpayer Against Collection of Tax

Corporate taxpayer was not entitled to maintain an action for a declaratory judgment to determine its tax liability to a municipality and for an injunction restraining the municipality from listing the taxpayer as a tax delinquent and advertising for sale its tax lien against the taxpayer. *Reeves Brothers v. Rutherfordton,* 385.

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation

Utilities Commission erred in failing to make a finding as to the replacement cost of the utility's property. *Utilities Comm. v. Telephone Co.,* 41.

In arriving at its finding as to original cost of a telephone company's property, Utilities Commission properly excluded cost of land acquired for future use. *Ibid.*

Utilities Commission properly deducted amount of federal tax accruals available to the utility in its determination of the utility's cash working capital requirement. *Ibid.*

Utilities Commission erred in requiring telephone company to install extended area calling services for two exchanges to a third exchange where no party to the proceeding or any customer had notice that such a change in services was being considered. *Utilities Comm. v. Telephone Co.,* 740.

TORTS

§ 6. Judgment Against Tortfeasor

Execution of a release of one tortfeasor by the guardian ad litem of a minor, order entered by a superior court judge approving the release, and payment of the agreed sum into the office of the clerk of superior court, held not to constitute a recovery and satisfaction of judgment which would discharge other tortfeasors from liability to the claimant for the same injury. *Payseur v. Rudisill,* 57.

§ 7. Release from Liability and Covenant Not to Sue

Where a release or a covenant not to sue is given to one or more persons liable in tort for the same injury, it does not discharge any other tortfeasor from liability unless its terms so provide. *Payseur v. Rudisill,* 57.

TRESPASS

§ 7. Sufficiency of Evidence and Nonsuit

Evidence in action to recover damages for wrongful cutting and removal of timber was sufficient to support jury finding that plaintiffs were owners of the property in question and to support award of double damages to plaintiffs. *Tyson v. Winstead,* 585.

§ 8. Damages in General

Plaintiff is not entitled to double the enhanced value of timber wrongfully cut from his land. *Jones v. Georgia-Pacific Corp.,* 515.

TRIAL

§ 11. Argument and Conduct of Counsel

Supervision over argument of counsel is a matter largely within discretion of trial judge. *Rupert v. Rupert,* 730.

§ 34. Statement of Contentions by Court to Jury

Trial court did not de-emphasize defendants' contentions and over-emphasize plaintiff's contentions. *Markham v. Johnson,* 139.

§ 42. Form and Sufficiency of Verdict

Trial court did not err in denial of motion to set aside verdict on ground that it was a quotient verdict. *Highway Comm. v. Cemetery, Inc.,* 727.

§ 52. Setting Aside Verdict for Excessive or Inadequate Award

Trial court did not abuse its discretion in refusing to set aside a verdict awarding minor plaintiffs the amounts of their medical expenses. *Barfield v. Fortine,* 178.

§ 54. New Trial for Defective Verdict

Trial court did not err in denial of motion to set aside verdict on ground that it was a quotient verdict. *Highway Comm. v. Cemetery, Inc.,* 727.

TROVER

§ 2. Procedure and Damages

Plaintiff is not entitled to double the enhanced value of timber wrongfully cut from his land. *Jones v. Georgia-Pacific Corp.,* 515.

UNFAIR COMPETITION

State may obtain injunctive relief against pyramid, chain and referral sales schemes. *Morgan v. Dare To Be Great,* 275.

UTILITIES COMMISSION

§ 1. Nature and Function of Commission and Proceedings

Utilities Commission erred in failing to make a finding as to the replacement cost of the utility's property. *Utilities Comm. v. Telephone Co.*, 41.

In arriving at its finding as to original cost of a telephone company's property, Utilities Commission properly excluded cost of land acquired for future use. *Ibid.*

Utilities Commission properly deducted amount of federal tax accruals available to the utility in its determination of the utility's cash working capital requirement. *Ibid.*

§ 6. Hearings and Orders

Utilities Commission erred in requiring telephone company to install extended area calling services for two exchanges to a third exchange where no party to the proceeding or any customer had notice that such a change in services was being considered. *Utilities Comm. v. Telephone Co.*, 740.

VENUE

§ 2. Residence of Parties

Trial court's determination that plaintiff was a resident of the county in which she filed an action for alimony and child custody was supported by the evidence. *Clarke v. Clarke*, 576.

Events transpiring after the action was filed were properly considered in determining plaintiff's residence for venue purposes. *Ibid.*

Where plaintiff is nonresident and defendant is resident, removal of action to county of defendant's residence may be had as a matter of right. *Chow v. Crowell*, 733.

§ 8. Removal for Convenience of Parties

In a proceeding to enforce plaintiff's visitation rights, trial court properly denied defendant's motion for change of venue to county where defendant and minor child now reside. *Edwards v. Edwards*, 608.

§ 9. Hearing of Motions, Orders and Subsequent Proceedings

Trial court did not err in considering together motions to remove made by two defendants. *Chow v. Crowell*, 733.

Trial court erred in ordering removal of case to Transylvania County on basis of one defendant's unverified motion that he was a resident of said county. *Ibid.*

WILLS

§ 36. Defeasible Fees

Provisions of a will gave each of the devisees a defeasible fee and contingent remainder to the interest of other devisees. *Moore v. Tilley*, 378.

WILLS — Continued

§ 39. Annuities and Income

Devise to three named children of testatrix of "all of my real estate 150 acres and they are to give support and home to" four other children of testatrix who are blind created an equitable lien or charge upon the land. *Moore v. Tilley*, 378.

WITNESSES

§ 6. Evidence Competent to Impeach Witness

Defendant was not prejudiced by the exclusion of a tape recording offered to impeach a witness who furnished no evidence at the trial bearing on any fact thereafter found by the court. *Greene v. Greene*, 314.

WORD AND PHRASE INDEX