NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 3

FALL SESSION 1968
SPRING SESSION 1969

RALEIGH
1969

CITE THIS VOLUME

3 N.C.App.

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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RUDOLPH I. MINTZ	Fifth	Wilmington
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COY E. BREWER	Twelfth	Fayetteville
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FRANK W. SNEPP, JR.	Twenty-sixth	Charlotte
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B. T. FALLS, JR.	Twenty-seventh	Shelby
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HARRY C. MARTIN	Twenty-eighth	Asheville
J. W. JACKSON	Twenty-ninth	Hendersonville
T. D. BRYSON	Thirtieth	Bryson City

Special Judges: J. William Copeland, Murfreesboro; Hubert E. May, Nashville; Fate J. Beal, Lenoir; James C. Bowman, Southport; Robert M. Martin, High Point; Lacy H. Thornburg, Sylva; A. Pilston Godwin, Raleigh; George R. Ragsdale, Raleigh.

Emergency Judges: W. H. S. Burgwyn, Woodland; Zeb V. Nettles. Asheville, Walter J. Bone, Nashville; Hubert E. Olive, Lexington; F. Donald Phillips, Rockingham; Henry L. Stevens, Jr., Warsaw; George B. Patton, Franklin; Chester R. Morris, Coinjock; Francis O. Clarkson, Charlotte.

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BRADFORD TILLERY	Fifth	Wilmington
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BALLARD S. GAY	Sixth	Jackson
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GILES R. CLARK	Thirteenth	Elizabethtown
E. LAWSON MOORE (Chief)	Fourteenth	Durham
THOMAS H. LEE	Fourteenth	Durham
SAMUEL O. RILEY	Fourteenth	Durham
HARRY HORTON (Chief)	Fifteenth	Pittsboro
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SAMUEL E. BRITT	Sixteenth	Lumberton
JOHN S. GARDNER	Sixteenth	Lumberton

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Byron Haworth	Eighteenth	High Point
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B. Gordon Gentry	Eighteenth	Greensboro
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Buford T. Henderson	Twenty-first	Winston-Salem
Rhoda B. Billings	Twenty-first	Winston-Salem
John Clifford	Twenty-first	Winston-Salem
A. Lincoln Sherk	Twenty-first	Winston-Salem
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Keith S. Snyder	Twenty-fifth	Lenoir
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William H. Abernathy	Twenty-sixth	Charlotte
Howard B. Arbuckle	Twenty-sixth	Charlotte
J. Edward Stukes	Twenty-sixth	Charlotte
Claudia E. Watkins	Twenty-sixth	Charlotte
P. B. Beachum, Jr.	Twenty-sixth	Charlotte
Lewis Bulwinkle (Chief)	Twenty-seventh	Gastonia
Oscar F. Mason, Jr.	Twenty-seventh	Gastonia
Joe F. Mull	Twenty-seventh	Shelby
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Wade B. Matheny	Twenty-ninth	Forest City
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Robert J. Leatherwood, III	Thirtieth	Bryson City

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Harry T. Westcott

Commissioners

John W. McDevitt — Clawson L. Williams, Jr.

M. Alexander Biggs, Jr. — Marvin R. Wooten

NORTH CAROLINA INDUSTRIAL COMMISSION

Chairman

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Commissioners

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Deputy Commissioners

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SOLICITORS

Name	*District*	*Address*
HERBERT SMALL	First	Elizabeth City
ROY R. HOLDFORD, JR.	Second	Wilson
W. H. S. BURGWYN, JR.	Third	Woodland
ARCHIE TAYLOR	Fourth	Lillington
LUTHER HAMILTON, JR.	Fifth	Morehead City
WALTER T. BRITT	Sixth	Clinton
WILLIAM G. RANSDELL, JR.	Seventh	Raleigh
WILLIAM ALLEN COBB	Eighth	Wilmington
DORAN J. BERRY	Ninth	Fayetteville
JOHN B. REGAN	Ninth-A	St. Pauls
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THOMAS D. COOPER, JR.	Tenth-A	Burlington
THOMAS W. MOORE, JR.	Eleventh	Winston-Salem
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J. ALLIE HAYES	Seventeenth	North Wilkesboro
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CLYDE M. ROBERTS	Nineteenth	Marshall
MARCELLUS BUCHANAN	Twentieth	Sylva
CHARLES M. NEAVES	Twenty-first	Elkin

[1]Appointed 1 March 1969.

CALL OF THE CALENDAR IN THE COURT OF APPEALS

SPRING SESSION, 1969

(Showing when records and briefs must be filed.)

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

THIRD DIVISION

SEVENTEENTH AND TWENTY-FIRST DISTRICTS appeals will be called Tuesday, January 28, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, December 31, 1968.

Appellant's Brief must be filed by noon of January 7.

Appellee's Brief must be filed by noon of January 14.

EIGHTEENTH AND NINETEENTH DISTRICTS appeals will be called Tuesday, February 4, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, January 7.

Appellant's Brief must be filed by noon of January 14.

Appellee's Brief must be filed by noon of January 21.

TWENTIETH, TWENTY-SECOND AND TWENTY-THIRD DISTRICTS appeals will be called Tuesday, February 11, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, January 14.

Appellant's Brief must be filed by noon of January 21.

Appellee's Brief must be filed by noon of January 28.

SECOND DIVISION

NINTH, TWELFTH AND THIRTEENTH DISTRICTS appeals will be called Tuesday, February 25, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, January 28.

Appellant's Brief must be filed by noon of February 4.

Appellee's Brief must be filed by noon of February 11.

TENTH AND ELEVENTH DISTRICTS appeals will be called Tuesday, March 4, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, February 4.

Appellant's Brief must be filed by noon of February 11.

Appellee's Brief must be filed by noon of February 18.

FOURTEENTH, FIFTEENTH AND SIXTEENTH DISTRICTS appeals will be called Tuesday, March 11, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, February 11.

Appellant's Brief must be filed by noon of February 18.

Appellee's Brief must be filed by noon of February 25.

FOURTH DIVISION

TWENTY-SIXTH, TWENTY-NINTH AND THIRTIETH DISTRICTS appeals will be called on Tuesday, April 1, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, March. 4.

Appellant's Brief must be filed by noon of March 11.

Appellee's Brief must be filed by noon of March 18.

TWENTY-FOURTH, TWENTY-FIFTH, TWENTY-SEVENTH and TWENTY-EIGHTH DISTRICTS appeals will be called on Tuesday, April 8, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, March 11.

Appellant's Brief must be filed by noon of March 18.
Appellee's Brief must be filed by noon of March 25.

FIRST DIVISION

FIRST, SECOND, THIRD AND SEVENTH DISTRICTS appeals will be called Tuesday, April 29, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, April 1.

Appellant's Brief must be filed by noon of April 8.

Appellee's Brief must be filed by noon of April 15.

FOURTH, FIFTH, SIXTH AND EIGHTH DISTRICTS appeals will be called Tuesday, May 6, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, April 8.

Appellant's Brief must be filed by noon of April 15.

Appellee's Brief must be filed by noon of April 22.

SECOND CALL FOR EACH DISTRICT

THIRD DIVISION

SEVENTEENTH, EIGHTEENTH, AND TWENTY-FIRST DISTRICTS appeals will be called, Tuesday, May 27, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, April 29.

Appellant's Brief must be filed by noon of May 6.

Appellee's Brief must be filed by noon of May 13.

NINETEENTH, TWENTIETH, TWENTY-SECOND AND TWENTY-THIRD DISTRICTS appeals will be called Tuesday, June 3, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, May 6.

Appellant's Brief must be filed by noon of May 13.

Appellee's Brief must be filed by noon of May 20.

SECOND DIVISION

NINTH, TENTH, ELEVENTH, TWELFTH, THIRTEENTH, FOURTEENTH, FIFTEENTH AND SIXTEENTH DISTRICTS appeals will be called Tuesday, June 17, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, May 20.

Appellant's Brief must be filed by noon of May 27.

Appellee's Brief must be filed by noon of June 3.

FOURTH AND FIRST DIVISIONS

TWENTY-FOURTH, TWENTY-FIFTH, TWENTY-SIXTH, TWENTY-SEVENTH, TWENTY-EIGHTH, TWENTY-NINTH, THIRTIETH, the FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH AND EIGHTH DISTRICTS appeals will be called Tuesday, July 1, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, June 3.

Appellant's Brief must be filed by noon of June 10.

Appellee's Brief must be filed by noon of June 17.

Opinions will be filed on the following dates, Spring Session, 1969.

5 February	2 April	28 May	2 July
26 February	30 April	18 June	23 July

The following fees payable in advance. (Inapplicable to criminal cases).

Upon docketing the appeal	$10.00
Motion to docket and dismiss Under Rule 17	14.00
Petition for certiorari	10.00
In pauper appeals	2.00

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION, 1968

S & N FREIGHT LINE, INC. AND GREAT AMERICAN INSURANCE COMPANY v. BUNDY TRUCK LINES, INC.

No. 6810SC286

(Filed 13 November 1968)

1. Carriers §§ 3, 10— interstate trip — lease agreement — action by lessee against lessor for damage to cargo

In an action by the lessee of a vehicle under an interstate trip-lease agreement against the lessor to recover for damages to the cargo allegedly caused by negligence of the lessor's driver, the court properly overruled defendant's demurrer to the complaint where the complaint (1) alleged that the driver of the vehicle was acting as the agent, servant, and employee of defendant-lessor and (2) set forth provisions of the trip-lease agreement by which the lessor agreed to fully maintain and service the equipment, furnish and pay the driver, and indemnify the lessee against loss resulting from the driver's negligence, notwithstanding the complaint also set forth a provision of the trip-lease agreement vesting exclusive control and possession of the vehicle in the lessee, such provision being included in the agreement for the purpose of meeting the requirements of the Interstate Commerce Commission and not being determinative of the liabilities and rights of the lessor and lessee *inter se*.

2. Parties § 4; Insurance § 145— partial payment of loss by insurer — action against tort-feasor — proper parties

Where an insurance company pays only part of the loss of an insured, the insured must bring an action to recover for the loss in his own name, but the insurer is a proper party to such an action since it is subrogated in part and has an interest in the subject matter of the suit.

3. Insurance §§ 78, 112, 145; Parties § 4— motor cargo insurance — subrogation — indemnity provision in trip-lease agreement

Where an insurer pays the insured lessee of a truck under an interstate trip-lease agreement for damages occurring to the cargo during the trip, the lessee having paid the consignor for the damages, the insurer becomes subrogated to the rights of the lessee against the lessor under an indemnity provision of the trip-lease agreement; where the insurer has not paid the full amount of the loss, the action for indemnity must be brought in the name of the insured, and the insurer is a proper party.

APPEAL by plaintiffs from *Bailey, J.*, 2 May 1968 Non-Jury Civil Session, WAKE Superior Court.

Plaintiffs' complaint states separately two causes of action. For a first cause of action, plaintiffs allege, in substance: S & N Freight Line, Inc. (S & N) contracted with Federal Electric Corporation (Federal Electric) to transport several cartons of sensitive electrical and electronic equipment. On 15 January 1965, S & N entered into a lease agreement with Bundy Truck Lines, Inc. (Bundy) under which Bundy leased its truck to S & N for the purpose of transporting the equipment of Federal Electric. The trip lease agreement was in writing, signed by the parties, and a copy attached to the complaint as Exhibit No. 1. Vernon Harrell was the agent, servant and employee of Bundy; was the driver of the leased unit; and signed the trip lease agreement for Bundy, having been authorized so to do. In the course of transporting the equipment, while operating the tractor-trailer unit in New Jersey, Vernon Harrell carelessly and negligently allowed the crates containing the equipment to collide with an underpass, or some other object, and some of the equipment was extensively damaged. When the equipment arrived at S & N's terminal at Norfolk, Virginia, it was inspected, found to be damaged, and returned to Federal Electric for repair and rebuilding so it could be delivered to the Air Force, the consignee. The equipment was damaged in the sum of $18,309.16, demand was made on S & N by Federal Electric, and S & N paid the damage. Great American Insurance Company (Great American) had issued to S & N a motor truck cargo insurance policy and, upon thorough investigation and receipt of proper proof of loss, paid to S & N $18,209.16 in partial reimbursement to S & N of its payment to Federal Electric. In consideration of said payment S & N executed a subrogation receipt under the terms of which Great American, to the extent of its payment to S & N, became subrogated to the rights of S & N against Bundy. A copy of the subrogation receipt is attached to the complaint as Exhibit No. 2. As a result of the negligent acts of Vernon Harrell, which are imputed to Bundy, plaintiffs

have been damaged in the amount of $18,309.16 and are entitled to recover said amount from Bundy.

For a second cause of action, plaintiffs allege matters substantially similar to those contained in the first cause of action. Additionally, they set out verbatim paragraph 17 of the trip lease agreement and allege that under the terms thereof Bundy agreed to save S & N harmless from the loss and damage alleged and that by virtue of the payment by Great American to S & N of a portion of the damage, Great American became subrogated to that extent to the rights of S & N against Bundy.

Bundy filed a motion to make the complaint more definite and certain, which was denied. Bundy then filed demurrer to the complaint. The court entered an order overruling the demurrer to the first cause of action and allowing the demurrer to the second cause of action. From that portion of the order allowing the demurrer to the second cause of action and dismissing it, plaintiffs appealed. Defendant Bundy applied for writ of certiorari from the overruling of the demurrer to the first cause of action, and the writ was granted by this Court.

Teague, Johnson, Patterson, Dilthey & Clay by Grady S. Patterson, Jr., and Bob W. Bowers for plaintiffs S & N Freight Line, Inc., the Great American Insurance Company.

Boyce, Lake & Burns by Eugene Boyce and Philip P. Godwin and Gerald F. White for defendant Bundy Truck Lines, Inc.

MORRIS, J.

FIRST CAUSE OF ACTION — DEFENDANT'S APPEAL

[1] Defendant argues that the demurrer should have been sustained because by the terms of the lease agreement, specifically paragraphs 5 and 14, the truck was in the exclusive possession, control, use, and management of lessee, S & N, at the time the damage was sustained and, therefore, Bundy cannot be liable under the doctrine of imputed negligence. Defendant concedes that, for the purpose of the demurrer, he has admitted the allegations in the complaint to the effect that the driver was his agent, servant and employee, but he contends that these allegations are inconsistent with the provisions of the lease agreement. Defendant therefore asserts that since the allegations are repugnant, they destroy and neutralize each other and when these are eliminated, no allegations of fact are left sufficient to state a cause of action. This principle

might ordinarily be applied. *Johnson v. Johnson,* 259 N.C. 430, 130 S.E. 2d 876. We think it would be applicable here if the provisions of the trip lease agreement relied on by defendant were determinative of the relationship between the parties. However, an analysis of cases involving trip lease agreements leads us to a contrary conclusion.

That these trip lease agreements present anomalous situations is pointed out by Bobbitt, J., in *Employment Security Commission v. Freight Lines,* 248 N.C. 496, 501, 103 S.E. 2d 829, when he said: "The hybrid nature of these trip lease agreements has caused much litigation. In reality, contrary to the Biblical admonition, a driver, employed and furnished by the lessor, must serve two masters."

Paragraph 5 of the trip lease agreement vests exclusive supervision and control of the vehicle in lessee for the purpose of meeting the requirements of the Interstate Commerce Commission. *Employment Security Commission v. Freight Lines, supra; Newsome v. Surratt,* 237 N.C. 297, 74 S.E. 2d 732; *Hill v. Freight Carriers Corp.,* 235 N.C. 705, 71 S.E. 2d 133. In the *Newsome* case, the Court said: "Likewise, it seems to be unanimously held by the courts that where a public authority grants an individual or corporation the right to engage in certain activities involving danger to the public, which right is denied to the general public, the duty to protect the public while performing such franchise activities is legally nondelegable and the franchise holder is therefore responsible for the conduct of those who are permitted to act under such franchise, even though such persons be independent contractors." That this policy is reflected in the Interstate Commerce Regulations is indicated by § 304(e), Title 49 U.S.C., which gives the Interstate Commerce Commission authority to prescribe regulations "as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carrier (lessee) is fully responsible for the operation thereof in accordance with applicable law and regulation, as if they were the owners of such vehicles . . ."

The action before us does not raise the question of the liability of the franchise carrier to a consignor, consignee, or third parties generally. *Wood v. Miller,* 226 N.C. 567, 39 S.E. 2d 608. This action raises the question of the liabilities and rights of the lessor and lessee *inter se.* The provision vesting exclusive control and possession of the vehicle in lessee, therefore, is not applicable here. The trip lease agreement discloses a business venture by the lessor. At his own expense, he furnishes "all necessary oil, gasoline, tires and repairs for the operation of said equipment" and is obligated "to pay all

other expenses incident to such operation." He furnishes "the driver, and shall pay the driver for his services, and shall withhold any withholding or social security tax required by the U. S. Government." He is responsible for all taxes, licenses and fines assessed against the equipment while it was being used by lessee. He is obligated to indemnify lessee against loss incurred on account of the driver's injury or death and loss resulting from the negligence, incompetence or dishonesty of the driver.

While exclusive control, management, and use of the vehicle was vested in the plaintiff for the purpose of meeting the requirements of the Interstate Commerce Commission, actual possession or custody thereof was retained by defendant Bundy. It was to be operated by one of his choosing and in the selection of whom plaintiff S & N had no part. Immediate supervision and control as to speed, manner of operation, hours of work, and the like necessarily remained with defendant Bundy. *Hill v. Freight Carriers Corp., supra; Employment Security Commission v. Freight Lines, supra.* These, we think, are the provisions of the agreement applicable and controlling here.

Defendant has admitted the allegations of agency in the complaint and the determinative provisions of the lease agreement. The demurrer was properly overruled.

SECOND CAUSE OF ACTION — PLAINTIFFS' APPEAL

The second cause of action is based on paragraph 17 of the trip lease agreement which provides:

> "The lessor shall save the lessee harmless from any loss, damage or happening caused by negligence, incompetence or dishonesty of the driver, or lessor, or faulty equipment giving rise to claims on the part of the shippers, and the lessee shall withhold payment of any and all sums then or thereafter due the lessor, to the extent of such expense and claims until the determination of such expense and valid claims, which amounts shall be deducted to the satisfaction thereof."

Defendant contends that this portion of the complaint is defective for three reasons: (a) there is a misjoinder of causes and parties plaintiff, the subject matter being an indemnification contract between plaintiff S & N and defendant Bundy, (b) that the superior court has no jurisdiction over the subject matter of said claim by S & N because the claim of S & N is in the sum of $100 only, (c) that there is a misjoinder of causes of action, plaintiffs' alleged second cause of action being two different causes of action not separately stated and set forth.

[2] It is well established that where an insurance company pays only a part of the loss of the insured, the insured must bring an action to recover for the loss in his own name, since the insurer has become subrogated to only a part of the loss. *Insurance Co. v. Sheek,* 272 N.C. 484, 158 S.E. 2d 635. It is also clear that the insurer is a proper party to such an action, since it is subrogated in part and has an interest in the subject matter of the suit. *New v. Service Co.,* 270 N.C. 137, 153 S.E. 2d 870. To reach a decision as to whether there is a misjoinder, we must first determine whether Great American became subrogated to the rights of S & N against Bundy based on the indemnity provisions of the lease agreement.

We do not find that the question of whether the insurer may be subrogated to the insured's contractual rights against a third party has ever been squarely presented to the North Carolina Supreme Court. In *Insurance Co. v. Faulkner,* 259 N.C. 317, 130 S.E. 2d 645, the Court, in an opinion by Parker, J. (now C.J.), held that the insurance company could become subrogated to the insured's rights against a third party when the liability of the third party arose by reason of a statute. Under G.S. 1-538.1 a parent is made responsible for damages in an amount not exceeding $500 resulting from the wilful or malicious acts of a child under 18 living with the parent. The plaintiff insurer had paid some $2000 under its policy of insurance and brought the action against the parent to recover the statutory maximum of $500. The Court quoted, with approval, the following from 46 C.J.S., Insurance, pp. 154-5:

> "The doctrine of subrogation is based on principles of natural justice and is created to afford relief to those required, as insurers, to pay a legal obligation which ought to have been met, either wholly or partially, by another. * * * Insurer's right to subrogation is not limited to cases where the liability of the third person is founded in tort, but any right of insured to indemnity will pass to insurer on payment of the loss, *including rights under contracts with third persons,* and rights under a statute making a city liable for injury to property by a mob or riot therein." (Emphasis added.)

See to same effect, Appleman, Insurance Law and Practice, Vol. 6, p. 521; Joyce, The Law of Insurance 2d, Vol. 5, p. 5913.

The precise question has been decided by courts of other jurisdictions. The Supreme Court of Washington in 1951 in *Consolidated Freightway v. Moore,* 38 Wash. 2d 427, 229 P. 2d 882, had before it a case involving a trip lease agreement containing a provision that lessor was to indemnify lessee in case of injury or damage. A third

party was injured in a collision with the leased equipment. Lessee's insurer paid the judgment obtained by the injured party against both lessee and lessor. Lessee gave insurer a loan receipt and brought action against lessor to collect under the indemnity provision. Plaintiff was given judgment as prayed. On appeal defendant lessor contended that the insurer was the real party in interest, was not privy to the contract of indemnity, had no right of subrogation by reason of its primary liability and that it should, therefore, not be permitted to make itself whole at the expense of the defendant. In affirming the trial court, the Supreme Court said:

> "We can agree that the insurance company is not privy to the contract and that the insurance company paid the loss. But, the ultimate question here presented is whether or not the insurance company is subrogated to respondent's contractual right of indemnity.
>
> * * *
>
> It (subrogation) is a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it. . . .
>
> That insurance company recoveries, under their right of subrogation, most often flow from tort actions is quite natural, but without significance. Subrogation is an equitable principle and applies to contract rights as fully as it does to tort actions. By his contract the appellant (defendant-lessor) bound himself to pay the loss. Respondent has a contractual right to recover it from him. This cause of action is not defeated by the insurance company's payment of the judgment. The insurer is subrogated to appellant's contract right of indemnity. This sustains the cause of action against appellant for the identical reason that subrogation sustains a tort action where the plaintiff has been paid for his loss."

In *F. H. Vahlsing, Inc. v. Hartford Fire Ins. Co.*, 108 S.W. 2d 947 (Tex.), a railroad company had leased certain buildings to Vahlsing, the lease providing that Vahlsing would be responsible for cars placed on the spur contiguous to its leased premises in the event of the damage or destruction of such cars by fire. There was a fire, and insured paid part of the loss, took an assignment from the insured of whatever cause of action insured had against Vahlsing, and brought an action against Vahlsing to recover, claiming it was subrogated to the railroad's rights against Vahlsing under the terms of the lease agreement. Vahlsing contended that its lease agreement was a contract of indemnity, that the contract of insurance was a con-

tract of indemnity and, therefore, the insurer could not be subrogated to the rights of the railroad. The Court allowed the action stating ". . . if the railroad company would be entitled to recover for the loss as against the appellant, the insurance company in this action stands in its shoes and would also be entitled to recover."

In *Chicago, St. L. & N. R. Co. v. Pullman Southern Car Co.,* 139 U.S. 79, 35 L. Ed. 97, Pullman Company had entered into a contract with the Railroad under which Pullman Company was to furnish pullman cars to the Railroad and which provided that Railroad would repair all damages caused by accident or casualty during the term of the contract. Damage by fire occurred. Insurer paid Pullman Company and was assigned the right to bring this action in the name of Pullman, any recovery to be divided. The Court allowed the insurer to be subrogated to the insured's contractual rights against the Railroad.

> "By the provisions of the policies, the insurance companies were entitled, in case of loss, to an assignment of the plaintiff's right to receive satisfaction therefor from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of the insurer. Upon payment of the loss, or to the extent of any payment by them on account of such loss, the insurance companies were subrogated to the rights of the insured, and could, in the name of the insured, or in their joint names, maintain an action against the Railroad Company for indemnity, if that Company was liable to the insured for the loss of the cars."

The Wisconsin Court, in *Hartford Accident & Indemnity Co., v. Worden-Allen Co.,* 238 Wis. 124, 297 N.W. 436, allowed an action by the insurer of the owner of premises against a subcontractor. The subcontractor had agreed to save harmless the general contractor and the owner of the premises from damages connected with subcontractor's operations. An employee of subcontractor was injured on the job. The owner of the premises was held liable under the safe-place statute. His insurer paid the employee and brought this action claiming to be subrogated to the rights of the insured under the indemnity contract executed by subcontractor. The Court emphasized the fact that the employee was under the control of the subcontractor, defendant, at the time of the injury; that the owner's liability arose by reason of the fact that this was a nondelegable duty; and that the active negligence producing the injury was that of the subcontractor, even though it escaped liability because of Workmen's Compensation laws. The Court stated:

"It appears to us that the liability of Seaman here is precisely the sort that was contemplated under the indemnity contract, and that to hold that it is not is to render the indemnity meaningless."

A thorough and scholarly discussion of the principles of subrogation is found in *Standard Accident Ins. Co. v. Pellecchia,* 15 N.J. 162, 104 A. 2d 288. Here the Court cited with approval the *Vahlsing* case, *supra,* and the *Pullman* case, *supra.* The Wisconsin Court noted that, in subrogation suits, based not on the torts of a third party but on his contractual obligation to the insured, there was some reluctance in the early decisions to permit any recovery but "it is now well settled generally that such an action in subrogation on the contractual obligation of the defendant to an insured exists in favor of the insurer."

The Oklahoma Court in *Commercial Union Fire Insurance Co. v. Kelly,* 389 P. 2d 641, allowed an action based on contract brought by the insurance company as subrogee. There lessee of a building had agreed to make repairs to the building except for the usual wear and tear. The building was destroyed by fire. Plaintiff insurer paid the loss and sued lessee claiming to be subrogated to lessor's contractual rights against lessee. The trial court sustained defendant's demurrer, and plaintiff appealed. The Oklahoma Supreme Court, in reversing the trial court, said:

"We can only conclude that an action in subrogation exists in favor of an insurance company against a third party, based on the contractual obligation of the third party to the insurance company's insured, where the insurance company has paid the claim of its insured for loss under the terms of a fire insurance policy; but the insurance company's rights are derived from the rights which the insured has and is limited to those rights, and there can be no subrogation where insured had no claim against the third party."

An opposite result was reached in *Alexandra Restaurant v. New Hampshire Ins. Co.,* 272 App. Div. 346, 71 N.Y.S. 2d 515, 79 N.E. 2d 268, affirmed without opinion 297 N.Y. 858. There the Court said that the contract between lessee and lessor was a matter in which the insurance company had no concern and that "it is difficult to see why under the subrogation clause in question, the ultimate loss should fall upon the landlord while the insurance company though accepting and retaining its premium for the precise coverage of loss that occurred, should have no obligation or liability whatever."

The argument that the insurer may be allowed to receive a

"windfall" by reason of the fact that a recovery would result in its suffering no loss although it has been paid premiums by the insured to reimburse it against just such a loss is rendered less effective by reason of the fact that the insurer has incurred expenses connected with the writing of the insurance, the investigation and determination of the insured's claim and the expenses of settling or litigating the claim. Of course, Bundy had equal opportunity to acquire insurance coverage to protect itself in the event of loss. Paraphrasing the language of Parker, C.J., in *Insurance Co. v. Faulkner, supra,* it is not apparent why the prudent foresight of S & N in insuring cargoes transported by it should result in a detriment to the insurance company who paid the loss while the party assuming the liability therefor escapes the very liability which it agreed to assume. "The granting of subrogation will reach an equitable result: to deny it would accomplish injustice."

[3] Applying the principles enunciated in the cases discussed herein, we conclude that Great American is subrogated to S & N's rights against Bundy based on the indemnity provision in the lease agreement. This result obviates the contention that there is a misjoinder of parties. Since the insurance company has not paid the full amount of the loss, the action must be brought in the name of the insured. *Insurance Co. v. Sheek, supra,* and the insurance company is a proper party. *New v. Service Co., supra.*

The contention that there is a misjoinder of causes of action is without merit. Paragraph 17 of the lease agreement provides, "The lessor shall save the lessee harmless from any loss, damage or happening caused by negligence, incompetence or dishonesty of the driver . . ." The rights of Great American are limited to the rights of S & N; and, therefore, the driver's negligence, incompetence, or dishonesty must be alleged and proved.

As to defendant's appeal — affirmed.

As to plaintiffs' appeal — reversed.

MALLARD, C.J., and CAMPBELL, J., concur.

PAULINE LAURENCE HABUDA v. TRUSTEES OF REX HOSPITAL, INC.

No. 6810SC394

(Filed 13 November 1968)

1. Hospitals § 3— liability of charitable hospital to patient — immunity from suit

A public hospital maintained primarily as a charitable institution may plead the common-law defense of charitable immunity to a cause of action arising in April 1964, the rule in *Rabon v. Hospital*, 269 N.C. 1, which abolishes the defense, being applicable to causes of action arising only after January 20, 1967.

2. Charities and Foundations § 3— defense of charitable immunity abolished

By virtue of G.S. 1-539.9, the common-law defense of charitable immunity does not constitute a valid defense to any action or cause of action arising subsequent to September 1, 1967.

3. Hospitals § 3— negligence of hospital in selection of employees

Prior to the decision in *Rabon v. Hospital*, 269 N.C. 1, a patient, paying or nonpaying, who was injured by the negligence of an employee of a charitable hospital could recover damages from the hospital only if the hospital was negligent in the selection or retention of the employee.

4. Hospitals § 3— defense of charitable immunity — sufficiency of evidence

In plaintiff's action against a charitable hospital for damages for personal injuries allegedly sustained when a student nurse of the hospital prepared and gave to plaintiff a laxative containing hexachlorophene, a cleaning substance, rather than cascara as prescribed by plaintiff's doctor, the evidence is insufficient to show such negligence by the hospital in the selection and retention of the nurse as would destroy the hospital's immunity as a charitable institution when plaintiff's own evidence tends to show (1) that the nurse made passing grades in her subjects, including pharmacology, (2) that she worked diligently for self-improvement in her work, and (3) that she was assigned to work on plaintiff's floor under supervision of a registered nurse.

5. Hospitals § 3— negligence in handling drugs

In plaintiff's action against charitable hospital for damages for personal injuries allegedly sustained when a student nurse prepared and gave to plaintiff a laxative containing hexachlorophene, plaintiff fails to show that the hospital was negligent in failing to promulgate rules relating to storage and handling of drugs where (1) her own evidence shows the existence of a hospital rule requiring that drug labels be read three times, and (2) there is no evidence that the nurse failed to follow this rule in the instant case.

6. Hospitals § 4— duty of nurses

Nurses are required to use their best efforts to carry out the instructions of the attending physician and must do as directed unless an obvious injury would result.

7. Hospitals § 3— negligence of charitable hospital — res ipsa doctrine

Doctrine of *res ipsa loquitur* is inapplicable in situation where proof of charitable hospital's negligence would depend upon evidence that student nurse or some other agent of the hospital negligently mixed hexachlorophene with milk of magnesia, thereby causing plaintiff's injury, but **common-law defense of charitable immunity would be applicable.**

APPEAL by plaintiff from *Bone, E.J.,* Second May 1968 Regular Civil Session of WAKE Superior Court.

Plaintiff instituted this action to recover damages for personal injuries alleged to have been sustained on 13 April 1964 while plaintiff was a patient in the hospital operated by defendant. Plaintiff alleges administrative or managerial negligence on the part of the defendant, as well as negligence on the part of the agents of the defendant and in addition, negligence on the part of the defendant in failing to use care in the selection of its employees. The defendant denies all allegations of negligence and pleads as a defense to the action the common-law defense of charitable immunity, alleging that the defendant was created by act of the General Assembly and is operating in the public interest as a non-stock, non-profit, public, charitable and eleemosynary corporation.

Summons was issued herein on 25 May 1965. It was stipulated that all parties to this action were properly before the court. Trial was by jury during the second week of the Second May 1968 Regular Civil Session of the Superior Court of Wake County. Plaintiff and defendant offered evidence. At the close of all the evidence, the defendant's demurrer to the evidence was allowed, judgment of nonsuit was entered, and the plaintiff appealed to the Court of Appeals.

Boyce, Lake & Burns by G. Eugene Boyce, and Nassif & Churchill by Ellis Nassif for plaintiff appellant.

Smith, Leach, Anderson & Dorsett by Henry A. Mitchell, Jr., for defendant appellee.

MALLARD, C.J.

[1] We are met at the beginning of this case with the question of whether the defendant's hospital was on 13 April 1964 a charitable institution and immune from liability for acts of negligence of its agents under the qualified charity immunity rule.

The Supreme Court of North Carolina in the case of *Rabon v. Hospital,* 269 N.C. 1, 152 S.E. 2d 485, held:

"Convinced that the rule of charitable immunity can no longer

properly be applied to hospitals, we hereby overrule *Williams v. Hospital,* 237 N.C. 387, 75 S.E. 2d 303, *Williams v. Hospital Asso.,* 234 N.C. 536, 67 S.E. 2d 662, and other cases of similar import. We hold that defendant Hospital is liable for the negligence of its employees acting within the scope and course of their employment just as is any other corporate employer. Recognizing, however, that hospitals have relied upon the old rule of immunity and that they may not have adequately protected themselves with liability insurance, we follow the procedure of Michigan, Illinois, Nebraska, and Wisconsin, as detailed in the decisions previously noted. The rule of liability herein announced applies only to this case and to those causes of action arising after January 20, 1967, the filing date of this opinion."

[2] The 1967 General Assembly of North Carolina, recognizing that in some instances the common-law defense of charitable immunity prevailed in this state, abolished it and declared that it "shall not constitute a valid defense to any action or cause of action arising subsequent to September 1, 1967." G.S. 1-539.9.

The cause of action on which the plaintiff bases her claim is alleged to have arisen in April 1964. According to the case law and statutory law, the common-law defense of charitable immunity was available to the defendant herein on a cause of action arising in April 1964.

The Supreme Court of North Carolina has held in the case of *Martin v. Comrs. of Wake,* 208 N.C. 354, 180 S.E. 777 (1935), that:

"The trustees of Rex Hospital, as a corporation created by the General Assembly of North Carolina, own and maintain a hospital in the city of Raleigh, Wake County, North Carolina, for the medical treatment and hospital care of the indigent sick and afflicted poor of the city of Raleigh and of Wake County. This hospital is supported by donations of property and money by individuals and by the city of Raleigh and Wake County, and also by sums paid by patients who are able to pay for services rendered to them. It is a public hospital, and is maintained, primarily, as a charitable institution. See *Raleigh v. Trustees,* 206 N.C. 485, 174 S.E. 278." See also *Rex Hospital v. Comrs. of Wake,* 239 N.C. 312, 79 S.E. 2d 892 (1954).

[1] The evidence in this case tends to show that the defendant's hospital in 1964 was being operated in substantially the same manner as it was in 1954. We are of the opinion that the defendant's hospital, as operated in April 1964, when plaintiff alleges she was

injured according to the evidence herein, was a public hospital maintained primarily as a charitable institution and comes within the rule of the common-law defense of charitable immunity.

This rule, with some but not all of the exceptions thereto, is set forth in 2 Strong, N. C. Index 2d, Charities & Foundations, § 3, as follows:

> "A person injured while enjoying the benefits provided by a charitable institution may not hold the institution liable for the negligence of its agents or employees if the institution has exercised reasonable care in their selection and retention. This rule applies even though the patron is a paying patient. . . . The fact that a charitable institution has procured insurance indemnifying it for liability does not enlarge its liability for negligence of its agents or employees. But a charitable hospital may be held liable for negligence in selecting an agent or employee."

[3] This rule is also stated in *Rabon v. Hospital, supra.* Sharp, J., speaking of the law as it was at the time the cause of action arose in the present case, said:

> "Decided cases indicate that the present state of the law in North Carolina is as follows: A patient, paying or nonpaying, who is injured by the negligence of an employee of a charitable hospital may recover damages from it only if it was negligent in the selection or retention of such employee, *Williams v. Hospital, supra, Williams v. Hospital Asso., supra,* or perhaps if it provided defective equipment or supplies. *Payne v. Garvey,* 264 N.C. 593, 142 S.E. 2d 159. . . . Nor does the fact that a charitable institution has procured liability insurance affect its immunity. *Herndon v. Massey,* 217 N.C. 610, 8 S.E. 2d 914."

[4] The evidence, taken in the light most favorable to the plaintiff, tended to show that the plaintiff was admitted to Rex Hospital by her family physician on 10 April 1964. Her physician's diagnosis was acute lumbosacral strain. She was placed in a room on the west wing of the fourth floor. At about nine o'clock P.M. on the evening of 13 April 1964, plaintiff requested that she be given a laxative composed of milk of magnesia and cascara which her doctor had prescribed. The laxative was prepared and given to her by Sylvia Scarborough (now Sylvia Scarborough Bynum, hereinafter referred to as student nurse) who was in her final year as a nursing student at the Rex Hospital School of Nursing. This laxative had a quantity of pHisoHex in it. pHisoHex is a cleaning substance similar to soap and contains, among other ingredients, three per cent hexachloro-

phene. Hexachlorophene is an anti-bacterial agent or a substance to decrease the number of bacteria. The laxative given to plaintiff foamed. One of the characteristics of pHisoHex is its tendency to foam when shaken. Milk of magnesia does not foam when shaken.

There was no written rule or regulation of Rex Hospital in April 1964 requiring that pHisoHex be maintained separate and apart from milk of magnesia, and there was no rule or regulation of defendant corporation applicable in April 1964 requiring external medicine to be kept separate from internal medicine. This bottle containing pHisoHex was at that time kept in the same area and immediately next to the bottle containing milk of magnesia. The student nurse was one of two persons assigned to the west wing of the fourth floor on the night in question. The other was a duly qualified registered nurse who was in overall charge on the west wing of the fourth floor. Shortly after taking the preparation, the plaintiff complained of a burning sensation, and approximately ten minutes later she became sick on her stomach. Subsequently, the plaintiff received treatment for gastritis and esophagitis, which could have been caused by the ingestion of pHisoHex. She was discharged from the hospital on 21 April 1964.

[3, 4] The general rule as to a cause of action arising in 1964, relating to charitable hospitals not coming within the rule of respondeat superior, would seem to be that they may be held liable for injuries to patients under their care where such injury results from the hospital's negligent selection and retention of employees. *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807. The plaintiff asserts that the defendant was negligent because "defendant's own rules approved by the trustees made no provision for using students, unsupervised in the capacity of qualified nurses" and furthermore, because defendant used a young girl who defendant's management knew was incompetent in the field of pharmacology, knew was an incompetent student having been on academic probation, and who was recently married and having personal difficulties which were exhibited in her poor performance. The basis for such assertion seems to be that this student nurse made her two lowest grades in pharmacology. However, it is to be noted that her two lowest grades were passing grades. It is difficult to comprehend how passing grades can be adjudged as a standard for incompetency. Plaintiff's exhibit "J" contains the following in relation to the student nurse in question: "She has demonstrated the ability to plan and implement nursing care to meet the needs of the patient as determined by his individuality. . . . Academically, Mrs. Bynum works diligently to attain a satisfactory score. . . ." We hold that the selection of a student

nurse who has passed her work, has demonstrated an aptitude for nursing, and who works diligently for self-improvement and is assigned to work under a registered nurse does not constitute such managerial or administrative negligence as is contemplated by the law in order to destroy the immunity of a charitable hospital. The plaintiff also asserts that the defendant violated its own rules by the use of a nursing student in the capacity as a fully qualified nurse. We note that plaintiff's exhibit "Q" refers to the use of student nurses within the hospital. The only possible assumption from the evidence here is that the defendant did contemplate the use of student nurses as was done in the present case. There is no evidence to show what the duties of a fully qualified nurse are, and we are therefore unable to determine if the student was actually used in such a capacity.

[4] In our opinion, the evidence of the plaintiff fails to show any evidence of negligence on the part of the defendant in the selection or retention of the student nurse.

[5] The plaintiff also asserts that the defendant was guilty of negligence in failing to promulgate rules relating to the separate storage of internal and external preparations. This contention assumes that the hospital was guilty of a lack of due care relative to the handling of drugs and other preparations. We do not agree with this contention; the plaintiff's evidence does not tend to show this. Plaintiff's exhibit "D" contains the following language relating to the administration of medicine:

"Read the label three times and check with card or order:

a. Before removing the bottle from the shelf.
b. Before pouring the drug.
c. Before replacing the bottle on the shelf."

[6] There is no evidence that the student nurse failed to carry out these instructions in relation to the preparation given to the plaintiff. Nurses are required to use their best efforts to carry out the instructions of the attending physician and must do as directed unless an obvious injury would result. *Byrd v. Hospital,* 202 N.C. 337, 162 S.E. 738. The instructions of the physician were to give a milk of magnesia and cascara preparation to the plaintiff if she requested it. Here the student nurse was carrying out these orders, and in doing so, she complied with the directives of the hospital relating to the administration of medicine. The hospital had every reason to assume that its instructions would be carried out.

[7] Plaintiff contends that the doctrine of *res ipsa loquitur* ap-

plies. If negligence in this case is proven, and we do not so decide, it would be proven by the evidence tending to show that pHisoHex was in some manner negligently mixed with the milk of magnesia by the student nurse or some other agent of the hospital, and this would not bring into play the doctrine of *res ipsa loquitur* but does bring into play the common-law defense of charitable immunity.

We are of the opinion that there was not sufficient evidence of managerial or administrative negligence or of a failure to use care by the defendant in the selection of its agents. However, we deem it proper to say in this case that were it not for the defense of the doctrine of charitable immunity, we are of the opinion that there would be sufficient evidence of negligence on the part of the agents of the hospital to take the case to the jury.

The judgment of nonsuit entered herein by the Superior Court is Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. BILLY KEITH FOWLER
No. 6815SC318

(Filed 13 November 1968)

1. Criminal Law § 84— evidence illegally obtained

Evidence obtained without a search warrant under conditions requiring a warrant is incompetent as evidence in the trial of any action. G.S. 15-27. G.S. 15-27.1.

2. Criminal Law § 84— objection to evidence gained by search — burden on the State

Where defendant objects to the introduction of evidence obtained under conditions requiring a search warrant, the State must produce the warrant or introduce evidence to show that it has been lost and to show its contents and regularity, unless production of the warrant is waived by the accused, notwithstanding the search was precipitated by a crime other than the one for which defendant is presently on trial.

3. Criminal Law § 84— motion to suppress evidence gained by search — procedure

The procedure upon motion to suppress evidence because of an illegal search and seizure is the same as the inquiry by the court into the voluntariness of an alleged confession.

4. Criminal Law § 84— objection to evidence gained by search — voir dire hearing

Where defendant interposes a general or specific objection to the admission of evidence obtained by a search and seizure, the trial judge must determine the legality of the search by a preliminary inquiry in the absence of the jury.

APPEAL by defendant from *Bailey, J.*, 22 April 1968 Criminal Term, ORANGE Superior Court.

Defendant was charged with breaking and entering and larceny from the F & F Super Market, Inc. Several items were taken including 210 cartons of cigarettes. These items were valued at $442. At the trial, the defendant, represented by counsel, entered a plea of not guilty to both charges and was tried by a jury. Victor Sharpe, who testified for the State, stated that he was the manager of the F & F Super Market; that when he went to the store on 15 July 1967, he discovered that the store had been entered and that the total value of the property missing was above $400.

Larry Eugene Langley and William Thomas Rudd also testified as witnesses for the State. They testified that they were accomplices in the break-in and that Billy Keith Fowler, the defendant, was present and took part in the crime.

Officer Coy Donovan, a detective with the Burlington Police Department, testified that he interviewed William Thomas Rudd who told him about his participation in the break-in, and also that of Gene Langley and Billy Keith Fowler. Officer Thomas Long of the Burlington Police Department testified that he assisted the Alamance Sheriff's Department in serving a search warrant, and that upon searching the residence of the defendant, they found cigarettes with an F & F Super Market label on them.

The defendant offered Jerry Fowler, his brother, as a witness in his behalf. He testified as a character witness for the defendant. Brenda Fowler, the wife of the defendant, testified that she was married to the defendant in 1966; that she was living with him on 14 July 1967, the night of the robbery, and that the defendant stayed with her the entire night.

The defendant appeals from a verdict of guilty on both charges.

Haywood, Denny & Miller by Emery B. Denny, Jr., for defendant appellant.

Attorney General T. Wade Bruton by Assistant Attorney General William W. Melvin and Staff Attorney T. Buie Costen for the State.

MORRIS, J.

By his first assignment of error the defendant contends that the trial court erred when it allowed testimony concerning certain evidence obtained by a search of his house. At the time this testimony was given by Officer Long, the State had not produced a search warrant. The defendant entered a general objection to the questions asked by the State, and this objection was overruled by the trial court. The assignment of error is based on the following series of questions asked by Detective Long:

"Q. What, if anything, did you find in the house?

DEFENDANT OBJECTS OVERRULED EXCEPTION No. 1

A. In the back bedroom we found several cases of food blenders and ice grinders and mixers in one of the kitchen cabinets.

THE COURT: I believe I will exclude that part of the evidence that has nothing to do with this case. Ladies and Gentlemen of the jury, the only thing involved in this case is cigarettes, hams, knives. Disregard the officer's testimony about food blenders and other things, mentioned by the witness.

Q. Did you find any cigarettes?

A. Yes, sir, I did.

Q. I show you this carton marked for identification as State's Ex. 1 and ask you if you can recognize it?

A. Yes, sir.

Q. Did you find it at the Billy Keith Fowler house at the time you are testifying about?

DEFENDANT OBJECTS OVERRULED EXCEPTION No. 2

A. Yes, sir."

[1] North Carolina General Statute 15-27 provides that evidence obtained without a warrant under conditions requiring a warrant shall not be competent as evidence in the trial of any action. G.S. 15-27.1 provides that this statute applies to all search warrants issued for any purpose. "No facts discovered or evidence obtained by reason of the issuance of an illegal search warrant or without a legal search warrant in the course of any search, made under the conditions requiring a search warrant, shall be competent as evidence in the trial of any action."

[2] The decisions of our Supreme Court establish the principle

that when a search is made under conditions requiring the issuance of a warrant, the State must lay a foundation for the evidence obtained from the search by producing the search warrant unless production of the warrant is waived by the accused. In *State v. McMilliam,* 243 N.C. 771, 92 S.E. 2d 202, the defendant moved to have certain evidence suppressed for the reason that it was obtained by an unlawful search warrant, or without a warrant. The State did not produce a warrant at the trial. The Court stated:

> "Where the search is made under conditions requiring the issuance of a search warrant, and it is attempted, over objection, to justify the search and seizure by the possession of a valid search warrant in the hands of the searchers, the State must produce the search warrant, or, if it has been lost, the State must prove such fact and then introduce evidence to show its contents and regularity on its face, unless production of the warrant is waived by the accused. To render admissible evidence obtained by a search made under conditions requiring the issuance of a search warrant, this legal foundation must be laid."

The following is quoted from the Supreme Court of Appeals of West Virginia:

> "If, when a search warrant and affidavit are at hand, but are not produced, it can be presumed that there is a valid and lawful search warrant, there would be little necessity in preserving such papers; all that would be necessary for the officers to say in justification of their search would be that they had a search warrant issued by a justice of the peace. Such holding would be an open door for all kinds of abuses, and the constitutional guarantee would be of little practical value in the protection of the home and person from unreasonable searches and seizures." *State v. Slat,* 98 W. Va. 448, 127 S.E. 191.

The Supreme Court concluded that it was prejudicial error to allow the evidence over the defendant's objection for the reason that the State had not produced a search warrant.

In *State v. Cobb,* 250 N.C. 234, 108 S.E. 2d 237, the Court in a *per curiam* opinion held that prejudicial error was committed when evidence obtained by a search of the defendant's premises, under circumstances requiring the issuance of a warrant, was introduced over the objection of the defendant and where no search warrant was produced by the State.

The State contends that the present case is distinguishable from *State v. McMilliam, supra,* and *State v. Cobb, supra,* for two rea-

sons. First, in these cases, the search originated from the crimes for which the defendant was being tried, and the evidence obtained related to the crime which precipitated the search. The State argues that since, in the present case, the search was precipitated by another unrelated crime and the evidence obtained did not relate to that crime, but to the crime in the present case, production of the search warrant is not necessary. To follow this argument would certainly weaken search and seizure laws as we know them today. The police officers would only have to say that when this evidence was found, they were not searching for evidence for this crime, but for another crime; and, because the warrant related to another crime, it need not be produced at this trial. We do not feel that production of the warrant should be excused because the search warrant was obtained in relation to a crime other than the one for which the defendant is presently on trial.

Second, the State contends that the present case is distinguishable from the *Cobb* case and the *McMilliam* case because there the defendants moved to suppress the evidence and specified the grounds for such a motion; however, here the defendant, Fowler, only made a general objection. In the recent case of *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481, the State introduced certain inculpatory statements allegedly made by the defendant. The defendant entered a general objection. The trial court overruled this objection and allowed the evidence without further inquiry. In reversing the conviction, the Supreme Court said:

> "For more than one hundred years this Court has recognized that 'it is the duty of the judge to decide the facts upon which depends the admissibility of testimony; he cannot put upon others the decision of a matter, whether of law or of fact, which he himself is bound to make.' *State v. Andrew,* 61 N.C. 205. The requirement now recognized in North Carolina that there should be a preliminary investigation in the absence of the jury to determine the voluntariness of confessions is demanded because of the conclusive nature of a confession. A trial jury's deliberations should not be infected by forcing a defendant to fight out his objection as to admissibility of an alleged confession in the presence of the jury. Even though the trial court might, after a hearing in the presence of the jury, rule out the confession as being involuntary and instruct the jury not to consider it in determining the innocence or guilt of a defendant, yet it must, in most cases, be prejudicial against the defendant."

The Court concluded:

> "We hold that hereafter when the State offers a confession in a criminal trial and the defendant objects, the trial judge shall determine the voluntariness of the admissions or confession by a preliminary inquiry in the absence of the jury."

[3, 4] Our Supreme Court has held that the procedure to suppress evidence because of an illegal search and seizure should be the same as the inquiry by the court into the voluntariness of an alleged confession. *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334; *State v. Myers,* 266 N.C. 581, 146 S.E. 2d 674. We deem this to be sound reasoning for that in a case where the defendant objects to the admissibility of evidence because of an illegal search or the non-production of a warrant, as in the case where the defendant contends that the confession was obtained by involuntary means, the jury's deliberations should not be infected by forcing a defendant to fight out his objection as to the admissibility of the evidence in the presence of the jury. We hold that when the defendant objects to evidence obtained by a search which requires a search warrant, the court should determine the legality of the search by a preliminary inquiry in the absence of the jury, and that, as in *State v. Vickers, supra,* and *State v. James Joseph Edwards,* 274 N.C. 431, 163 S.E. 2d 727, the general objection is sufficient.

We do not discuss the other assignments of error raised by the defendant as they are not likely to occur again. For the above reasons, there must be a

New trial.

MALLARD, C.J., and CAMPBELL, J., concur.

E. L. McSWAIN v. THOMAS G. LANE, JR., ADMINISTRATOR OF THE ESTATE OF GEORGE Z. HOWARD

AND

SUE McSWAIN v. THOMAS G. LANE, JR., ADMINISTRATOR OF THE ESTATE OF GEORGE Z. HOWARD

No. 6826SC352

(Filed 13 November 1968)

1. Trial § 21— motion to nonsuit — consideration of evidence

On motion to nonsuit, the evidence must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may be drawn therefrom.

2. Trial § 21— weight and credibility of evidence

The weight and credibility of the evidence are for the jury.

3. Executors and Administrators § 24; Quasi-Contracts § 2— action for personal services rendered decedent

In an action to recover for personal services rendered to decedent, plaintiffs' evidence tended to show that decedent offered to leave all his property to plaintiffs and their children if plaintiffs would move into his house and take care of him, that plaintiffs told decedent they would not move into his house but would do everything possible to take care of him, whereupon decedent stated he would make a will leaving all his property and insurance to plaintiffs and their children, and that plaintiffs thereafter performed various services for decedent during their visits to his home. *Held:* While the evidence is insufficient to sustain an express contract, decedent's offer having been rejected by plaintiffs' failure to move into his house, the issue of *quantum meruit* should have been submitted to the jury, since the evidence was sufficient to permit the jury to find that the services were rendered and accepted under the mutual understanding that they would be paid for.

4. Executors and Administrators § 24; Quasi-Contracts § 2— action for personal services rendered decedent

Allegations that the personal services rendered decedent were under an express contract to reimburse plaintiff therefor does not preclude recovery on *quantum meruit.*

5. Executors and Administrators § 24; Quasi-Contracts § 1— implied promise to pay for services

Where one performs services for another which are knowingly and voluntarily accepted, nothing else appearing, the law implies a promise on the part of the recipient to pay the reasonable value of the services.

APPEAL by plaintiffs from *Bowman, S.J.,* 29 April 1968, Schedule D Session, MECKLENBURG Superior Court.

In the E. L. McSwain case, the plaintiff alleged a contract with George Z. Howard (the intestate), pursuant to which the plaintiff was to render certain personal services in consideration of the intestate's leaving all of his property to plaintiff's children. The plaintiff also stated a second cause of action for payments made on a bank loan in behalf of the intestate. The defendant filed a cross-action in connection with this second cause of action.

The second cause of action in the E. L. McSwain case and the cross-action were not disposed of in the superior court, and they remain on the docket in that court.

In the Sue McSwain case, a cause of action similar to the first cause of action in the E. L. McSwain case is set out.

The two cases were consolidated for purposes of trial, and at the

close of the plaintiffs' evidence, judgments of involuntary nonsuit were entered as to the first cause of action in the E. L. McSwain case and the cause of action in the Sue McSwain case. From these judgments, an appeal was taken to the Court of Appeals.

Sanders, Walker & London by Alvin A. London and James M. Shannonhouse, Jr., Attorneys for plaintiff appellants.

Clayton, Lane & Helms by O. W. Clayton; Childers & Fowler by Max L. Childers, Attorneys for defendant appellee.

CAMPBELL, J.

[1] The plaintiffs assign as error the granting by the trial court of the motions for judgment as of involuntary nonsuit entered at the close of the evidence on behalf of plaintiffs.

> "It is axiomatic that on motion to nonsuit the evidence must be taken as true and considered in its light most favorable to the plaintiff. Plaintiff is entitled to the benefit of every reasonable inference which may be drawn therefrom. Contradictions and inconsistencies in plaintiff's evidence are for the jury where the evidence, taken in its most favorable light to the plaintiff, makes out a *prima facie* case. All conflicts in plaintiff's evidence must be resolved in his favor." (Citations omitted) *Homes, Inc. v. Bryson,* 273 N.C. 84, 159 S.E. 2d 329.

[2] The weight and credibility of the evidence are within the province of the jury. *Sneed v. Lions Club,* 273 N.C. 98, 159 S.E. 2d 770.

Prior to 1950 the intestate owned a home at 115 Gum Street in Charlotte, which was occupied by the intestate, John Lester Howard, Sally Howard, and Sue McSwain. John Lester Howard was referred to as "Uncle Jux", while Sally Howard was known as "Aunt Sally." The relationship between these parties is not shown, but the occupants lived and conducted themselves as a family group. Sue McSwain, an orphan, had lived there since the death of her parents, and from the time she was a small child, this was the only home she knew. On 11 November 1950 she was married to E. L. McSwain, a sergeant and career soldier in the United States Army since 29 July 1948. After their marriage, they lived at various places, depending on E. L. McSwain's duty station, but until 1962 the Gum Street residence was used as their permanent mailing address. She returned there for visits and for vacations of varying duration. She brought her children there when her husband was on overseas duty. When she was there, they all continued as a family group.

E. L. McSwain testified as to a conversation between the intestate and the plaintiffs, which took place in February 1958 immediately after the death of "Aunt Sally":

"George asked my wife, because since Aunt Sally died he had nobody else to care for him, if we would move into the house with him, that this property and home and everything he might have would go to my wife and children. That, in essence, is what he said. My wife told him we could not move there, but she would do everything in her power to take care of him. George then told Sue he would make the will giving her everything he owned plus his insurance to her and the children."

Although the plaintiffs did not move into the house with him, they performed various services for him during their visits, and these services included running errands, cooking, doing the laundry, cutting the grass, repairing the house and various other chores.

[3, 4] The evidence in this case does not sustain an express contract between the intestate and either plaintiff. The offer made by the intestate in 1958 after the death of "Aunt Sally" was flatly rejected. Sue McSwain and her family did not move into his house and take on a full-time duty of caring for the intestate. However, we think there is sufficient evidence to go to the jury on the issue of *quantum meruit*. The failure to establish an express contract does not prevent the prosecution of a claim for services rendered during the three years preceding the death of the intestate, and whether such services were rendered with the expectation of being paid or under an implied promise of compensation, is a question of fact for the jury.

[4, 5] Until 1962 the services rendered by the plaintiffs were those ordinarily rendered by a member of a family group and would be controlled by the doctrines enunciated in *Callahan v. Wood*, 118 N.C. 752, 24 S.E. 542; *Lindley v. Frazier*, 231 N.C. 44, 55 S.E. 2d 815, and *Brown v. Hatcher*, 268 N.C. 57, 149 S.E. 2d 586. However, when the plaintiffs moved to Charlotte and established their own home, this relationship changed after 1962. They continued to perform services for the intestate but the family group no longer existed. Clearly, the plaintiffs were entitled to have the jury pass upon their claim for services rendered during the three years immediately preceding the death of the intestate in 1966. The evidence in this case was sufficient to permit, but not require, a jury to find that the services rendered by each of the plaintiffs were not rendered gratuitously, but were rendered in the expectation of compensation. The evidence would also permit, but not require, a finding by the jury

that these services were knowingly and voluntarily accepted by one who fully intended to reward such conduct. This would bring the plaintiffs "within the general rule that if one performs services for another which are knowingly and voluntarily accepted, nothing else appearing, 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. *Gibbs v. Jones,* 261 N.C. 610, 135 S.E. 2d 673.

The evidence in this case should have been submitted to the jury on the issue of *quantum meruit* for the three years prior to the death of the intestate.

The judgment of involuntary nonsuit in each case is

Reversed.

MALLARD, C.J., and MORRIS, J., concur.

CASE NO. 1 EVELYN D. NELSON v. RICHARD DALE CARROLL, A MINOR, BY HIS GUARDIAN AD LITEM MAE S. CARROL, AND MAE S. CARROLL, ORIGINAL DEFENDANTS, AND BOBBY LINN MORTON AND MINOR LOVE, D/B/A LOVE MOTORS, ADDITIONAL DEFENDANTS

AND

CASE NO. 2 PATRICIA ANN NELSON, A MINOR, BY HER NEXT FRIEND MAURICE B. NELSON v. RICHARD DALE CARROLL, A MINOR, BY HIS GUARDIAN AD LITEM MAE S. CARROLL, AND MAE S. CARROLL, ORIGINAL DEFENDANTS, AND BOBBY LINN MORTON AND MINOR LOVE, D/B/A LOVE MOTORS, ADDITIONAL DEFENDANTS

AND

CASE NO. 3 MARY HOPKINS SEHORN v. EVELYN DUNN NELSON, MAURICE B. NELSON, RICHARD DALE CARROLL, A MINOR, BY HIS GUARDIAN AD LITEM MAE S. CARROLL, AND BOBBY LINN MORTON, ORIGINAL DEFENDANTS, AND MINOR LOVE, D/B/A LOVE MOTORS, ADDITIONAL DEFENDANT

No. 6819SC306

(Filed 13 November 1968)

1. Torts § 4— right of joinder for contribution — applicability of G.S. 1-240

Where action was instituted and all motions for joinder of additional parties for purposes of contribution were made prior to January 1, 1968, G.S. 1-240 is applicable. Session Laws of 1967, Ch. 847, § 2.

2. Torts § 4— prerequisite to contribution

A defendant may not invoke the statutory right of contribution under

[former] G.S. 1-240 against an additional defendant in a tort action unless both parties are liable as joint tort-feasors to the plaintiff in the action.

3. Torts § 4— right of joinder for contribution under G.S. 1-240 — demurrer

In three causes of action arising out of a four-car collision, the defendant was an original defendant in one cause and was joined in the other two causes as an additional defendant for purposes of contribution. The allegations in the three causes were to the effect that defendant was negligent in following the third car too closely, failing to keep a proper lookout and failing to keep his car under proper control. Defendant denied these allegations and in each of the cases filed a cross-action against an automobile dealer as an additional party for contribution under [former] G.S. 1-240 on the ground that the automobile which defendant was driving at the time of the collision had defective brakes as a result of the dealer's negligence. *Held:* Demurrer by the dealer to defendant's cross-actions on ground that they failed to state a cause of action was properly sustained.

4. Torts § 4— contribution — necessity for allegations of concurring negligence

To entitle a defendant to join an additional defendant under [former] G.S. 1-240 for contribution as a joint tort-feasor, facts must be alleged which, if established, would constitute concurring negligence in producing the injury complained of by plaintiff; mere allegation that negligence of the additional defendant concurred with that of the original defendant is a mere conclusion.

APPEAL by Bobby Linn Morton from *Seay, J.*, 22 April 1968 Session, CABARRUS Superior Court.

These three actions grow out of a four-car collision on 20 July 1966. The vehicles will be referred to as the Sehorn car, the Nelson car, the Carroll car, and the Morton car. Each of the cars was traveling north on Highway No. 29 with the Sehorn car in the lead, the Nelson car second, the Carroll car third, and the Morton car fourth in line. The Nelson, Carroll and Morton cars either ran into, or were knocked into, the rear of the car in front of it.

The cases are numbered in the record on appeal and in this opinion in the order of the date upon which summons was issued. The plaintiff in Case No. 1 was the operator of the Nelson car; the plaintiff in Case No. 2 was a passenger in the Nelson car; and the plaintiff in Case No. 3 was the operator of the Sehorn car. In view of the fact that the Sehorn car was at the "head of the line" of the four cars, and the Nelson car was second in line, we will first discuss Case No. 3.

Case No. 3

The plaintiff, Mary Hopkins Sehorn, brings her action against

the owners and the operators of the Nelson, the Carroll, and the Morton cars, alleging various negligent acts on the part of each operator. The allegations with respect to the operator of the Morton car are the only ones pertinent to this appeal. Summarized, the plaintiff in Case No. 3 alleges that the defendant Morton was negligent in (1) following the Carroll car too closely, (2) failing to keep a proper lookout, and (3) failing to keep his car under proper control.

We will discuss the pleadings filed by the defendant Morton after a summary of the allegations against him in each of the three cases.

Case No. 1

The plaintiff, Evelyn D. Nelson, brings her action only against the owner and the operator of the Carroll car, which was next in line behind her car, alleging various negligent acts on the part of the operator of that car. The original defendants in this case filed a cross-action against Morton for contribution under G.S. 1-240, alleging concurring negligence on the part of Morton. Summarized, the original defendants (Carroll) in Case No. 1 allege that Morton was negligent in (1) following the Carroll car too closely, (2) failing to keep a proper lookout, and (3) failing to keep his car under proper control. Morton was brought into this case as an additional defendant.

Case No. 2

The plaintiff, Patricia Ann Nelson, brings her action only against the owner and the operator of the Carroll car, alleging various negligent acts on the part of the operator of that car. As in Case No. 1, the original defendants in this case filed a cross-action against Morton for contribution under G.S. 1-240, alleging concurring negligence on the part of Morton. Summarized, the original defendants (Carroll) in Case No. 2 allege that Morton was negligent in (1) following the Carroll car too closely, (2) failing to keep a proper lookout, and (3) failing to keep his car under proper control. Morton was brought into this case as an additional defendant.

In Case No. 1 and Case No. 2 the additional defendant Morton denied negligence, and alleged that a sudden and unexpected brake failure caused his car to collide with the Carroll car. In Case No. 3 Morton denied negligence on his part.

In each of the three cases Morton filed a cross-action against Minor Love, doing business as Love Motors, for contribution under G.S. 1-240, alleging that Love sold him the automobile two days be-

fore the accident, and that certain negligent acts by Love combined and concurred with any negligence on the part of Morton. Summarized, Morton alleges that Love was negligent (1) in selling Morton the automobile when he knew or should have known the brakes were defective, (2) in representing to Morton that the brakes were dependable and reliable, (3) in failing to exercise reasonable skill in inspecting the automobile for purposes of the "Safety Equipment Inspection of Motor Vehicles" statute, (4) in certifying that the brakes met the North Carolina standards, and (5) in performing the safety equipment inspection in a negligent manner.

Upon these allegations, summons was issued to and served upon Minor Love in each of the three cases making him an additional party defendant. Love demurred in each case, and from Orders sustaining the demurrers Bobby Linn Morton appealed.

Kennedy, Covington, Lobdell and Hickman by J. Donnell Lassiter, for appellant, Bobby Linn Morton.

Helms, Mullis and Johnston by E. Osborne Ayscue, Jr., for appellee, Minor Love.

BROCK, J.

[1] The determinative question upon this appeal is whether Bobby Linn Morton has alleged a cause of action for contribution against Minor Love. It should be noted at the outset that this action was instituted and all motions for additional parties were made before 1 January 1968, the effective date upon which G.S. 1-240 was repealed by Session Laws 1967, c. 847, s. 2. Also the pleadings by Bobby Linn Morton specify that he seeks contribution from Minor Love under G.S. 1-240. Therefore, decision in this case is governed by the provisions of G.S. 1-240 and the interpretations placed thereon by our Supreme Court.

[2] A defendant may not invoke the statutory right of contribution under G.S. 1-240 against an additional defendant in a tort action unless both parties are liable as joint-tortfeasors to the plaintiff in the action. *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673. "To constitute two or more persons joint tort-feasors the negligent or wrongful act of the one must be so united in time and circumstance with the negligent or tortious act of the other that the two acts in fact constitute but one transaction. While neither concert of action nor unity of purpose is required, there must be concurrence in point of time and place. The parties must either act together in committing the wrong, or their acts, if independent of each other, must unite in

causing a single injury." *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295. "In order to show *joint* tortfeasorship, it is necessary that the facts alleged in the cross complaint be sufficient to make the third party liable to the plaintiff along with the cross-complaining defendant in the event of a recovery by the plaintiff against him." *Hayes v. Wilmington, supra.* "To entitle the original defendant in a tort action to have some third party made an additional party defendant under G.S. 1-240 to enforce contribution, it must be made to appear from the facts alleged in the cross action that the defendant and such third person are tort-feasors in respect of the subject of controversy, jointly liable to the plaintiff for the particular wrong alleged in the complaint. The facts must be such that the plaintiff, had he desired so to do, could have joined such third party as defendant in the action." *Hobbs v. Goodman,* 240 N.C. 192, 81 S.E. 2d 413.

[3] The negligence as alleged against Minor Love by Bobby Linn Morton consists entirely of negligence in the inspection and sale of the Morton car with defective brakes. None of the allegations of negligence against Morton charge an operation of the vehicle with defective brakes; it is Morton himself who first raises any question about brakes and he asserts a sudden, unexpected and unforeseeable brake failure. If this theory were determined in his favor by the jury, it would exonerate Morton insofar as any question of the brakes is concerned, and there would be no cause for Love to be a party for contribution. On the other hand, a finding by the jury that Morton was negligent would necessarily be upon one or more of the specifications of negligence *alleged against Morton* (i.e. following too closely, failing to keep a proper lookout, or failing to keep his car under proper control), and there would be no cause for Love to be a party for contribution to pay damages inflicted by Morton's negligence in one of those respects.

[4] To entitle a defendant to join an additional defendant under G.S. 1-240 for contribution as a joint tort-feasor facts must be alleged which, if established, would constitute concurring negligence in producing the injury complained of by the plaintiff. A mere allegation that the negligence of the additional defendant concurred with that of the original defendant is no more than a conclusion.

[3] We agree with the trial judge that the demurrers of Love should be sustained. This disposition renders unnecessary a discussion of the other arguments advanced by the parties in their briefs and oral arguments.

Affirmed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. THOMAS E. WHITE
No. 6825SC261

(Filed 13 November 1968)

1. Indictment and Warrant § 17; Automobiles § 3— variance between allegation and proof

There is a fatal variance between allegation and proof where the warrant charges that defendant operated a motor vehicle on a public highway while his license was revoked "on or about Monday, 12, 1967 at 10:00 a.m." and the evidence discloses that the alleged offense occurred on Saturday, 18 November 1967.

2. Constitutional Law § 32— right to counsel — misdemeanor cases

An indigent defendant charged with a misdemeanor does not have an absolute right to have court-appointed counsel; the appointment of counsel in such cases rests in the sound discretion of the presiding judge.

3. Criminal Law §§ 75, 162— statements by defendant in officer's presence — failure to object — applicability of Miranda

In a prosecution for reckless driving, testimony by a law officer that while defendant was receiving emergency treatment at a hospital a doctor asked defendant what he had been drinking, and defendant replied that he had drunk a fifth of liquor that day, *is held* properly admitted, defendant having made no objection to the testimony, and *Miranda v. Arizona* not being applicable since the statement did not result from in-custody interrogation by the officer.

4. Criminal Law § 163— failure to except to charge

Assignment of error to the charge is ineffectual where defendant made no exception to any portion of the charge.

APPEAL by defendant from *Falls, J.*, 10 April 1968, Criminal Session of CATAWBA Superior Court. The original record filed in this case did not contain a charge by warrant or bill of indictment upon which the defendant was tried. An addendum to the record contains two warrants. The first warrant carries at the top thereof "North Carolina Uniform Traffic Ticket c051431." It is further designated as Docket No. 67-CrD-13604. This warrant purports to charge the defendant with unlawfully and willfully operating a motor vehicle on Highway 127 — "Driving while license were revoked and during period of revocation". It is further charged that this occurrence was on or about Monday, 12, 1967 at 10:10 A.M. The space for inserting the month of the violation is not readable.

The other warrant bears the designation "North Carolina Uniform Traffic Ticket c051429". It is further designated as Docket No. 67-CrD-12734. It charges the defendant with unlawfully and willfully operating a motor vehicle on Highway 127 — "No Operators

License G.S. 20-7; Reckless Driving G.S. 20-140; No Registration Plates G.S. 20-50-111; Inspection Violation G.S. 183-2." The violation date is designated therein as Saturday, the eleventh month, eighteenth day, 1967, at 6:30 P.M.

The addendum to the record further shows that in the District Court of Catawba County the charge — "No Operators Licenses — Nol prossed."

The evidence shows that about 7:00 P.M. on 18 November 1967 the defendant was operating a motor vehicle upon Highway 127, a public road in Catawba County. He was operating on the wrong side of the road when he met another vehicle going in the opposite direction. The operator of the second vehicle, Deputy Sheriff Yoder, had to leave the road in order to avoid being run into by the defendant. Yoder turned around and overtook the defendant, who ran off the road and into a service station, hitting two other vehicles. The defendant, who had no driver's license, was operating a vehicle which had no license tag. As a result, warrants were issued by A. L. Warren, the Chief of Police of the Town of Brookford. The warrant in Docket No. 67-CrD-13604 was sworn to on 12 December 1967. The warrant in Docket No. 67-CrD-12734 was sworn to on 19 November 1967.

The defendant, who was not represented by counsel at his trial, entered a plea of not guilty to all charges. The district court found him guilty in Docket No. 67-CrD-13604 for driving while his license was revoked and during the period of revocation and in Docket No. 67-CrD-12734 for reckless driving, driving with no registration plates, and inspection violation. From the judgments imposed in Docket No. 67-CrD-13604 and in Docket No. 67-CrD-12734, he appealed to the superior court, where he again entered a plea of not guilty to all charges.

In the superior court, the jury rendered a verdict of guilty on the charges of driving after revocation of license, reckless driving, no registration plates, and inspection violation. For driving after revocation, judgment was entered that the defendant be confined in the common jail of Catawba County for two years and assigned to work under the supervision of the Department of Correction. For reckless driving and inspection violation, judgment was entered that the defendant be confined in the common jail of Catawba County for six months and assigned to work under the supervision of the Department of Correction, this sentence to commence at the expiration of the sentence pronounced in Docket No. 67-CrD-13604. On

the charge of no registration plates, which charge was contained in Docket No. 67-CrD-12734, there was a dismissal by the court.

From these sentences, the defendant gave notice of appeal to the Court of Appeals. This appeal was perfected as a pauper and the Court appointed counsel to represent the defendant.

T. W. Bruton, Attorney General, William W. Melvin, Assistant Attorney General, and T. Buie Costen, Staff Attorney, for the State.

Lewis E. Waddell, Jr., Attorney for defendant appellant.

CAMPBELL, J.

The record on appeal in this case is inadequate in that no exceptions appear in the record or in the transcript and there are no exceptions supporting the assignments of error. The charge of the court is not contained in the record, and there are other deficiencies.

[1] In Docket No. 67-CrD-13604 the date of the violation charged is Monday, the 12th of some month which is illegible. In the year 1967 the month of June was the only month that had a Monday falling on the 12th day. The evidence discloses that whatever offense the defendant committed was on Saturday, 18 November 1967, but there is nothing in the warrant in Docket No. 67-CrD-13604 that connects the defendant with any offense on Saturday, 18 November 1967. It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged. The allegation and proof must correspond. *State v. Watson,* 272 N.C. 526, 158 S.E. 2d 334; *State v. Sossamon,* 259 N.C. 374, 130 S.E. 2d 638. We hold that there is a fatal variance between the charge contained in the warrant in Docket No. 67-CrD-13604 and the evidence. This Court *ex mero motu* vacates the judgment entered in Docket No. 67-CrD-13604. If a uniform traffic ticket is going to be used, care must be exercised in filling it out so that it accurately charges the offense, and the defendant will know with what he is charged.

In the other case, Docket No. 67-CrD-12734, the defendant was found guilty by the jury of reckless driving, no registration plates, and inspection violation. The trial court dismissed the charge of no registration plates. On the other two charges, as stated above, the defendant was sentenced to six months in the common jail of Catawba County to be assigned to work under the supervision of the State Department of Correction.

[2] The defendant contends that there was error in the trial

court in failing to appoint counsel to represent him. We find no merit in this contention.

> "We do not conceive it to be the absolute right of a defendant charged with a misdemeanor, petty or otherwise, to have court-appointed and-paid counsel. . . . The Statute . . . leaves the matter to the sound discretion of the presiding judge. Some misdemeanors and some circumstances might justify the appointment of counsel, but this is not true in all misdemeanors." *State v. Bennett,* 266 N.C. 755, 147 S.E. 2d 237; *State v. Morris,* 2 N.C. App. 262, 163 S.E. 2d 108.

[3] The defendant further contends that there was error in the trial court in allowing the following testimony of Deputy Sheriff Yoder:

> "We called the ambulance and taken Thomas White to the hospital. And I immediately went on down to the hospital and Chief Warren stayed with the car. And he [defendant] was in the emergency room. I talked with Dr. Jones which was waiting on him; and Dr. Jones asked him in my presence what he had been drinking. He said he had drank a fifth of liquor that day."

No objection was entered to the admission of this statement. An objection is a prerequisite. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Stubbs,* 266 N.C. 274, 145 S.E. 2d 896. There was no "in-custody interrogation" by the officer, therefore, this evidence was clearly outside the scope of the *Miranda* ruling. *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638.

This assignment of error is overruled.

[4] The defendant also attempts to assign error to the judge's charge. There was no exception to any portion of the charge, therefore, this assignment of error is ineffectual. Nevertheless, we reviewed the charge of the court and do not find any prejudicial error to the defendant contained therein.

For fatal variance between the warrant and the evidence in Case No. 67-CrD-13604, sentence vacated.

In Case No. 67-CrD-12734, judgment affirmed.

MALLARD, C.J. and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. JAMES BURRIS

No. 6827SC282

(Filed 13 November 1968)

1. Criminal Law § 124; Assault and Battery § 17— sufficiency of verdict

The jury's verdict of guilty of assault with a deadly weapon with intent to kill, which was given in response to the clerk's inquiry as to whether the jury found defendant guilty or not guilty of assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death, *is held* complete, sensible and responsive in light of the indictment and the instructions, and the action of the trial court in failing to accept the verdict and instead insisting that the jury reply directly to the inquiry of the clerk is erroneous; consequently, judgment and sentence of seven to ten years entered upon the jury's subsequent reply of guilty to the offense of felonious assault is vacated and the cause remanded for entry of proper sentence not to exceed two years.

2. Assault and Battery § 5— misdemeanors

Both assault with a deadly weapon with intent to kill and an assault with a deadly weapon are general misdemeanors. G.S. 14-33.

3. Criminal Law § 126— acceptance of verdict

A verdict is a substantial right, and whenever the verdict is complete, sensible and responsive to the bill of indictment, it must be accepted by the court.

4. Criminal Law § 138— punishment for misdemeanor

The maximum punishment for a general misdemeanor is two years. G.S. 14-3.

APPEAL by defendant from *Froneberger, J.*, 19 February 1968 Session (3rd week), GASTON Superior Court.

Defendant was charged in a bill of indictment with the felony of assault with a deadly weapon with intent to kill, inflicting serious bodily injury, not resulting in death. It is alleged that the assault was committed on 17 July 1966 upon one John Randleman with a knife. From a verdict of guilty, and judgment of confinement for a period of not less than seven nor more than ten years, the defendant appealed.

T. W. Bruton, Attorney General, by Andrew A. Vanore, Jr. and Jeff D. Johnson, III, Staff Attorneys, for the State.

Horace M. DuBose, III, for the defendant.

BROCK, J.

The facts are not necessary to an understanding of defendant's principal assignments of error. Suffice it to say that the State's

evidence was sufficient to justify submitting the case to the jury upon the charge contained in the bill of indictment, and the defendant does not contest this.

[1] In his charge to the jury the trial judge adequately and correctly explained the elements of the offense charged, and correctly instructed the jury upon its duties. However, after the jury had retired, His Honor, considering that he had erred in restricting the jury to a verdict of guilty of the offense charged, or to a verdict of not guilty, and in failing to submit to the jury the question of guilt of a lesser included offense, recalled them for further instructions.

After the jury was returned to the courtroom, His Honor instructed:

> "Ladies and gentlemen of the jury, I'm sorry I had to bring you back in. I overlooked one thing in my charge and that is I instructed you there were only two verdicts you could bring in under this evidence and that is guilty or not guilty of assault with a deadly weapon with intent to kill. However, the Court will now instruct you that if you do not find the defendant guilty, or you find the defendant not guilty of assault with a deadly weapon with intent to kill, then it would be your duty to consider whether or not the defendant is guilty of an assault with a deadly weapon."

[2] However inadvertent it may have been, the foregoing instruction relates to two general misdemeanors; an assault with a deadly weapon with intent to kill is a general misdemeanor, G.S. 14-33; *State v. Braxton,* 265 N.C. 342, 144 S.E. 2d 5; and an assault with a deadly weapon is a general misdemeanor, G.S. 14-33; *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633. Nowhere is the felony charge referred to in this additional instruction. Then after defining an assault with a deadly weapon, and further explaining the burden of proof the Court continued:

> "Instead of bringing in two verdicts, you could bring in three verdicts: *guilty of assault with a deadly weapon with intent to kill,* or, not guilty; or, *guilty of assault with a deadly weapon,* or, not guilty, or *not guilty* of both of them." (Emphasis added.)

Again the jury was instructed that they might return a verdict of guilty of either of two general misdemeanors, or not guilty.

After the jury had deliberated and returned into Court to announce its verdict, the following transpired:

"CLERK: Members of the jury, have you agreed upon a verdict?

"JUROR: Yes, we have.

"CLERK: How do you find the defendant, guilty or not guilty of assault with a deadly weapon with intent to kill, resulting in serious bodily injury not resulting in death? Do you find the defendant guilty or not guilty of that charge?

"JUROR: We find him guilty of assault with a deadly weapon with intent to kill.

"COURT: Would you stand up again. I want to know how you answered.

"CLERK: Your Honor, they didn't answer the first question I asked. How do you find the defendant, guilty or not guilty of assault with a deadly weapon with intent to kill, resulting in serious bodily injury not resulting in death? Do you find him guilty or not guilty of that charge?

"JUROR: Guilty."

Thereafter the jury was polled and each answered questions as follows:

"CLERK: Your foreman has reported a verdict of guilty of assault with a deadly weapon with intent to kill, resulting in serious bodily injury not resulting in death; was that your verdict?

"JUROR: Yes.

"CLERK: Is that now your verdict?

"JUROR: Yes.

"CLERK: Do you now agree and assent to that verdict?

"JUROR: Yes."

The State argues that this procedure clarified that the jury intended a verdict of guilty of a felonious assault when it first returned a verdict of "guilty of assault with a deadly weapon with intent to kill." We cannot conclude that the jury intended conviction of a felony when its verdict of guilty of a misdemeanor is responsive, complete and sensible.

The trial judge had specifically instructed the jury that they might return a verdict of guilty of a misdemeanor assault, and in his final instruction he stated:

"If you find him guilty of assault with a deadly weapon

with intent to kill, doing serious bodily injury, then you wouldn't answer the second count in the bill of indictment or the lesser crime. All right, you may retire."

[1, 3] The verdict as first rendered by the jury was a complete, clear, sensible, and responsive verdict, and it could not thereafter change that verdict to a verdict of guilty of a more serious offense. *State v. Hamrick,* 2 N.C. App. 227, 162 S.E. 2d 567. A verdict is a substantial right, and whenever the verdict is complete, sensible and responsive to the bill of indictment, it must be accepted by the court. *State v. Hamrick, supra.*

It may well be that the trial judge intended by his additional instructions to instruct the jury that they might return any one of three possible verdicts: (1) guilty of assault with a deadly weapon with intent to kill inflicting serious bodily injury, not resulting in death; or (2) guilty of assault with a deadly weapon; or (3) not guilty. But this he failed to do. It appears that the action of the judge and the clerk in insisting upon a direct answer to the clerk's first inquiry, may have led the jurors to believe they had done something wrong, and they then answered in a manner that they thought acceptable by the court. We do not feel that coercion was intended; nevertheless, it appears that was the result.

[4] The offense of an assault with a deadly weapon with intent to kill, a general misdemeanor, is a lesser included offense of the felony charged in a bill of indictment drawn under G.S. 14-32. The maximum punishment for a general misdemeanor is two years. G.S. 14-3.

[1] In this case the sentence entered by the trial judge was for confinement for a term of not less than seven nor more than ten years. Therefore the judgment entered by the trial court is vacated and this cause is remanded to the Superior Court of Gaston County for entry of a proper sentence not to exceed two years.

Judgment vacated and case remanded.

BRITT and PARKER, JJ., concur.

ROBERT I. POWELL v. BOARD OF TRUSTEES OF TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM

No. 6810SC284

(Filed 13 November 1968)

1. Retirement Systems § 5— claim of deceased member's beneficiary to retirement allowance

The death of plaintiff's wife prior to the effective date of her disability retirement under Teachers' and State Employees' Retirement System renders unenforceable her election of option two under G.S. 135-5(g) whereby upon her death the plaintiff, as her nominated beneficiary, would continue to receive her reduced retirement allowance for the remainder of his life; consequently, plaintiff is entitled only to a return of his wife's accumulated contributions to the retirement system in accordance with G.S. 135-5(f). G.S. 135-5(g).

2. Statutes § 5— rules of construction — legislative intent

The intent and spirit of a statute are controlling in its construction, and its language should be construed contextually to ascertain the legislative intent.

3. Retirement Systems § 2— purpose of State retirement system

In creating the Teachers' and State Employees' Retirement System, it was not the intention of the legislature to establish a group life insurance program; rather, its purpose was to provide benefits on retirement for the teachers in the public school system of the State and for State employees.

APPEAL by plaintiff from *Godwin, J.*, 10 June 1968 Session, WAKE, Superior Court.

Ruth P. Powell, wife of plaintiff, died 21 August 1966, at the age of 51 years. At the time of her death she had more than twenty years service as a public school teacher in North Carolina, and was a fully accredited member of the Teachers' and State Employees' Retirement System. On 9 August 1966, her medical condition was such that she was fully entitled to a "disability retirement" provided she complied with the applicable statutes.

On 9 August 1966, Ruth P. Powell filed with the Board of Trustees of the Teachers' and State Employees' Retirement System her "Application for Disability Retirement," requesting that her retirement become effective 1 October 1966. In the application she elected "Option two" under G.S. 135-5(g), nominating plaintiff as beneficiary. Option two provided: "Upon his death his reduced retirement allowance shall be continued throughout the life of and paid to such person as he shall nominate by written designation duly acknowledged and filed with the board of trustees at the time of his retirement."

The Board of Trustees refused to pay plaintiff a reduced retirement allowance, but tendered to him a return of Mrs. Powell's contributions in accordance with G.S. 135-5(f).

Plaintiff instituted this action seeking a writ of *mandamus* to be issued directing the Board of Trustees to pay him the reduced retirement allowance under Option two as elected by his wife. The cause was heard by Godwin, J., and from judgment denying relief, plaintiff appealed, assigning as error the entry of the judgment.

Warren and Fowler, by Miles B. Fowler, for plaintiff appellant.

T. W. Bruton, Attorney General, by Harry W. McGalliard, Deputy Attorney General, and Christine Y. Denson, Staff Attorney, for defendant appellees.

BROCK, J.

[1] It was stipulated that, at the time of filing her application, Ruth P. Powell's medical condition was such that she was fully entitled to disability retirement benefits under G.S. 135-5(c) provided she complied with the applicable statutes; therefore the question posed by the parties is whether her election of Option two under G.S. 135-5(g) was valid and enforceable in view of her death prior to 1 October 1966, her selected date of retirement.

On the date of filing her application for retirement G.S. 135-5(g) provided as follows:

> "(g) Election of Optional Allowance. — With the provision that until the first payment on account of any benefit becomes normally due, or his first retirement check has been cashed, any member may elect to receive his benefits in a retirement allowance payable throughout life, or he may elect to receive the actuarial equivalent of such retirement allowance in a reduced allowance payable throughout life under the provisions set forth in Options one, two, three, or four below: Provided further, that an optional election may be made after attainment of age 60 without establishment of a date of retirement. Such election will be effective 30 days after execution and filing thereof with the Retirement System. The election of Option two or Option three or nomination of the person thereunder shall be revoked if such person nominated dies prior to the date the first payment becomes normally due or until the first retirement check has been cashed. Such election may be revoked by the member prior to the date the first payment becomes normally due or until his

first retirement check has been cashed. Any member dying in service after his optional election has become effective shall be presumed to have retired on the first day of the month following the date of death."

Option two under G.S. 135-5(g) read as follows:

"Option 2. Upon his death his reduced retirement allowance shall be continued throughout the life of and paid to such person as he shall nominate by written designation duly acknowledged and filed with the board of trustees at the time of his retirement."

[2] The intent of the legislature controls the interpretation of a statute. The intent and spirit of an act are controlling in its construction, and its language should be construed contextually to ascertain the legislative intent. 7 Strong, N. C. Index 2d, Statutes, § 5, p. 68.

[3] It should be noted at the outset that by legislative definition Article 1 of Chapter 135 (G.S. 135-1 through 135-18.5) creates the "Teachers' and State Employees' Retirement System of North Carolina" for the purpose of "providing retirement allowances and other benefits . . . for teachers and state employees . . ." G.S. 135-2. Nowhere do the statutes indicate a legislative intent to establish a group life insurance program. On the contrary, G.S. 135-5(f) provides in part specifically as follows: ". . . Upon receipt of proof satisfactory to the board of trustees *of the death, prior to retirement, of a member or former member* there shall be paid . . . the *amount of his accumulated contributions* at the time of his death." (Emphasis added.) " 'Retirement' shall mean the withdrawal from active service with a retirement allowance granted under the provisions of this chapter." G.S. 135-1(20). In *Bridges v. Charlotte,* 221 N.C. 472, 20 S.E. 2d 825, our Supreme Court held the purpose of the legislature was "to provide *benefits on retirement* for the teachers in the public school system of the State and for State employees. It is based not only upon the principle of justice to poorly paid State employees, but also upon the philosophy that a measure of *freedom from apprehension of old age and disability* will add to the immediate efficiency of those engaged in carrying on a work of first importance to society and the State." (Emphasis added.)

[1] It is clear from the stipulated facts that Ruth P. Powell had not retired on the date of her death; she had selected 1 October 1966 as the date for her retirement to become effective, and she died 21 August 1966. And it cannot be said that her selection of a date for retirement has created an unfortunate situation. Because, under the

disability retirement section by virtue of which she was eligible to elect to retire it is provided that she may not be retired less than thirty days after filing her application. G.S. 135-5(c). She filed her application on 9 August 1966 and she died twelve days thereafter on 21 August 1966.

Although Option two of G.S. 135-5(g) is a departure from a direct retirement benefit to the teacher or employee, it requires an agreement to accept, upon retirement, a reduced retirement allowance. And within the option itself can be seen the legislative intent that the member must first retire before the death benefit to the nominee can become effective. It provides that the reduced retirement allowance *shall be continued* to the nominee. G.S. 135-5(g), *supra.*

In addition to the clear provisions in case of death before retirement as contained in the above quoted portion of G.S. 135-5(f), and the generally expressed legislative intent to provide for *retirement benefits,* Ruth P. Powell, in her application for retirement acknowledged the necessity to survive until she was retired. The selection by her of Option two was as follows: "I elect to receive a reduced retirement allowance in accordance with Option 2, *which provides that upon my death after retirement,* the same reduced retirement allowance will be continued to the beneficiary designated below for the remainder of his (her) life." (Emphasis added.)

It is clear that Ruth P. Powell wished for plaintiff to have the benefit of the reduced retirement allowance in the event he outlived her, but the wishes of the deceased member cannot amend the clear provisions of the statutes. Nor can this Court amend the statutes to accommodate the wishes of the deceased member. It was necessary for the legislature to establish a point at which benefits would become due and payable; this they have established after retirement. We recognize that had Ruth P. Powell lived for only another month or so the plaintiff would be entitled to receive these payments for the rest of his life, but this cannot justify ignoring the statute. Nor do we think the provisions of the statute constitute a trap for the unwary as argued by the plaintiff. Ruth P. Powell did nothing to her detriment in undertaking to establish retirement under Option two; she would not have gained retirement status under any provision of the act. The attempted election by her has in no way devalued her estate; it is entitled to the same benefit of accumulated contributions as though no option had been elected. We

perceive no unfairness in the statute. If changes seem desirable, it is a matter for the legislature.

Affirmed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. STEVE WAYNE KIRBY

No. 6826SC409

(Filed 13 November 1968)

1. Burglary and Unlawful Breakings § 5 — nonsuit — testimony by accomplice

In a prosecution for breaking and entering and larceny, defendant's motion for nonsuit was properly denied where an accomplice testified that defendant acted as a lookout while the accomplice and another broke and entered a building and stole property therefrom, and that defendant shared in the division of the stolen property.

2. Criminal Law § 106— nonsuit — unsupported testimony by accomplice

The unsupported testimony of an accomplice is sufficient to support conviction if it satisfies the jury of defendant's guilt beyond a reasonable doubt.

3. Criminal Law § 9— aider and abettor

When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty without regard to any previous confederation or design.

4. Criminal Law § 117— duty of jury to scrutinize testimony of accomplice — request for special instructions

Where a request is made for a specific instruction as to the rule of scrutiny in the event of an accomplice testifying for the prosecution, which instruction is correct in itself and supported by the evidence, the trial judge, while not required to parrot the instruction in the exact words of counsel, must charge the jury in substantial conformity to the prayer.

5. Criminal Law § 117— instruction as to testimony of accomplice

An instruction that it is dangerous to convict a defendant upon the unsupported testimony of an accomplice *is held* to conform substantially to the special instructions requested by defendant as to the rule of scrutiny of an accomplice's testimony and is more than that to which the defendant is entitled.

APPEAL by defendant from *Beal, S.J.*, at 16 April 1968 Schedule "D" Criminal Session of MECKLENBURG Superior Court.

The bill of indictment against defendant charged him with feloniously breaking and entering Phil's Dinette in the City of Charlotte and the larceny of certain property therefrom. On a plea of not guilty, the jury found the defendant guilty as charged, and from an active prison sentence of five years, defendant appealed.

Attorney General T. Wade Bruton by Assistant Attorney General Bernard A. Harrell for the State.

Don Davis for defendant appellant.

BRITT, J.

Defendant assigns as error the failure of the trial judge to grant his motion for nonsuit made at the close of the State's evidence and renewed at the close of all the evidence.

Before resting its case, the State introduced two witnesses. Phil George Lucas gave testimony to the effect that he was the owner of the premises, that they were burglarized on the night of 23 February 1968 or early morning of 24 February 1968, and that the property itemized in the bill of indictment was taken.

The other witness was Ted Cook, a 15-year-old cousin of the defendant, whose testimony is summarized as follows: He was on probation from reform school and was spending the night in question in defendant's home. During the night, he and defendant were walking on Central Avenue in the City of Charlotte, Phil's Dinette being on said avenue. They walked around the block on which the dinette was located twice before they decided to enter it. Ronnie Kirby, 14-year-old brother of the defendant, was with them. Defendant told Cook that every time he had entered the dinette he had gotten more than $100.00. Cook and Ronnie entered the building while defendant walked up and down the street near the building "to see if there was any law coming." After burglarizing the premises, the three of them returned to defendant's home on Independence Boulevard where the money that had been taken was divided, defendant getting some of the money. The cigarettes and certain other stolen property were placed in a closet in defendant's home, and some stolen papers were placed under the house. The next day Cook accompanied defendant to Scranton, South Carolina, and a portion of the stolen property, including a radio and some cigarettes, were taken by them to South Carolina. Cook entered a

plea of guilty to a separate indictment charging him with breaking and entering and larceny.

[1-3] The evidence against defendant was sufficient to withstand his motions of nonsuit. The unsupported testimony of an accomplice is sufficient to support conviction in this State if it satisfies the jury of guilt beyond a reasonable doubt. *State v. Terrell,* 256 N.C. 232, 123 S.E. 2d 469. "It is thoroughly established law in this State that, without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty." *State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95; *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169.

Defendant also assigns as error the refusal of the trial court to give the jury the following tendered special instructions:

> "1. In North Carolina a defendant may be convicted upon the unsupported testimony of an accomplice, if the jury is satisfied from such testimony and beyond a reasonable doubt of his guilt; and, in this case, the witness Ted Cook is what is known in law as an accomplice; and I further instruct you that his testimony as to the guilt of the defendant is unsupported by any other evidence.
>
> 2. The Court further instructs you that it is dangerous to convict a defendant upon the unsupported testimony of an accomplice; that it will be dangerous to convict the defendant in this case upon the testimony of Ted Cook, although it is permissible for you to do so if the State has satisfied you beyond a reasonable doubt of the defendant's guilt; and that it is your duty to scrutinize the testimony of the witness Ted Cook with caution and with care and in the light of his interest and bias, if any, in the case."

The special instructions requested are very similar to those requested by the defendant in *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165, and those requested in *State v. Hooker,* 243 N.C. 429, 90 S.E. 2d 690.

[4] It is a well-established rule in this jurisdiction that if a request is made for a specific instruction as to the rule of scrutiny in the event of an accomplice testifying for the prosecution, which is correct in itself and supported by evidence, the trial judge is not required to "parrot the instructions or to become a mere judicial phonograph for recording the exact and identical words of counsel"; however, he must provide instructions that are in *substantial* conformity

to the prayer. *State v. Bailey, supra; State v. Mitchell,* 1 N.C. App. 528, 162 S.E. 2d 94.

[5] We hold that the trial judge in this case provided the jury with instructions which substantially conform to those requested. In addition to instructing the jury several times that the State must satisfy the jury by the evidence and beyond a reasonable doubt as to the defendant's guilt, the trial judge charged as follows: "* * * the Court instructs you that you may convict in the State of North Carolina on the unsupported testimony of an accomplice. The Court, however, instructs you that it is dangerous to convict on the unsupported testimony of an accomplice."

As was said in *State v. Bailey, supra,* quoting from *State v. Ashburn,* 187 N.C. 717, 122 S.E. 833: "The charge was all, and perhaps more, than the defendant was entitled to." The assignment of error is overruled.

We have carefully considered the other assignments of error brought forward in defendant's brief, but finding them without merit, they are overruled.

The record before us discloses that although the defendant was only 18 years old at the time of trial, he had been tried and convicted of breaking and entering in 1965 and again in 1966; had been tried and convicted of escape; and was on parole from South Carolina at the time charged in this case. He testified that when he and Ted Cook returned to Charlotte from South Carolina on the day following the burglary of Phil's Dinette, they returned in a stolen car. His court-appointed attorney represented him well in the superior court where he received a fair trial and in this court where we find that the trial was free from prejudicial error.

No error.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIE ROBERT STEVENSON

No. 6826SC408

(Filed 13 November 1968)

1. Criminal Law § 115— instructions on lesser degrees of crime

G.S. 15-170, which provides that a defendant may be convicted of the crime charged in the indictment or of a less degree of the same crime,

does not compel the trial court to charge on the lesser included offense where the evidence is such that the jury could not find that such lesser crime was committed.

2. Robbery § 5— instructions — submission of lesser degree of armed robbery

Where the State's evidence tends to establish that a robbery with a knife was committed on the prosecuting witness, and the defendant's evidence tends to establish that there was no robbery but that the prosecuting witness loaned him the money, there is no evidence to sustain a conviction of common law robbery, assault with a deadly weapon or assault, and the trial court is not required to charge on these lesser included offenses of armed robbery.

APPEAL from *Hasty, J.*, 8 July 1968 Schedule "C" Session, MECKLENBURG Superior Court.

The defendant was tired on a bill of indictment charging him with the felony of robbery with firearms or other dangerous weapons; to wit, a knife whereby the life of Jonathan Wayne Phillips was endangered and threatened. The defendant, through his attorney, entered a plea of not guilty. After the evidence was heard the jury returned a verdict of guilty and a sentence was imposed of not less than five nor more than seven years in the State Prison. The defendant appeals from this verdict.

At the trial the State offered evidence by Jonathan Wayne Phillips to the effect that he was first introduced to the defendant on 17 March 1968. They met at the Morehead Bowling Center in Charlotte at approximately 8:15 p.m. From the Bowling Center they went to a place called Joe's A'Go Go Club and stayed there approximately one hour and fifteen minutes. They then returned to the Bowling Center and stayed there until approximately 11:45 p.m. At this time they went to Phillips' car so that Phillips could take the defendant home. Phillips gave this account of the robbery:

". . . Bobby Stevenson told me to pull the car over to the side of the road. I asked him 'what for?' and he didn't give me an explanation. He then said 'pull over' again and at this time I pulled over and stopped and came to a complete stop. I came to a complete stop on Bradford Drive. I turned on the dash light overhead and he said, 'Wayne, I want your money,' and I said, 'I am not going to give it to you.' About that time I saw a little knife about six or seven inches overall length with a small, white, pearl handle. It was about one inch in diameter and one-half inch thick. It had about 2½- or 3-inch blade on it. Bobby Stevenson had the knife. He grabbed my

shirt collar and stuck the knife right at my throat and said, 'I want your money.' He stuck it about one-half inch away from my throat and said, 'I want your money,' and I said, 'All right, you can have it.'

* * *

I was willing to give the defendant the money with that knife up to my throat, but I would not have been willing to give it to him without the knife up to my throat. I gave the money to him because I wanted him to get the knife away from my throat and get out of the car."

The defendant took the stand and testified in his own behalf. His account of the alleged robbery is as follows:

"I live on Edgewood, and when he stopped, I asked him if he would loan me some money and he said he would let me have twelve dollars. I said that would be O.K., so I got out and shook his hand and told him I would be back down at Morehead the following day, which was on Sunday. I got him to let me out about a block away from my home because I was afraid to go home where my mother was because she does not approve of drinking. . . .

* * *

I did not have any weapon or knife on me and I have never owned a pearl-handled knife of two or three inches or four-inch knife."

Robert F. Rush for defendant appellant.

Attorney General T. W. Bruton by Deputy Attorney General Harry W. McGalliard for the State.

MORRIS, J.

The defendant's sole assignment of error relates to the failure of the court to charge the jury on the lesser included offenses of armed robbery; to wit: common law robbery, assault with a deadly weapon, or assault.

G.S. 15-170 provides:

"Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

The statute does not compel the trial court to charge on the lesser

included offense where the evidence is such that the jury could not find that such lesser crime was committed.

> "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545.

The recent case of *State v. McLean,* 2 N.C. App. 460, 163 S.E. 2d 125, is on "all fours" with the present case. There, the State's evidence clearly described an armed robbery. The defendant's evidence showed that he was in another place when the robbery occurred. Campbell, J., speaking for this Court said:

> "G.S. 15-170 permits the conviction of a defendant of the crime charged in the bill of indictment 'or of a less degree of the same crime.' This statute, however, does not make mandatory the submission to the jury of a lesser included offense where the indictment does not charge such offense and where there is no evidence of such offense.
>
> * * *
>
> It not only is unnecessary, but it is undesirable for a trial judge to give instructions on abstract possibilities unsupported by evidence."

[2] In the present case the State's evidence tends to establish that a robbery with a knife was committed. The knife was plainly described at the trial by the prosecuting witness. The defendant's evidence tends to establish that there was not a robbery, but that the prosecuting witness loaned him the money. There was no evidence upon which a conviction of common law robbery, assault with a deadly weapon, or assault could have been sustained.

> "If the jury believed the testimony in the case under review, . . . it was its duty to convict the defendants of robbery with firearms because all of the evidence tended to show that such offense was committed upon the prosecuting witness, . . . as alleged in the indictment. There was no testimony tending to establish the commission of an included or lesser crime. The

evidence necessarily restricted the jury to the return of one of two verdicts . . . namely, a verdict of guilty of robbery with firearms . . . or a verdict of not guilty. It follows that the court did not err in failing to instruct the jury that they might acquit the defendants of the crime of robbery with firearms charged in the indictment in question and convict them of a lesser offense." *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; as quoted in *State v. McLean, supra.*

State v. LeGrande, 1 N.C. App. 25, 159 S.E. 2d 265, is in accord with this decision. The trial court did not commit error when it failed to charge on the lesser included offenses of armed robbery.

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE OF NORTH CAROLINA v. ERNEST FREEMAN (JR.)
No. 6825SC245

(Filed 13 November 1968)

1. Criminal Law §§ 75, 76— general objection to admission of confession

A general objection is sufficient to challenge the admissibility of a proffered confession if timely made.

2. Criminal Law § 76— admission of confession over objection — necessity for findings of fact as to voluntariness

In a prosecution for involuntary manslaughter growing out of an automobile accident, the court erred in admitting, over objection, an incriminating statement made by defendant to the investigating officer some three or four hours after the accident occurred where a *voir dire* hearing was held in the absence of the jury but the court made no findings of fact as to whether defendant's statement was understandingly and voluntarily made.

APPEAL by defendant from *Falls, J.,* 1 April 1968 Ordinary Mixed Session of CATAWBA Superior Court.

The defendant, who was fourteen years of age at the time, was charged in a bill of indictment with unlawfully, willfully, and feloniously killing and slaying Katherine Winkler Pearson with a deadly weapon, to wit, an automobile on 20 June 1967. The defendant pleaded not guilty. The State presented evidence which

tended to show that the defendant was driving a friend's car at the time the collision occurred in which Mrs. Pearson was killed. The automobile operated by the defendant collided with one being operated by the deceased, Katherine Winkler Pearson, wife of Lester P. Pearson, Sr. Mrs. Pearson died as a result of injuries received in the collision. There was evidence from which it could be inferred that the defendant was driving on the wrong side of the road at the time of the collision, and there was also evidence that the defendant had been driving at a high rate of speed in a negligent manner in the vicinity of the accident some fifteen minutes before the accident occurred. The State also offered the testimony of the investigating police officer as to incriminating statements made by the defendant three to four hours after the accident while the defendant was at Hickory Memorial Hospital. At the close of the State's evidence, the defendant moved for judgment as of nonsuit, which motion was denied. The defendant did not offer any evidence but renewed his motion for nonsuit, which was again denied. The jury returned a verdict of guilty and judgment was imposed. The defendant excepted and appealed to the Court of Appeals.

Attorney General T. W. Bruton, Assistant Attorney General William W. Melvin, and Staff Attorney T. Buie Costen for the State.

Tate & Weathers by Carroll W. Weathers, Jr., for defendant.

MALLARD, C.J.

We think that the defendant's motion for judgment of nonsuit on the evidence was properly denied.

[2] However, we are of the opinion and so hold that the trial court committed error in admitting, over objection, a statement made by the defendant to the investigating officer some three or four hours after the accident, without first holding a hearing and making a finding upon competent evidence that such statement was understandingly and voluntarily made.

In this case a *voir dire* was had in the absence of the jury. There was evidence tending to show that the defendant had been warned of his rights before he answered any questions. There was also evidence tending to show that the defendant, a fourteen year old boy, understood his rights and voluntarily made the statements. In addition, there was evidence that he had been injured in the collision, had already been given some treatment by the doctor for such injuries, and that he appeared to be groggy at the time he was being questioned.

During the course of the *voir dire,* defendant's counsel moved to suppress the evidence, and the Court replied, "I think it's for the jury to weigh it for whatever it's worth." The Court made no findings and the *voir dire* continued. Thereafter, while the investigating officer was testifying, the following occurred:

"Q You testified yesterday that you talked with the defendant about this matter. What did he tell you?

MR. WEATHERS: May it please the Court, I believe the Court is going to allow the testimony. I'd like to preserve my exception by (sic) the Court's ruling. We object and except.

THE COURT: Overruled." DEFENDANT'S EXCEPTION #1

Thereupon, the witness proceeded to relate what he said the defendant told him.

The record does not show that the trial judge made any finding as to whether the statement made by the defendant was understandingly and voluntarily made.

[1] "A general objection is sufficient to challenge the admission of a proffered confession if timely made." *State v. James Joseph Edwards,* 274 N.C. 431, 163 S.E. 2d 767, filed 30 October 1968; *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481, filed 9 October 1968.

In the case of *State v. James Joseph Edwards, supra,* Justice Branch, speaking for the Court, said after citing and quoting from *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1:

"Thus, upon defendant's objection the trial court should have excused the jury and in its absence heard the evidence of both the State and defendant and resolved the question of the voluntariness of the statement. The court should have then made findings of fact on this question and incorporated them into the record."

[2] On the record before us in the instant case, the court heard some evidence but made no findings of fact as to whether the statement made by the defendant was understandingly and voluntarily made. In the absence of such specific finding incorporated in the record, we are unable to determine whether the defendant has been accorded due process of law. For the reasons stated, the defendant is awarded a

New trial.

CAMPBELL and MORRIS, JJ., concur.

IN RE CUSTODY OF OWENBY

IN THE MATTER OF THE CUSTODY OF: WILLIAM THOMAS OWENBY (TAYLOR) AGE 9, DEBRA LYNN OWENBY (TAYLOR) AGE 8, SHELIA KAYE OWENBY (TAYLOR) AGE 5

No. 6828SC302

(Filed 13 November 1968)

1. Bastards § 11— custody of illegitimate child

Ordinarily, the mother of an illegitimate child is its natural guardian and, if a suitable person, has the legal right to its custody, care and control; however, the welfare and best interests of the child override her paramount right to custody where the mother is unfit or unable to care for the child.

2. Infants § 9— custody of children — polar star

The polar star for determining the custody of children is what serves the best interests of the children.

3. Bastards § 11— custody of illegitimate children

Order of the court finding that neither the father nor the mother of minor illegitimate children was a fit and proper person to have custody of the children and that the best interests of the children would be served by placing them in custody of the county welfare department, which would place them in the home of a paternal aunt, *is held* supported by the evidence.

APPEAL from *Martin, (Harry C.) J.*, 1 April 1968, Civil Session, BUNCOMBE County Superior Court.

William Thomas Taylor and Dorothy Owenby lived together for approximately twelve years without benefit of clergy. During this period of cohabitation, three children were born: William Thomas Owenby (Taylor) born 21 July 1958, Debra Lynn Owenby (Taylor) born 30 September 1959, and Shelia Kaye Owenby (Taylor) born 28 November 1963.

During the latter part of 1967, William Thomas Taylor and Dorothy Owenby separated. The former brought the matter to the attention of the Domestic Relations Court of Buncombe County (Domestic Relations Court). After conferring with both parents and after a hearing, the judge of the Domestic Relations Court placed the temporary custody, control and supervision of the three children with the Child Welfare Department of the Buncombe County Welfare Department, pending further hearings. The welfare department was directed to place the two older children with their paternal aunt and her husband, Mr. and Mrs. Robert E. Williams. The younger child was to remain with her mother.

Under date of 11 January 1968 the mother, who married Kenneth Howell on 31 January 1968, filed a petition in the Domestic

Relations Court. That court heard the case on 14 February 1968. It was found that neither parent was a fit and suitable person to have the care, custody and control of the children and that the best interests of the children would be served by placing them in the custody and control of the welfare department, which was ordered to place them in the home of Mr. and Mrs. Robert E. Williams. The father was ordered to provide for their support.

From this order, an appeal was taken to the Superior Court of Buncombe County, where a plenary hearing was held on affidavits and oral testimony.

On 3 May 1968 Judge Martin entered an order finding as a fact that neither Dorothy Owenby Howell nor William Thomas Taylor was a fit and proper person to have the care and custody of said minor children and that the best interests and welfare of the children would be served by placing them in the custody of the Buncombe County Welfare Department, which would place them in the home of Mr. and Mrs. Robert E. Williams. The court ordered that the father pay the sum of $40 per week and the mother pay the sum of $10 per week into the office of the clerk of the Domestic Relations Court to be disbursed to the Williamses for the support and maintenance of these children. There were provisions in the order for visitation rights of each parent. The cause was remanded to the Domestic Relations Court to supervise the enforcement of the judgment and to retain the matter for further orders of the court. From this order, the mother appealed.

S. Thomas Walton, Attorney for Dorothy Owenby Howell, appellant.

No Counsel, contra.

CAMPBELL, J.

[1] Ordinarily, if a suitable person, the mother of an illegitimate child is its natural guardian and, as such, has the legal right to its custody, care and control. *Jolly v. Queen,* 264 N.C. 711, 142 S.E. 2d 592. While the mother of an illegitimate child has the paramount right to its custody, nevertheless, the welfare and best interests of the child override her paramount right to custody, where, by reason of character or special circumstances, the mother is unfit or unable to care for the child. *Jolly v. Queen, supra.*

[2] The polar star for determining the custody of children is what serves the best interests of the children.

[3] In the instant case, the children were wards of the court, and their welfare and best interests are the determining factors. *In re Custody of Ross*, 1 N.C. App. 393, 161 S.E. 2d 623. In conducting the plenary hearing, the trial court had an opportunity to observe these children, the parties and the witnesses, and it would serve no useful purpose to detail the evidence. There was ample evidence to support the findings of fact, and the findings of fact support the judgment. Both parents were justifiably held responsible for the support and maintenance of the children. G.S. 49-2.

No error appears in the findings of fact or in the conclusions of Judge Martin.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. JOHN C. GODWIN
No. 6827SC423

(Filed 13 November 1968)

1. Burglary and Unlawful Breakings § 5; Safecracking— prosecutions — sufficiency of evidence

Issues of defendant's guilt of felonious breaking and entering and of attempted safecracking are properly submitted to the jury where the State's evidence tended to show that defendant was apprehended by an officer as he ran from a corporate premises at 5 a.m. carrying a tire tool, that the front door of the premises had been broken open from the outside and the rear door from the inside, that the handle and combination dial of an office safe had been broken off and that a canister of tear gas inside the safe had been activated, and that a tire tool was found lying beside the safe.

2. Criminal Law § 106— nonsuit — sufficiency of circumstantial evidence

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.

3. Criminal Law § 106— nonsuit — circumstantial evidence

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.

4. Burglary and Unlawful Breakings § 10— possession of housebreaking implements — tire tool — nonsuit

A tire tool is not an "implement of housebreaking" within the purview of G.S. 14-55, and a defendant cannot be convicted under that statute upon evidence that tire tools were used by him to break into and out of a building and to attempt the opening of a safe.

APPEAL by defendant from *Snepp, J.*, 8 July 1968 Session, CLEVELAND Superior Court.

Defendant was charged in three bills of indictment with (1) (#67-232) felonious breaking or entering, (2) (#67-232A) attempt to force open or pick a safe, and (3) (#67-232B) unlawful possession of implements of housebreaking. To each charge the defendant entered his plea of not guilty, and upon trial by jury was found guilty of each charge.

The defendant appeals, assigning as error in each case the refusal of the trial judge to grant his motion for judgment of nonsuit made at the close of the State's evidence, and renewed at the close of all the evidence. The defendant offered no evidence.

The facts are sufficiently set forth in the opinion.

T. W. Bruton, Attorney General, by Millard R. Rich, Jr., Assistant Attorney General, for the State.

N. Dixon Lackey, Jr., Attorney for the defendant.

BROCK, J.

[1] The evidence for the State tended to show the following:

The Stamey Company building at Polkville in Cleveland County was locked at the close of business at approximately seven o'clock p.m. on 5 August 1968. That the defendant was not given permission to go into the building. That at about five o'clock a.m. on 6 August 1968, Mr. R. R. McKinney, an officer of the State Highway Patrol, went to the Stamey Company building where he observed the defendant run out of the rear door of the building carrying an object in his hand. When defendant failed to halt at his command, Officer McKinney fired his revolver and defendant fell to the ground (he was not struck by the bullet) and as he was falling he dropped the object he had been carrying. At about the same time one J. D. Haroldson also came out of the rear door with his hands in the air. Both defendant and Haroldson were immediately placed under ar-

rest. A "tire tool" was found lying beside defendant where he had fallen.

Mr. J. W. Norman, a deputy sheriff of Cleveland County, arrived immediately and conducted further investigation. The front door had been broken open from the outside, and the rear door had been broken open from the inside. In the office the Stamey Company safe had been damaged; the handle and the combination dial had been broken off. A canister of tear gas on the inside of the safe had been activated and it was several minutes before the gas cleared the building sufficiently to allow the officers to enter comfortably. A second "tire tool" was found lying beside the safe. No one else was found in or near the Stamey Company building.

Viewing the evidence in the light most favorable to the State, it would permit the jury to find: That the defendant and Haroldson, armed with two tire tools, unlawfully broke open the front door and entered the Stamey Company building with intent to steal property of Stamey Company. That they attempted to pry or break open the Stamey Company safe where money and other valuables were kept. That in beating upon the safe they activated the tear gas canister and were forced to retreat from the premises. That they pried open the rear door from the inside and were apprehended as they went out.

[1-3] Clearly the State's evidence, although partly circumstantial, was sufficient to repel defendant's motion for judgment of nonsuit on the charge of felonious breaking and entering, and the charge of attempting to force open or pick the safe. 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.

[4] Defendant's assignment of error in No. 67-232B to the failure of the trial judge to allow his motion for nonsuit on the charge of unlawful possession of implements of housebreaking raises the question of whether a "tire tool" is an instrument condemned by G.S. 14-55. It appears reasonably clear that the "tire tools" in evidence in this case were used to break into and out of the building, and

were used in an effort to open the safe. However, it does not appear that the use to which a tool or instrument is put is necessarily controlling in determining whether it is within the intent of the phrase "or other implement of housebreaking" as contained in G.S. 14-55. This statute defines a separate felony for mere possession without lawful excuse of tools or implements of housebreaking, and it is the inherent nature and purpose of the tool, or the clear effect of a combination of otherwise innocent tools, which is condemned. "We have some doubt whether a tire tool under the *ejusdem generis* rule is of the same classification as a pick lock, key, or bit, and hence condemned by the statute." *State v. Garrett,* 263 N.C. 773, 140 S.E. 2d 315. We hold that defendant's motion for nonsuit upon this charge should have been allowed.

In No. 67-232, No error.

In No. 67-232A, No error.

In No. 67-232B, Reversed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. THOMAS BENNETT WADDELL

No. 6829SC421

(Filed 13 November 1968)

1. Criminal Law § 154— record on appeal

It is not the function of the Court of Appeals to oversee the preparation of the record on appeal; that is the function of counsel. G.S. 1-282; G.S. 1-283.

2. Criminal Law § 158— conclusiveness and effect of record

Until a record on appeal is filed, there is nothing before the Court of Appeals, since the Court can judicially know only that which appears in the record.

3. Criminal Law §§ 156, 159— record on appeal — record in petition for certiorari

A record filed in a petition for a writ of *certiorari,* nothing else appearing, does not become the record on appeal upon allowance of the writ even though the record filed therewith contains what occurred in the trial tribunal.

4. Criminal Law § 156— conclusiveness and effect of record on certiorari

Defendant's purported record on *certiorari,* which was fragmentary

and which failed to comply with Rules of Practice in the Court of Appeal Nos. 19(c) and 21 relating to assignments of error and grouping of exceptions, *is held* insufficient to show error.

5. Criminal Law § 134— the judgment — presumption of validity

There is a presumption that the judgment of a court is valid and just, and the burden is upon appellant to show error amounting to a denial of some substantial right.

ON *certiorari* from *Thornburg, S.J.*, February 1968 Session of Superior Court of HENDERSON County.

There is no proper record on appeal filed in this case. The Attorney General in his brief says:

> "This is a criminal action in which the defendant Thomas Bennett Waddell was tried at the February, 1968 Session, Henderson Superior Court, before his Honor Lacy H. Thornburg, Judge presiding, and a jury on indictments charging assault with intent to commit rape and breaking and entering with intent to commit rape on January 15, 1968. The cases were consolidated for trial. The defendant pleaded not guilty. From verdicts of guilty as charged as to both counts, and sentence duly pronounced thereon, the defendant appealed to the Court of Appeals."

Attorney General T. W. Bruton and Deputy Attorney General Harry W. McGalliard for the State.

Ruben J. Dailey for defendant appellant.

MALLARD, C.J.

[1, 2] No statement of case on appeal has been served on the solicitor or agreed to by the solicitor or settled by the judge as provided by statute. G.S. 1-282; G.S. 1-283. It is not the function of this Court to oversee the preparation of the record on appeal; that is the function of counsel. Until a record on appeal is filed, there is nothing before the Court. "This Court can judicially know only that which appears in the record." *State v. Morgan,* 225 N.C. 549, 35 S.E. 2d 621.

[3] A record filed in a petition for a writ of *certiorari,* nothing else appearing, does not become the record on appeal upon allowance of the writ. This is true even though the record filed therewith contains what occurred in the trial tribunal. One reason for this is that in filing a record with a petition for a writ of *certiorari,* it is

not required that opposing counsel concur specifically or by default as to the correctness thereof prior to its being filed. The service of the statement of the case, as required by G.S. 1-282, before it is filed as the record on appeal, is required to be done in an effort to assure a correct record.

In the order allowing the writ of *certiorari* by this Court on 11 September 1968, it was ordered that the record be filed in the Court of Appeals on 24 September 1968. This was not done. On 24 September 1968 there was filed part of the transcript of testimony taken in Superior Court of Henderson County in "cases nos. 1085 and 1087" entitled, *State v. Thomas Bennett Waddell,* which reveals that over sixty-five pages are missing therefrom.

[4] The purported record herein is defective in a number of ways, in addition to being fragmentary. There are, among other things, no assignments of error or grouping of exceptions in that part of the transcript filed herein, or even in the petition for writ of *certiorari,* as required by Rules 19(c) and 21 of the Rules of Practice in the Court of Appeals of North Carolina.

The Attorney General in his brief says:

> "Notwithstanding the above, the State has carefully examined the complete transcript of the evidence and the judge's instructions to the jury as found in the fragmentary purported case on appeal and in the full transcript which is part of the files of the case in connection with a petition for a writ of certiorari. It is the State's opinion that there is no merit in any of the questions raised save possibly that relating to the identification of the defendant by the victim. There is no evidence that the defendant was informed of right to counsel, or that he intelligently waived right to counsel, or that he had counsel present when a preliminary 'on the scene' identification was made of the defendant by the victim at her home about an hour and a half after the offenses occurred. It should be noted that the victim's courtroom identification was not shown to be based on completely independent evidence from the out-of-court identification and there is no evidence that such in-court identification was not tainted by the out-of-court identification. *That is not to say that the in-court identification was tainted,* but merely that evidence was not received on this point." (Emphasis added)

[4, 5] "There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amounting to a denial of some substantial right." *State v. Pope,* 257 N.C.

326, 335, 126 S.E. 2d 126; *London v. London,* 271 N.C. 568, 157 S.E. 2d 90. "Where the record is silent upon that particular point, the action of the trial judge will be presumed correct." 1 Strong, N. C. Index 2d, Appeal & Error, § 46, p. 191; *State v. Dew,* 240 N.C. 595, 83 S.E. 2d 482. The purported record being silent with respect thereto, the possibilities suggested by the Attorney General are not presented or decided.

On the purported record we find

No error.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. RUSSELL LEE HOLLIS
No. 6826SC368

(Filed 13 November 1968)

1. Robbery § 1— common-law robbery defined

Common-law robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.

2. Robbery § 4— sufficiency of evidence and nonsuit

The evidence in this case *is held* sufficient to be submitted to the jury as to defendant's guilt of common-law robbery.

APPEAL by defendant from *Ervin, J.,* at the 6 May 1968 "A" Session of MECKLENBURG Superior Court.

The defendant, Russell Lee Hollis, and one James Devon Bethea were jointly indicted under a bill of indictment, proper in form, charging them with the crime of common-law robbery. By consent, the cases were consolidated for trial and each defendant pleaded not guilty. The jury found the defendant Russell Lee Hollis guilty as charged in the bill of indictment and found the defendant Bethea not guilty. From a judgment imposing an active prison sentence for a term of not less than five nor more than seven years, the defendant Russell Lee Hollis appealed.

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

James E. Martin, Jr., for defendant appellant.

PARKER, J.

[1, 2] The sole assignment of error appearing in the record is directed to the trial court's refusal to grant defendant's motion of nonsuit at the close of the State's evidence. Robbery, a common-law offense not defined by statute in North Carolina, has been repeatedly and consistently defined by the Supreme Court of North Carolina as the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869. Examination of the record in the case before us discloses that there was plenary evidence that defendant Hollis committed the robbery charged in the indictment. Indeed, it would be difficult to imagine any more direct, complete, and unequivocal testimony to establish a defendant's guilt than was presented in this case. Mrs. Lena Cook testified that she was manager of and alone in a variety store when defendant Hollis and Bethea, both of whom she had previously seen, entered; that Bethea stood by the door and Hollis came to the counter, seized her around the neck, threw her to the floor and beat her with his fists; that she feared for her safety and begged him not to hit her but to take what was in the cash register and go; that Hollis took approximately $100.00 from the cash register and ran; and that she required medical attention for her injuries.

Marvin Frazier testified he had been with Hollis and Bethea when they walked past the store and that Hollis had said, "Let's rob the store;" that he had told Hollis and Bethea not to do that; that he had then walked on but the two defendants went back toward the store.

Mr. and Mrs. D. C. Brown testified that they lived nearby; that they knew both defendants and saw them entering the store; that when the Browns started to enter the store for the purpose of making a purchase, the two defendants ran out; that the Browns then entered the store and found Mrs. Cook on the floor crying and calling for help.

The defendant Bethea testified in his own behalf that he, Hollis, and Frazier had been together but that Frazier had left them when Bethea and Hollis had gone back to the store; that Hollis stated he wanted to get cigarettes, but on entering the store Hollis had gone behind the counter, got the money from the cash register and went out the door with the money in his hand; that Mrs. Cook was calling for help when Hollis rushed out of the store. The defendant Hollis did not take the witness stand.

Appellant's court-appointed counsel has frankly stated in his brief that after making a careful study of the record on appeal he finds no legitimate assignment of error or contention which would entitle the defendant to a new trial. We have, nevertheless, made a careful review of the entire record, including the charge made by the able trial judge, and we find

No error.

BROCK and BRITT, JJ., concur.

EDDIE LAMAR MATTOX, A MINOR, BY HIS NEXT FRIEND, MRS. LAURA RICHARDSON MATTOX v. ALBERTA FRANCIS HUNEYCUTT

No. 6826SC411

(Filed 13 November 1968)

1. Automobiles § 90; Damages § 16— instructions as to measure of damages

In an action for personal injuries resulting from an automobile accident, the court's charge as to the measure of damages, when taken as a whole, *is held* proper.

2. Automobiles § 90; Damages § 16— instructions as to use of Mortuary Tables

In an action for personal injuries resulting from an automobile accident, the court's charge as to the use of Mortuary Tables, G.S. 8-46, *is held* to comply with the requirement of G.S. 1-180 that the court declare and explain the law arising on the evidence in the case.

APPEAL by plaintiff from *Grist, J.*, 15 April 1968 Schedule "C" Session of the Superior Court of MECKLENBURG County.

This action arose out of an automobile collision that occurred on 3 December 1966 involving a car being driven by the minor plaintiff and a car being driven by the defendant. When the case was called for trial, the defendant admitted liability and agreed with plaintiff that the only issue to be submitted to the jury would be the issue of damages. The plaintiff put on evidence which tended to show that prior to the collision, the minor plaintiff had had little or no problem with his teeth and that as a result of the accident, he had lost three teeth which required the placing of a partial denture in his mouth. The minor plaintiff testified that the partial denture has restricted his ability to bite in a normal manner. Expert testi-

mony was introduced which tended to show that the denture would have to be replaced at least once as the minor plaintiff grew older. In addition to the problem with his teeth, the minor plaintiff testified that he had a badly bruised left arm as well as some injury to his lower back. The jury returned a verdict of five hundred dollars. The plaintiff moved to set the verdict aside and for a new trial on the grounds that the damages awarded were inadequate. This motion was overruled and judgment was entered in accordance with the verdict. From this judgment, plaintiff appealed to the Court of Appeals.

Warren C. Stack and James L. Cole for plaintiff appellant.

Carpenter, Webb & Golding by Fred C. Meekins for defendant appellee.

MALLARD, C.J.

The only assignments of error brought forward by plaintiff and discussed in his brief relate to the charge of the court.

> "The purposes of the court's charge to the jury are the clarification of the issues, the elimination of extraneous matters, and the declaration and explanation of the law arising on the evidence in the case. . . . It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence, without special request, and to apply the law to the various factual situations presented by the conflicting evidence. . . . It is not essential that the court charge the jury as to the law in connection with each contention of the parties; the better practice is for the court to give (1) a summary of the evidence, (2) the contentions of the parties, and (3) an explanation of the law arising on the evidence." 7 Strong, N. C. Index 2d, Trial, § 32, pp. 322, 323.

The question presented on this appeal is whether the trial judge charged in accordance with the above stated principles.

[1] The court's charge with respect to the measure of damages, when taken as a whole, appears to be in conformity with the decisions of the Supreme Court of North Carolina.

[2] One other question raised by the plaintiff relates to the charge of the trial court relative to the use of the Mortuary Tables (G.S. 8-46) introduced into evidence. The plaintiff admits that there does not appear to be error in the charge of the judge relating to G.S. 8-46 and states that it is correct. However, the plaintiff asserts

that the manner in which this portion of the charge was given "either encouraged or permitted the jury to depreciate the plaintiff's claim," and as a result prejudicial error is present. G.S. 1-180 requires the judge to "declare and explain the law arising on the evidence given in the case." In the instant case, we think the judge has properly done this. If the plaintiff had wished further instructions relating to any other features of the case, plaintiff should have requested them. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 754; *Freight Lines v. Burlington Mills and Brooks v. Burlington Mills*, 246 N.C. 143, 97 S.E. 2d 850.

We have carefully considered the charge in its entirety and are of the opinion that there is no prejudicial error therein.

The jury found from the facts presented what they thought to be fair damages to be awarded to plaintiff. This court will not substitute its judgment for that of the triers of the facts. The judgment of the trial court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

JAMES STEVEN BRYANT v. KEITH S. SNYDER, ADMINISTRATOR OF THE ESTATE OF WILLIAM DAVID HUMPHREYS, AND CAROLYN J. HUMPHREYS, ADMINISTRATRIX OF THE ESTATE OF WILLIAM DAVID HUMPHREYS

No. 6825SC347

(Filed 13 November 1968)

Appeal and Error § 41— evidence submitted under Rule 19(d)(2) — failure to affix summary of evidence to brief

Where appellant's only assignment of error is to the entry of judgment of nonsuit, and appellant submits the evidence in the record on appeal under Rule 19(d)(2) of the Rules of Practice in the Court of Appeals but fails to affix an appendix to the brief summarizing the testimony he relies upon to support his assignment of error, appellees' motions to dismiss the appeal are allowed.

APPEAL by plaintiff from *Falls, J.*, 18 March 1968 Session, CALDWELL Superior Court.

Plaintiff is the only survivor of an automobile accident on 5 September 1963 in Caldwell County. He alleges that defendants'

intestate was the owner and operator of the vehicle in which plaintiff was riding, and alleges negligence in the operation of said vehicle. By this action he seeks to recover for personal injury.

At the close of plaintiff's evidence the motion of each defendant for judgment of nonsuit was allowed. Plaintiff appealed, assigning as error the entry of judgment of nonsuit.

Wilson & Palmer, by W. C. Palmer, for plaintiff appellant.

Townsend & Todd, by J. R. Todd, Jr., for Keith S. Snyder, Administrator, appellee.

Patrick, Harper & Dixon, by Bailey Patrick, for Carolyn J. Humphreys, Administratrix, appellee.

BROCK, J.

Each of the defendants-appellees in apt time filed in this Court a motion to dismiss the appeal because plaintiff failed to comply with Rule 19(d)(2), Rules of Practice in the Court of Appeals of North Carolina.

Rule 19(d)(2) provides in pertinent part as follows:

> "As an alternative to the above method (as a part of the record on appeal but not to be reproduced), the appellant shall cause the complete stenographic transcript of the evidence in the trial tribunal, as agreed to by the opposite party or as settled by the trial tribunal as the case may be, to be filed with the clerk of this Court and then the appellant in an appendix to his brief shall set forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof."

Rule 19(d)(2) was adopted as an alternate to the formerly existing Rule to accomplish two primary purposes: (1) to relieve counsel of the necessity of narrating all of the testimony, and (2) to save litigants the expense of mimeographing all of the evidence as a part of the Record on Appeal. Only one copy of the stenographic transcript is required to be filed. Therefore, in order for the three members of the panel to understand appellants' assignments of error, it is necessary that appellant *in an appendix to his brief shall set forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends*

to establish with citation to the page of the stenographic transcript in support thereof. Rule 19(d)(2), *supra.*

In the instant case appellant has elected to proceed under this Rule, and has filed the complete stenographic transcript of the evidence; however, appellant's brief contains only the following as an appendix:

> "Pursuant to Rule 19(d)(2), the plaintiff appellant attaches this appendix and respectfully submits that the entire record must be read to determine whether the plaintiff should have been nonsuited at the close of the evidence."

Aside from constituting a complete failure to comply with Rule 19(d)(2), the statement is far from accurate. The stenographic transcript contains sixty-three pages and a cursory examination thereof clearly shows that at least thirty-three pages have absolutely no bearing upon the question raised by this appeal, i.e., the identification of the driver of the vehicle in which plaintiff was injured.

The defendants' motions filed under Rule 16 are allowed and this

Appeal is dismissed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. HAROLD MOSTELLER

No. 6825SC255

(Filed 13 November 1968)

1. Constitutional Law § 36; Criminal Law § 140; Forgery § 2— cruel and unusual punishment

Upon defendant's pleas of guilty to three charges of uttering a forged check, sentences of six to ten years imposed in each case, the sentences to run consecutively, are within the maximum authorized by G.S. 14-120 and cannot be considered cruel and unusual punishment in the constitutional sense.

2. Criminal Law § 140— consecutive sentences

The trial court has authority to provide that two or more sentences imposed for separate offenses shall run consecutively.

3. Criminal Law § 138— severity of sentence — consideration on appeal

Where the sentences imposed are within statutory limits and within the authority of the trial court, they will not be disturbed on appeal.

APPEAL by defendant from *Falls, J.*, 1 April 1968 Mixed Session of CATAWBA Superior Court.

At the April 1968 Session of Superior Court of Catawba County the grand jury returned three true bills of indictment each of which charged defendant on two counts, the first charging the making of a forged check, the second charging the uttering of a forged check knowing it to be forged. Various violations of the traffic laws, not pertinent to this appeal, were also pending against the defendant, in which pleas were taken and judgments entered. The defendant, represented by court-appointed counsel, pleaded guilty to uttering a forged check in each of the three indictments. The court entered judgment of imprisonment in the State's Prison of not less than six nor more than ten years in each case, the sentences to run consecutively. The defendant appealed, making as his sole assignment of error that the prison sentences imposed constituted cruel and unusual punishment forbidden by Article I, Section 14, of the Constitution of North Carolina.

Attorney General T. W. Bruton and Assistant Attorney General Millard R. Rich, Jr., for the State.

Stanley J. Corne for defendant appellant.

PARKER, J.

[1, 2] The sentences imposed were within the maximum authorized by G.S. 14-120. Appellant does not attack the constitutionality of that statute but pleads that the sentences imposed upon him in this case were abnormally long in view of the relatively small amount of money involved in each of the three checks and in view of the fact that it was his father's name which was forged. It is, however, firmly established in our jurisprudence that when the punishment imposed does not exceed the limits fixed by statute, it cannot be considered cruel and unusual punishment in a constitutional sense. *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216. The court's authority to provide that two or more such sentences shall run consecutively is also well established. *State v. Dawson,* 268 N.C. 603, 151 S.E. 2d 203. Even imposition of two life sentences to run consecutively does not contravene the constitutional prohibition against cruel and unusual punishment. *State v. Bruce, supra.*

Before imposing sentence, the trial judge had the opportunity to observe the defendant and was in position to know something of his previous history. The sentences imposed were within statutory limits

and within the authority of the trial court and will not be disturbed on appeal. *State v. Faison,* 272 N.C. 146, 157 S.E. 2d 664.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. JOHN L. JONES

No. 6825SC262

(Filed 13 November 1968)

1. Escape § 1; Constitutional Law § 36— sentence for felony escape

Sentence of nine months imposed upon defendant's conviction of an escape committed while serving a felony is within the limits provided by G.S. 148-45(a) and cannot be considered cruel and unusual punishment.

2. Escape § 1; Criminal Law § 138— consideration of past criminal record in passing sentence

Upon defendant's plea of guilty to a felony escape, the trial court properly considered defendant's past criminal record in passing judgment on him.

APPEAL by defendant from *Falls, J.,* 9 April 1968 Criminal Session of CATAWBA Superior Court.

In a bill of indictment proper in form, defendant was charged with feloniously escaping from North Carolina Prison Unit No. 085, in Catawba County, where he was lawfully confined and serving a sentence for the crime of breaking, entering and larceny.

Before the case was called for trial, defendant was advised of his right to be represented by legal counsel but, in writing, he waived the right and expressed his desire to appear in his own behalf.

When the case was called for trial, defendant pled guilty to the charge contained in the bill of indictment. He was sentenced to prison for nine months, sentence to commence at the expiration of sentences then being served. After being sentenced and within the time allowed by law, defendant gave notice of his desire to appeal to the Court of Appeals. Upon a finding of indigency, counsel was appointed to perfect his appeal.

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

Charles W. Gordon, Jr., for defendant appellant.

BRITT, J.

[1] G.S. 148-45(a) provides that any prisoner serving a sentence imposed pursuant to conviction of a felony who escapes from the State's prison system shall, for the first offense, be guilty of a felony and upon conviction shall be imprisoned not less than six months nor more than two years. The sentence of nine months imposed in this case is within the statutory limits and cannot be considered cruel and unusual punishment. *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34.

[2] Defendant contends that the trial judge considered defendant's past record in passing judgment on him and that this was improper. The contention is without merit. In *State v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695, Ervin, J., speaking for the court, it is said: "In making a determination of this nature after a plea of guilty or *nolo contendere,* a court is not confined to evidence relating to the offense charged. It may look anywhere, within reasonable limits, for other facts calculated to enable it to act wisely in fixing punishment. Hence, it may inquire into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced. * * *"

We have carefully reviewed the record and briefs in this case and find

No error.

BROCK and PARKER, JJ., concur.

STATE v. BRADLEY DEAN MITCHELL AND JERRY DALE FRANKLIN
No. 6830SC288

(Filed 13 November 1968)

Constitutional Law § 36— cruel and unusual punishment

Punishment within the maximum fixed by statute cannot be considered cruel and unusual in the constitutional sense.

APPEAL by defendants from *Bryson, J.,* January 1968 Session, HAYWOOD County Superior Court.

The defendants were duly charged in separate bills of indictment

with the felonious breaking and entering of the Waynesville Junior High School Building on 25 November 1967 and with the felonious larceny of goods and chattels therefrom. They were further charged with feloniously breaking into other buildings and with the felonious larceny of goods and chattels therefrom. Charges of malicious destruction of personal property located in the Bethel School and Bethel Cafeteria in Haywood County were also lodged against these defendants.

Pleas of guilty to all of the offenses were freely, voluntarily and understandingly entered by the defendants, who were represented by counsel.

From active sentences of not less than five nor more than seven years on all of the charges, each defendant appealed to the Court of Appeals.

T. W. Bruton, Attorney General, and Millard R. Rich, Jr., Assistant Attorney General, for the State.

J. Charles McDarris, Attorney for defendant appellants.

CAMPBELL, J.

The defendants assign as error the imposition of five to seven years active sentences, contending that this constitutes cruel, unusual and unjust punishment in view of the age of the defendants, their past criminal records and the nature of the criminal acts. This is contained in the brief but not shown by the record. There is no merit in this assignment of error.

> "We have held in case after case that when the punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense." *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330. *Mathis v. State of North Carolina,* 266 F. Supp. 841 (M.D.N.C. 1967).

No error.

MALLARD, C.J. and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. DAVID HUBERT KELLY

No. 6827SC273

(Filed 13 November 1968)

Constitutional Law § 36; Burglary and Unlawful Breakings § 8— cruel and unusual punishment

Sentence of seven to ten years imposed upon defendant's plea of guilty of felonious breaking and entering is within the statutory maximum and does not constitute cruel and unusual punishment.

APPEAL by defendant from *Snepp, J.,* 1 May 1968 Session CLEVELAND Superior Court.

Defendant was charged in a valid bill of indictment with felonious breaking and entering and larceny. He entered a plea of guilty to the charge of felonious breaking and entering, and the court found that the plea was freely, understandingly and voluntarily made without undue influence, compulsion or duress, and without promise of leniency. The State took a *nol pros* with leave in the larceny charge. The judgment of the court is that defendant "be confined in the State Prison under the jurisdiction of the Department of Correction for not less than seven (7) years nor more than ten (10) years." From said judgment, defendant, an indigent, through his court-appointed counsel, appeals to the Court of Appeals.

Ernest A. Gardner for defendant appellant.

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

MORRIS, J.

Defendant makes only one assignment of error: That the sentence imposed is too severe. He contends that he should not have been sentenced to more than three to five years. This Court and the Supreme Court of North Carolina have held repeatedly that a sentence within the statutory limits is not excessive, nor does it constitute cruel and unusual punishment. *State v. Burgess,* 1 N.C. App. 142, 160 S.E. 2d 105; *State v. Chapman,* 1 N.C. App. 622, 162 S.E. 2d 142; *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216; *State v. Parrish,* 273 N.C. 477, 160 S.E. 2d 153.

The sentence imposed does not exceed the maximum provided by G.S. 14-54.

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

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

No. 68SC93

(Filed 13 November 1968)

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

The facts of this case are set out in *State Bar v. Temple,* 2 N.C. App. 91, 162 S.E. 2d 649. In apt time, respondent filed a petition to rehear. Because a motion of complainant suggesting a diminution of the record had not come to the attention of the Court, although properly filed and with proper notice to respondent, this Court granted the petition to rehear and directed oral arguments under Rule 44(e), Rules of Practice in the Court of Appeals of North Carolina.

Robert B. Morgan and B. E. James for complainant.

Elam Reamuel Temple, Attorney pro se, and John W. Hinsdale for respondent appellant.

MORRIS, J.

Respondent's appeal in this matter was duly docketed and calendared for hearing on 12 June 1968. At that time the respondent did not appear to argue. The matter was calendared for rehearing on 23 October 1968. Again respondent did not appear to argue, nor did counsel who had signed his brief appear to argue, although respondent's petition to rehear specifically requested that the Court direct oral arguments.

We have carefully examined the brief filed by respondent on rehearing and have re-examined the record. All assignments of error were considered and disposed of in the opinion of Britt, J., in *State Bar v. Temple,* 2 N.C. App. 91, 162 S.E. 2d 649, and no useful purpose would be served by a second opinion discussing the assignments of error and reaching the same conclusion. We, therefore, deem it sufficient to say that each of respondent's assignments of error has been considered and found to be without merit.

Affirmed.

CAMPBELL and BRITT, JJ., concur.

ASHEVILLE SHOWCASE & FIXTURE COMPANY v. RESTAURANT ASSOCIATES, INC., AND N. W. B. BUILDING OF ASHEVILLE, INC.

No. 6828SC427

(Filed 20 November 1968)

1. Time— computation of time — extension of time for filing answer

Clerk's several extensions of time for filing answer or demurrer, which were consented to by the parties as provided by G.S. 1-125, become an act "done as provided by law" within the purview of statute relating to computation of time. G.S. 1-593.

2. Time— act falling on a Saturday

Where order of the clerk permitted defendants up to and including July 20 in which to answer, demur or otherwise plead, and July 20 was a Saturday, and the office of the clerk was closed on Saturdays, demurrer filed by defendant on Monday, July 22, was timely. G.S. 1-593, G.S. 103-5.

3. Pleadings § 23— frivolous demurrer

Where plaintiff sought to recover money judgment from two defendants on a contract for the purchase of merchandise but failed to allege that one of the defendants had incurred or assumed the indebtedness, demurrer by that defendant on ground that the complaint failed to state a cause of action in that it appeared from the face of the complaint that defendant did not contract for or agree to pay plaintiff, held not frivolous. G.S. 1-219.

4. Pleadings § 9— time for filing answer — disposition of demurrer

Until demurrer has been passed upon on its merits, the time for filing an answer has not expired.

APPEAL by defendant, N. W. B. Building of Asheville, Inc., from *McLean, J.*, 19 August 1968 Session, BUNCOMBE County Superior Court.

This action was commenced 14 May 1968 by the issuance of summons and the ancillary remedy of claim and delivery for merchandise valued at $13,000. The summons was served on the defendant, N. W. B. Building of Asheville, Inc., (Building) on 14 May 1968, and the property taken. The other defendant, Restaurant Associates, Inc., (Restaurant) was not to be found in Buncombe County after due search. Building executed a bond and retained the property.

In the complaint filed 14 May 1968 plaintiff alleged a sale of property to Restaurant under date of 7 July 1966 for the sum of $18,892.26 and, at time of sale and delivery of the property, Restaurant had executed a "Conditional Sales Contract or Mortgage" reconveying the property to plaintiff as security for the purchase price, which contract was duly recorded in the Buncombe County

Public Registry; that Restaurant had made no payments and there was due the sum of $18,892.26 plus interest from 7 July 1966. The complaint further alleges that on 13 June 1967 Building purchased all shares of stock of Restaurant and at time of purchase knew that Restaurant "was in complete default of said Conditional Sales Contract"; that Building assumed possession and control of the merchandise referred to and had used same in the operation of a restaurant located in Building; that Building "has succeeded to all obligations of (Restaurant) to this Plaintiff under said Conditional Sales Contract" and has refused to make payment of said account; that plaintiff is entitled to possession of the merchandise for the purpose of selling same under the conditional sales contract in order to satisfy the indebtedness. The plaintiff seeks judgment against Restaurant and Building jointly and severally for $18,892.26 plus interest from 7 July 1966 and for the possession of the property in order to sell same and apply it on the indebtedness.

On 5 June 1968 the attorney for plaintiff filed an affidavit and motion for service of process on Restaurant by serving same on the Secretary of State as statutory process agent. Pursuant thereto, service of process was had upon Restaurant by serving its statutory process agent, the Secretary of State of North Carolina, on 10 June 1968. Restaurant has filed no pleadings.

By order dated 12 June 1968, the defendants were given to and including the 1st day of July, 1968, to file answer or demurrer.

On 1 July 1968 another order was entered by the assistant clerk of court, consented to by the attorney for the plaintiff, granting the defendants up to and including 20 July 1968 in which to answer, demur or otherwise plead.

On 19 July 1968 defendant Building mailed from Charlotte, North Carolina, a demurrer to the office of Clerk of Buncombe County Superior Court. This demurrer set out that the complaint failed to state a cause of action against the defendant Building.

The demurrer was filed 22 July 1968.

On 24 July 1968 Judge McLean, presiding at the 22 July 1968 Civil Jury Session of Buncombe County Superior Court, entered a judgment by default final against both defendants finding that no pleading had been filed by either defendant on or before 20 July 1968 and that the demurrer filed 22 July 1968 was not filed within time. The court further found that said demurrer "is frivolous and without merit." It was adjudged that the plaintiff have and recover of the defendants jointly and severally the sum of $18,892.26 with interest from 7 July 1966.

On 2 August 1968 the defendant Building filed an answer to the complaint setting up defenses to plaintiff's claim of title to the merchandise involved and alleging title in Building by virtue of chattel mortgages recorded prior to the recordation of the conditional sales contract.

On the same date, 2 August 1968, the defendant Building moved to set aside the judgment by default final. In said motion it was stated that 20 July 1968 fell on Saturday; that the clerk of court's office in Buncombe County did not pick up and receive mail on Saturday and, for this reason, the demurrer was not filed until the following Monday, 22 July 1968; that defendant Building had no notice or information concerning the hearing on said demurrer and requested that the judgment by default final be set aside.

On 23 August 1968 a plenary hearing was had on the motion to set aside the judgment by default final. The court found as a fact that the main office of the Clerk of Superior Court of Buncombe County is open from 8:30 a.m. until 5:00 p.m. Monday through Friday; that a basement office is open on weekends for the purpose of issuing warrants and other court papers; that civil papers will be accepted for filing if same are presented to the deputy clerk on duty; that the main office is closed on Saturdays and was closed on Saturday, 20 July 1968, and the deputy clerks on duty in the basement do not pick up mail on Saturdays. The court further found:

> "That the Defendant, N. W. B. Building of Asheville, Inc., has introduced no evidence, oral or by affidavit, indicating to the undersigned Judge Presiding that it has a meritorious defense to the matters and things alleged in the plaintiff's complaint."

The trial judge then concluded that the filing of the demurrer by defendant Building on 22 July 1968 "was untimely" and that the defendant "has not shown unto this Court a meritorious defense to the matters and things alleged in the Complaint and the Court should not set the Judgment of July 22nd, 1968, aside on the ground that the defendant has shown a meritorious defense. . . . That the demurrer filed by the Defendant (Building) on the 22nd day of July, 1968, was frivolous and without merit and the Court hereby reaffirms its decision on said matter as set forth in the Court's Judgment of July 24th, 1968." The court then reaffirmed and upheld its judgment of 24 July 1968 and denied the motion to set same aside. This judgment was dated 29 August 1968. The defendant Building objected and excepted thereto and appealed therefrom.

Patla, Straus, Robinson & Moore; Harold K. Bennett by E. Glenn Kelly, Attorneys for plaintiff appellee.

Gudger & Erwin by James P. Erwin, Jr., Attorneys for defendant, N. W. B. Building of Asheville, Inc., appellant.

CAMPBELL, J.

The first question to be decided is whether the demurrer filed by the defendant Building was timely filed.

[1] The order of the assistant clerk of court dated 1 July 1968, which had been consented to by the attorney of the plaintiff, permitted the defendants up to and including 20 July 1968 in which to answer, demur or otherwise plead. 20 July 1968 was a Saturday.

G.S. 1-125 provides:

> "The clerk shall not extend the time for filing answer or demurrer more than once nor for a period of time exceeding twenty days except by consent of parties."

In the instant case the clerk had extended the time for filing answer or demurrer more than once, but he did so in the order of 1 July 1968 "by consent of parties." Thus, the effect of the extension of time by the order of 1 July 1968 became an act "done as provided by law."

G.S. 1-593 provides:

> *"How computed.* — The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Saturday, Sunday or a legal holiday, it must be excluded."

Since 20 July 1968 was a Saturday, it should be excluded under the statute, and the following Monday, 22 July 1968, became the proper date to file answer, demurrer or other pleadings.

In addition to this, we have in this case a finding by the trial court:

> "6. That the hours of the main Office of the Clerk of Superior Court of Buncombe County, North Carolina, run from 8:30 a.m. until 5:00 p.m., Monday through Friday. That the Office of the Clerk of Superior Court of Buncombe County, North Carolina, is open on weekends, said Office being located in the basement of the Buncombe County Courthouse, and is maintained by three Deputy Clerks of Superior Court of Buncombe County, one of whom is present at all times in said basement

office for the purpose of issuing warrants and other court papers. That said Deputy Clerks of the Superior Court are authorized to accept civil papers for filing if the same are presented to them. That the main Office of the Clerk of Superior Court of Buncombe County is closed on Saturdays and was closed on Saturday, July 20th, 1968. That the Deputy Clerk of the Superior Court maintaining the basement office of said Clerk on Saturday, July 20th, 1968, between the hours of 8:30 a.m. and 5:00 p.m. was Mr. Charles Knighten. That the Deputy Clerks in the basement of the Buncombe County Courthouse do not pick up the mail on Saturdays and Mr. Charles Knighten was not instructed to pick up the mail."

The trial court did not find by what authority the main office of the Clerk of Superior Court of Buncombe County was closed on Saturdays. We assume such closing was not illegal and was done pursuant to a valid order of the board of county commissioners of Buncombe County. G.S. 2-24.

G.S. 103-5 provides:

"*Acts to be done on Sunday or holidays.* — Where the day or the last day for doing an act required or permitted by law to be done falls on Sunday or a holiday the act may be done on the next succeeding secular or business day and where the courthouse in any county is closed on Saturday or any other day by order of the board of county commissioners of said county and the day or the last day required for filing an advance bid or the filing of any pleading or written instrument of any kind with any officer having an office in the courthouse, or the performance of any act required or permitted to be done in said courthouse falls on Saturday or other day during which said courthouse is closed as aforesaid, then said Saturday or other day during which said courthouse is closed as aforesaid shall be deemed a holiday; and said advance bid, pleading or other written instrument may be filed, and any act required or permitted to be done in the courthouse may be done on the next day during which the courthouse is open for business."

[2] We hold that since the order of the clerk of court dated 1 July 1968 granting the defendants up to and including 20 July 1968 in which to answer, demur or otherwise plead, since 20 July 1968 fell on a Saturday and since the main office of the clerk of superior court was closed on Saturdays, the defendant Building filed said pleading timely. Compare *Hardbarger v. Deal,* 258 N.C. 31, 127 S.E. 2d 771.

[3] The next question presented is whether the demurrer filed by the defendant Building is frivolous.

G.S. 1-219 provides:

> *"On frivolous pleading.* — If a demurrer, answer or reply is frivolous, the party prejudiced thereby may apply to the court or judge for judgment thereon, which may be given accordingly."

In *Bank v. Duffy,* 156 N.C. 83, 72 S.E. 96, Walker, J., stated:

> "We have held that a pleading will not be adjudged frivolous, irrelevant, or impertinent, so as to entitle the other party to a judgment *non obstante placito,* unless it is clearly and palpably so. . . . If it raises a question, whether of law or fact, fit for consideration or discussion, we will not adjudge it to be irrelevant and as not standing in the way of a summary judgment upon the pleadings. . . . Even under the old system of pleading and practice, the courts hesitated to give judgment upon a pleading unless it plainly raised no real issue of law or fact, for *Baron Parke* said in *Linwood v. Squire,* 5 Exch. (W. H. & G.), 234: 'I do not say that the plea is a good plea, as it is not necessary to decide that question, but a plaintiff has no right to sign judgment if the plea raises a serious question and one which is fit for discussion.' The courts do not encourage the practice of moving for judgment upon an answer or demurrer as being frivolous."

The demurrer filed by defendant Building was "that the Complaint of the Plaintiff fails to state a cause of action against the Defendant, (Building), in that it appears from the face of the Complaint that the Defendant, (Building), did not purchase, contract for or agree to pay the Plaintiff for the matters and things alleged in the Complaint."

The complaint seeks to recover $18,892.26 with interest from 7 July 1966, being the amount contracted to be paid by the defendant Restaurant. The judgment by default final entered by the trial court gave the plaintiff judgment for this amount against the defendant Building as well as against the defendant Restaurant. There is no specific allegation that the defendant Building assumed this indebtedness or succeeded to the liabilities of the defendant Restaurant. While there is an allegation that the defendant Building "purchased all the shares of stock in the corporation (Restaurant) . . . knowing at the time of the purchase of said stock that (Restaurant) was in complete default of said Conditional Sales

Contract herein referred to", there is no allegation that thereafter there was a reorganization, consolidation, amalgamation, or union between the two corporations, and no sufficient allegation to assert an implied assumpsit or fraud or a trust fund doctrine or other situation to make the defendant Building become the debtor to the creditors of the defendant Restaurant. *c.f. Begnell v. Coach Lines*, 198 N.C. 688, 153 S.E. 264.

There is no allegation that Restaurant is no longer in existence. In fact, process was served on it and a judgment obtained against it.

There is an allegation to the effect that the defendant Building "has succeeded to all obligations of (Restaurant) to this Plaintiff under said Conditional Sales Contract," but no allegation that defendant has become obligated on the note or other evidence of the purchase price.

The allegations of the complaint in this case may be sufficient to establish the right of the plaintiff to seek possession of the merchandise involved. Whether the allegations of the complaint are sufficient to justify a judgment against the defendant Building for the amount of the original purchase price of $18,892.26 with interest thereon from 7 July 1966, which the plaintiff seeks to recover from the defendant Building, and judgment for which was rendered in the trial court, we do not decide.

It suffices for this decision that the demurrer raises a question fit for consideration or discussion; therefore, it cannot be considered frivolous. *Bank v. Duffy, supra.*

[4] The demurrer having been timely filed and not being frivolous, we hold that it should be passed upon on its merits. Until that is done and the demurrer disposed of, the time for filing an answer has not expired.

Error and

Remanded.

MALLARD, C.J., and MORRIS, J., concur.

ASHEVILLE SHOWCASE & FIXTURE COMPANY v. RESTAURANT ASSOCIATES, INC., AND N. W. B. BUILDING OF ASHEVILLE, INC.

No. 6828SC428

(Filed 20 November 1968)

APPEAL from *McLean, J.*, 19 August 1968 Session, BUNCOMBE County Superior Court.

This action is a companion case to a case with the same title, decided this day, but bearing number 6828SC427. This case was instituted the same date, namely, 14 May 1968, but in this case the merchandise was valued at $7,000. It is alleged that the property was purchased during the month of September 1966; that the defendant, Restaurant Associates, Inc. (Restaurant), agreed to pay the plaintiff therefor the sum of $21,504.06; that subsequent to the time of the sale and delivery of the merchandise, the defendant Restaurant executed a promissory note dated 18 January 1967 payable on demand in the amount of $21,504.06 with interest thereon at the rate of six per cent per annum; and that to secure said note, the defendant Restaurant executed a chattel deed of trust conveying the merchandise in question. The plaintiff further alleges that the defendant Restaurant defaulted in the payments due; that defendant Restaurant, in fact, made no payments; and that there remains due $21,504.06 plus interest at the rate of six per cent per annum from 18 January 1967. The plaintiff seeks judgment from the defendant, N. W. B. Building of Asheville, Inc. (Building), alleging that the defendant Building on 13 June 1967 purchased all shares of stock in the defendant Restaurant "knowing at the time of the purchase of said stock that (Restaurant) was in complete default of said chattel Deed of Trust"; that defendant Building "assumed possession and control of said articles of merchandise"; that defendant Building used the same in a restaurant located on the premises of the defendant Building; and that defendant Building "has succeeded to all obligations of (Restaurant) to this plaintiff under said chattel Deed of Trust." The plaintiff seeks judgment against Restaurant and Building jointly and severally for $21,504.06 plus interest from 18 January 1967 and for the possession of the property in order to sell same and apply it on the indebtedness.

A judgment by default final was entered 24 July 1968 for the sum of $21,504.06 together with interest thereon from 18 January 1967 against both defendants. In this judgment a demurrer, filed 22 July 1968, was found not to have been timely filed and to be frivolous and without merit.

Patla, Straus, Robinson & Moore; Harold K. Bennett by E. Glenn Kelly, Attorneys for plaintiff appellee.

Gudger and Erwin by James P. Erwin, Jr., Attorneys for defendant, N. W. B. Building of Asheville, Inc., appellant.

CAMPBELL, J.

All of the facts, including filing dates, dates of orders, hearings and adjudications, were the same as in the companion case bearing the same title and decided this day. Since the decisive facts in the instant case and in the companion case, *supra,* are the same, upon authority thereof and cases therein cited, we hold that the demurrer having been timely filed and not being frivolous, it should be passed upon on its merits. Until that is done and the demurrer disposed of, the time for filing an answer has not expired.

Error and

Remanded.

MALLARD, C.J., and MORRIS, J., concur.

LEON DAVES AND GLADYS DAVES v. UNION MUTUAL INSURANCE COMPANY OF PROVIDENCE

No. 6829SC378

(Filed 20 November 1968)

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

On motion for nonsuit, plaintiff's evidence is to be taken as true and all the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence.

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

On motion for nonsuit, defendant's evidence is to be considered only to the extent that it is not in conflict with plaintiff's evidence and tends to make clear or explain plaintiff's evidence.

3. Evidence § 4— evidence that letter mailed properly — presumption

Evidence that a letter was properly mailed *prima facie* establishes that it was received by the addressee in the usual course of the mail; where the addressee introduces evidence that it was not in fact received, a jury question arises as to whether the letter was actually received.

4. Insurance §§ 129, 136— notice of cancellation mailed — receipt of notice — jury question

In an action on a fire insurance policy, defendant insurer's motion for nonsuit was properly denied where plaintiffs' evidence tended to show that the loss resulting from the destruction by fire of plaintiffs' house and its contents was covered by a fire insurance policy issued by defendant and that plaintiffs had received no notice of cancellation of the policy prior to the fire, notwithstanding the parties stipulated that defendant insurer had properly mailed a notice of cancellation to plaintiffs several months before the fire occurred.

5. Insurance §§ 128, 130— waiver of written proof of loss — sufficiency of allegations and proof

In an action on a fire policy, plaintiffs' allegations and evidence that they notified defendant insurer's agent of the fire loss, that defendant's adjuster visited the scene of the fire, took pictures, made measurements and told plaintiffs to submit a list of items destroyed, that plaintiffs submitted such a list, and that the adjuster later informed plaintiffs that the policy had been cancelled before the fire occurred *are held* sufficient to justify the submission of issues as to whether defendant waived the policy requirement of written proof of loss and whether defendant was estopped to plead lack of such notice.

APPEAL by defendant from *Thornburg, J.*, April 1968 Term, TRANSYLVANIA Superior Court.

The defendant issued a policy of fire insurance to the plaintiffs who are husband and wife on 25 August 1965 to cover the plaintiffs' house and its contents. The policy was to expire in three years with the premium being paid in yearly installments. After the policy was issued and received by the plaintiffs, the general agent for the defendant, Mullinax, Bost, and Bogle in Kannapolis, North Carolina, upon the recommendation of their underwriter, decided that the property was insured in excess of its value. This was confirmed by the local agent from whom the plaintiff purchased the insurance. On 22 November 1965 a notice was mailed by the general agent to the plaintiffs advising them that their policy of insurance was being canceled as of 2 December 1965. It was stipulated by the parties that this notice was placed in the United States mail at Kannapolis, North Carolina. A receipt for the letter containing the cancellation notice was procured from the United States Post Office and was attached to the stipulation. On 8 December 1965 a letter was sent by the general agent to the local agent stating that at that time they had received no evidence of cancellation and requesting that he send such; however, there was no evidence that the local agent had taken any action toward canceling the policy held by the plaintiffs. The plaintiffs denied that they received any notice of cancellation.

They stated that sometime in December of 1965 they received a notice entitled "Endorsement", and stating:

> "This endorsement, effective 12/2/65 (12:01 A.M., standard time), forms a part of policy No. 38-13652 issued to Leon & Gladys Daves by Union Mutual Insurance Company.
>
> It is understood and agreed that there should be an additional premium of $9.87 to revise the cancellation to $42.00 in lieu of $51.87.
>
> Inception — 8/25/65
> Expiration 8/25/68
> First Pay. $ 57.00
> POthers 57.00
> $171.00"

The plaintiffs testified that they understood this "endorsement" to mean that they owed an additional $9.87 on the policy. That the husband took the "endorsement" to the agent who sold them the insurance. The agent told him that there was an additional $9.87 owing on the policy. However, the plaintiff husband was told that a dividend was owed to him from an earlier policy and that this dividend would be used to pay off this additional amount. It appears that there were no further transactions between the plaintiffs and the insurance company until March of 1966. The plaintiffs' house burned on 20 March 1966. On 21 March 1966, the husband went to his local agent and informed him of the fire. He was told that they would have to get an adjuster to view the loss. It was one to two weeks before the adjuster came. The adjuster measured the dimensions of the house, made pictures of the burned contents, and asked the plaintiffs to make a list of the burned contents of the house, giving the actual cost price as near as possible. Plaintiffs were told to take this list to the office of the local agent. The plaintiffs made this list as requested and turned it in to the local agent the next day. Some weeks after this first meeting, the adjuster for the defendant met with the male plaintiff and advised him that his company had canceled plaintiffs' policy of insurance before the fire occurred. A demand for payment was made upon the defendant by plaintiffs. The defendant has refused to make payment.

At the time of the trial, the Johnson-Kilpatrick Agency from whom the plaintiffs purchased their insurance had been purchased by Clifton Sneeden and was then called the "Insurance Service of Brevard". Sneeden testified that he took control of the records of the Johnson-Kilpatrick Agency and that these included records per-

taining to the plaintiffs. He stated that it was the normal practice for the agent to receive a notice of cancellation when a customer's policy was being canceled, but that he had found no such notice in the plaintiffs' file.

At the close of the plaintiffs' evidence and at the close of all the evidence the defendant demurred to the evidence and moved for motion as of nonsuit. These motions were denied.

The following issues were submitted to the jury:

1. Did the defendant issue a policy of fire insurance to the plaintiffs on August 25, 1965, as alleged in the Complaint?

2. Was the said policy in full force and effect on March 20, 1966, at the time of the loss alleged in the Complaint?

3. Did the plaintiffs give immediate written notice to the defendant of a loss occurring on March 20, 1966, as required by the said policy?

4. Did the plaintiffs render to the defendant a Proof of Loss signed and sworn to by the insured concerning the said loss of March 20, 1966, as required by the said policy?

5. Is the defendant estopped to rely on plaintiffs' failure to file written notice or proof of loss concerning their loss of March 20, 1966, or did defendant waive its right to require plaintiffs to file written notice or proof of loss concerning their loss of March 20, 1966, as alleged in the Reply?

6. What amount, if any, are the plaintiffs entitled to recover of the defendant?

The jury found that the policy of insurance was issued by the defendant and that it was in force at the time of the fire. They found that the plaintiffs had not filed written notice of the loss and a sworn proof of loss as required by the terms of the policy. However, by their answer to the fifth issue, the jury found that the defendant was estopped to rely on plaintiffs' failure to file written notice and proof of loss, or defendant had waived its right to require written notice and proof of loss. The plaintiffs were awarded damages in the sum of $3,500.

Ramsey and White by William R. White for plaintiff appellees.

Williams, Williams and Morris by William C. Morris for defendant appellant.

MORRIS, J.

The defendant's sole contention is that the trial judge should have allowed its motion for nonsuit. Its argument is based on two contentions: one, that the plaintiffs did not comply with the terms of the policy in that they did not file written notice or a sworn proof of loss; and, two, that its uncontradicted evidence shows that the policy of insurance was canceled as of 2 December 1965.

[1-3] Perhaps the rule of law most often stated in North Carolina is that "On a motion to nonsuit, plaintiff's evidence is to be taken as true, and all the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of every fact and inference of fact pertaining to the issues, which may be reasonably deduced from the evidence. Contradictions, even in plaintiff's evidence, must be resolved in his favor." 7 Strong, N. C. Index 2d, Trial, § 21, p. 294. Defendant's evidence which tends to impeach or contradict the plaintiff's evidence is not to be considered and defendant's evidence is to be considered only to the extent that it is not in conflict with the plaintiff's evidence and tends to make clear or explain plaintiff's evidence. 7 Strong, N. C. Index 2d, Trial, § 21. The defendant argues that since its evidence showing that the notice of cancellation was properly mailed was uncontradicted, this should have been considered in passing on the motion for nonsuit. Defendant contends that evidence showing that the notice of cancellation was properly mailed raises the presumption that it was received and for this reason the motion for nonsuit should have been allowed. For this proposition the following is quoted in its brief:

> ". . . When the evidence shows that a letter has been committed to the post office or other depository from which letters are regularly delivered, properly stamped, and correctly addressed to the place of residence of the person for whom it is intended, it will be presumed that the sendee received the letter in the due course of mail. . . ." *Eagles v. R. R.*, 184 N.C. 66, 113 S.E. 512.

The above is clearly stated by the Supreme Court in the case cited. However, for its true meaning it must be read in context. The presumption is not conclusive as the defendant argues in his brief. In the sentence following the above quotation the Court quotes from an earlier North Carolina case:

> "When it is shown that a letter has been 'mailed,' this establishes *prima facie* that it was received by the addressee in the usual course of the mails and his business, and when the latter introduces evidence that it was not in fact received, or not re-

ceived at the time alleged, such testimony simply raises a conflict of evidence, on which it is the exclusive province of the jury to pass." *Trust Co. v. Bank,* 166 N.C. 112, 81 S.E. 1074.

[4] In the present case the evidence shows that the plaintiffs purchased a policy of insurance in August of 1965 which was to run for three years; that they did not receive the notice of cancellation; that they understood the "endorsement" which was received sometime in December of 1965 to mean that they owed an additional $9.87 on the policy. They stated that the local agent told them he would pay this as they were due a dividend on an old policy. The witness Sneeden stated that he had bought out the agency with which the plaintiffs dealt; that he received the plaintiffs' file along with other records in this transaction and that he found no notice of cancellation in the file. He stated that ordinarily the local agent would receive such a notice. The defendant Company offered evidence that it had mailed the plaintiffs a notice of cancellation, and, in fact, the plaintiffs stipulated that such notice had been mailed. The defendant introduced a postal receipt which, as stipulated to by the plaintiffs, showed that the notice of cancellation had been mailed. This testimony raises a conflict of evidence. The motion for nonsuit was, therefore, properly denied.

[5] The defendant argues that the plaintiffs failed to file written notice of the loss and proof of loss as required by the policy. It is argued that the plaintiffs' allegations do not raise the question of waiver, that they only raise the question of whether the defendant is estopped to raise these defenses, and that the evidence is insufficient to allow the question of estoppel to be submitted to the jury; therefore, because plaintiffs have not complied with the terms of the policy, nonsuit should have been granted. The pertinent allegations are as follows:

". . . plaintiffs allege that because of the actions on the part of the agents and employees of the defendant, that the defendant is estopped to plead lack of notice. That shortly after the fire, as alleged in the complaint, agents, servants and employees of the defendant contacted these plaintiffs and went to the site of the destroyed home, measured the size of the dwelling, took pictures of the destroyed home and requested the plaintiffs to furnish to the agent of the defendant in Brevard a list of the contents destroyed in said fire, and notified these plaintiffs that they would contact them again in the near future. That these replying plaintiffs took the list of contents to the agent in Brevard and were never thereafter contacted by

the defendant. That because of these actions on the part of the agents, servants and employees of the defendant, the defendant is estopped to plead lack of notice."

We feel that these allegations properly raised the question of waiver. 1 McIntosh, N. C. Practice 2d, § 999, p. 556, states:

"The court will grant relief, either legal or equitable, according to the facts alleged and proved, though there be no formal prayer for relief, or though relief of another kind be demanded. The court has stated it thus: 'In numerous and repeated decisions of this Court we have held that neither a particular form of statement nor a special prayer for relief should be allowed as determinative or controlling, but rights are declared and justice administered on the facts which are alleged and properly established.' The statement found in some cases that 'A complaint proceeding upon one theory will not authorize a recovery upon another and independent theory' has no reference to the theory indicated in the prayer for relief, but merely prohibits invocation of a theory not supported by the facts alleged. That is, a party cannot recover upon a theory or cause of action not supported by the facts, regardless of the actual existence of *other* facts not alleged which he might have been able to prove.

It is clear that upon demurrer for failure to state a cause of action, or upon motion for nonsuit, the theory of recovery is unimportant except to the extent that it must be determined that the facts alleged, or alleged and proved, justify recovery on some theory."

In *Laughinghouse v. Insurance Co.*, 200 N.C. 434, 157 S.E. 131, the Court held that the issue of waiver should have been submitted to the jury although it was not expressly pleaded.

The evidence taken in the light most favorable to the plaintiffs shows that they notified the defendant's agent of the fire loss; that the defendant's adjuster later visited the scene of the fire, took pictures, made measurements, and asked the plaintiffs to submit a list of the contents which were destroyed in the fire. The plaintiffs submitted this list as requested, and it was retained by the defendant without objection. The adjuster did not suggest to the plaintiffs that it was necessary to file a proof of loss, but returned, after his first visit, and advised the plaintiffs that the policy had been canceled. This position is completely inconsistent with the requirement of the filing of a proof of claim. The allegations and the evidence taken

in the light most favorable to the plaintiffs justify the submission of the issues of waiver and estoppel to the jury. The court charged the jury on waiver and estoppel, without objection or exception on the part of defendant, nor did defendant make any exception to the issue submitted. In the trial below there was no error.

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

ELRY HOLLOWAY AND WIFE, PEGGY S. HOLLOWAY v. BILL E. MEDLIN AND WIFE, RUBY L. MEDLIN, CENTRAL CAROLINA BANK & TRUST COMPANY, TRUSTEE, AND SECURITY SAVINGS & LOAN ASSOCIATION

No. 6814DC365

(Filed 20 November 1968)

1. Evidence § 32— parol evidence rule

No verbal agreement between parties to a written contract, made before or at the time of the execution of the contract, is admissible to vary its terms or to contradict its provisions, it being presumed that the writing merged therein all prior and contemporaneous negotiations.

2. Evidence § 32— parol evidence rule

The parol evidence rule has no application to written or parol agreements made subsequent to the written instrument.

3. Evidence § 32; Contracts § 26— parol agreements changing terms of written contract

In an action to recover upon a written contract to build a house, the court properly excluded defendant's evidence of conversations and agreements with plaintiffs prior to the date the written contract was entered and correctly admitted plaintiffs' evidence of changes in the contract made by the parties after that date.

4. Appeal and Error § 32— assignments of error to the issues

Where appellant made no objection or exception at the trial to the issues submitted or to the court's refusal to submit issues tendered, appellant may not challenge the issues for the first time on appeal in his assignments of error.

5. Appeal and Error § 31— assignments of error to court's review of the evidence

Assignments of error to the court's recapitulation of the evidence will be overruled where appellants made no suggested corrections to the trial court and the court charged the jury to use their own recollection of the evidence.

6. Trial § 32— consideration of issues submitted

An instruction that the jury might consider together two issues, one of which the plaintiff has the burden of proof and the other of which the defendants have the burden of proof, *is held* to constitute prejudicial error.

7. Contracts § 28; Damages § 16— contract action — instructions as to damages — burden of proof

In an action for breach of a construction contract, an instruction that the jury could answer the issue as to plaintiffs' damages "in such amount as you feel they are entitled to under the evidence" *is held* to relieve the plaintiffs of their burden of proof to satisfy the jury by the greater weight of the evidence and constitutes prejudicial error.

8. Trial § 33— instructions not based on evidence

An instruction about a material matter not based on sufficient evidence is erroneous.

APPEAL by defendants Bill E. Medlin and wife, Ruby L. Medlin, from *Lee, J.*, March 1968 Civil Session District Court Division, DURHAM County.

Plaintiffs allege that on 8 February 1967 they entered into a contract with individual defendants for the construction of a house on defendants' lot at a price of $17,500. Subsequently the contract was amended by oral agreements between the parties and, after allowance for all debits and credits for subsequent oral modifications, a net contract price of $17,152 resulted. Work was begun on the house on 1 March 1967, and completed on or about 10 May 1967. Payment under the contract was due 10 days from and after completion. Defendants have paid $14,800 and although demand has been made, defendants have refused to pay the balance due of $2,352. On 31 October 1967, plaintiffs filed a notice of lien. Central Carolina Bank & Trust Company is trustee under a deed of trust executed by the individual defendants securing a note in the amount of $15,000 to Security Savings & Loan Association. Plaintiffs ask for recovery of $2,352 with interest from 20 May 1967, and sale of the property to satisfy such indebtedness as plaintiffs recover of individual defendants.

Individual defendants answered, admitted a contract was entered into, denied the amount, denied oral agreements modifying, denied the job had been completed in a workmanlike manner, denied the net resulting contract price was $17,152, admitted the payment of $14,800 and demand for $2,352, admitted the notice of lien, admitted the note and deed of trust, but averred that there remains on deposit with Security Savings & Loan Association the sum of $2,000.

As a further answer and defense, set-off, and counterclaim individual defendants allege that the house is constructed in a "poor workmanlike" manner and not in compliance with the contracts entered into and not in accordance with the plans and specifications. Individual defendants listed some 20 items allegedly not in compliance totaling $2,217.50. They also alleged a contract of 8 March 1967 amending the 8 February contract. They owed on the original contract as amended $16,356, have paid $14,800, "leaving a balance due upon the original contract and as amended based upon the faithful and good performance of the same $1,556.00, which the defendants Bill E. Medlin and wife, Ruby L. Medlin, specifically plead as a set-off against any balance due upon said contract." Individual defendants allege they have been damaged $661.50 as a result of the failure of plaintiffs to perform the contract, that demand has been made and payment refused.

Plaintiffs' reply to the set-off and counterclaim of individual defendants admitted credits due totaling $47 but averred that these had been allowed in the complaint; admitted payment of $14,800; and admitted that defendants had made demand upon them for certain money allegedly due. All other allegations of the set-off and counterclaim are denied.

Upon issues answered by the jury in favor of the plaintiffs, the court entered judgment against the individual defendants in favor of plaintiffs in the amount of $2,352 and provided that the judgment be a lien against the property described in the complaint from 8 February 1967, subject only to the lien of the deed of trust to Central Carolina Bank & Trust Company, Trustee, to which lien the plaintiffs agreed to subordinate their materialman's and laborer's lien. The judgment also provided that funds of individual defendants on deposit with Security Savings & Loan Association be transferred to plaintiffs in partial satisfaction of the judgment and directed individual defendants to endorse such disbursement drafts as may be necessary to effect such transfer. Individual defendants appealed.

Newsom, Graham, Strayhorn & Hedrick by Josiah S. Murray, III, for plaintiff appellees.

Brooks and Brooks by Eugene C. Brooks, III, for Bill E. Medlin and wife, Ruby L. Medlin, defendant appellants.

MORRIS, J.

Defendants make 35 assignments of error based on some 69 exceptions. The errors assigned have primarily to do with two facets

of the trial: one, the application by the trial court of the parol evidence rule; and, two, errors in the charge to the jury.

The trial court refused to allow the individual defendants to testify concerning conversations had and purported agreements had with plaintiffs prior to 8 February 1967, the date of the written contract between plaintiffs and defendants Medlin. Defendants Medlin contend this was error. Defendants' Exhibit 1 is entitled "Changes Medlin Job". It contains a series of handwritten additions and subtractions, some of which are labeled and some of which are not. It bears the figures "3/18/67" and bears the signatures of B. E. Medlin and Peggy S. Holloway on the front thereof. On the back thereof appears handwritten "additions" and "deductions". Defendants earnestly contend that this constitutes a written contract and that the court erred in admitting any testimony with respect to changes in the 8 February 1967 contract other than those listed on Defendants' Exhibit 1. Defendants Medlin also urge that any testimony tending to explain the entries on Defendants' Exhibit 1 should have been excluded.

[1-3] These contentions and the assignments of error relating thereto are without merit. "No verbal agreement between parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. *Insurance Co. v. Morehead,* 209 N.C. 174, 183 S.E. 606. It will be presumed that the writing merged therein all prior and contemporaneous negotiations. *Neal v. Marrone,* 239 N.C. 73, 79 S.E. 2d 239." *Fox v. Southern Appliances,* 264 N.C. 267, 141 S.E. 2d 522. The court properly excluded testimony with respect to conversations and agreements prior to 8 February 1967 not incorporated in the contract of that date and contradictory of its terms. The rule, however, has no application to agreements subsequent to the written instrument, whether those agreements be in writing or oral. Stansbury, N. C. Evidence 2d, § 258, p. 623, and cases there cited. There is nothing on the face of Defendants' Exhibit 1 nor in the evidence to indicate that this is or was ever intended to be a contract. There is nothing in the document itself which gives any meaning to the figures appearing thereon, no language indicating mutual contractual obligations, no execution by two of the parties to the 8 February 1967 contract, nothing indicating an agreement between the two signatories that an accounting between them with respect to changes had been finalized. The court correctly admitted testimony as to changes after 8 February 1967 and up to the completion of the construction together with testimony tending to explain Defendants' Exhibit 1.

[4] Assignments of error 16 and 17 are directed to the issues submitted to the jury. These exceptions to the issues are noted for the first time in the charge of the court in the record on appeal. Nothing in the record indicates that appellants objected and excepted to the submission of these issues nor does the record reveal that appellants tendered issues for submission to the jury and excepted to the court's refusal to submit any tendered issue. Appellant may not, therefore, challenge the issues for the first time on appeal in his assignments of error. *Wooten v. Cagle*, 268 N.C. 366, 150 S.E. 2d 738.

[5] Assignments of error 19, 20, 21, 22 and 23 are all addressed to the court's recapitulation of the evidence, the contention being that the recapitulation, in many instances, does not conform to the evidence. The record does not indicate that appellants suggested any corrections to the court. The court specifically charged the jury to use their own recollection of the evidence, they being the sole triers of the facts. These assignments are overruled. See *State v. Lambe*, 232 N.C. 570, 61 S.E. 2d 608.

[6, 7] The court properly placed the burden of proof on the first issue and second issue on the plaintiffs and on the defendants with respect to the third issue and the fourth issue. Appellants' assignments of error 27 and 28 are addressed to the following portion of the charge:

> "That takes us to the third issue, members of the jury, that is, 'Did the plaintiffs breach their construction contract by failing to perform same in an efficient and workmanlike manner?' On that issue the burden of proof is upon the defendant. Issues 2 and 3 must be taken together. You can answer #2 for the plaintiffs in such an amount as you feel they are entitled to under the evidence. Then #3 is a separate matter."

To instruct the jury to consider together two issues with respect to one of which the plaintiff has the burden of proof and with respect to the other of which the defendants have the burden of proof we think is so confusing to the jury as to be prejudicial error. Additionally, the instruction "You can answer #2 for the plaintiffs in such an amount as you feel they are entitled to under the evidence" relieves the plaintiffs of their burden of proof to satisfy the jury by the greater weight of the evidence and constitutes prejudicial error.

Assignment of error 18 is addressed to that portion of the charge as follows:

> "If, in order to conform the work to the contract requirements, a substantial part of what has been done by the contractor must

be undone and the contractor has acted in good faith, or the owner has taken for granted (sic), the owner is not permitted to recover the cost of making the change, but may recover the difference in value."

[8] This portion of the charge was given in connection with the charge on substantial performance. We assume that the words "for granted" should have read "possession". Nevertheless, the record contains no evidence of value and no evidence requiring this charge. This portion of the charge is, therefore, subject to a valid exception. "An instruction about a material matter not based on sufficient evidence is erroneous. In other words, it is error to charge on an abstract principle of law not raised by proper pleading and not supported by any view of the evidence." *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62.

Since these errors require a new trial, and matters complained of by other assignments of error are not likely to occur upon another trial of the matter, we do not deem it necessary to discuss them.

New trial.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD ROPER

No. 6825SC425

(Filed 20 November 1968)

1. Burglary and Unlawful Breakings § 3; Indictment and Warrant § 9 — indictment — description of premises broken and entered

An indictment charging defendant with the felonious breaking and entering of "a certain dwelling house and building" occupied by a named person identifies the premises with sufficient certainty to enable defendant to prepare his defense and to afford him protection from another prosecution for the same incident.

2. Indictment and Warrant § 14— sufficiency of indictment — how raised

The sufficiency of a bill of indictment may be raised only by motion to quash or motion in arrest of judgment and may not be raised by motion for judgment of nonsuit.

3. Criminal Law § 75— confessions — Miranda warnings

Failure of officers to warn illiterate defendant prior to in-custody inter-

rogation that anything he said could be used against him in a court of law renders inadmissible incriminating statements made by defendant to the officers during the interrogation.

4. Criminal Law § 75— confession induced by offer of hope of lesser punishment

Statement by an officer that he could not promise defendant anything but that defendant could help himself "in the eyes of the court" if he returned the stolen property *is held* an improper offer to defendant of a measure of hope for a lighter punishment which renders defendant's subsequent confession involuntary and inadmissible.

APPEAL by defendant from *Falls, J.*, June 1968 Session of Superior Court of BURKE County.

Defendant was charged in a bill of indictment with the felony of breaking and entering the dwelling house and building occupied by one Henry Lane with felonious intent to steal, take, and carry away therefrom the property of Henry Lane and was also charged with the felony of larceny of property of Henry Lane of the value of more than two hundred dollars.

Defendant pleaded not guilty and trial was by jury. The jury returned a verdict of guilty of the felony of breaking and entering with the intent to commit the felony of larceny and guilty of the charge of larceny of goods of the value of more than two hundred dollars. From judgment of imprisonment upon the verdict, the defendant gave notice of appeal to the Court of Appeals.

Attorney General T. W. Bruton and Deputy Attorney General Ralph Moody for the State, appellee.

Riddle & McMurray by John H. McMurray for the defendant, appellant.

MALLARD, C.J.

[1] Defendant contends that the bill of indictment is fatally defective in failing to identify the premises with sufficient certainty to enable him to prepare his defense and afford him protection from another prosecution for the same incident. This contention is without merit.

The pertinent part of the bill of indictment alleges: "That James Edward Roper County of Burke on the 13th day of June, A.D., 1967, with force and arms at and in the county aforesaid, a certain dwelling house and building occupied by one Henry Lane . . ."

[2] Defendant attempts to raise the question of the sufficiency of

the bill of indictment on his motion for judgment of nonsuit. In *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688, Justice Branch, speaking for the Supreme Court, said: "The proper methods to raise the question of the sufficiency of a bill of indictment are by motion to quash or motion in arrest of judgment. However, if the offense is not sufficiently charged in the indictment, this Court, *ex mero motu*, will arrest the judgment."

[1, 2] Even though the question of the sufficiency of the bill of indictment is not properly raised, we are of the opinion that in this case it sufficiently describes the premises. *State v. Burgess*, 1 N.C. App. 142, 160 S.E. 2d 105; *State v. Knight*, 261 N.C. 17, 134 S.E. 2d 101.

The defendant contends that the court committed error in admitting evidence, over objection, of incriminating statements made by the defendant to the investigating officers after he was arrested and was being interrogated while in custody.

Upon a *voir dire*, properly held, the State offered evidence which, in substance, tended to show that the defendant was arrested on Friday night, 30 June 1967, about midnight and was taken to the Caldwell County Jail. The investigating officer testified that the defendant told him he could not read or write. The officer further testified that at the time the defendant was arrested, the following occurred:

> "He was advised of the charge and the warrant was read to him. He was advised that he did not have to talk to us at all. He had the right to remain silent and if he would like to call his lawyer, he could call his lawyer. We would have one at the Sheriff's department as soon as he got there and he had a right to communicate with his family and friends."

The State further offered evidence that the defendant was questioned late Saturday evening and made incriminating statements while being held in the Caldwell County Jail. Before he was interrogated, the defendant was informed of his rights, according to the testimony of the witness, in the following manner:

> "Sheriff Wise advised Mr. Roper that he would like to ask him some questions but before he did, Mr. Roper had the right to remain silent, he did not have to tell him anything. If he would like to have a lawyer present during the interrogation he could and if Mr. Roper could not afford a lawyer, the State would get him a lawyer, and he also informed Mr. Roper he had a right to have communication with his friends and relatives.
>
> . . .

Mr. Roper was informed during the interrogation that it would look better on him in the eyes of the Court if this stuff was returned but we couldn't make no promises whatsoever for him. . . .

I told him I could not promise him anything as a result of anything he might do to help us, that the only way he could be helped was for him to help himself. . . .

The Sheriff advised him that he did not have to tell anything, he could remain silent, and that he could have a lawyer present during the interrogation if he wanted to. If he could not afford a lawyer that the State would furnish him a lawyer; that he had the right to communicate with his friends and family."

In *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, it is said:

"Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, *the following measures are required.* He must be warned prior to any questioning that he has the right to remain silent, *that anything he says can be used against him in a court of law,* that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (emphasis added)

In the case of *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, Justice Lake said:

"When the State proposes to offer in evidence the defendant's confession or admission, and the defendant objects, the proper procedure is for the trial judge to excuse the jury and, in its absence, hear the evidence, both that of the State and that of the defendant, upon the question of the voluntariness of the statement. In the light of such evidence and of his observation of the demeanor of the witnesses, the judge must resolve the question of whether the defendant, if he made the statement, made it voluntarily and with understanding. (citations omitted) The trial judge should make findings of fact with reference to this question and incorporate those findings in the record. Such findings of fact, so made by the trial judge, are conclusive *if they are supported by competent evidence in the record. No reviewing court may properly set aside or modify those findings if so supported by competent evidence in the record."* (emphasis added)

After the evidence was taken on the *voir dire,* the trial judge found "as a fact that any statement which the defendant made to the officers was made voluntarily, understandingly, after having been advised on two occasions: first, at the time of his arrest and the warrant was read to him and again prior to the interrogation, that he had the right to remain silent; *that any statement which he made could or would be used against him;* that he had the right to have an attorney present during the interrogation if he so desired and that if he could not afford a lawyer that one would be furnished to him by the State." (emphasis added)

[3] There is no evidence in this record indicating that this defendant, who was illiterate, was informed that anything he might say could be used against him in court. Thus, there was no evidentiary basis for the finding by the trial court to the effect that he had been so informed; therefore, the finding was in error. *State v. Gray, supra.* In *Miranda v. Arizona, supra,* it is held that the warning of the right to remain silent alone is not sufficient and that this warning "must be accompanied by the explanation that anything said can and will be used against the individual in court." In fact, this warning to the effect that anything he says may be used as evidence against him in court is one of the four specific warnings required by the *Miranda* case and *State v. Gray, supra.*

We hold, therefore, that the declaration entered on the record by the trial judge that the statement which the defendant made was voluntarily and understandingly made was a conclusion improperly reached and entered because it is based, in part, on a finding of fact not supported by the evidence.

The Attorney General in a Citation of Additional Authority calls this Court's attention to a decision of the District Court of Appeal of Florida in the case of *Ortiz v. State,* 212 So. 2d 57. In the *Ortiz* case the Florida court held that the following warning was sufficient under the *Miranda* case:

> "I told him he did not have to tell me anything. He could obtain a lawyer, and if he was not in a position to obtain a lawyer, the State would furnish one to him. I told him he did not have to tell me anything without the advice of Counsel. He advised me that he would tell me about it."

We do not so construe the *Miranda* case. It is clear that the foregoing warning does not contain all four of the warnings set out in *Miranda.* Neither does it contain any other fully effective means to notify the defendant of his right of silence *"and to assure that the exercise of the right will be scrupulously honored"* as required

by *Miranda.* It does not contain the warning "that anything he says can be used against him in a court of law." This is one of the four specific requirements in *Miranda.* See also *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511.

[4] This confession is also tainted by offering to the defendant the hope of reward. *State v. Fuqua,* 269 N.C. 223, 152 S.E. 2d 68. It appears from the record that at some point during the interrogation of the defendant, he was told that the officers could not promise him anything but that "it would look better on him in the eyes of the court" if the stolen property was returned.

We think that the statement made by the officer to the defendant to the effect that the officer could not promise the defendant anything but that the defendant could help himself "in the eyes of the court" if he returned the stolen property was designed and intended to, and did, improperly offer to the defendant a measure of hope for lighter punishment. Even though the officer said he was not authorized to speak for the court, we are of the opinion, under these circumstances, that this illiterate defendant was improperly induced to make the incriminating statement to the officer.

For the reasons stated, there must be a

New trial.

CAMPBELL and MORRIS, JJ., concur.

MRS. SOL REESE, MARY RING, SUE McCALL, EULA BALL, EDITH McINTYRE AND BUD McCULLOUGH v. LOUISE CARSON, HERMAN McCULLOUGH, AND JOEL H. WALKER, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ERLINE DUNCAN WALKER, DECEASED

No. 6828SC419

(Filed 20 November 1968)

1. Executors and Administrators § 33— family settlements

Family settlements for distribution of estates contrary to testamentary dispositions are upheld and enforced where the rights of creditors are not impaired and in the absence of fraud.

2. Wills § 60— renunciation of bequest

A testamentary beneficiary has the right to renounce or decline a devise or bequest in his favor, and his motives in doing so are immaterial, at least so long as he receives no fraudulent benefit for the renunciation.

3. Wills § 60— renunciation by parol

The renunciation of a devise or bequest need not be made in writing but may be effected by parol.

4. Wills § 60— right of renunciation

In this State a devisee or legatee may disclaim or renounce his right under a will.

5. Wills §§ 35, 60— vesting of estate — renunciation of bequest

Where testator provided that the residue of his estate should go to his daughter, but that if she should die before complete distribution of the estate the residue should go in trust for the daughter's husband for his lifetime, with remainder to certain named beneficiaries, the residue of the estate vested in the daughter prior to her death notwithstanding that the husband failed to negotiate a check issued to him by his wife as payment for a bequest, since his failure to negotiate the check constituted an effective and timely renunciation of the bequest under the circumstances of the case.

6. Appeal and Error § 2— review of decision of lower court — effect of incorrect reasons

If the correct result has been reached by the trial court, its judgment should not be disturbed on appeal even though some of the reasons assigned therefor may not be correct.

APPEAL by plaintiffs and by the defendants Louise Carson and Herman McCullough from *McLean, J.*, 22 April 1968 Session (second week), BUNCOMBE Superior Court.

This action involves the disposition of the residuary estate of William T. Duncan who died testate on 8 November 1963. Each of the plaintiffs, and the defendants Louise Carson and Herman McCullough, are contingent residuary beneficiaries named in Item IX of the Will of William T. Duncan.

After making several specific bequests of cash and personal property, the testator provided in Item VIII of his Will that the residue of his estate should go to his daughter, Erline Duncan Walker, the wife of defendant appellee Joel H. Walker. Following this disposition of the residue of his estate, the testator provided by Item IX of his Will that in the event his daughter Erline Duncan Walker should predecease him, *or die before complete distribution of his estate,* the residue of his estate should go in trust for Joel H. Walker for his lifetime, with the remainder to be divided equally between plaintiffs and the defendants Louise Carson and Herman McCullough.

The estate of William T. Duncan consisted of real estate of a value of $65,370.00, and personal property of a value of $18,257.44. His specific cash bequests ($12,500.00), the debts and costs of ad-

ministration ($4,266.61), North Carolina Inheritance Tax ($2,325.26), and Federal Estate Tax ($2,118.81) totaled $21,210.68.

Testator nominated Louise Carson and Herman McCullough (two of the defendants) as co-executors of his Will, and they qualified as such on 12 November 1963; and Notice To Creditors was published, commencing 28 November 1963. After qualification the co-executors determined that the estate did not contain sufficient cash or liquid personalty to pay the cash bequests, debts and costs, and inheritance and estate taxes. They therefore entered into a contract on 21 November 1963 with Erline Duncan Walker, daughter and principal beneficiary of testator, whereby Erline Duncan Walker agreed to pay from her personal monies, and from funds of the estate, all of the bequests, debts, costs and taxes of the estate.

Pursuant to her agreement with the co-executors, Erline Duncan Walker paid the debts, inheritance and estate taxes, attorney fee, commissions to the co-executors, and the specific cash bequests including $1,000.00 to Mary Ring (one of the plaintiffs), and $1,000.00 each to Louise Carson and Herman McCullough (two of the defendants). She also delivered to the various legatees the items of personal property specifically bequeathed by the testator.

Erline Duncan Walker and her husband, Joel H. Walker, maintained a joint bank account in the First Citizens Bank and Trust Company in Asheville, North Carolina, and all of the checks drawn by Erline Duncan Walker in payment of the debts, inheritance and estate taxes, attorney fee, commissions to the co-executors, and the cash bequests were drawn on and paid from this joint account. Testator made a specific bequest of $4,000.00 to Joel H. Walker, and the check for this specific bequest was drawn on the same joint bank account; however, this check has never been negotiated. No final account of the administration of the estate of William T. Duncan has been filed with the Clerk of Superior Court, and the court costs have not been paid.

Erline Duncan Walker died testate on 20 November 1964, and Joel H. Walker was named as sole beneficiary and executor. He has qualified as executor and is in possession of the property of her estate and the residuary property of the estate of William T. Duncan.

The present controversy is centered upon whether, at the time of the death of Erline Duncan Walker, there had been a *complete distribution* of the estate of William T. Duncan. The plaintiffs and the defendants Louise Carson and Herman McCullough urge that there had not been a complete distribution, and therefore the residue

of the estate of William T. Duncan should pass to them under Item IX of his Will, subject to the Trust established therein. The defendant Joel H. Walker urges that there had been a complete distribution and therefore the residue of the estate of William T. Duncan had vested in Erline Duncan Walker before her death, and as the sole beneficiary under her Will he is entitled to the estate of William T. Duncan which had vested in her.

The case was heard by Judge McLean by consent without a jury, and from a judgment decreeing that the estate of William T. Duncan had been fully distributed at the time of the death of Erline Duncan Walker, the plaintiffs and defendants Louise Carson and Herman McCullough appealed.

Loftin & Loftin, by E. L. Loftin, for plaintiff appellants.

Landon Roberts for Louise Carson and Herman McCullough, defendant appellants.

Harold K. Bennett for Joel H. Walker, defendant appellee.

BROCK, J.

Appellants concede, and properly so, that the failure of Erline Duncan Walker to file a final account in the Superior Court before her death would not preclude a determination that there had been a *complete distribution* of the estate of William T. Duncan. Their contention is that a *complete distribution* was not accomplished because the $4,000.00 bequest to Joel H. Walker, as provided in the Will of William T. Duncan, was never paid.

Each of the checks in payment of the specific bequests of cash under the Will of William T. Duncan, including the one payable to Joel H. Walker for his specific bequest, was dated and signed by Erline Duncan Walker on 29 November 1963, almost a year before her death. Each of these checks was drawn on the joint bank account of Erline Duncan Walker and her husband, Joel H. Walker, wherein the personal funds of both were on deposit. Each of these checks, with the exception of the one payable to Joel H. Walker, was subsequently negotiated and charged by the bank against the joint account of Erline Duncan Walker and Joel H. Walker.

Joel H. Walker, the only witness called to testify by either side, testified that he and his wife were with the co-executors in the office of Mr. Pennell, attorney for the co-executors, when the checks for the specific bequests were prepared and signed. He testified there was some discussion concerning the check drawn payable to him,

and that Mr. Pennell advised him that "there wasn't any use to cash this check and draw my own money out of the bank and put it right back in bank again under the circumstances." He further testified that he agreed not to present the check to the bank, and that he has never presented it to the bank.

[1] It is quite clear that the agreement of Erline Duncan Walker to pay the bequests, costs, commissions, and taxes from her and her husband's personal funds was for the purpose of avoiding the necessity of a sale of the real estate which was a part of the residue of the estate that would pass to her. This agreement was in the nature of a family settlement. "Family settlements for distribution of estates contrary to testamentary dispositions are almost universally approved, upheld and enforced, where the rights of creditors are not impaired and in the absence of fraud." *In Re Will of Pendergrass,* 251 N.C. 737, 112 S.E. 2d 562. Joel H. Walker, by his conduct, concurred in this arrangement. On 3 May 1966 the co-executors were discharged by the court from further responsibility.

[2] "The right of a testamentary beneficiary to renounce or decline a devise or bequest in his favor is generally recognized. The law does not compel a devisee to accept a devise against his consent, and, as is sometimes said, it is optional with a devisee whether to accept or decline the devise however beneficial it may be to him. The motives of the donee in declining the gifts are immaterial, at least so long as he receives no fraudulent benefit for the renunciation." 57 Am. Jur., Wills, § 1566, p. 1070; *In Re Will Of Pendergrass, supra; Perkins v. Isley,* 224 N.C. 793, 32 S.E. 2d 588. Clearly the conduct on the part of Joel H. Walker in this case was to accomplish the same purpose as the contract negotiated by the co-executors with his wife, i.e., to prevent the necessity of sale of the real estate for the purpose of paying the cash bequests. No fraudulent benefit was gained by him in his conduct.

[3, 4] "The view that the renunciation of a devise or bequest need not be made in writing, but may be effected by parol, has been recognized in a number of cases." Annotation: 93 A.L.R. 2d 71 (1964). "In a number of cases an effective renunciation of a devise or bequest was found, solely or primarily, from the fact that the beneficiary, although not expressly renouncing the gift, deliberately refused to enter into possession of the devised or bequeathed property, or to exercise control over it, or to assert the rights or interest to be acquired therein." Annotation: 93 A.L.R. 2d 72 (1964). "In North Carolina a devisee or legatee may disclaim or renounce his right under a Will." *In Re Will Of Pendergrass, supra.*

[5] We hold that, under the circumstances of this case, by agreeing not to negotiate the check, coupled with his conduct in not negotiating the check, Joel H. Walker effectively renounced the bequest to him and that a complete distribution of the estate of William T. Duncan was accomplished before the death of Erline Duncan Walker; and that, under the terms of the Will, the residue of the estate of William T. Duncan vested in Erline Duncan Walker prior to her death. It follows that Item IX of the Will of William T. Duncan is not operative and the beneficiaries named therein are not entitled to receive any devise or bequest under its provisions.

[6] If the correct result has been reached by the trial court, its judgment should not be disturbed even though some of the reasons assigned therefor may not be correct. *Sanitary District v. Lenoir*, 249 N.C. 96, 105 S.E. 2d 411.

The judgment of the trial court is

Affirmed.

BRITT and PARKER, JJ., concur.

SAM COOK v. JAMES C. LAWSON

No. 6829SC303

(Filed 20 November 1968)

1. Frauds, Statute of § 6— contract to share profits from purchase and sale of realty

An oral contract to divide the profits from the purchase and sale of real estate is not within the statute of frauds.

2. Contracts § 27— breach of contract — nonsuit — damages

Where plaintiff's evidence tends to show the existence of a contract between the parties and that defendant performed an act rendering it impossible for plaintiff to perform his part of the agreement, or otherwise makes out a *prima facie* case of breach of contract, a motion to nonsuit is properly denied irrespective of the evidence of damage, since breach of contract entitles the injured party to nominal damages at least.

3. Contracts § 21— anticipatory breach

Anticipatory breach of contract is a breach committed before there is a present duty of performance, and is the outcome of words evincing intention to refuse performance in the future.

4. Contracts § 21— anticipatory breach

The theory of anticipatory breach of contract avails in North Carolina.

5. Contracts §§ 21, 27— anticipatory breach — sufficiency of evidence

In an action for breach of an oral contract whereby plaintiff and defendant agreed to purchase land for the purpose of reselling it and dividing the profits, plaintiff's evidence of a statement by defendant that "I bought the land and paid for it; you ain't got no more to do with it" is sufficient to show an anticipatory breach of the contract by defendant.

6. Contracts § 29— breach of contract to divide profits from sale of realty — measure of damages

The measure of damages for breach of a contract whereby plaintiff and defendant agreed to purchase and sell real property and divide the profits equally is one-half the profits which would have been made upon a resale of the property in the exercise of reasonable care and judgment.

APPEAL by plaintiff from *Jackson, J.*, at the 23 April 1968 Session of RUTHERFORD Superior Court.

In his complaint, plaintiff alleged that on or about 1 June 1966 he and the defendant, both being residents of Rutherford County, N. C., orally agreed to buy and sell land together, "going 50-50 on it," and sharing any profit equally. He further alleged acts by both parties in accord with the agreement, including negotiation, the taking of an option, and subsequent purchase of certain property near Chesnee, South Carolina; that the defendant secretly took title in his own name, subsequently informing the plaintiff that plaintiff had nothing to do with it. Plaintiff prayed for damages in the amount of one-half the difference between the fair market value and the purchase price of the land.

The evidence favorable to plaintiff tended to show: Plaintiff was engaged in the real estate business in Forest City, N. C. Defendant came to plaintiff's home on 1 June 1966, and as a result of a conversation, the parties entered into a parol agreement to buy and sell land, sharing the profits or losses equally. After considerable traveling and looking, the parties located certain land belonging to a Dr. Reed near Chesnee, South Carolina. Since Plaintiff was known as a realtor, it was felt the defendant alone might obtain a better price, as the owner was likely to assume the land was desired for farming. While plaintiff waited in the car, defendant obtained an option to purchase the property for $25,000, paying $1,000 for the option. Plaintiff offered to pay half of the $1,000, but defendant said settlement could be made when the property was resold. On inquiry by the defendant, plaintiff assured defendant that he would pay the $500 to defendant if no profit was made on resale. Plaintiff advertised the property for several weeks and placed signs upon it, but the property was not sold. The parties then decided to take sealed bids for the timber on the land, and plaintiff solicited bids

from various timber dealers. On opening the bids, defendant failed to disclose the amounts of the bids to plaintiff. When plaintiff asked about it, defendant replied: "Why do you care? I bought the land and paid for it; you ain't got no more to do with it." Plaintiff's evidence also indicated that the defendant had represented joint ownership of the property both to the plaintiff and to third persons. Plaintiff then offered his own expert opinion of the fair market value of the property at the time of the repudiation by defendant.

At the close of the plaintiff's evidence, the court granted defendant's motion for judgment as of nonsuit. Plaintiff appealed.

Hamrick & Hamrick by J. Nat Hamrick for plaintiff appellant.

M. Leonard Lowe for defendant appellee.

BRITT, J.

Plaintiff assigns as error the granting of defendant's motion for nonsuit. Two questions are presented by this appeal: Was plaintiff entitled to have the jury pass upon his action for breach of contract; if so, what was the measure of damages?

[1] It is clear that in North Carolina an oral contract to divide the profits from the purchase and sale of real estate is not within the statute of frauds. *Newby v. Realty Co.*, 180 N.C. 51, 103 S.E. 909, 182 N.C. 34, 108 S.E. 323; *Brogden v. Gibson*, 165 N.C. 16, 80 S.E. 966.

In *Newby v. Realty Co., supra,* plaintiffs alleged and offered evidence tending to show that they entered into an oral contract with defendants on 6 December 1918 under which it was agreed that the subject property would be bought by defendants and held for resale for the joint account of both plaintiffs and defendants, with the parties sharing equally in all profits; that all money necessary for the purchase of the land (and the operation of the farm during the interim) was to be furnished by the defendants. The case was heard by our Supreme Court twice, and on the second appeal the question of the statute of frauds was considered. In holding that the agreement sued on did not come within the statute of frauds, the court declared: "* * * we are of the opinion that it is not within the language or spirit of the statute of frauds, which provides that all contracts to sell or convey lands, or any interest in or concerning them, shall be void, unless the contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully

authorized. * * * There is no such contract in this case as is described in the statute. The plaintiffs have not contracted to sell or convey any land to the defendants, nor have the defendants agreed to buy and pay for the same, nor *vice versa.*" Further on in the opinion and referring to the contract sued upon, the court said: "In the majority view of the courts such an agreement for the purchase of land for the purpose of resale is regarded, not as a contract to sell or convey lands, but as a contract of partnership or a joint venture, as the case may be, which contemplates, not the transfer of any interest in lands from one party to the contract to the other, but only a division of profits upon a resale of the lands."

Plaintiff has offered evidence sufficient, if believed, to support a finding of the existence of a parol contract to buy and sell realty and divide the profits, with a subsequent modification relating to the sale of the timber separate from the land itself.

We next consider whether the plaintiff has presented facts sufficient to establish a breach of the contract.

[2] "Where plaintiff's evidence tends to show the existence of a contract between the parties and that defendant performed an act rendering it impossible for plaintiff to perform his part of the agreement, or otherwise makes out a prima facie case of breach of contract, a motion to nonsuit is properly denied irrespective of the evidence of damage, since breach of contract entitles the injured party to nominal damages at least." 2 Strong, N. C. Index 2d, Contracts, § 27, p. 337.

[3, 5] Anticipatory breach is defined as: "A breach committed before there is a present duty of performance, and is the outcome of words evincing intention to refuse performance in the future." Black's Law Dictionary, 4th Ed.; *McJunkin Corp. v. North Carolina Natural Gas Corp.*, 300 F. 2d 794. The statement of the defendant that "I bought the land and paid for it; you ain't got no more to do with it" clearly evinces an intention to refuse to share the profits from sale of the timber or land.

[4] That this theory avails in North Carolina is supported by the case of *Tillis v. Cotton Mills and Cotton Mills v. Tillis,* 251 N.C. 359, 111 S.E. 2d 606, where the court said: "At the close of the evidence Calvine moved for judgment of involuntary nonsuit. The court properly overruled the motion. Parties to an executory contract for the performance of some act or services in the future impliedly promise not to do anything to the prejudice of the other inconsistent with their contractual relations and, if one party to the

contract renounces it, the other may treat renunciation as a breach and sue for his damages at once, provided the renunciation covers the entire performance to which the contract binds the promisor. *Pappas v. Crist,* 223 N.C. 265, 268, 25 S.E. 2d 850; *Edwards v. Proctor; Proctor v. Edwards,* 173 N.C. 41, 43-44, 91 S.E. 584. Tillis gave testimony of a contract, breach thereof, and damages. 'In a suit for damages for breach of contract, proof of the breach would entitle the plaintiff to nominal damages at least.' *Bowen v. Bank,* 209 N.C. 140, 144, 183 S.E. 266." See also 2 Strong, N. C. Index 2d, Contracts, § 21, p. 329, and 4 Corbin on Contracts, Anticipatory Repudiation, § 970, p. 896.

[5] We hold that plaintiff was entitled to have the jury pass upon his allegations and evidence of breach of contract.

As to the measure of damages, plaintiff contends that he was entitled to prove his damage by showing the difference between the purchase price and the fair market value at the time defendant took title in himself and repudiated his agreement with plaintiff. We do not agree with this contention.

The rule which plaintiff contends for was disapproved in *Newby v. Realty Co.,* 180 N.C. 51, 103 S.E. 909. Instead, the court applied the following rule: "* * * the plaintiffs are entitled to be put in the same position they would have been in if the contract had been performed, and to recover only what has been lost by nonperformance, and tested by this principle instead of being entitled to the difference between the option price and the market value of the land on 1 January, 1919, they ought to recover, if they sustain their contentions, one-half the profits which would have been made upon a resale of the property in the exercise of reasonable care and judgment." This measure has been approved in subsequent cases and should be employed in the case at hand. *Service Co. v. Sales Co.,* 259 N.C. 400, 131 S.E. 2d 9; *Bishop v. DuBose,* 252 N.C. 158, 113 S.E. 2d 309; *Perkins v. Langdon,* 237 N.C. 159, 74 S.E. 2d 634; *Troitino v. Goodman,* 225 N.C. 406, 35 S.E. 2d 277.

The granting of defendant's motion for judgment as of nonsuit was error, as plaintiff was entitled to have the jury pass upon his action for breach of contract, if only for nominal damages.

The judgment of the superior court is

Reversed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. DONALD WESLEY HOYLE

No. 6825SC330

(Filed 20 November 1968)

1. Criminal Law § 99— questions propounded by trial court

In this homicide prosecution, questions propounded to the witnesses by the trial judge were for the purpose of clarification and were not expressions of opinion by the court.

2. Criminal Law §§ 99, 170— question propounded by trial court

In this homicide prosecution, trial judge's question "Can you jump slow?" after defense counsel asked a State's witness on cross-examination whether another had jumped "quickly," while disapproved, *is held* not to constitute prejudicial error.

3. Criminal Law §§ 113, 163— misstatement of defendant's evidence

In a homicide prosecution, the court did not err in its recapitulation of defendant's testimony by stating that defendant and the deceased "went together" instead of using some other words to convey how the defendant and the deceased engaged in a fight in which defendant contends he was cut by deceased with a pocket knife, and defendant's contention that the term "went together" is a misstatement of the evidence is not reviewable on appeal where defendant did not call this to the court's attention at the trial.

4. Homicide § 28— instruction on self-defense

In a homicide prosecution, the court did not err in its instructions relating to self-defense in failing to explain the meaning of the words "was the defendant at a place where he had a right to be."

5. Criminal Law §§ 102, 170— remarks of solicitor — failure of defendant to testify

In a homicide prosecution, a remark by the solicitor that "He hasn't put the defendant up" in objecting to defense counsel's examination of a witness as to decedent's reputation related to the competency of the evidence sought to be introduced and did not mislead or prejudice the jury so as to require a new trial.

APPEAL by defendant from *Falls, J.*, 27 May 1968 Ordinary Mixed Session of BURKE Superior Court.

The defendant was charged in a bill of indictment with first degree murder. Upon the call of the case for trial, the solicitor for the State announced, in substance, that he would not ask for a verdict of guilty of murder in the first degree but that he would seek a verdict of guilty of murder in the second degree or manslaughter or such verdict as the law and the evidence in the case might warrant. The defendant pleaded not guilty and was tried by a jury. The evidence presented at the trial tended to show that the defendant and John Henry McDaniels (hereinafter referred to as deceased) were

at the Do-Drop-In, "a piccolo joint," about midnight on 17 December 1966. The deceased had been drinking and was being abusive to those around him. Deceased had a knife which he began to wave about after the defendant had slapped him. The deceased's brother-in-law, who was the proprietor of the Do-Drop-In, asked him to leave before any trouble started. The deceased went out the back door toward his brother-in-law's house at about the same time the defendant went out the front door. On the way to the house, the deceased was met by his sister who urged him to continue to the house. He refused and followed her back toward the store. The defendant came around to the back of the store with a gun in his hand and told the deceased to drop the pocket knife he had in his hand. The first shot was fired by the defendant while the deceased was standing there with his knife open. After the first shot was fired at the deceased by the defendant, the deceased advanced on the defendant with the knife in his hand. They collided and fell into a ditch, with the defendant landing on top of the deceased. Another shot was fired while they were in the ditch, and then four more shots were fired by the defendant after he got out of the ditch. When the defendant got up, he was bleeding from a cut on his left temple. The defendant went back around to the front of the building and left the scene with a friend. The deceased was taken to the hospital where he died from a bullet wound. The case was submitted to the jury who returned a verdict of guilty of manslaughter. Sentence was imposed and the defendant appealed to the Court of Appeals.

Attorney General T. W. Bruton and Deputy Attorney General Harry W. McGalliard for the State.

Byrd, Byrd & Ervin by John W. Ervin, Jr., for the defendant appellant.

MALLARD, C.J.

The defendant asserts that the following four questions are raised on this appeal:

"1. Did the questioning of witnesses by the Court constitute an expression of opinion as to the weight and sufficiency of evidence?

2. Did the Court's recapitulation of the defendant's evidence constitute an expression of opinion by the Court?

3. Did the Court err in its charge to the jury on the elements of the plea of self-defense?

4. Did the Solicitor prejudice the defendant by making a remark in the presence of the jury that the defendant had not testified in his own behalf?"

The defendant contends that the questioning of witnesses by the judge violated his duty under G.S. 1-180, not to express an opinion on the evidence during the course of a trial or in his charge to the jury. In the case of *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774, we find the following language:

> "It is well settled in this jurisdiction that it is improper for a trial judge to ask questions for the purpose of impeaching a witness. . . .
>
> On the other hand, there are times in the course of a trial, when it becomes the duty of the judge to propound competent questions in order to obtain a proper understanding and clarification of the testimony of the witness or to bring out some fact that has been overlooked. But the trial judge should not by word or mannerism convey the impression to the jury that he is giving it the benefit of his opinion on the facts. . . .
>
> 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." See also *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334; *State v. Hoover,* 252 N.C. 133, 113 S.E. 2d 281; and 2 Strong, N. C. Index 2d, Criminal Law, § 99.

[1] Looking at the record as a whole and considering the questions propounded by the judge, in the light of all the attendant facts and circumstances disclosed by this record, we are of the opinion that the questions propounded to the witnesses by the judge were for the purpose of clarification and were not expressions of opinion and therefore not prejudicial to defendant.

[2] While defendant's counsel was cross-examining one of the State's witnesses, the following occurred:

"Q You were watching it. Did he just kind of walk up on the bank as I am walking?

A No, he jumped.

Q Quickly?

A Quickly?

Q Yes.

A Quickly?

Q Yes.

A Did he—?

THE COURT: Can you jump slow?"

While we do not approve of such a question being propounded by the court to the lawyer, or to a witness, under the circumstances disclosed by the record, we are of the opinion that such was not prejudicial error.

[3] Defendant contends that the court committed error in recapitulating the defendant's testimony in stating that the defendant and the deceased "went together" instead of using some other words to convey how the defendant and the deceased engaged in a fight in which the defendant contends he was cut by the deceased with a pocket knife. This contention is without merit. Some of the witnesses used the term they "went together." The defendant used the words, "I walked out there, walked up to him," and again, "I walked up to him and I said, John Henry, what is wrong with you? That is when he come off on me and cut me with a knife." If the defendant considered the words "went together" to be a misstatement of the evidence, he did not call this to the attention of the court at the time.

> "The Court, in reviewing the evidence offered by the respective parties, is not required to give the jury a verbatim recital of the testimony. It must of necessity condense and summarize the essential features thereof in short-hand fashion. All that is required is a summation sufficiently comprehensive to present every substantial feature of the case. When its statement of the evidence in condensed form does not correctly reflect the testimony of the witnesses in any particular respect, it is the duty of counsel to call attention thereto and request a correction. . . . As the Court's attention was not called thereto and exception not entered in apt time, they are not now tenable." *Steelman v. Benfield; Parsons v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829; see also *O'Berry v. Perry,* 266 N.C. 77, 145 S.E. 2d 321.

[4] The defendant contends but cites no authority other than G.S. 1-180 that the court committed error in failing to explain what was meant by the words "was the defendant at a place where he had a right to be," contending that the court should have charged as to whether or not the defendant Hoyle had a right to be at the

place where the shooting occurred. This contention is without merit. Also, this assignment of error is improper in that it is based on an exception that does not appear of record. The evidence tends to show that the fatal shooting took place behind a place of business after an argument, between the parties, had occurred on the inside. Both the deceased and defendant were customers at this place of business. There was no request for special instructions on this aspect of the law. We are of the opinion and so decide that the trial judge correctly and adequately charged the jury on self-defense.

[5] The defendant's final assignment of error relates to a remark made by the solicitor that the defendant had not testified in his own behalf.

A defendant's witness was on the witness stand and was being examined by defendant's attorney when the following occurred:

"Q What was John Henry McDaniels' general reputation there in the community where he lived?

SOL. CHILDS: Objection.

THE COURT: Overruled.

A He would cut you. I had heard —

SOL. CHILDS: Objection; move it be striken (*sic*).

THE COURT: Overruled.

SOL. CHILDS: If the Court, please, you may overrule. He is trying to get something through the back door. It isn't competent at this time.

THE COURT: He is entitled to show his reputation as being a dangerous and violent man.

SOL. CHILDS: He hasn't put the defendant up. He can't get it in at this particular point as competent evidence.

THE COURT: Overruled."

The remark made by the solicitor related to the competency of evidence that was being sought to be introduced and was not calculated to "mislead and prejudice the jury," and we are of the opinion that it did not mislead or prejudice the jury so as to require a new trial. *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335; *State v. Bentley*, 1 N.C. App. 365, 161 S.E. 2d 650; 2 Strong, N. C. Index 2d, Criminal Law, § 102.

We therefore hold that the remark of the solicitor, under the

circumstances, was not sufficiently prejudicial to warrant a new trial.

In the trial, we find

No error.

CAMPBELL and MORRIS, JJ., concur.

STATE v. JAMES MILLARD SNYDER

No. 6825SC356

(Filed 20 November 1968)

1. Bastards § 6— failure to support illegitimate child — nonsuit

In prosecution for the wilful refusal of defendant to support his illegitimate child, evidence of defendant's guilt of the offense is sufficient to be submitted to the jury where the prosecuting witness testifies that defendant was the father of her child, that her last menstrual period prior to meeting defendant had been in April, that she met defendant and began having sexual relations with him in May and that she continued doing so until July, that from the time she first met defendant until the birth of her child in December she did not date or go out with any other men, and that, despite demand, defendant had never contributed to the support of the child although he was able to do so.

2. Criminal Law § 98— custody of witnesses — intimidation of other witnesses

In prosecution of defendant for wilful refusal to support his illegitimate child, trial court's action in placing two of defendant's witnesses in custody after they had testified to having sexual relations with the 15-year-old mother was not improper on the ground that other witnesses were thereby intimidated, since the record did not show that any other witness was tendered or called or that an effort was made to produce any other witness.

3. Criminal Law § 98— custody of witnesses — expression of opinion by trial court

In prosecution of defendant for the wilful refusal to support his illegitimate child, trial court's action in placing two of defendant's witnesses in custody and ordering them to be charged with contributing to the delinquency of a minor after they had testified to having sexual relations with the 15-year-old mother on several occasions *is held* not to constitute an expression of opinion in violation of G.S. 1-180, since the witnesses were placed in custody during the absence of the jury from the courtroom.

4. Criminal Law § 80— testimony to contents of medical records

In prosecution for wilful refusal of defendant to support his illegitimate

child, trial court properly admitted testimony of the prosecuting witness' attending obstetrician that the records in his office revealed that the mother had told the nurse that her last menstrual period was on a certain date, since the records were kept by his nurse in the regular course of business.

5. Bastards § 6— nonsupport prosecution — nonsuit — weight of opinion testimony

In prosecution for wilful failure of defendant to support his illegitimate child, testimony of prosecutrix' attending obstetrician that the period of gestation is thirty-six weeks is an expression of opinion and is not binding on the State.

6. Bastards § 7— failure to support illegitimate child — instruction on periods of gestation

In a prosecution for the wilful failure to support an illegitimate child, an instruction that the jury may take judicial notice that the normal period of gestation is 7, 8, 9, 9½, or 10 months is not prejudicial.

7. Criminal Law § 113— instructions on reasonable doubt and presumption of innocence

Trial court did not err in failing to define the terms "reasonable doubt" and "presumption of innocence" where there was no request for special instructions as to the meaning of these terms.

8. Criminal Law §§ 88, 93— order of proof — discretion of trial court

In a prosecution for the wilful failure to support an illegitimate child, where defendant offered no objection, action of trial court in allowing solicitor to place the mother on the witness stand for a few qualifying questions before putting her doctor on the stand, in order to accommodate the doctor by keeping him in court as short a period of time as possible, is within the discretion of the court and is not error as a denial of defendant's right of cross-examination.

APPEAL by defendant from *Falls, J.*, May 1968 Session, CALDWELL County Superior Court.

Defendant was tried on a warrant issued 8 January 1968 charging him with unlawfully and willfully neglecting and refusing to provide support for his two weeks old illegitimate daughter, after demand having been made. To the charge, the defendant entered a plea of not guilty. From a jury verdict of guilty and imposition of sentence, the defendant appealed assigning various errors in the trial. The facts are set forth in the opinion.

T. W. Bruton, Attorney General, by Bernard A. Harrell, Assistant Attorney General, for the State.

Wilson & Palmer by Hugh M. Wilson, Attorneys for defendant appellant.

CAMPBELL, J.

[1] The first contention of the defendant is that the trial judge erred in denying his motion for nonsuit. The mother of the child testified that while she had had sexual relations with some six or seven young men prior to the defendant, the last time had been in the month of January 1967 with Randal Snyder, the defendant's second cousin. She further testified that her last menstrual period had been 22 April 1967; that she met the defendant on 21 May 1967; that she began having sexual relations with him the following day, 22 May 1967; that she continued doing so until sometime during the month of July 1967; and that from the time she first met the defendant until her baby girl was born on 27 December 1967, she did not date or go out with any other men. The mother, who became sixteen years of age on 12 September 1967, testified that the defendant was the father of her child. There was also corroborating evidence, including a purported statement from the defendant himself that he knew he was the father of the child.

After the birth of the child and before the warrant was issued, demand for support was made upon defendant by the brother-in-law of the mother. The defendant never contributed anything to the support, and he was able to do so.

> "The practice is thoroughly settled in this jurisdiction that on a motion to nonsuit, the evidence is to be considered in its most favorable light for the State, and the State is entitled to every inference of fact which may reasonably be deduced from the evidence, and contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant the granting of the motion of nonsuit." *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826; *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128; *State v. Woodlief,* 2 N.C. App. 495, 163 S.E. 2d 407.

This assignment of error is overruled.

[2] The second contention of the defendant is that the trial judge committed error in placing two of his witnesses in custody after they had testified. The first such witness was the defendant's cousin, Randal Snyder, who testified to having sexual relations with the fifteen year old mother on several different occasions. After his testimony had been concluded the jury was excused and, in the absence of the jury, the trial judge ordered the witness taken in custody to be charged with contributing to the delinquency of a minor. The second such witness was another cousin of the defendant, Joe Snyder, who testified to having sexual relations with the fifteen year

old mother in company with the defendant on the one occasion he saw her. At the conclusion of his testimony, the jury again was excused and he, too, was placed in custody. Both witnesses were removed from the courtroom prior to the return of the jury. No explanation or comment was made about their absence in the presence of the jury. The defendant did not request the return of either of these witnesses for purposes of rebuttal.

The defendant contends that other witnesses were intimidated by this action on the part of the trial judge; however, the record does not reveal such intimidation. There is nothing in the record to show that any other witness was tendered or called or that an effort was made to produce any other witness. It is not to be presumed that such additional witnesses, if any, would have committed perjury if they had been offered.

[3] This action on the part of the trial judge did not constitute an expression of opinion in violation of G.S. 1-180 since no doubt was cast upon the testimony of these witnesses and since their credibility was in no way impeached. The present situation is clearly distinguishable from *State v. McNeill,* 231 N.C. 666, 58 S.E. 2d 366, and *State v. McBryde,* 270 N.C. 776, 155 S.E. 2d 266, where, in each instance, the witness was taken into custody under such circumstances that the jury observed it.

This assignment of error is overruled.

[4] The third contention of the defendant is that the trial judge erred in admitting testimony of Dr. Segars to the effect that the records in his office which were kept by his nurse revealed that the mother had told the nurse that her last menstrual period was 22 April 1967.

The mother testified that Dr. Segars was her attending obstetrician; that she first went to him in November 1967 before her child was born 27 December 1967; and that she told him her last menstrual period was in April 1967. The doctor was testifying as to what the records in his office showed. These records were kept by his nurse in the regular course of business and were clearly admissible. "If the entries were made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they were made, they are admissible." Stansbury, N. C. Evidence 2d, § 155.

The testimony of Dr. Segars was offered for the purpose of corroborating the mother as to what she had told him. On cross-exam-

ination of the mother following the admission of this testimony, she was asked:

"Q You did, I believe, tell the doctor that you had a period, told somebody, that you had one on the 22nd of April?

A Yes, sir.

Q Is that correct?

A Yes, sir."

This assignment of error is overruled.

[5, 6] The fourth contention of the defendant is that the trial judge committed error in charging the jury:

"Upon the first issue, the Court instructs you that the reasonable period of gestation prior to the birth of a human child is approximately seven, eight, nine, nine and one-half, or ten months prior to the birth of the baby, which period of time, members of the jury, and the Court can judicially notice, is the normal period of gestation. So, the Court instructs you, members of the jury, if you should find from the evidence and beyond a reasonable doubt, the burden being upon the State to so satisfy you, that the defendant James Millard Snyder had sexual intercourse with the prosecuting witness, Pamela Duckworth, on or about the latter part of May, 1967, and within a reasonable period of gestation Pamela Duckworth gave birth to the baby, Claudia Jean Duckworth; and that the defendant is the father of the child, then in that event you would answer the first issue YES. Otherwise, you would answer it No."

The defendant argues that since Dr. Segars testified that in his opinion the period of gestation was thirty-six weeks, it was therefore mathematically impossible for the defendant to be the father of the baby. The testimony of Dr. Segars was an expression of his opinion, and it was not binding upon the State, for as previously pointed out, "contradictions and discrepancies in the State's evidence are for the jury to resolve." The taking of judicial notice that the normal period of gestation is between seven and ten months has been sustained by the Supreme Court, and a charge to that effect was approved in *State v. Key,* 248 N.C. 246, 102 S.E. 2d 844. The charge in the instant case is not deemed prejudicial.

This assignment of error is overruled.

[7] The fifth contention of the defendant is that the trial judge erred in failing to define the terms "reasonable doubt" and "presumption of innocence."

There was no request for special instructions.

> "The remaining exceptions are to the effect that the court in the charge used phrases such as 'presumption of innocence,' 'burden of proof,' '*quantum*' and 'reasonable doubt,' but did not define or explain them to the jury. The record shows no request that these terms be defined and in *S. v. Browder,* 252 N.C. 35, 112 S.E. 2d 728, the court held that it did not constitute error to fail to define 'reasonable doubt' in the absence of a request. A similar holding as to 'presumption of innocence' appears in *S. v. Perry,* 226 N.C. 530, 39 S.E. 2d 460 and the same reasoning will apply to the other terms and phrases." *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548.

This assignment of error is overruled.

The sixth contention of the defendant is that the trial court committed error in failing to set the verdict aside. For the reasons previously stated above, it was not error for the trial court to refuse to set the verdict aside. The evidence was sufficient to sustain the verdict.

This assignment of error is overruled.

[8] The seventh contention of the defendant is that the trial court committed error in failing to permit the defendant to cross-examine the mother when she first testified. The record discloses that in order to accommodate Dr. Segars by keeping him in court as short a period of time as possible, the solicitor on behalf of the State announced at the beginning of the trial that he desired to place the mother on the witness stand for a few qualifying questions before putting the doctor on the witness stand. In the discretion of the court, this procedure was accordingly followed. The mother, who subsequently resumed her direct examination and was cross-examined by the defendant, was withdrawn after the qualifying questions. The record reveals no objection on the part of the defendant, but in the instant case the trial court, in its discretion, could have followed this procedure even if there had been an objection. 7 Strong, N. C. Index 2d, Trial, § 5, p. 260. *A fortiori* in the absence of any objection there was no error.

This assignment of error is overruled.

A review of the entire record discloses that the defendant has had a fair and impartial trial free of any prejudicial error.

No error.

MALLARD, C.J., and MORRIS, J., concur.

ROBERTS *v.* STEWART AND NEWTON *v.* STEWART

(CASE NO. 1) WALTER RAYMOND ROBERTS, PLAINTIFF, v. MABEL D. STEWART, EXECUTRIX OF THE ESTATE OF HOMER AARON STEWART, AND EAST TENNESSEE AND WESTERN NORTH CAROLINA TRANSPORTATION COMPANY, INC., ORIGINAL DEFENDANTS, v. BILLY MONROE NEWTON AND WHITMYER BROS., INC., ADDITIONAL DEFENDANTS

AND

(CASE NO. 2) BILLY MONROE NEWTON, PLAINTIFF, v. MABEL D. STEWART, EXECUTRIX OF THE ESTATE OF HOMER AARON STEWART, AND EAST TENNESSEE AND WESTERN NORTH CAROLINA TRANSPORTATION COMPANY, INC., ORIGINAL DEFENDANTS, v. WALTER RAYMOND ROBERTS AND WHITMYER BROS., INC., ADDITIONAL DEFENDANTS

No. 6828SC407

(Filed 20 November 1968)

1. Appeal and Error § 39— record on appeal — time of docketing

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 ninety-day period, 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. Rule of Practice in the Court of Appeals No. 5.

2. Appeal and Error §§ 16, 36— service of case on appeal — jurisdiction of trial court

Where, upon notice of appeal, the trial judge fixes the time at sixty days within which the case on appeal should be served on opposing counsel, his authority is thereafter limited to settling the case on appeal in the event a countercase is served or exceptions are filed, and consequently the trial court is *functus officio* and is without authority to enter subsequent orders which enlarge the time to serve statement of case on appeal. G.S. 1-282.

3. Appeal and Error § 36— belated service of case on appeal — scope of review

In the absence of a case on appeal served within the time fixed by 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.

APPEAL by original defendants from *McLean, J.*, 8 April 1968, Civil Session, BUNCOMBE Superior Court.

The first cause of action was instituted by the plaintiff Roberts for recovery of property damage to a tractor trailer-unit which he owned. At the time of the accident, the unit was being operated by the additional defendant Newton, and it was under lease to Whitmyer Bros., Inc. The damage was allegedly caused by the negligence of the original defendant Stewart's testate (Stewart), who was the agent of the original defendant East Tennessee and Western North Carolina Transportation Company, Inc., (Transportation Company).

The second cause of action was instituted by the plaintiff Newton for personal injuries allegedly caused by the negligence of the original defendant Stewart, who was the agent of the original defendant Transportation Company.

In each cause of action the original defendants filed answer, counterclaim and cross-action. The original defendant Stewart sought damages for personal injuries prior to death and for wrongful death. The original defendant Transportation Company sought to recover property damages to its tractor-trailer equipment.

By consent order dated 15 June 1965, both actions were consolidated for trial.

The jury answered issues finding that the plaintiffs were injured in their property and person by the negligence of the original defendant Stewart; that the plaintiff Newton was not contributorily negligent; that the plaintiff Newton was entitled to recover $2,130 for personal injuries; and that the plaintiff Roberts was entitled to recover $14,000 for damages to his tractor-trailer unit and $2,500 for damages to the cargo. Judgment was entered thereon under date of 16 April 1968. From this verdict and judgment, the original defendants Stewart and Transportation Company entered exceptions and notice of appeal.

At the time of noting the appeal, Judge McLean under date of 16 April 1968 allowed the defendants 60 days "in which to prepare and serve case on appeal and plaintiff is allowed 30 days after such service in which to serve counter case or exceptions." Thereafter, the following order was entered on 13 June 1968:

> "Upon application being made, and for good cause shown, IT IS ORDERED that the time for docketing the Record on Appeal in the Court of Appeals be extended to and including the 12 day of September 1968, date of Judgment being 16 day of April, 1968.
>
> This extension of time being made pursuant to Rule Five (5) of the Rules of the North Carolina Court of Appeals."

On the same date, 13 June 1968, Judge McLean entered a second order:

> "Upon application being duly made, and for good cause shown, IT IS ORDERED that the defendants Mabel D. Stewart, Executrix of the Estate of Homer Aaron Stewart and East Tennessee and Western North Carolina Transportation Company, Inc., be, and they are hereby, allowed an extension of time to and

including the 12 day of July, 1968, in which to file Statement of Case on Appeal in the above entitled action, and serve copy thereof on plaintiff's counsel."

On 28 June 1968 Judge McLean entered a third order:

"For good cause shown, IT IS HEREBY ORDERED, that the Appellants Mabel D. Stewart, Executrix of the Estate of Homer Aaron Stewart, and East Tennessee and Western North Carolina Transportation Company, Inc. are hereby allowed an extension of time in which to serve Statement of Case on Appeal to and including July 25, 1968."

The record discloses that the record on appeal was filed in the Court of Appeals on 12 September 1968. This was in conformity with the order of Judge McLean dated 13 June 1968.

The record further discloses that under date of 24 July 1968 the appellants tendered to the plaintiffs and to the additional defendants statement of case on appeal. Service thereof was accepted and receipt of copy was acknowledged. This was in conformity with the order of Judge McLean dated 28 June 1968.

When the case was called for argument in the Court of Appeals, the plaintiff in each case, Roberts and Newton, filed a written motion to dismiss the appeal because the order of Judge McLean dated 13 June 1968 and the order dated 28 June 1968 were nullities since Judge McLean at that time was *functus officio*.

Uzzell and DuMont by Harry DuMont, Attorneys for plaintiff appellees.

Harold K. Bennett by Robert B. Long, Jr.; McGuire, Baley & Wood by Philip Carson, Attorneys for original defendant appellants.

Landon Roberts, Attorney for additional defendant appellee, Whitmyer Bros., Inc.

CAMPBELL, J.

The motion to dismiss the appeal must first be determined.

[1] There is a difference between docketing the record on appeal in the Court of Appeals and serving a case on appeal on opposing parties. As pointed out by Brock, J., in *Smith v. Starnes*, 1 N.C. App. 192, 160 S.E. 2d 547, the two should not be confused. 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. This provision, however, does not apply to serving a case on appeal on opposing counsel. That is controlled by the following statute:

> "G.S. 1-282. *Case on appeal; statement, service, and return.* — The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case."

[2] When Judge McLean under date of 16 April 1968 fixed the time at sixty days within which the appeal should be served, his authority was thereafter limited to settling the case on appeal in the event a countercase was served or exceptions were filed. *Machine Co. v. Dixon*, 260 N.C. 732, 133 S.E. 2d 659.

> "As a general rule, an appeal takes a case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio*. '. . . (A) motion in the cause can only be entertained by the court where the cause is.' Exceptions to the general rule are: (1) notwithstanding notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, (2) the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned, (3) the settlement of the case on appeal. *Hoke v. Greyhound Corp.*, 227 N.C. 374, 42 S.E. 2d 407.
>
> The authority of the trial judge to settle the case on appeal may be invoked only by the service of a countercase or by filing exceptions to the appellant's statement of case. Otherwise the

appellant's statement becomes the case on appeal. G.S. 1-282, 283; *Wiggins v. Tripp,* 253 N.C. 171, 116 S.E. 2d 355. 'The right of appeal is not an absolute right, but is only given upon compliance with the requirements of the statute. . . . rules requiring service to be made of case on appeal within the allotted time are mandatory, not directive.' *Little v. Sheets,* 239 N.C. 430, 80 S.E. 2d 44." *Machine Co. v. Dixon, supra.*

[2] In the instant case, the order of Judge McLean dated 13 June 1968 and the order dated 28 June 1968, which enlarged the time to serve statement of case on appeal to and including 25 July 1968, were entered without authority since the appeal had removed the case to the Court of Appeals.

[3] 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. We accordingly have reviewed the record proper and no error of law is disclosed on the face thereof.

The judgment of the Superior Court of Buncombe County is Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. KENNETH CALVIN ANDERSON
No. 6818SC345

(Filed 20 November 1968)

1. Constitutional Law § 11; Criminal Law § 1— power of Legislature to define crime

The Legislature, unless limited by Federal or State constitutional provisions, has the inherent power as a part of the police power of the State to define and punish any act as a crime, provided the statute has some substantial relation to the ends sought to be accomplished.

2. Statutes § 4— presumption of constitutionality

Any act passed by the Legislature is presumed to be constitutional, and all reasonable doubts will be resolved in favor of the lawful exercise of the legislative powers.

3. Constitutional Law § 13; Automobiles § 7— right to travel on public highway — safety statutes

While the right of a citizen to travel upon the public highways is a

common right, it is within the State's police power to regulate and control the manner of exercise of that right in the interest of public safety and welfare.

4. Constitutional Law § 13; Automobiles § 140— constitutionality of statute requiring motor cycle operators to wear helmets

G.S. 20-140.2(b), which prohibits the operation of a motorcycle upon a public street or highway unless the operator and all passengers thereon wear safety helmets of a type approved by the Commissioner of Motor Vehicles, *is held* a valid exercise of the State police power in that it has a substantial effect in promoting both the safety and welfare of all who travel on the public streets and highways and does not contravene any provision of the State or Federal Constitutions.

APPEAL by defendant from *Gwyn, J.*, 8 July 1968 Criminal Session of GUILFORD Superior Court, Greensboro Division.

Defendant was indicted for operating a motorcycle upon a public street in the City of Greensboro on 21 January 1968 without wearing a safety helmet of a type approved by the Commissioner of Motor Vehicles in violation of G.S. 20-140.2(b). Upon call of the case for trial defendant moved to quash the bill of indictment on the grounds that the statute creating the criminal offense for which he was indicted is unconstitutional. This motion was overruled. The jury returned a verdict of guilty as charged and from sentence imposed thereon defendant appealed.

Attorney General T. W. Bruton, Assistant Attorney General William W. Melvin and Staff Attorney T. Buie Costen for the State.

Douglas, Ravenel, Hardy & Crihfield, by D. S. Crihfield for defendant appellant.

PARKER, J.

The sole question presented by this appeal is the constitutionality of that portion of G.S. 20-140.2(b), enacted as part of Sec. 1, Chap. 674 of the 1967 Session Laws, which reads as follows:

> "No motorcycle shall be operated upon the streets and highways of this State unless the operator and all passengers thereon wear safety helmets of a type approved by the Commissioner of Motor Vehicles."

Defendant raises no question as to the beneficial effect and intended good purpose of this legislation. He contends, however, that it exceeds constitutional limits imposed by Art. 1, Sec. 17, of the North Carolina Constitution and by the Fourteenth Amendment to the

Federal Constitution on the State's police power in that the statute makes it a criminal offense for a person to fail to do an act the only result of which, so defendant argues, is to reduce possible injuries to himself, when this cannot be shown to be for the benefit of the public at large. We do not agree that the beneficial effects of the statute are so limited.

[1-3] At the outset, it must be recognized that as stated by Parker, J. (now C.J.) in *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768:

> "The Legislature, unless it is limited by constitutional provisions imposed by the State and Federal Constitutions, has the inherent power to define and punish any act as a crime, because it is indisputedly a part of the police power of the State. The expediency of making any such enactment is a matter of which the Legislature is the proper judge. However, the act of the Legislature declaring what shall constitute a crime must have some substantial relation to the ends sought to be accomplished."

Furthermore there is a presumption that any Act passed by the Legislature is constitutional and all reasonable doubts will be resolved in favor of the lawful exercise of their powers by the representatives of the people. The right of a citizen to travel upon the public highways is a common right, but it is clearly within the State's police power to regulate and control the manner of exercise of that right in the interest of public safety and welfare. *Honeycutt v. Scheidt*, 254 N.C. 607, 119 S.E. 2d 777; *Fox v. Scheidt*, 241 N.C. 31, 84 S.E. 2d 259. In the case before us we are called upon to decide, therefore, only whether the statute here under attack bears a substantial relation to the promotion of the welfare and safety of the general public as distinguished from the welfare solely of the individual riders of motorcycles who are most directly affected. We hold that it does.

Death on the highway can no longer be considered as a personal and individual tragedy alone. The mounting carnage has long since reached proportions of a public disaster. Legislation reasonably designed to reduce the toll may for that reason alone be sufficiently imbued with the public interests to meet the constitutional test required for a valid exercise of the State's police power. However, it is not necessary to invoke so broad a premise in order to find the statute here attacked to be constitutional.

Approximately 30 states presently have statutes similar to the statute here attacked. The Supreme Court of Rhode Island, in holding constitutional the statute of that State, said:

"(I)t is our unqualified judgment that the purpose sought to be achieved by requiring cyclists to wear protective headgear clearly qualified as a proper subject for legislation.

"The defendant's contention to the contrary presupposes that protection for the motorcycle operator was the sole motivation for the general assembly's action. Even if this were so, we are not persuaded that the legislature is powerless to prohibit individuals from pursuing a course of conduct which could conceivably result in their becoming public charges. Be that as it may, however, the requirement of protective headgear for the exposed operator bears a reasonable relationship to highway safety generally. It does not tax the intellect to comprehend that loose stones on the highway kicked up by passing vehicles, or fallen objects such as windblown tree branches, against which the operator of a closed vehicle has some protection, could so affect the operator of a motorcycle as to cause him momentarily to lose control and thus become a menace to other vehicles on the highway.

"It is fundamental that an act of the legislature commands judicial approval if on any reasonable view such act is designed and intended to protect the public health, safety and morals." *State v. Lombardi,* ..... R.I. ....., 241 A. 2d 625.

Although its highest Court has not yet passed on the question, lower New York courts have also held the statute of that State constitutional under the State's police power. *People v. Schmidt,* 54 Misc. 2d 702, 283 N.Y.S. 2d 290; *People v. Carmichael,* 56 Misc. 2d 388, 288 N.Y.S. 2d 931, (reversing 53 Misc. 2d 584, 279 N.Y.S. 2d 272).

In *People v. Carmichael, supra,* the court pointed out that the New York statute requiring any person operating or riding on a motorcycle to wear an approved protective helmet had been enacted at the request of the New York Department of Motor Vehicles following an extensive study by a special committee appointed by the Commissioner, and the court quoted from the Departmental Memorandum to the Legislature citing the results of this study as follows:

"The number of accidents involving motorcycles is increasing rapidly. In fact, motorcycle accidents increased by 105% in 1965 as compared to 1964, while the total registration of these vehicles increased by 83%. Fatalities increased by 63.6% and personal injury accidents by 100%. A summary of the Department statistics indicates that 89.2% of the motorcycle accidents result in injury or death and that almost all fatalities occurring

as a result of such accidents involve head injuries. Most of these fatalities could have been avoided, or the severity lessened, by the use of a proper helmet."

In ruling the New York statute constitutional, the court said:

"(O)n the factual situation . . . giving rise to the instant enactment, it is apparent that the challenged legislation requiring the wearing of a protective helmet for self-protection is a valid purpose of legislative action under the police power of the state. Indeed, the inherent danger of operating a motorcycle, not only to the driver but to other users of the highway, has likewise been considered in upholding the validity of this statute as a valid objective of the state's police power (*People v. Schmidt,* 54 Misc. 2d 702, 283 N.Y.S. 2d 290).

"Given the existence of a proper purpose, it still remains that the means undertaken to accomplish it are reasonable and not oppressive or discriminatory. A determination of this issue depends upon existing circumstances, contemporaneous conditions, the object sought to be obtained and the necessity or lack thereof for the required legislation (*Vernon Park Realty Inc. v. City of Mt. Vernon,* 122 N.Y.S. 2d 78, aff'd 282 App. Div. 890, 125 N.Y.S. 2d 112, aff'd 307 N.Y. 493, 121 N.E. 2d 517).

"Considering the nature of a motorcycle (the intrinsic vulnerability of the operator and speed attainable), together with the circumstances set forth in the departmental memorandum, it is apparent that motorcycles are readily distinguishable from other vehicles, and that the means employed in this legislation are reasonably appropriate to accomplish the desired purpose and are not unduly oppressive."

[4] In addition to the fact that wearing protective headgear reduces the vulnerability of motorcycle riders to injuries from flying stones and other objects, thereby increasing their ability to keep their vehicles under control and consequently lessening danger to other users of the highway, the statute here attacked affects the general motoring public in another way. In North Carolina, by reason of our Motor Vehicle Safety and Financial Responsibility Act, G.S., Chap. 20, Art. 9A, most operators of motor vehicles in our State are required to carry motor vehicle liability insurance at a heavy annual premium cost. Any statute which can reasonably be expected to reduce that premium cost necessarily affects the welfare of the public at large. Reducing the number of deaths and the severity of injuries to riders of motorcycles on the streets and highways of our State and the consequent reduction in liability insurance

premium costs does, therefore, affect not alone that limited class of persons who ride motorcycles, but also directly and beneficially affects all operators of motor vehicles in our State.

We are advertent to the fact that other courts, in passing upon the similar statutes of their states, have found them to be unconstitutional. In *Everhardt v. New Orleans,* 208 So. 2d 423, and in *American Motorcycle Association v. Davids,* 158 N.W. 2d 72, the courts of appeal of Louisiana and Michigan found insufficient relationship between the admittedly desirable purposes which may be promoted by the statute and the achievement of any benefit to the public at large.

[4] For the reasons stated above we do not agree that the beneficial effect of the statute is so limited that it affects only those individuals upon whom it directly operates, but hold that it does have a substantial effect in promoting both the safety and the welfare of all who travel our streets and highways. Accordingly, we hold that G.S. 20-140.2(b) does not contravene any provision of either our State or Federal Constitutions, and the judgment of the trial court is

Affirmed.

BROCK and BRITT, JJ., concur.

WALTER C. WOODWARD v. SUDIE SHOOK AND ROY GARLAND SHOOK

No. 6825SC422

(Filed 20 November 1968)

1. Automobiles § 90— accident case — instructions — G.S. 1-180

In action arising out of an automobile accident, instructions of the trial court substantially complied with G.S. 1-180 in applying the law of the case to the facts in evidence.

2. Automobiles § 90— accident case — instructions — law as to skidding

In automobile accident case, trial court was warranted in giving instruction on the law applicable to skidding where there was evidence as to the presence of a film of mud which completely covered the highway for a distance of 35 feet at the scene of the accident and where there was testimony, although conflicting, that both plaintiff and defendant entered the muddy area at about the same time and began skidding.

3. Negligence § 37; Appeal and Error § 50— instructions — definition of negligence per se

Failure of trial court in one part of the charge to define the term *per se* or to differentiate between negligence and negligence *per se* with ref-

erence to the violation of a statute is not error where trial court subsequently defines negligence *per se* in another part of the charge relating to proximate cause.

4. Negligence § 40— instructions on proximate cause and foreseeability

Trial court's instruction in defining and explaining proximate cause and the element of foreseeability *is held* without prejudicial error in this automobile accident case.

APPEAL by plaintiff from *Martin (Robert M.), S.J.*, 24 June 1968 Regular Civil Session, CATAWBA Superior Court.

This action resulted from a collision between an automobile driven by plaintiff and an automobile owned by defendant Roy Garland Shook and driven by defendant Sudie Shook. The collision occurred at about 7:30 a.m., on 20 September 1966, on Rural Paved Road No. 1715 at a point about one half mile north of Claremont, North Carolina. Plaintiff was proceeding in a northerly direction, and defendant Sudie Shook was proceeding in a southerly direction. The road is straight for a distance of well over 250 feet both to the north and south of the point of collision with a constant and uniform slight downgrade for traffic traveling south. A short distance to the north of the point of collision extensive grading and construction work was underway, a heavy rain had fallen the night before the collision, and on the morning of the collision the road was covered with a film of mud covering the road at the place of the collision from shoulder to shoulder and extending some 30 to 35 feet north and south. The highway was clear for some 35 to 50 feet north of the point of the collision and then there was another stretch of mud.

The evidence is conflicting as to the speed of the two vehicles and as to the location on the road of the impact. Plaintiff testified that defendant was driving at a speed of 60 to 65 when he first saw her and reduced her speed to about 55 to 60 as she reached the mud. Defendant testified she was driving about 35 miles per hour until she saw what she thought was water and decreased her speed to 30 miles per hour when she reached that point. Plaintiff testified he was driving about 35 miles per hour and reduced his speed to 5 to 10 miles per hour as he entered the mud. An eyewitness testifying for defendant testified that in his opinion defendant was driving about 30 miles per hour as she approached the scene of the collision and that plaintiff was driving about 35 miles per hour as he approached; that both of them were traveling at about the same speed.

As to the place on the road where the collision occurred, plaintiff testified that he had reduced his speed to 5 to 10 miles per hour and was well to his right of the center line; that he had pulled

off on to the shoulder to the extent that his right front and right rear wheels were "off on the shoulder of the road"; that defendant weaved across the road and hit his car. Defendant testified that she lost control of her car when it hit the mud; that it went first to the left a little, then back to the right, and the cars collided about the middle of the road. She testified that she and plaintiff entered the mud slick at about the same time and that plaintiff "came in it sliding the same way I did". The eyewitness testified that both cars entered the mud at approximately the same time and that they hit in approximately the center of the road.

Issues of negligence, contributory negligence, personal injury, and property damage as to plaintiff and as to defendant were submitted to the jury. The first and fifth issues, as to negligence, were both answered "No". From a judgment that plaintiff recover nothing of defendants and that defendants recover nothing of plaintiff on their counterclaim, plaintiff appealed.

Larry W. Pitts and Corne & Warlick by Stanley J. Corne for plaintiff appellant.

Patrick, Harper & Dixon by Bailey Patrick for defendant appellees.

MORRIS, J.

Plaintiff's assignments of error are all directed to the charge to the jury.

[1] Plaintiff argues that the trial court failed to apply the law of the case to the facts in evidence as required by G.S. 1-180.

The exception on which this assignment of error is based is to the charge on the first issue.

The court had previously summarized the evidence, instructed on burden of proof; defined actionable negligence, foreseeability, and proximate cause; instructed with respect to what constitutes negligence *per se;* summarized and explained the applicable statutes; and again reminded the jury that plaintiff, in invoking the violation of one or more of those statutes as being the proximate cause of his damages, had the burden of proof by the greater weight of the evidence.

We are of the opinion, from an examination of the entire charge, that there is a substantial compliance with G.S. 1-180. This assignment of error is overruled.

[2] The second assignment of error is directed to the charge of the court on the law applicable to skidding. Appellant contends that this was not warranted by the evidence in the case. The record, in our opinion, contains sufficient evidence to warrant the charge. The evidence is not conflicting with respect to the presence on the highway of a film of mud which completely covered the highway for a distance of some 35 feet. Defendant testified that she did not hit her brakes when she entered the mud, that it was so slippery "it just took control of the car". That she and the plaintiff entered the muddy area at about the same time and "he came in it sliding the same way I did". Plaintiff testified that the area was so slick you couldn't control a car at a high rate of speed, but could at 15 to 20 miles per hour. Clyde E. Fisher, called as a witness for the defendant, testified that the mud was three or four inches deep across the road, that it was so slippery there was "very little control with the car in it".

Webster's Third New International Dictionary defines "skid" thusly: "To slide without rotating (as a wheel held from turning while a vehicle moves onward)" and gives "slide" as a synonym for "skid".

This assignment of error is overruled.

[3] Appellant also contends that the trial judge committed reversible error in that he failed to define the term *per se*. The court, in charging on the law applicable to the first issue instructed the jury that plaintiff invoked the alleged violation of certain statutes. He then discussed those statutes and their provisions, instructing, as to some of them, that a violation thereof is negligence *per se*. It is true that at this point in his charge, he did not define *per se* or differentiate between negligence and negligence *per se* with reference to the violation of a statute. However, later, in connection with that portion of his charge having to do with proximate cause, he instructed the jury substantially in the language of *Cowan v. Transfer Co., and Carr v. Transfer Co.*, 262 N.C. 550, 138 S.E. 2d 228, and, we think, clearly defined for the jury negligence *per se* as related to the violation of a statute. It was not necessary for the court again to define it in setting out the statutes allegedly violated.

[4] Appellant's remaining assignment of error embraces his contention that the court committed prejudicial error in defining and explaining proximate cause and the element of foreseeability. Reading the charge contextually, we do not think the jury could have been confused or misled, particularly in view of the fact that the

court, after the charge on foreseeability, instructed the jury as follows:

> "Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery for any injury negligently inflicted. A proximate cause is also a cause 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."

An examination of the entire charge does not, in our opinion, reveal reversible error.

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE OF NORTH CAROLINA v. VAN HENRY COFFEY

No. 6825SC369

(Filed 20 November 1968)

1. Bastards § 1— wilful refusal to support illegitimate child — elements of offense

For a defendant to be found guilty of the offense of wilfully refusing to support his illegitimate child, it must be established that (1) the defendant is a parent of the illegitimate child in question and (2) the defendant has wilfully neglected or refused to support and maintain such illegitimate child. G.S. 49-2 *et seq.*

2. Bastards § 3— nonsupport prosecution — statutory limitations

In a prosecution under G.S. 49-2, if the defendant is the reputed father, it must be shown that the prosecution has been instituted within one of the time periods provided in G.S. 49-4.

3. Bastards § 1— wilful failure to support illegitimate child — the offense

The mere begetting of a child is not a crime; the crime is the wilful neglect or refusal of a parent to support his or her illegitimate child. G.S. 49-2.

4. Bastards § 9; Criminal Law § 18— appeal from adverse finding of paternity — effect of G.S. 7A-288

The proviso in G.S. 49-7, which gives a defendant in a prosecution for nonsupport of his illegitimate child the right of appeal from a finding establishing his paternity of the child notwithstanding the verdict finds

him not guilty of the offense, was not repealed either expressly or by implication by enactment of G.S. 7A-288.

5. Bastards § 9— appeal from adverse finding of paternity — jurisdiction of Superior Court

In a prosecution for nonsupport of an illegitimate child, defendant's appeal from the District Court upon an adverse finding on the issue of paternity entitles him to have this issue determined by trial *de novo* in the Superior Court, but it is error for Superior Court to submit to the jury the issue of defendant's wilful refusal to support his illegitimate child when the issue has already been determined in defendant's favor in this prosecution by the District Court. G.S. 49-7.

6. Bastards § 9— wilful nonsupport prosecution — res judicata on issue of paternity — new warrant for nonsupport

In a prosecution for the wilful nonsupport of an illegitimate child, the issue of paternity was decided adversely to the defendant but the issue of defendant's wilful refusal to furnish support was decided in his favor. *Held:* Defendant may not re-litigate the issue of paternity; since the offense of nonsupport under G.S. 49-2 is a continuing one, defendant may be charged under a new warrant with nonsupport if such has occurred after issuance of the warrant on which he has been tried.

APPEAL by defendant from *Beal, S.J.*, May 1968 Session of CALDWELL Superior Court.

Defendant was tried in the district court on a warrant charging him with willfully refusing to support his illegitimate child, a violation of G.S. 49-2. He pleaded not guilty. After hearing, the district judge found as a fact that defendant was the father of the child in question but found that no demand for support of the child had been made on the defendant by the mother since the child's birth and accordingly found defendant not guilty. Defendant appealed to the superior court where he was tried *de novo* by judge and jury. The State offered evidence bearing upon defendant's paternity of the child in question and upon his willful refusal to support, and the case was submitted to the jury upon both questions. The jury answered all issues against the defendant and the court entered judgment sentencing defendant to six months in jail suspended upon condition that defendant make stated payments for support of the child. Defendant appealed.

Attorney General T. W. Bruton and Staff Attorney (Mrs.) Christine Y. Denson for the State.

Ted S. Douglas for defendant appellant.

PARKER, J.

[1, 2] For a defendant to be found guilty of the criminal offense created by G.S. 49-2, two facts must be established: First, that the

defendant is a parent of the illegitimate child in question, who must be a person coming within the definition of a child as set forth in that section; and second, that the defendant has willfully neglected or refused to support and maintain such illegitimate child. In addition, if the defendant is the reputed father, it must be shown that the prosecution has been instituted within one of the time periods provided in G.S. 49-4. In prosecutions under G.S. 49-2 *et seq.* the court is expressly commanded first to determine the paternity of the child, and "(a)fter this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to support and maintain the child who is the subject of the proceeding." G.S. 49-7.

[3] In the present case the judge of the district court found the issue of paternity against the defendant but found that no demand for support had been made upon defendant after the child's birth. In accordance with these findings the district court properly found defendant not guilty of willful failure to support his illegitimate child. Under G.S. 49-2 the mere begetting of the child is not a crime. The crime recognized by that statute is the willful neglect or refusal of a parent to support his or her illegitimate child. "The question of paternity is incidental to the prosecution for the crime of nonsupport — a preliminary requisite to conviction." *State v. Ellis,* 262 N.C. 446, 137 S.E. 2d 840; *State v. Robinson,* 245 N.C. 10, 95 S.E. 2d 126.

[4] G.S. 7A-288 provides that "(a)ny defendant convicted in district court before the judge may appeal to the superior court for trial de novo." Here, it is true the defendant was not convicted of any crime in the district court. Nevertheless he had a right to appeal to the superior court from the adverse finding of the district court on the issue of paternity. G.S. 49-7 expressly provides "that from a finding of the issue of paternity against the defendant, the defendant shall have *the same right to an appeal as though he had been found guilty* of the crime of willful failure to support a bastard child." (Emphasis added.) This proviso in G.S. 49-7 was not repealed either expressly or by implication by enactment of G.S. 7A-288. The two statutes, when properly construed together, are not inconsistent, and the decision in *State v. Clement,* 230 N.C. 614, 54 S.E. 2d 919, recognizing the validity of the above-quoted proviso to G.S. 49-7, is still controlling. Therefore, there can be no question but that upon defendant's appeal from the district court, the superior court acquired jurisdiction to inquire into the issue of paternity and the defendant had the right to have this issue determined by trial *de novo* before judge and jury.

[5] Defendant's appeal did not, however, bring before the superior court for trial *de novo* the issue of defendant's willful neglect or refusal to furnish support. That issue, insofar as the present prosecution is concerned, had already been determined in defendant's favor by the district court. From this determination the State had no right to appeal, and the defendant, by appealing the finding adverse to him on the issue of paternity, did not lose the benefit of the finding in his favor on the issue of nonsupport. It was, therefore, error for the superior court to submit the question of defendant's willful refusal to support his illegitimate child to the jury.

[6] The issue of paternity has been established by the present case adversely to defendant and cannot be re-litigated by him. *State v. Ellis, supra.* Since the offense of nonsupport under G.S. 49-2 is a continuing one, a new warrant may be filed charging defendant with nonsupport, if such has occurred after the issuance of the warrant on which he has been tried. *State v. Johnson,* 212 N.C. 566, 194 S.E. 319.

Reversed.

BROCK and BRITT, JJ., concur.

IN THE MATTER OF CHARLES POPE WILSON

No. 6828SC384

(Filed 20 November 1968)

1. Habeas Corpus § 4— review of habeas corpus proceeding — certiorari

No appeal lies from a judgment entered in a *habeas corpus* proceeding, review being available only upon application for a writ of *certiorari.*

2. Habeas Corpus § 4— review of habeas corpus proceeding

Purported appeal from a *habeas corpus* proceeding is dismissed by the Court of Appeals and the record is considered as a petition for a writ of *certiorari,* which is allowed.

3. Criminal Law §§ 18, 138— appeal from inferior court — length of sentence

Upon appeal from a criminal conviction in the General County Court, the Superior Court may impose a longer or shorter sentence than that imposed by the inferior court.

4. Criminal Law § 138— credit for time in jail awaiting trial

Upon conviction in the Superior Court after having appealed from a conviction in an inferior court, defendant is not entitled as a matter of right to credit for the time he spent in jail awaiting trial in the Superior Court because of his inability to make bond.

ON *certiorari* to review judgment of *Froneberger, J.*, entered in a hearing on a petition for *habeas corpus* on 16 July 1968 during 16 July 1968 Session, BUNCOMBE Superior Court.

The petitioner was tried in the General County Court of Buncombe on two charges of assault with a deadly weapon. After entering a plea of not guilty he was found guilty of both charges and was sentenced to be confined for nine months in the Buncombe County jail on each charge. The second sentence was to run at the expiration of the first.

From this judgment the petitioner gave notice of appeal to the Superior Court of Buncombe County. In the Superior Court the State took a *nol pros* on one of the charges and the defendant entered a plea of guilty to the other. On the basis of this plea the trial judge placed the defendant in the custody of the Commissioner of Correction for a maximum period of 18 months, the defendant being a youthful offender.

Following this trial in the Superior Court the defendant filed an affidavit of indigency, and counsel was appointed to represent him in a post-conviction hearing. Defendant, through his counsel, filed an application for a writ of *habeas corpus* directed to Martin (Harry C.), J., Superior Court of North Carolina. This application was denied on 16 July 1968 by Froneberger, J. From the order denying the writ, the defendant attempts to appeal.

Attorney General T. W. Bruton by Assistant Attorney General Millard R. Rich, Jr., for the State.

McGuire, Baley & Wood by Philip G. Carson for defendant appellant.

MORRIS, J.

[1, 2] An appeal is not allowed from a judgment entered in a *habeas corpus* proceeding. Such judgments may be reviewed by way of *certiorari* if the court, in its sound discretion, chooses to grant such a writ. *In re Palmer*, 265 N.C. 485, 144 S.E. 2d 413; *In re Croom*, 175 N.C. 455, 95 S.E. 903. Accordingly, the defendant's appeal is

dismissed as improper. However, we have considered the record as a petition for writ for *certiorari,* which has been allowed.

[3] The defendant argues that he was denied due process and equal justice when he was given a longer sentence in the Superior Court than he had received in the General County Court. In an appeal from an inferior court to the superior court, in a criminal case, the defendant receives a trial *de novo,* and without prejudice from the proceedings below. The sentence, if any, imposed in the superior court is without regard to what occurred in the court below. For this reason, the sentence may be longer or shorter than that given in the court below. *State v. Morris,* 2 N.C. App. 262, 163 S.E. 2d 108. A defendant should not have any proprietary rights in a sentence so long as he is asserting his rights to trials in the various courts. To allow defendants a trial *de novo* with the certainty that the sentence imposed cannot be increased upon conviction in the higher court would tend to reduce such appeals from the standpoint of the defendant to a "heads I win, tails you lose" proposition. The effect could only be an increasing disrespect for the courts.

Additionally, the maximum sentence is fixed by the Legislature. It is not and should not be within the power of a judge of a lower court, in effect, to change the statute by imposing a sentence less than the maximum and when a new trial is had, tie the hands of the court which is superior to his.

[4] The trial judge did not err in failing to give the defendant credit for the time which he spent in jail awaiting a trial in the Superior Court, *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633, for his status was that of a prisoner awaiting trial. He was held in jail because of his inability to post bond. He was not serving a sentence as punishment for the crime charged.

The defendant entered a plea of guilty when he was called for trial in the Superior Court. The sentence imposed by the court was within the limit which is allowed by law for the crime charged. See G.S. 14-33 and G.S. 14-3. The record docketed in this Court is dismissed as an appeal, but having considered the matter on *certiorari,* in the trial below, we find

No error.

MALLARD, C.J., and CAMPBELL, J., concur.

MRS. ESTHER BYERS, WIDOW AND ADMINISTRATRIX OF THE ESTATE OF WEAVER BYERS, DECEASED EMPLOYEE v. NORTH CAROLINA STATE HIGHWAY COMMISSION, EMPLOYER, SELF-INSURER; STANDARD CONCRETE PRODUCTS COMPANY, THIRD PARTY TORT-FEASOR

No. 6823SC241

(Filed 11 December 1968)

1. Master and Servant § 96— appeal of Industrial Commission decision — where heard

While an appeal from an order of the Industrial Commission taken prior to 1 October 1967 is heard by the Superior Court, such an appeal taken on or after that date goes directly to the Court of Appeals. G.S. 97-86.

2. Master and Servant § 96— appeal of Industrial Commission decision — scope of review

Upon appeal from an order of the Industrial Commission, the appellate court has jurisdiction to review only for errors of law; consequently, 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 on appeal must accept such findings as true and merely determine whether they justify the legal conclusions and the decision made by the Commission.

3. Master and Servant § 96— appeal of Industrial Commission decision — scope of review

Upon appeal from a decision of the Industrial Commission, the appellate court may neither consider the evidence introduced before the Industrial Commission for the purpose of making new findings of fact for itself nor receive or consider new evidence not introduced in the hearing before the Commission.

4. Master and Servant § 97— remand of cause to Industrial Commission

If the findings of fact made by the Commission are insufficient to enable the appellate court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the Commission for proper findings, but the appellate court ordinarily may not remand the case for the taking of additional evidence.

5. Master and Servant § 97— remand of case to Industrial Commission — newly discovered evidence

The appellate court may remand a cause to the Industrial Commission on the ground of newly discovered evidence only when a proper case is made to appear by affidavit meeting the seven requirements set out in *Johnson v. R. R.*, 163 N.C. 431.

6. Master and Servant § 89— distribution of wrongful death recovery — subrogation rights of employer — reception of new evidence in appellate court and findings and conclusions based thereon

Upon appeal to the Superior Court from an order of the Industrial Commission directing that the entire sum recovered in a wrongful death action brought by the administratrix of the estate of the deceased em-

ployee be paid to the employer in satisfaction of its subrogation rights under G.S. 97-10.2(f)(1)(c), the Superior Court has no authority to make a new factual finding based on evidence introduced for the first time at the appellate hearing that the dependents of the deceased employee under the Workmen's Compensation Act are not the same in this case as the distributees of the deceased, and the court's conclusion of law based thereon that the provisions of the Wrongful Death Act, G.S. 28-173, control over the provisions of the Workmen's Compensation Act so that the wrongful death proceeds should be distributed to the heirs at law of the deceased employee is erroneous.

7. Master and Servant § 89— subrogation right of employer to share in wrongful death recovery

The provision of G.S. 28-173 which prohibits the use of a wrongful death recovery to pay a debt of the decedent does not bar the subrogation right of an employer under G.S. 97-10.2(f)(1)(c) to share in the proceeds of a wrongful death recovery against a third party tortfeasor, the employer's right to reimbursement under G.S. 97-10.2(f)(1)(c) not being a debt of the decedent.

8. Master and Servant § 89— wrongful death recovery by administratrix — employer's right to subrogation — employer's failure to participate in wrongful death action

Employer did not forfeit its subrogation right under G.S. 97-10.2(f)(1)(c) to share in the proceeds of a wrongful death action brought by the administratrix of the estate of the deceased employee by its refusal to participate in the trial and appeal of the wrongful death action where the action was instituted by the administratrix within twelve months after the employee's death, the personal representative of the deceased employee having the exclusive right under G.S. 97-10.2(b) to proceed to enforce the liability of a third party tortfeasor by appropriate proceedings if such proceedings are instituted within twelve months after the date of death, and the employer being neither a necessary nor a proper party to such an action.

APPEAL by defendant from *Gambill, J.*, March 1968 Civil Session of WILKES Superior Court.

This is an appeal from a judgment of the superior court which reversed an order of the North Carolina Industrial Commission directing disbursement of certain funds recovered from a third party tort-feasor as result of a wrongful death action brought by the administratrix of the estate of a deceased employee. The facts are as follows:

Plaintiff's intestate, Weaver Byers, was an employee of the defendant, North Carolina State Highway Commission, which is a self-insured employer subject to the North Carolina Workmen's Compensation Act. On 26 May 1965 Weaver Byers was injured in an accident which arose out of and in the course of his employment when a bridge on which he was standing collapsed as a heavily laden

cement truck owned by Standard Concrete Products Company drove onto the bridge. As a result of these injuries he died on the following day. The defendant employer admitted liability under the North Carolina Workmen's Compensation Act and on 15 June 1965 the North Carolina Industrial Commission approved an award under which defendant paid medical bills and funeral expenses of the deceased employee and made and has continued to make weekly compensation payments to his widow for her use and the use of the four children of the deceased employee who were under eighteen years of age at the time of his death. When the last weekly payment is made under this award, defendant will have made total payments, including payments for medical and funeral expenses, in excess of $12,000.00.

On 15 April 1966, within one year after the death of the employee, his widow, who had qualified as administratrix of his estate, filed an action in the Superior Court of Wilkes County against Standard Concrete Products Company to recover damages for the death of her intestate, alleging that his death was caused by the negligence of that company. The defendant in that action filed answer in which it denied any negligence on its part and pleaded contributory negligence of the deceased. Upon the trial and at the close of plaintiff's evidence a judgment of involuntary nonsuit was entered by the superior court on 9 June 1966. On appeal to the Supreme Court by the plaintiff administratrix, the judgment of nonsuit was reversed in an opinion filed 23 November 1966 and reported in 268 N.C. 518. Thereafter plaintiff administratrix and the third party tort-feasor negotiated a settlement of the wrongful death action for the sum of $7,500.00.

The present proceeding was commenced by petition filed by plaintiff administratrix with the North Carolina Industrial Commission on 19 December 1966 in which plaintiff prayed for an order authorizing and approving the negotiated settlement of the wrongful death action and for a further order directing the distribution of the funds recovered. In this petition plaintiff alleged that the North Carolina State Highway Commission had been informed of the entry of the judgment of nonsuit in her wrongful death action at the time it had been entered and had been requested to participate in the appeal to the State Supreme Court, but that it had refused to do so or to share in the cost of the appeal and that plaintiff administratrix had prosecuted the appeal at her own expense. Plaintiff contended in her petition that for these reasons the North Carolina State Highway Commission was precluded from sharing in the proceeds of the settlement under its right of subrogation. On 4 January

1967 the State Highway Commission executed a release consenting to the settlement which plaintiff had negotiated with the third party tort-feasor, and on 11 January 1967 a consent judgment was entered in the wrongful death action in the Superior Court of Wilkes County adjudging that the plaintiff recover $7,500.00 from the Standard Concrete Products Company. On 26 January 1967 Chairman J. W. Bean of the North Carolina Industrial Commission, without holding any formal hearing on plaintiff's pending petition, entered an order directing that the entire sum of $7,500.00 recovered from the tort-feasor be paid to the employer State Highway Commission in satisfaction of its subrogation rights under the provisions of G.S. 97-10.2(f)(1)(c), subject to the payment of attorneys' fees not exceeding one-third thereof. Plaintiff appealed from this order to the Full Commission. As grounds for her appeal, plaintiff contended that the employer's subrogation rights had been forfeited by its failure to participate in the trial of her wrongful death action as well as by its refusal to authorize, participate in, or to share in the costs of her appeal to the State Supreme Court from the judgment of nonsuit. After hearing before the Full Commission, at which counsel for plaintiff and defendant appeared and argued their respective contentions, the Full Commission entered an order on 30 May 1967 affirming the order which had theretofore been entered by Chairman Bean. In apt time on 21 June 1967 the plaintiff appealed from the order of the Full Commission to the Superior Court of Wilkes County, where the matter was heard before Judge Gambill at the Regular March 1968 Session. After this hearing, Judge Gambill entered an order dated 15 March 1968 in which he made extensive findings of fact relating to the death of the injured employee, the award of compensation which had been made under the provisions of the Workmen's Compensation Act to the widow and the four children of the deceased employee who were under eighteen years of age at the time of his death, the qualification of the widow as administratrix and the bringing of the wrongful death action against the third party tort-feasor, the results of the trial and appeal in that case, and the final negotiation of the settlement with the third party tort-feasor. Included among the findings of fact made by the judge of superior court was a finding that at the time of the death of the injured employee he left surviving, in addition to the dependents named as beneficiaries of the Workmen's Compensation award, three older children who were also heirs at law and distributees of the deceased. In addition, the court made the following findings of fact:

"(6) That said action against the Standard Concrete Products Company was tried at the June Civil Session, 1966, and at the conclusion of the trial on the 9th day of June, 1966, a judgment of involuntary nonsuit was entered by the Superior Court of Wilkes County, which was a final judgment unappealed from and would have ended the case but for the action of the administratrix at her own cost and expense.

"(7) That the State Highway and Public Works Commission was advised of said action in the Superior Court and were advised of the trial and invited to participate in the trial in the Superior Court and said Highway Commission refused to do so.

"(8) That on the signing of the judgment of nonsuit the State Highway Commission was advised of the judgment of nonsuit and was further advised that the counsel for the administratrix believed that the plaintiff had made out a case and were asked to authorize an appeal to the Supreme Court of North Carolina and to participate in an appeal to the Supreme Court and the State Highway Commission refused to do so. That counsel for the plaintiff advised the Commission that the administratrix would take the position that the judgment of nonsuit was a final adjudication of the State Highway Commission's subrogation rights and that the plaintiff would plead the same against the State Highway Commission as an abandonment and forfeiture of any rights they might have, and that the plaintiff intended to appeal the case at her own cost and expense, which she did.

* * * * *

"That the Court further finds as a fact that the State Highway Commission, by its failure to participate in the trial in the Superior Court, and its failure to participate in the appeal, after notice, waived its right to participate in the proceeds of the judgment, and that its action was an abandonment of its subrogation rights, and that the State Highway Commission is now by its conduct estopped from asserting any claim in the recovery and in the distribution of the funds received in the tort action.

"The Court is further of the opinion and so finds that Chapter 97 of the General Statutes entitled 'Workmen's Compensation Act' relates solely to a contract between the employer and employee. That the Act provides further for payment to the employee, or in case of death to his dependents, regardless of whether from an accident or a tort. General Statutes 28-173 is

a wrongful death statute (tort) and that the same as such provides for distribution of the funds received from a tort action and is not liable for debts of a deceased, but survives in the personal representative for distribution to his next of kin, and the Court further finds from the evidence and stipulations that the dependents under the Act are not the same in this case as the distributees of the deceased, and that to permit the State Highway Commission to take these funds as subrogee would be depriving the three children of their rightful inheritance for the wrongful death of their father. That General Statutes 28-173 is non-contractual and does not arise until death and survives in the personal representative for distribution under the statute and the decedent could not enter into a contract that would nullify the statute that would take from his heirs at law the right of distribution.

"The Court concludes that to permit the Highway Commission to take this money would be harsh treatment and not in keeping with the laws as intended by the Legislature, nor is it in keeping with equity or justice. That the payment made by the State Highway Commission grew out of the relationship of Employer and Employee, while the wrongful death statute provides for recovery only on the basis of the tort committed by the party and goes to the administratrix for distribution by the Administratrix."

On these findings the court concluded as a matter of law that the funds recovered from the third party tort-feasor as a result of settlement of the wrongful death action should be paid to the plaintiff administratrix for distribution by her among the widow and all of the children of the deceased, including the three older children, and that the employer is estopped by its conduct from asserting any claim to any part of said funds. On the basis of these findings and conclusions, the superior court entered judgment reversing the order of the Industrial Commission and remanding the case to the Commission for entry of a new order directing disbursement of the funds to the administratrix for distribution among the heirs at law of the deceased. From this judgment the employer, North Carolina State Highway Commission, appealed.

Attorney General T. W. Bruton, Deputy Attorney General Harrison Lewis, Assistant Attorney General Henry T. Rosser and Trial Attorney Fred P. Parker, III, for defendant appellant.

Hayes & Hayes by Kyle Hayes for plaintiff appellee.

PARKER, J.

[1-5] In this case the appeal from the order of the Industrial Commission was taken prior to 1 October 1967 and accordingly properly lay to the superior court. Had the appeal been taken on or after 1 October 1967, it would have come directly to the Court of Appeals. G.S. 97-86, as amended by Chap. 669, 1967 Session Laws. In either case the appellate court, which was the superior court in this case, has jurisdiction to review only for errors of law. *Brice v. Salvage Co.,* 249 N.C. 74, 105 S.E. 2d 439. If the findings of fact of the Industrial Commission in a proceeding over which it has jurisdiction are supported by competent evidence and are determinative of all of the questions at issue in the proceeding, the court on appeal must accept such findings as true and merely determine whether they justify the legal conclusions and the decision made by the Commission. In no event may the superior court or this Court consider the evidence which was introduced in the proceedings before the Industrial Commission for the purpose of making new findings of fact for itself. *Pardue v. Tire Co.,* 260 N.C. 413, 132 S.E. 2d 747. *A fortiori* the appellate court may not receive or consider new evidence not introduced in the hearing before the Commission. The scope of review is limited to the record as certified by the Industrial Commission and to the questions of law therein presented. *Penland v. Coal Co.,* 246 N.C. 26, 97 S.E. 2d 432. If the findings of fact made by the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the Commission for proper findings. *Thomason v. Cab Co.,* 235 N.C. 602, 70 S.E. 2d 706. Even in such cases, however, ordinarily the limited authority of the reviewing court does not permit it to order remand of the case for the taking of additional evidence. *Bailey v. Dept. of Mental Health,* 272 N.C. 680, 159 S.E. 2d 28. The appellate court may remand a cause to the Industrial Commission on the ground of newly discovered evidence only when a proper case is made to appear by affidavit meeting the seven requirements set out in *Johnson v. R. R.,* 163 N.C. 431, 453, 79 S.E. 690, 699. *McCulloh v. Catawba College,* 266 N.C. 513, 146 S.E. 2d 467. No affidavit and no such showing has been presented in the present case.

[6] In the light of the foregoing well-established principles it is apparent that the judgment of the superior court here appealed from was erroneous. Not only did the judge make new findings of fact on the basis of the record certified by the Industrial Commission for appellate review, but he allowed introduction into the record of entirely new evidence, in the form of a stipulation, as to the ex-

istence of three older children of the deceased employee who did not share in the workmen's compensation award but who were heirs at law of the deceased. On the basis of this new evidence, introduced for the first time in the appellate review hearing in the superior court, the judge found as a fact that the dependents of the deceased employee under the Workmen's Compensation Act are not the same in this case as the distributees of the deceased. On this finding the court concluded as a matter of law that the provisions of the North Carolina Wrongful Death Statute, G.S. 28-173, are controlling over the provisions of the Workmen's Compensation Act, G.S., Chap. 97. It is true that for purposes of the North Carolina Workmen's Compensation Act a "child" is defined to include only persons who at the time of the death of a deceased employee are under eighteen years of age, G.S. 97-2(12), while our Wrongful Death Statute, G.S. 28-173, provides that any recovery thereunder shall be distributed under the North Carolina Intestate Succession Act, G.S., Chap. 29, in which no such age limitation appears. The question of a possible conflict in the distributive provisions of the two statutes is an interesting one and has given the courts of other states considerable difficulty when they were confronted with similar problems in considering their own statutes. (For cases holding that the provisions of the Wrongful Death Statutes control to the extent that the employer's subrogation rights under Workmen's Compensation Statutes are limited to the portion of the wrongful death recovery which is distributed under the Wrongful Death Statutes to persons who also receive compensation as dependents under the Workmen's Compensation Statutes, see: *Doleman v. Levine,* 295 U.S. 221, 55 S. Ct. 741, 79 L. Ed. 1402; *Holley v. Stansfield,* 186 F. Supp. 805; *Joel v. Peter-Dale Garage,* 206 Minn. 580, 389 N.W. 524; *United States Fidelity & Guaranty Co. v. Higdon,* 235 Miss. 385, 109 So. 2d 329; *Buzynski v. County of Knox,* 159 Me. 52, 188 A. 2d 270; *Insurance Co. v. Laval,* 131 N.J. 23, 23 A. 2d 908; *In Re Zirpola v. Casselman, Inc.,* 237 N.Y. 367, 143 N.E. 222. For cases holding that the provisions of the Workmen's Compensation Statutes control, see: *In Re Shields' Estate,* 320 Ill. App. 522, 51 N.E. 2d 816; *Gall v. Robertson,* 10 Wis. 2d 594, 103 N.W. 2d 903.)

However, in the case before us the question was not presented for decision on the record before the Industrial Commission and was not properly before the superior court when this case came before it for appellate review. Nor is the question at present properly before this Court and accordingly we refrain from expressing any opinion on it, other than to refer to the following language in the

opinion by Chief Justice Denny in *Cox v. Transportation Co.*, 259 N.C. 38, 43, 129 S.E. 2d 589:

> "(I)t is mandatory under the provisions of the Workmen's Compensation Act that any recovery against a third party by reason of an injury to *or death* of an employee subject to the Act, the proceeds received from such settlement with or judgment against the third party, *shall be disbursed according to the provisions of the Workmen's Compensation Act.*" (Emphasis added.)

Since the superior court had no power to make the new factual finding, the resulting conclusion of law and the judgment insofar as it was based thereon was erroneous.

[7] Appellee further contends that the Highway Commission is barred from sharing in the wrongful death recovery by the language in G.S. 28-173 which provides that the amount recovered in a wrongful death action is not liable to be applied in payment of debts of the decedent. This contention is without merit. The employer's right of reimbursement under G.S. 97-10.2(f)(1)(c) is not a debt of the decedent. It is a right created by statute, just as is the right to bring action for wrongful death. The two statutes must be construed together, and when so construed we find no conflict in the language in G.S. 28-173 which prohibits use of the wrongful death recovery to pay a debt of the decedent and the language in G.S. 97-10.2(f)(1)(c) which directs that a portion of the recovery be applied to the reimbursement of the employer for benefits paid under award of the Industrial Commission.

[8] The judgment of the superior court was also based in part upon a finding that the employer State Highway Commission, by its failure to participate in the trial and appeal of the wrongful death action, had waived its right to participate in the recovery against the third party tort-feasor. While designated a finding of fact, this was actually a mixed finding of fact and conclusion of law. The factual finding was that the employer had not participated in the trial or the appeal; the conclusion of law derived therefrom was that this amounted to a waiver by the employer of any right to participate in the recovery. The Industrial Commission made a factual finding to the effect that plaintiff administratrix had herself brought the wrongful death action and had appealed to the Supreme Court. It made no finding of fact directly bearing on the employer's failure to participate in such trial or appeal. For the reasons stated above it was error for the superior court on appeal to it to make any new factual findings. Had the superior court on appeal considered that a

finding on this point was necessary to a proper determination of this case, the proper course would have been to remand the case to the Industrial Commission to make complete findings. However, in our view the Industrial Commission was entirely correct in not making any finding on this point, since such a finding would have been neither relevant nor determinative of any issue in this case. G.S. 97-10.2(b) grants to the personal representative of a deceased employee the *exclusive* right to proceed to enforce the liability of a third party tort-feasor by appropriate proceedings if such proceedings are instituted not later than twelve months after the date of death. If summons is issued against the third party during said twelve months period, the personal representative has the right to settle with the third party and to give a valid and complete release of all claims by reason of the death, subject only to the lien rights of the employer to protect his interest in the proceeds and subject to the requirement that any settlement must be made with the written consent of the employer. G.S. 97-10.2(d) and (h).

In the case before us the wrongful death action was instituted within twelve months after the date of the employee's death. The right to proceed with such action was therefore by express language of the statute vested exclusively in plaintiff administratrix. The employer, State Highway Commission, was neither a necessary nor a proper party thereto. G.S. 97-10.2(d). This being so, it is difficult to see in what manner the State Highway Commission could have "participated" in the trial or appeal of the wrongful death action. Its failure to do what it had no legal right to do could not result in a forfeiture of the right expressly vested in it by statute to share in the proceeds of the recovery against the third party tort-feasor. G.S 97-10.2(f)(1) expressly provides that where the employer has either filed a written admission of liability for benefits under the Workmen's Compensation Act, or an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by settlement with, judgment against, or otherwise from the third party by reason of injury or death of the employee shall be disbursed by order of the Industrial Commission, first to the payment of actual court costs taxed by judgment, second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission. Any amount remaining after the foregoing payments is to be paid to the employee or his personal representative.

The Industrial Commission had the exclusive original jurisdiction in this case to determine the proper distribution of the funds recovered from the third party tort-feasor. *Cox v. Transportation Co., supra.* The order entered by the Industrial Commission in this case followed precisely the directions of the statute, G.S. 97-10.2 (f)(1), and was correct. Accordingly, the judgment of the superior court is reversed and this case is remanded to the Superior Court of Wilkes County for entry of judgment affirming the decision of the Industrial Commission.

Reversed and remanded.

BROCK and BRITT, JJ., concur.

JUANITA F. ZANDE v. ALBERT ZANDE
No. 6828SC401

(Filed 11 December 1968)

1. Divorce and Alimony §§ 20, 23— post-divorce proceedings — attorney's fees — child support

The trial judge may not order the husband to pay attorney's fees for services rendered to the wife subsequent to the divorce of the parties, but he may, in the exercise of discretion, order the husband to pay attorney's fees for services rendered on behalf of the minor children of the marriage.

2. Trial § 57— trial by court without jury — admission of incompetent evidence

There is a rebuttable presumption in a trial before a judge without a jury that if incompetent evidence was admitted it was disregarded and did not influence the judge's findings.

3. Divorce and Alimony § 22— child custody and support — modification of decree

Any judgment, entered by consent or otherwise, determining the custody and maintenance of minor children may be modified by the court at any time changed conditions make a modification right and proper.

4. Divorce and Alimony § 23— child support — sufficiency of evidence and findings of fact

In a hearing upon the wife's motion for an increase in the husband's support payments for the minor children of the marriage, the evidence is sufficient to show a change of condition in the support needs of the three minor children and to support a finding of fact that the children require $775.00 per month, but the evidence is insufficient (1) to support

a finding relating to the college plans of the daughter or (2) to support an order reducing future support payments to a stated amount after the daughter is graduated and after the eldest son becomes twenty-one years of age or is emancipated.

5. Divorce and Alimony § 23— child support — father's right to accounting

The father is not entitled to an accounting from the mother for money awarded to her as payments for the support of the children.

6. Parent and Child § 7; Divorce and Alimony § 23— father's right to control higher education of child — effect of loss of custody

Unless his parental authority has been taken away by the court, the father is the one to decide the extent of and the place of the education of his child beyond that which is provided by the public school system, but where the custody of the child has been taken from the father by the court, it is for the custodian to make such decision, subject to the approval of the court in cases where the father is required to pay therefor.

APPEAL by defendant from *McLean, J.*, 6 June 1968 Session of Superior Court of BUNCOMBE County.

Plaintiff and defendant were married 11 January 1941. There were born of this marriage three children, to wit: Angela Charlotte Zande on 5 April 1949, Michael Lawrence Zande on 25 July 1950, and Anthony Lewis Zande on 21 June 1954.

Plaintiff instituted this action on 13 March 1962 in the Superior Court of Buncombe County to recover alimony without divorce, counsel fees, and custody of the children born of the marriage. A temporary order awarding plaintiff $450.00 per month as support for the plaintiff and the children, the home at 231 Edgewood Road, Asheville, North Carolina, attorney fees, and custody of the children was entered on 23 March 1962. Out of this sum plaintiff was to pay the monthly mortgage payment on the home of approximately $72.50.

On 18 November 1965 the defendant, Albert Zande, instituted an action against the plaintiff herein, Juanita F. Zande, in the General County Court of Buncombe County for an absolute divorce. Juanita F. Zande filed answer and cross action on 24 December 1965.

On 14 January 1966 in the Superior Court of Buncombe County, a "Final Judgment" in this action was entered. This judgment was signed by each of the parties and their attorneys indicating their consent thereto. This judgment provided that the title to the home was to be conveyed to plaintiff. Defendant was to pay the unpaid balance due on the home and $300.00 to repair the roof of the

house. In addition, defendant was to pay $350.00 per month for the support of the children whose custody was given to the plaintiff. No more attorney fees for the plaintiff were to be paid by defendant. Also, defendant expressed a desire, voluntarily and without compulsion, to assist the children to obtain a higher education if they desired and requested such assistance from him.

On 17 January 1966 the answer of Juanita F. Zande to the divorce action instituted by Albert Zande in the General County Court of Buncombe County was withdrawn at her request. On 31 January 1966 a judgment was entered in the General County Court of Buncombe County dissolving the marriage between the parties. The decree of absolute divorce mentions the fact that the children are in the custody of and residing with Juanita F. Zande, the plaintiff herein. The divorce decree, however, does not refer to the support of the children or to the judgment awarding the custody to Juanita F. Zande.

On 12 October 1967 Albert Zande filed notice of a motion in the cause asking "for a reduction of the payments the defendant has heretofore been ordered to pay to the plaintiff for the support of his three (3) children born of his marriage to the plaintiff in keeping with the change of condition set forth in a copy of said motion attached and served herewith." The change of condition alleged was that Angela Charlotte Zande had become eighteen years of age and was attending King's Business College in Charlotte and that he was paying her expenses there.

On 7 December 1967 the plaintiff filed answer and a motion to increase the payments for the support of the children from $350.00 to $450.00 per month. She alleged, among other things, increased living expenses and the needs of the children and the fact that defendant's income had increased substantially since the entry of the final judgment.

Defendant replied to plaintiff's motion and requested, among other things, that he, the defendant, be permitted to continue with his performance of a consent judgment entered on "23 January 1966." On 11 January 1968 Judge McLean, on motion of defendant's attorney, ordered the dismissal of defendant's motion to reduce the support payments.

Defendant moved to dismiss plaintiff's motion for an increase in support payments. This motion was denied on 2 February 1968 and plaintiff was allowed twenty days "in which to file an amended motion for an increase of support payments."

Plaintiff on 12 February 1968 filed another motion to increase support payments for the children. In this motion plaintiff asks for $1,200.00 per month for the support of the children and in addition thereto, the defendant be required to pay attorney fees and the cost of a higher education for each of the three minor children until they reach the age of twenty-one years.

After hearing the evidence of the parties, Judge McLean on 6 June 1968 found facts, made conclusions of law, and entered the following order:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant pay to the plaintiff the sum of $775 per month for the support, maintenance and education of said three children, commencing on the 23rd day of June, 1968, and continuing thereafter until such time as Angela C. Zande graduates from the King's Business College (Executive Secretarial Course) at which time said payments shall be reduced to $550 per month, which payment shall continue until such time as Michael L. Zande graduates from the School of the Arts, becomes 21 years of age, or otherwise becomes emancipated under law. That thereafter said support payments shall be decreased to the sum of $400 per month, to be used for the support, maintenance and education of Anthony L. Zande, until said child graduates from college, reaches the age of 21 years, or otherwise becomes emancipated under law.
>
> IT IS FURTHER ORDERED that the defendant shall pay the plaintiff's attorney the sum of $500.00, in compensation for the services rendered on behalf of the plaintiff and the three minor children since October 13, 1967.
>
> IT IS FURTHER ORDERED that this matter be retained by the court, subject to further orders of this court.
>
> All provisions of the judgment of January 14, 1966, not inconsistent with the provisions herein recited, shall remain in full force and effect."

From this order, defendant appeals and assigns error.

Williams, Williams & Morris by John Golding for plaintiff appellee.

Sanford W. Brown for defendant appellant.

MALLARD, C.J.

[1] Appellant contends that the "Final Judgment" entered with the consent of the parties and their respective counsel in this cause

on 14 January 1966, terminated the defendant's liability to further support the plaintiff and to pay her counsel fees. The question of support for the plaintiff is not presented by this record. The judgment appealed from makes no provision for the support of the plaintiff.

In *Becker v. Becker,* 273 N.C. 65, 159 S.E. 2d 569, it is said, "Attorneys fees for services rendered subsequent to plaintiff's divorce may be allowed only for services rendered *on behalf of the children.*" (emphasis added) The parties hereto were divorced 31 January 1966 which was before this motion was filed. It was also set out in the judgment dated 14 January 1966 that defendant would not be liable for further counsel fees for plaintiff's attorney. There is no finding of fact in the record herein which can serve as a basis for ordering payment of attorney fees. It was error for the judge to order defendant to pay plaintiff's attorney for "services rendered on behalf of the *plaintiff* and the three minor children since October 13, 1967." It is, however, proper for the trial judge, in the exercise of discretion, to order a defendant, in proper cases upon proper findings, to pay attorney fees for services rendered on behalf of minor children.

[2] Defendant also contends and argues that evidence of plaintiff's income, the cost of plaintiff's living expenses, including the cost of upkeep of her house and automobile and some other expenses, were improperly admitted over objection. Appellant in his brief appears to have used "assignments of error" when he obviously intended to refer to "exceptions." It has, therefore, been difficult to determine in some instances to what appellant refers. The evidence tended to show that the children were living in the home of plaintiff and some of the evidence, admitted over objection, was competent to show the cost of the living expenses of the children. Although some of the evidence may have been incompetent, we are of the opinion that such did not influence the judge's findings and was therefore not prejudicial to defendant. There is a rebuttable presumption in a trial before a judge, sitting without a jury, that if incompetent evidence was admitted, it was disregarded and did not influence the judge's findings. Stansbury, N. C. Evidence 2d, § 4a.

[3] Plaintiff contends that the trial court committed error in that it reviewed and revised the judgment entered by consent of the parties on 14 January 1966 by another superior court judge. There is no merit to this contention. Any judgment entered by consent or otherwise, determining the custody and maintenance of minor children, may be modified by the court at any time changed conditions

make a modification right and proper. *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136; *Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332; *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240; 2 Lee, North Carolina Family Law, § 152; *Bishop v. Bishop,* 245 N.C. 573, 96 S.E. 2d 721.

[4] Appellant contends that there was insufficient competent evidence of a change of condition in the support needs of the three minor children to support the findings of fact set out in the judgment of 6 June 1968. We think there was ample evidence to show a change of condition in the support needs of the three minor children and to support the finding of fact that the three children require $775.00 per month, which sum the defendant is financially capable of making and paying. However, as to paragraph eleven of the judgment, there is no competent evidence to support the finding of fact therein that "said daughter desires to attend college during the summer months of 1968 and graduate from her two year executive secretarial course at the close of March of 1969," and this portion of the findings of fact is stricken.

The order also provides that the $775.00 payments shall be reduced to $550.00 per month after Angela C. Zande is graduated from King's Business College and to $400.00 per month after Michael L. Zande is graduated from the School of the Arts, becomes twenty-one years of age, or otherwise becomes emancipated under the law. This does not take into consideration the amount found to be required for the support of Angela, nor does it take into account her age. Neither does this take into consideration the finding of fact in paragraph eleven that $260.00 per month of the $775.00 was required for Angela which, if no longer required, would leave only $515.00 of the $775.00 instead of the $550.00. Also not considered in the order reducing the payments were the amounts found to be required for the support of Michael. The effect of this order is to increase automatically the awards for the other two children when and if Angela is graduated from business college and to increase automatically the amount to be paid for Anthony when Michael becomes twenty-one years of age. This also assumes that Angela will be graduated from King's Business College at some time in the future.

[4] The order reducing the payments in the future after Angela is graduated and after Michael becomes twenty-one years of age or is emancipated is not supported by the evidence or the findings of fact.

[5] Appellant also asserts that plaintiff should account to him for the sums paid under the consent judgment of 14 January 1966. This contention is without merit. In 3 Lee, North Carolina Family

Law, § 229 (1968 Supp.), citing *Tyndall v. Tyndall,* 270 N.C. 106, 153 S.E. 2d 819, it is said, "If a mother fails to use the money awarded to her for the support of a minor child, a cause of action for the benefit of the child, prosecuted on his or her behalf, arises; the father may not recover the money for his own benefit." Under the judgment of 14 January 1966, the payments for support were to be paid by the defendant to the clerk of court. The clerk of court was required to disburse the sums so paid to plaintiff. The defendant is not entitled to an accounting from plaintiff. See also *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E. 2d 113.

[6] Appellant's last contention is that the father, not the child, may select the school for the child to attend in obtaining an education beyond high school when such education will be at the father's expense. Under ordinary circumstances, we think appellant's contention is correct. But here, a court of competent jurisdiction has awarded the custody to the mother. In 39 Am. Jur., Parent and Child, § 49, there appears the following:

> "At common law, however, while the duty rested upon the parent to educate his child, the law would not attempt to force him to discharge this duty, and the child, at the will of the parent, could be allowed to grow up in ignorance, the law providing no remedy in such a situation. . . .
>
> In the absence of a statute changing the common-law rule, control of the child's education is the right especially and primarily of the father. . . . Where the custody of the child has been taken from the father by a court of competent jurisdiction and awarded to the mother, the view has been taken that the mother should determine what education the child should have, and that the father, although liable for the expense involved, should be required to abide by her decision unless it is reached for a vindictive purpose, lacks adequate support in the facts, or is for some other reason clearly wrong. Other authorities, however, appear to consider that so long as the father is sought to be charged with the expense of the education he should have some voice in the type of education the child should have."

"In providing for the support of minor children the ability of the father to pay, as well as the needs of the children, must be taken into consideration by the court." *Martin v. Martin,* 263 N.C. 86, 138 S.E. 2d 801.

In *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227, the court said:

> "Whatever may have been the rule at common law, a father's duty of support today does not end with the furnishing of mere necessities if he is able to afford more. In addition to the actual needs of the child, a father has a legal duty to give his children those advantages which are reasonable considering his financial condition and his position in society."

We have not found any decision of our Supreme Court deciding the precise question of who selects the school for a minor child to attend in obtaining an education beyond that provided by the public school system of the state. We are of the opinion that the father, unless his parental authority has been taken away by the court, is the one to decide the extent of and the place of the education of his child beyond that which is provided by the public school system. However, where the custody of the child has been taken away from the father by the court, we are of the opinion that the custodian, subject to the approval of the court in cases where the father is required by the court to pay therefor, is the one to make such decision. *Esteb v. Esteb,* 138 Wash. 174, 244 P. 264; 47 A.L.R. 119; 56 A.L.R. 2d 1207; *Jenks v. Jenks,* 385 S.W. 2d 370; 24 Am. Jur. 2d, Divorce and Separation, § 796, p. 903.

The following portion of the order of 6 June 1968 is also ordered stricken:

> ". . . and continuing thereafter until such time as Angela C. Zande graduates from the King's Business College (Executive Secretarial Course) at which time said payments shall be reduced to $550 per month which payment shall continue until such time as Michael L. Zande graduates from the School of the Arts, becomes 21 years of age, or otherwise becomes emancipated under law. That thereafter said support payments shall be decreased to the sum of $400 per month, to be used for the support, maintenance and education of Anthony L. Zande, until said child graduates from college, reaches the age of 21 years, or otherwise becomes emancipated under law.
>
> IT IS FURTHER ORDERED that the defendant shall pay the plaintiff's attorney the sum of $500.00, in compensation for the services rendered on behalf of the plaintiff and the three minor children since October 13, 1967."

The order of Judge McLean of 6 June 1968, as modified herein, is affirmed.

Modified and affirmed.

CAMPBELL and MORRIS, JJ., concur.

WACHOVIA BANK AND TRUST COMPANY, TRUSTEE, AND THE ALEXANDER CHILDREN'S CENTER, A CHARITABLE CORPORATION, v. JOHN THOMASSON CONSTRUCTION CO., INC., A CORPORATION

No. 6826SC420

(Filed 11 December 1968)

1. Trusts § 4; Deeds § 12— charitable trust — restraint upon alienation

A conveyance in remainder of realty to a trustee "to hold said land forever for the sole use and benefit" of a named charity, the trustee to have no power to sell or convey the land either with or without the consent of the charity, vests in the trustee upon the death of the life tenant a title in fee simple absolute for the use of the charity, since the restraint upon alienation imposed by the transferor is void as a matter of public policy.

2. Trusts § 4— charitable trust — equitable jurisdiction of court to order sale of trust property

Courts of equity have jurisdiction to order, and in proper cases do order, the alienation of property devised for charitable uses, and such power is frequently exercised where change in conditions make the alienation of the property, in whole or in part, necessary or beneficial to the administration of the charity.

3. Trusts § 4— charitable trust — sale of trust property — restraint on alienation

In trustee's action to determine its right to convey a fee simple title to property which it holds in trust for benefit of a charity under trust indenture providing that trustee is to hold the property forever with no power of alienation, trial court properly exercised its equitable jurisdiction to permit the sale of the property where there was evidence that (1) the property, consisting of some 450 acres, was a thriving dairy farm at the time the trustee acquired the property but is no longer productive and is lying idle, (2) the property has a value in excess of one million dollars but does not produce income sufficient to pay ad valorem taxes, which amounted to $2367 in a recent year, and (3) the charity does not have funds to pay the taxes.

APPEAL by defendant from *Hasty, J.*, 3 September 1968, Criminal Session, MECKLENBURG County Superior Court.

The plaintiff, The Alexander Children's Center (Alexander), is a non-profit corporation which was organized as "The Alexander Home of Charlotte, North Carolina", pursuant to Chapter 225 of the 1903 Private Laws of North Carolina, entitled "An Act to Incorporate The Alexander Home of Charlotte, North Carolina". For many years this institution engaged in custodial care for orphan children. However, it was determined that the youth of the community could best be served by promoting in-patient care for emotionally disturbed children. Therefore, the institution's name was

changed in 1963. Such in-patient care was adopted as its purpose, and that is its present activity.

By deed dated 17 October 1930, duly recorded in the Mecklenburg County Public Registry, E. T. Garsed conveyed certain lands to the Charlotte National Bank (Charlotte) as trustee for the benefit of Alexander. Wachovia Bank and Trust Company (Wachovia), a banking institution organized and doing business under the laws of the State of North Carolina, is the corporate successor of Charlotte.

This deed provided that Garsed "has bargained, sold and conveyed, and by these presents does bargain, grant, sell and convey unto (Charlotte) at the expiration of the natural life of (Garsed) the remainder in and to the hereinafter described tract of land upon the following trust:

> To hold said land forever for the sole use and benefit of the Alexander Home, a corporation organized under Chap. 225 of the Private Laws of North Carolina, of the year 1903, and to that end to take charge of, manage, rent and have general control of said tract of land and to turn over the net revenue derived therefrom to the proper officers of the said Alexander Home, annually, or more often if it be practicable to do so. The said party of the second part may use such part of the income that may be derived from said estate as may be necessary to keep said premises in repair, but shall use no part of said income in permanent improvements without the consent of the Alexander Home.
>
> The party of the second part shall have power to lease any part of said land and for such term of years as it sees fit; provided, however, that no lease of any part of said land for a period longer than five years shall be made without the consent of the said Alexander Home. Provided further, that after the death of the party of the first part, said lands shall be held forever for the above set out trust, and that the party of the second part shall have no power to sell or convey the same either with or without the consent of the Alexander Home, said tract of land . . . (here follows a description)
>
> TO HAVE AND TO HOLD the remainder, at the expiration of the natural life of the said party of the first part, of the said tract unto the Charlotte National Bank, its successors and assigns forever, upon the uses and trusts above set out."

On 12 October 1967 plaintiffs and defendant entered into an agreement whereby plaintiffs agreed to sell and defendant agreed

to buy approximately ten acres of the Garsed land for the sum of approximately $30,000. Thereafter, by letter dated 7 December 1967, defendant refused to accept the deed to the property or pay the purchase price, alleging that plaintiffs could not convey a valid fee simple title to the property.

The plaintiffs instituted this action to determine whether they have the right to convey a fee simple title to the Garsed property and to require the defendant to perform the terms of the purchase contract.

For their first cause of action, the plaintiffs assert that the restriction in the Garsed deed is void as a matter of law because it purports to restrain the alienation of land in perpetuity. For their second cause of action, they assert that changed conditions will cause the trust to fail and the primary purpose of the grantor to be frustrated unless the court exercises its equitable jurisdiction to permit sales of the Garsed property.

The plaintiffs introduced evidence showing the background of Alexander, including its original location on East Boulevard in the City of Charlotte, the change in conditions necessitating a move from that location, and the re-establishment of the institution on a tract of some thirty acres of the Garsed property. This evidence further shows that the Garsed property consisted of some 450 acres; that the property was a thriving dairy farm at the time of the death of Garsed and the acquisition of the property by the trustee; that due to the growth of Charlotte and other changes, the property is no longer productive; that the property has a value in excess of one million dollars; but that in its present state, it does not produce enough income to pay taxes. "The ad valorem property taxes on the property for 1967 amounted to $2,367.79. They are unpaid and we do not have the funds to pay them. The annual income of the property is nowhere near enough to pay the taxes on it."

An assistant trust officer of Wachovia testified:

> "Needless to say, if the land not now necessary to the purposes of The Alexander Children's Center could be sold and the proceeds held in trust and invested, this trust would produce a very substantial annual income for the use of the beneficiary. As matters stand, the trust is actually running an annual deficit because the value of the land and the ad valorem taxes have gone up while the income has gone down.
>
> When this trust was created the land in question was a thriving dairy with adjoining woodland and pasture land a number of

miles from the city limits of Charlotte. It was producing income and there was no reason to think that it would not continue to do so. The unprecedented and then unforeseen growth of the City of Charlotte right up to the boundaries of this property, together with the drastic change in economic conditions and more particularly in the dairying industry have rendered the land unproductive for any purposes springing from the use of the land itself that would be compatible with the presence of the Center on part of the land. At the same time the land has become highly desirable for residential purposes. The Alexander Children's Center has now moved its facilities to a part of the property. Single-family residential development of the quality that the prospective purchaser intends to place on the land will serve to insulate the Center against the kind of encroachment of undesirable adjoining land use that forced it to move from its former location, while at the same time giving the Center a substantial income from the remainder of the property, something which, along with the providing of a future site for the location of the Center, was one of the expressed intentions of the donors of the property."

The trial court under date of 19 September 1968 entered a judgment to the effect that on the first cause of action the restriction constituted an illegal restraint on alienation and was void.

On the second cause of action, the trial court found that the facilities of Alexander located on East Boulevard in the City of Charlotte became outdated and inadequate and the surrounding neighborhood changed to such an extent that it was necessary for Alexander to relocate; that it did so on a portion of the Garsed lands; that the major portion of the Garsed lands are unoccupied and lying idle; that the greater portion of the lands are not needed for the operation of Alexander; that at the time of the original gift the land was used for a thriving dairy which has now gone out of existence; that there has been a substantial change of conditions unforeseen by Garsed; that as a result of these unforeseen changes of conditions, the original intent of Garsed is being thwarted and the ability of Alexander to carry out the intentions of Garsed are being materially impaired by a lack of operating income funds for capital improvements; that it is necessary and in the best interests of Alexander that the administrative provisions of the trust be amended so that a portion of the property in question can be sold and the proceeds of the sale held in trust and invested so as to produce income to allow for the full development and utilization of that part of the property which Alexander desires to retain for its own

use; that it is only by doing this, that the intention of Garsed can be fully realized; that the entire property is of such size and nature that it cannot be economically sold as one parcel; that it is highly desirable that the property in close vicinity to the facilities of Alexander be utilized for residential purposes; that it is not economically feasible to use leased land for residential purposes; and that the only practical way to accomplish the purposes for which Alexander exists is to sell the land in question in marketable parcels under the supervision of the court.

The trial court then found that it was necessary and in the best interests of Alexander that portions of the 450 acre tract, not necessary for the purposes of Alexander, be sold and the proceeds invested in order that the land retained may be developed and utilized to carry out the purposes of the trust.

The trial court concluded that ". . . in the exercise of its inherent equitable power to supervise the administration of charitable trusts (the court) ought to allow and require the conveyance of the land which is the subject of this suit."

The trial court ordered that the terms of the purchase contract be carried out by the parties and ". . . that this cause be retained on the docket of this Court so that the Court may from time to time consider upon motion the sale by the plaintiffs of land under the additional options heretofore granted to the defendant and of such additional parcels of land as they may from time to time desire to be allowed to convey."

The defendant excepted to the findings of fact and conclusions of law and appealed.

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

James O. Cobb, Attorney for defendant appellant.

CAMPBELL, J.

[1] The defendant presents two questions for consideration: (1) Did the trial court commit error in holding that the restriction in the Garsed deed was void as against public policy? (2) Did the trial court commit error in holding that, under the facts and circumstances in the record, equitable jurisdiction could be exercised in order to permit the sale of a portion of the real property?

> "There can not be a co-existence of a fee-simple estate and a total restriction upon its alienation during any period of time,

> however short it may be. One person can not own the fee and another person the right of alienation." *Latimer v. Waddell,* 119 N.C. 370, 26 S.E. 122.

This principle was applied to a charitable trust in *Hass v. Hass,* 195 N.C. 734, 143 S.E. 541, where the Supreme Court stated:

> "The second sentence in Item 2 of said will, to wit: 'It is my will that my real estate be not sold, but that the rents and profits for ninety-nine years be paid to the authorities aforesaid for the blind children as aforesaid,' if construed as an attempt to restrain the alienation of the real estate, devised in fee to the defendant, the State School for the Blind and Deaf, is of no legal effect and is void in law."

Prohibitions against alienation imposed by the transferor of legal and equitable fees and legal life estates upon the transferee are held by the common law to be invalid as against public policy. Bogert, Trust and Trustees, 2d Edition, § 349. While some authorities hold that this common law rule does not apply to a prohibition against the transfer of trust property by a trustee for a charity, there are many authorities to the contrary. *Hass v. Hass, supra,* is cited by Bogert as placing North Carolina among those authorities to the contrary. Bogert points out that courts, which hold that this common law rule is inapplicable to a trustee's power of sale, may have been influenced by the rule that charitable trusts may be perpetual and that inalienability of the trust property would, therefore, follow as a practical matter. However, he further points out that "[i]f the restraint on the trustees is regarded as illegal, the effect is to leave the trust in force without any restriction. The trust does not fall. The restriction alone is declared void." Bogert, *supra.*

We conclude that the trial court was correct in holding that the trustee took title in fee simple absolute upon the death of the life tenant without restraint or restriction on the power of alienability.

[2] The second question may also be answered in the negative.

> ". . . [C]ourts of equity have jurisdiction to order, and in proper cases do order, the alienation of property devised for charitable uses. . . . The power is not infrequently exercised where conditions change and circumstances arise which make the alienation of the property, in whole or in part, necessary or beneficial to the administration of the charity. . . . [C]ourts of equity have long exercised the jurisdiction to sell property devised for charitable uses, where, on account of changed condi-

tions, the charity would fail or its usefulness would be materially impaired without a sale." *Holton v. Elliott,* 193 N.C. 708, 138 S.E. 3.

[3] Alexander will not cease to exist if the contract in this instance is not performed. However, nonperformance would materially impair the usefulness of Alexander as a charitable institution since the property in question is now unproductive and idle and since the present and future needs of Alexander do not necessitate retention. The property in question is not self-sustaining and does not produce enough income to pay ad valorem taxes. If the taxes are not paid, the property could be lost unless other funds of Alexander are used for the payment of these taxes. Without question, the grantor did not foresee thirty-eight years ago the discontinuance of the dairy farm or the growth in population and territory of Charlotte. The chief object of the grantor's bounty was to increase the effectiveness of the charities being performed by Alexander for the children in the territory served by Alexander. The proposed sale and the judgment of the trial court will carry out the primary purpose of the grantor. The evidence supports the findings of fact and the findings of fact in this case support the judgment entered.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

HAROLD E. SETSER, T/A TASTEE-FREEZ OF LENOIR v. CEPCO DEVELOPMENT CORPORATION, TASTEE-FREEZ OF PIEDMONT, N. C., INC., AND CHARLES E. PARNELL

No. 6825SC312

(Filed 11 December 1968)

1. Injunctions §§ 2, 6— action to restrain premature termination of contract — sufficiency of complaint

In an action to restrain defendants from prematurely terminating a lease agreement and an operator's agreement for conducting a business on the leased premises and from interfering with plaintiff's business, plaintiff's allegations that defendants have given notice that the lease and operator's agreements will terminate on a date prior to the expiration date of the agreements, that defendants have demanded that plaintiff vacate the premises by the earlier date, and that plaintiff will suffer "irreparable damages to the extent of many thousands of dollars" *are held* insufficient to state a cause of action for equitable relief since the

complaint fails to allege facts showing irreparable damage or that defendants are insolvent and unable to respond in damages, and defendants' demurrer thereto is properly allowed.

2. Injunctions § 2— necessity for inadequate remedy at law

An injunction will not lie when there is an adequate remedy at law.

3. Pleadings § 29— demurrer sustained — dismissal of the action

When a demurrer is sustained, the action will be then dismissed only if the allegations of the complaint affirmatively disclose a defective cause of action, that is, that plaintiff has no cause of action against the defendant.

4. Pleadings § 38— judgment on the pleadings

Although the complaint does not allege facts sufficient to constitute a cause of action, defendants' motion for judgment on the pleadings is improperly allowed where a material issue of fact is joined between the parties in the further answer and defense of the defendants and the reply thereto of the plaintiff.

APPEAL by plaintiff from *Falls, J.*, 25 March 1968, Civil Session, CALDWELL County Superior Court.

When this case was called for trial and after a jury had been selected but before the jury was empaneled, the defendants demurred *ore tenus* to the complaint. This demurrer was sustained. The defendants then moved for judgment on the pleadings and this motion was allowed. The plaintiff appealed.

Marshall Cline and Womble, Carlyle, Sandridge & Rice by I. E. Carlyle and Allan R. Gitter, Attorneys for plaintiff appellant.

No counsel, contra.

CAMPBELL, J.

Messrs. Wilson and Palmer appeared as attorneys for the defendants in the trial court, but for good cause shown, they were permitted to withdraw as counsel by order of Judge Bryson dated 8 October 1968.

In the complaint filed 25 October 1967, plaintiff alleged that he had subleased in writing certain premises located in the City of Lenoir, which lease did not expire until 6 January 1973; that at the time of making the sublease he had entered into a written operator's agreement for a period of ten years, with option to renew, commencing 1 June 1963 pursuant to which the plaintiff was to operate a food and dairy products business known as "Tastee-Freez of Lenoir"; that the plaintiff purchased equipment and inventory

and commenced business, which the plaintiff "still operates today as a going concern and as a profitable business"; that the defendants acting through Charles E. Parnell, individually and as an officer of the defendant corporations, have "now given notice to the plaintiff that both the ten-year sub-lease agreement and the ten-year operator's agreement will terminate on October 31, 1967, and [have] demanded that the plaintiff vacate the premises by that date"; that the defendants in attempting to terminate both agreements prior to expiration date have advised the plaintiff that the defendants have assigned all of their rights, title and interest in Tastee-Freez of Lenoir to "Char's, Inc."; that the defendants are not acting in good faith and are conspiring among themselves to force the plaintiff to terminate his successful and profitable business and to accept a new sublease agreement with Char's, Inc.; that these unlawful and wrongful demands have been made by the defendants because the Harlee Manufacturing Company of Illinois has revoked the regional Tastee-Freez franchise which it had granted to Tastee-Freez of Piedmont, N. C., Inc.; and that this revocation had occurred during the summer of 1966. The plaintiff then alleged that "if the defendants are permitted to impose their unlawful and wrongful plans upon this plaintiff, then the plaintiff will be irreparably damaged to the extent of many thousands of dollars, and will be deprived of his livelihood through no fault of his own, and that the plaintiff has no adequate remedy at law for the redress of his grievances." The plaintiff then prayed judgment that the defendants be restrained from terminating either of the said written agreements, from evicting the plaintiff, and "from molesting, interfering with or harassing the plaintiff in the operation of his business pending a hearing in this matter", and that the defendants be perpetually restrained.

On 25 October 1967 a temporary restraining order was issued and on 14 November 1967 this order was continued in effect until the trial. The answer, which was filed by the defendants on 22 November 1967, admitted the lease, but it alleged that said lease had terminated in accordance with its terms and had been assigned to Char's, Inc. It was also admitted that plaintiff and Tastee-Freez of Piedmont, N. C., Inc., had entered into a written agreement on 1 June 1963 and that the regional franchise agreement between Harlee Manufacturing Company and Tastee-Freez of Piedmont, N. C., Inc., had been terminated. The defendants set forth in their answer Paragraph 21 of the lease, which provided:

> "A territorial franchise agreement exists between Tastee-Freez of Piedmont, N. C., Inc. and Harlee Manufacturing Company, an Illinois Corporation, for the purposes of conducting a

> Tastee-Freez business. It is expressly agreed that should Tastee-Freez of Piedmont, N. C., Inc. become disposed of its franchise agreement in any manner whatsoever, then Lessor shall have the right, privilege and option to cancel and terminate this lease."

The defendants further alleged that the franchise agreement had been terminated; that the plaintiff had been given notice of this termination; that the lessor in the lease agreement with the plaintiff would exercise its right and privilege to cancel the lease; that the plaintiff was notified to vacate the leased premises by 31 October 1967; but that the plaintiff had failed and refused to do so. The defendants prayed that the restraining order be dismissed; that the plaintiff be ordered to vacate the leased premises; and that the lessors be placed in possession of same.

The plaintiff filed a reply, in which it was stated that, among other things, the franchise agreement between the Harlee Manufacturing Company and Tastee-Freez of Piedmont, N. C. Inc., terminated in September 1966; that thereafter no effort was made to terminate the sublease for a period of thirteen months, while plaintiff was making monthly payments of rent; that the right to do so had been waived; and that the defendants are estopped to exercise said option now.

Two questions are presented by this appeal. 1. Did the trial court commit error in sustaining the demurrer *ore tenus* for failure to state a cause of action in the complaint? 2. Did the trial court commit error in granting the defendants' motion for judgment on the pleadings?

> "On a demurrer *ore tenus* to the complaint, we take the case as made by the complaint. It is hornbook law that the office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose, the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. It is also common knowledge of the Bench and the Bar that the court is required on a demurrer to construe the complaint liberally with a view to substantial justice between the parties, and every reasonable intendment is to be made in favor of the pleader. G.S. 1-151; *Bailey v. McGill,* 247 N.C. 286, 100 S.E. 2d 860, and cases cited." *Beam v. Almond,* 271 N.C. 509, 157 S.E. 2d 215.

[1] Tested by this mandate, we are of the opinion that the demurrer *ore tenus* was properly sustained. Plaintiff seeks an injunc-

tion. However, there is no averment that the defendants have done anything to the plaintiff. The only factual averment is to the effect that the defendants have given notice to the plaintiff that the ten-year sublease and the ten-year operator's agreement would terminate on 31 October 1967 and have made demand that the plaintiff vacate the premises by that date. There is no averment that the operation of plaintiff's business will in any way be affected if the plaintiff fails to comply with the demand made by the defendants. In fact, the complaint itself states that the plaintiff's business "still operates today as a going concern and as a profitable business." In the prayer for relief, the plaintiff requested the court to restrain the defendant "from molesting, interfering with or harassing the plaintiff in the operation of his business." However, there is no averment in the complaint to the effect that the defendants are doing any of these things. The simple averment that the defendants gave notice that the sublease and the operator's agreement would terminate on 31 October 1967 and made demand that the plaintiff vacate the premises by 31 October 1967 does not show any molestation, interference, or harassment on the part of the defendants. The plaintiff did not allege any facts constituting irreparable damage, insolvency on the part of the defendants, or any grounds for equitable relief.

[2] "Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy." *In Re Davis,* 248 N.C. 423, 103 S.E. 2d 503.

[1] If and when the defendants interfere with the plaintiff's business, the plaintiff may have the right to obtain adequate recompense in money. The allegation of "irreparable damage to the extent of many thousands of dollars" is not sufficient to justify equitable relief. "It is true he alleges in general terms, 'irreparable injury,' but he fails to allege and give evidence of facts showing that he may sustain such injury. It is not sufficient to simple allege such injury — facts must appear from which the court can see and determine that it is such, and probable." *Lewis v. Lumber Co.,* 99 N.C. 11, 5 S.E. 19.

[2] As stated by Clark, C. J., in *Porter v. Armstrong,* 132 N.C. 66, 43 S.E. 542:

> "An injunction will not lie when there is an adequate remedy at law . . .
>
> . . .
>
> . . . Apart from the fact that an injunction will not lie because there is full remedy at law, the complaint does not state

> a cause of action on which to procure an injunction, in that it is not alleged that the defendant is insolvent and unable to respond in damages. . . . Nor is it sufficient to allege, as here, in general terms that the injury will be irreparable, but the complaint must set out such specific allegations of fact which will enable the court to see that the apprehended damages will be irreparable, and therefore that there will be no adequate remedy at law."

[3] We hold that it was not error for the trial court to sustain the demurrer *ore tenus* and dissolve the restraining order which had been entered. Since the plaintiff might have made allegations in an amended complaint which would have met the foregoing objections, he should have been permitted to do so. Therefore, the cause is remanded so that the plaintiff may amend, if so advised.

> "When a demurrer is sustained, the action will be *then dismissed* only if the allegations of the complaint affirmatively disclose a defective cause of action, that is, that plaintiff has no cause of action against the defendant." *Skipper v. Cheatham,* 249 N.C. 706, 107 S.E. 2d 625.

The second question presented by this appeal is, did the trial court commit error in granting the defendants' motion for judgment on the pleadings?

Ervin, J., stated in *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384:

> "A motion for judgment on the pleadings is in the nature of a demurrer. . . . Its function is to raise this issue of law: Whether the matters set up in the pleading of an opposing party are sufficient in law to constitute a cause of action or a defense. . . .
>
> When a party moves for judgment on the pleadings, he admits these two things for the purpose of his motion, namely: (1) The truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations in so far as they are controverted by the pleading of his adversary. . . . These admissions are made only for the purpose of procuring a judgment in the movant's favor. . . .
>
> A motion for judgment on the pleadings is allowable only where the pleading of the opposite party is so fatally deficient in substance as to present no material issue of fact. . . .

> On a motion for judgment on the pleadings, the presiding judge should consider the pleadings, and nothing else. . . . He should not hear extrinsic evidence, or make findings of fact. . . . If he concludes on his consideration of the pleadings that a material issue of fact has been joined between the parties, he should deny the motion in its entirety, and have the issue of fact tried and determined in the way appointed by law before undertaking to adjudicate the rights of the parties. The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition."

[4] Although the complaint in the instant case did not set forth facts sufficient to constitute a cause of action, it cannot be stated that a material issue of fact has not been joined. A material issue of fact was joined between the parties as contained in the further answer and defense of the defendants and the reply thereto of the plaintiff. It was error in the trial court to enter that portion of the judgment reading: "That the defendant Cepco Development Corporation be, and it is hereby entitled to immediate possession of the premises described in the pleadings filed herein . . ."

Error and

Remanded.

MALLARD, C.J., and MORRIS, J., concur.

CHARLES McADAMS v. BARBARA GOODE BLUE, ADMINISTRATRIX OF THE ESTATE OF RICHARD BLUE, JR.; BLONDELL ROBINSON, ADMINISTRATRIX OF THE ESTATE OF RICHARD CARL ROBINSON; LONNIE REDFERN, HENRY L. ANDERSON AND PURVIS TOBE

AND

JIMMY McADAMS, BY HIS NEXT FRIEND, CHARLES McADAMS v. BARBARA GOODE BLUE, ADMINISTRATRIX OF THE ESTATE OF RICHARD BLUE, JR.; BLONDELL ROBINSON, ADMINISTRATRIX OF THE ESTATE OF RICHARD CARL ROBINSON; LONNIE REDFERN, HENRY L. ANDERSON AND PURVIS TOBE

No. 6828SC417
No. 6828SC416

(Filed 11 December 1968)

1. Appeal and Error § 6— orders appealable — motion to strike

Rule 4(b) of the Court of Appeals has no application when the order striking a portion of the pleadings is in effect the granting of a demurrer, and an appeal will lie from such order.

2. Pleadings § 2— allegations of ultimate facts

In personal injury action wherein plaintiff relies on theory of agency, plaintiff must allege the ultimate facts which, if proven, would justify a finding that at the time and place of injury defendant was an agent and acting within the scope of that agency.

3. Joint Ventures; Automobiles § 95— joint enterprise and joint adventure distinguished

Although the terms "joint adventure" and "joint enterprise" have been used interchangeably, they are legally distinguishable: the latter term is normally employed, not with reference to a business relationship comparable to a partnership, but by way of representing merely a unity between persons in the pursuit of a common purpose, as a result of which the negligence of one participant may be imputed to another.

4. Automobiles § 43— pleadings — issue of joint enterprise

Allegations in complaint *are held* sufficient to raise the issue of joint enterprise in a personal injury action arising out of an automobile accident.

5. Conspiracy § 1— elements of civil conspiracy

A civil action for conspiracy is an action for damages resulting from wrongful or unlawful acts committed by one of the conspirators pursuant to the formed conspiracy, and not simply because of the existence of the conspiracy.

6. Conspiracy § 2— pleading of ultimate facts in civil action

Allegations that defendants were negligent "in conspiring" to do certain things is subject to be stricken on motion, it being necessary to allege the wrongful or unlawful acts resulting from a conspiracy.

7. Damages § 11— punitive damages — when recoverable

Punitive damages are recoverable in an automobile collision case on allegations and proof that the injury complained of resulted from wanton negligence, and conduct is wanton when it is in conscious and intentional disregard of and indifferent to the rights and safety of others.

8. Damages § 11— punitive damages — effect of wrongdoer's death

While punitive damages would be proper against a wrongdoer if living, they are not recoverable against his personal representative, however aggravated the circumstances.

Appeal by plaintiffs from *Braswell, J.*, at the 5 August 1968 Session of Buncombe Superior Court.

On 20 February 1968, the two plaintiffs instituted separate actions against the defendants. The allegations of the complaints are practically identical except that the complaint of Charles McAdams seeks recovery for property damage and the complaint of Jimmy McAdams, a minor, seeks recovery for personal injury. The record indicates that the actions were considered together in the superior

court, and they are treated as consolidated for purpose of hearing and determination in this court.

The complaints are summarized as follows: On 24 December 1967, the plaintiff Jimmy McAdams was operating an automobile belonging to his father, plaintiff Charles McAdams, in a westerly direction on Southside Avenue in the city of Asheville, N. C. Defendant Blue's intestate, Richard Blue (Blue), defendant Robinson's intestate, Richard Carl Robinson (Robinson), and defendants Redfern, Anderson and Tobe were occupants of an automobile owned by Redfern and operated by Blue which collided with the automobile owned and operated by plaintiffs, resulting in the damage and injury sued for in this action. Defendant Robinson demurred to the complaint and was overruled. Defendants Blue and Redfern moved to strike all of paragraphs 13, 14, 15, 16, 19 and 22 of the complaints; defendants Tobe and Anderson moved to strike portions of paragraphs 14, 15, 16 and 19. Briefly stated, the paragraphs sought to be stricken alleged that at the time of the collision an agency relationship existed between Blue and Robinson, Anderson, and Tobe; that at the time of the collision all five occupants of the Redfern automobile were engaged in a joint enterprise involving the operation of said automobile; that a conspiracy existed between the five occupants of the Redfern automobile; and that plaintiffs are entitled to recover punitive damages against each of the defendants.

The motions to strike were allowed substantially as requested, and plaintiffs appealed from the orders allowing the motions to strike.

Williams, Williams & Morris by James N. Golding for plaintiff appellants.

Uzzell & DuMont by Harry DuMont for defendant appellees Blue and Redfern.

No counsel for defendant appellees Anderson and Tobe.

Britt, J.

[1] Rule 4 of the Rules of Practice in the Court of Appeals of North Carolina contains the following proviso:

"The Court of Appeals Will Not Entertain an Appeal:

* * *

(b) From an order striking or denying a motion to strike allegations contained in pleadings. When a party conceives that

such order will be prejudicial to him on the final hearing of said cause, he may petition this Court for a writ of *certiorari* within thirty days from the date of the entry of the order."

Defendants contend that because of the above rule plaintiffs' appeal should be dismissed. We hold otherwise.

In *Etheridge v. Light Co.*, 249 N.C. 367, 106 S.E. 2d 560, the Supreme Court, in discussing the same rule in that court, states:

"Rule 4(a) of this Court has no application when the order striking a portion of the pleading is in effect a demurrer denying the pleader a right to recover for failure to state facts sufficient to constitute a cause of action. Such an order comes within the provisions of G.S. 1-277 and the party adversely affected may appeal."

In that case, the appeal was treated as an appeal from an order allowing a demurrer. Such is the case here with respect to defendants Anderson and Tobe; without the stricken portions, the complaints contain no allegations of negligence on the part of said defendants.

Strictly applied, the rule would result in a dismissal of the appeal as to defendants Blue and Redfern. Even so, plaintiffs have properly appealed as to defendants Anderson and Tobe, and since the entire case as to said four defendants is before us, we will consider the exceptions appearing in the record on appeal. *Harris v. Board of Commissioners,* 1 N.C. App. 258, 161 S.E. 2d 213.

[2] Defendants contend that the allegations of agency contained in paragraphs 13 of the complaints, even when liberally construed, amount only to conclusions. This contention is well-founded. Plaintiffs should allege the ultimate facts which, if proven, would justify a finding that at the time and place of injury defendant Blue was an agent and acting within the scope of that agency. This they have not done. 6 Strong, N. C. Index 2d, Pleadings, § 2, p. 292. 1 McIntosh, N. C. Practice 2d, § 981, p. 522.

Defendant appellees contend that plaintiffs have failed to allege facts constituting a cause of action on the theory of joint enterprise. Plaintiffs' pleadings must be upheld on this theory.

[3] "The term 'joint enterprise' has been defined as an undertaking for the mutual benefit or pleasure of the parties; and it has been said that no legal distinction exists between the phrases 'joint enterprise' and 'the prosecution of a common purpose.' Although the terms 'joint adventure' and 'joint enterprise' will be found to have

been used interchangeably in some instances, that is an indiscriminate use. The latter term is normally employed, not with reference to a business relationship comparable to a partnership, but by way of representing merely a unity between persons in the pursuit of a common purpose, as a result of which the negligence of one participant may be imputed to another." 30 Am. Jur., Joint Adventures, § 2, p. 940. See also 60 C.J.S., Motor Vehicles, § 444, p. 1142.

[4] Disregarding plaintiffs' conclusory statements in paragraphs 14, that the defendants were engaged in a joint enterprise, the remaining allegations of those paragraphs are sufficient to raise the issue of joint enterprise. In *Newman v. Coach Co.*, 205 N.C. 26, 169 S.E. 808, the defendant sought to impute the negligence of the driver of plaintiff's car to the guest plaintiff. The court, in affirming for the plaintiff, stated:

> "The contention that the plaintiff and the driver of the car were engaged in a joint enterprise is not sustained. 'A common enterprise in riding is not enough. The circumstances must be such as to show that the plaintiff and the driver had such control over the car as to be substantially in the joint possession of it.' *Charnock v. Refrigerating Co.*, 202 N.C. 105, 161 S.E. 707; *Albritton v. Hill*, 190 N.C. 429, 130 S.E., 5. * * *" See also *James v. R. R.*, 233 N.C. 591, 65 S.E. 2d 214.

Plaintiffs have followed the language of these cases practically verbatim; moreover, the ultimate facts have been pleaded.

[5] Defendants contend that the complaints fail to state a cause of action on the theory of conspiracy. We agree with this contention. A conspiracy is generally defined as an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful manner. A civil action for conspiracy is an action for damages resulting from wrongful or unlawful acts committed by one of the conspirators pursuant to the formed conspiracy, and not simply because of the existence of the conspiracy. *Shope v. Boyer*, 268 N.C. 401, 150 S.E. 2d 771. Each conspirator is jointly and severally liable for any harm resulting from an overt act done by one of the conspirators pursuant to the agreement. *Burton v. Dixon*, 259 N.C. 473, 131 S.E. 2d 27; 16 Am. Jur. 2d, Conspiracy, § 43, p. 149.

[6] Plaintiffs have alleged that defendants were negligent "in conspiring" to do certain things instead of alleging wrongful or unlawful acts resulting from a conspiracy. That being true, defendants' challenge to the portions of the complaints dealing with conspiracy is well taken.

[7] Finally, defendants contend that the complaints do not contain sufficient allegations to warrant a prayer for punitive damages. In *Hinson v. Dawson,* 244 N.C. 23, 92 S.E. 2d 393, in an opinion by Bobbitt, J., our Supreme Court held that punitive damages are recoverable in an automobile collision case on allegations and proof that the injury complained of resulted from *wanton* negligence, and "[c]onduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." We hold that the allegations contained in plaintiffs' complaints are sufficient to warrant a prayer for recovery of punitive damages as against defendants Redfern, Anderson and Tobe.

[8] However, punitive damages would not be recoverable as against defendant Blue. In *Rippey v. Miller,* 33 N.C. 247, in an opinion by Ruffin, C.J., our Supreme Court held that while vindictive (punitive) damages would be proper against a wrongdoer if living, they would not be recoverable against his personal representative, however aggravated the circumstances. See also *Dalton v. Johnson,* 204 Va. 102, 129 S.E. 2d 647; 22 Am. Jur. 2d, Damages, §§ 255, 262, pp. 349, 357, and 25 C.J.S., Damages, § 125(3), p. 1153. Defendant Robinson is not before us on this appeal.

Summarizing, with respect to defendants Redfern, Blue, Anderson and Tobe, we hold that the superior court:

(1) Properly ordered paragraph 13 in each complaint stricken.

(2) Erred in striking paragraphs 14 of the complaints or any part thereof.

(3) Properly ordered stricken the following portion of paragraph 15 of each complaint: "and conspiracy to violate the laws of the State of North Carolina and the City of Asheville"; it erred in ordering stricken the remaining portions of paragraph 15 of each complaint.

(4) Erred in ordering paragraph 16 of each complaint stricken.

(5) Correctly ordered stricken subparagraphs A and B of paragraph 19 of each complaint and the following portion of subparagraph D: "and his co-conspirators." It erred in striking the remaining portions of paragraph 19 of each complaint.

(6) Erred in striking paragraph 22 of each complaint as to defendants Redfern, Anderson and Tobe; it properly struck paragraph 22 as to defendant Blue.

These actions will be remanded to the Superior Court of Buncombe County for entry of proper order consistent with this opinion.

Error and remanded.

Brock and Parker, JJ., concur.

EAST COAST OIL COMPANY v. JAMES H. FAIR AND WIFE, ESTHER FAIR
No. 6828SC275

(Filed 11 December 1968)

1. Pleadings § 13— counterclaim arising out of contract sued on

In an action to recover overpayments allegedly made under a lease agreement, it was error for the court to strike defendant's counterclaim for commissions allegedly due by plaintiff to defendant under the terms of the lease upon which plaintiff's cause of action arose. G.S. 1-137.

2. Pleadings § 7— prayer for relief

It is not reversible error to strike parts of a prayer for relief even when a party is entitled to the relief set out in the prayer, but a denial of the relief to which a party is entitled is error regardless of whether or not it is set out in the prayer for relief.

3. Pleadings § 7— prayer for relief — necessity

A party is entitled to the relief which the allegations in the pleadings justify, it not being necessary that there be a prayer for relief or that the prayer for relief contain a correct statement of the relief to which the party is entitled.

4. Trial § 40; Pleadings § 37— issues submitted — discretion of trial judge

While it is ordinarily within the sound discretion of the trial judge as to what issues shall be submitted to the jury and the form thereof, G.S. 1-200 requires the judge to submit such issues as are necessary to settle the material controversies arising on the pleadings.

5. Trial § 42— sufficiency of verdict

The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment.

6. Judgments § 3; Pleadings § 37— judgment must conform to verdict

The judgment must be supported by and conform to the verdict of the jury in all substantial particulars.

7. Judgments § 3— effect of failure of verdict to support judgment

Where neither the verdict rendered by the jury in response to the single issue submitted to them nor the admissions in the record will support the judgment rendered by the court, the cause is remanded for a new trial.

APPEAL by defendant from *Thornburg, S.J.*, 22 April 1968 Session of BUNCOMBE Superior Court.

On 30 April 1960 the plaintiff and the defendant James H. Fair (individually) entered into a lease agreement whereby the plaintiff leased certain property owned by the defendant and used as a service station. The term of the lease was four years with an option to

renew for an additional five years. During the original term, the plaintiff paid and the defendant accepted a rental payment of $125 per month. Commencing with the renewal term beginning on 1 May 1964, the defendant refused to accept any rental payments tendered by the plaintiff until the payment that was made in June 1965. The check issued by the plaintiff to the defendant dated 1 June 1965 was in the amount of $1,750 and was accompanied by a letter noting that it was for the accrued rental from 30 April 1964 to 8 July 1965. The defendant endorsed this check and deposited it in the Black Mountain Savings and Loan Association. In the succeeding months, the following checks were issued by the plaintiff to the defendant for rent: July, $1,875; August, $2,000; September, $2,125; October, $2,250. Each of these checks was designated as covering the entire rental due for the period 30 April 1964 through the current month. Each check was accompanied by a letter stating that all checks previously issued had not been cashed and payment had been stopped thereon. Payment had not been effectively stopped, and all of these checks were cashed by the defendant so that he received the total sum of $10,000 from the plaintiff. The plaintiff contends that the defendant is entitled to only $2,250 of this amount and seeks to recover the overpayment of $7,750. Defendant contended in a counterclaim, which was stricken, that the plaintiff owes $75,900 in commission payments on the lease agreement for the period 1 June 1960 through 28 February 1966. Only one issue was submitted to the jury who returned a verdict in favor of the plaintiff. Judgment was entered as follows:

> "This cause coming on to be heard and being heard before the undersigned, Judge holding the April 22, 1968, Civil 'A' Session of the Superior Court of Buncombe County, and a jury, and the plaintiff having offered evidence and the defendant having elected not to offer evidence, the following issue was submitted to the jury and answered as follows:
>
> Did the defendant James H. Fair receive from the plaintiff the sum of $7,750.00, which belonged to the plaintiff, as alleged in the Complaint?
>
> 'Yes.'

Upon the foregoing verdict, the Court ADJUDGES:

1. That the plaintiff is entitled to recover of the defendant James H. Fair the sum of Seven Thousand Seven Hundred Fifty ($7,750.00) Dollars, which amount is reduced by the amount of One Hundred Twenty-five ($125.00) Dollars for

each calendar month after October, 1965, that the plaintiff has occupied the leased premises, including April, 1968, being thirty (30) months, for a total reduction of Three Thousand Seven Hundred Fifty ($3,750.00) Dollars.

2. That the plaintiff have and recover judgment of the defendant James H. Fair in the amount of Four Thousand ($4,000.00) Dollars, together with interest at the rate of six (6%) per cent per annum from this date until paid.

3. That the plaintiff be relieved of any further payment of rent to the defendant James H. Fair until said judgment is paid and satisfied in full.

4. That the defendant James H. Fair is hereby ORDERED to turn over to the Clerk of the Superior Court all checks issued to him in payment of rent from July, 1964, through May, 1965, and he is permanently restrained and enjoined from endorsing or presenting said checks for payment.

5. That the plaintiff and the surety on its bond are hereby discharged of their obligation filed with this Court dated the 17th day of November, 1965.

6. That the defendant James H. Fair pay the costs of this action to be taxed by the Clerk."

The defendant excepted, assigned error, and appealed to the Court of Appeals.

Landon Roberts for plaintiff appellee.

Cecil C. Jackson, Jr., for defendant appellants.

MALLARD, C.J.

Defendant Esther Fair did not appeal. No judgment was entered against her. Plaintiff's case against her, if it has one, is not submitted on this record.

When this case was called for trial in this Court, defendant demurred *ore tenus*. This demurrer has no merit and is denied.

[1] Defendant James H. Fair in his answer set up a counterclaim in which he asserted that he is entitled to recover a total of $75,900 for unpaid commissions due under the terms of the lease, a copy of which he attaches, and on which plaintiff's cause of action is founded. Upon motion of plaintiff the counterclaim was stricken. We are of the opinion and so hold that it was proper for the defendant to as-

sert a counterclaim for commissions due by plaintiff to defendant under the terms of the lease upon which plaintiff's cause of action arose. G.S. 1-137; 1 McIntosh, N. C. Practice 2d, § 1240; *Rubber Co. v. Distributors, Inc.,* 251 N.C. 406, 111 S.E. 2d 614; *Burns v. Oil Corporation,* 246 N.C. 266, 98 S.E. 2d 339.

It was error for the court to allow plaintiff's motion to strike the defendant James H. Fair's "Further Answer, Defense and Counterclaim." Defendant James H. Fair was entitled to allege in this cause a breach of the lease agreement sued on by plaintiff. We are not concerned here with whether the defendant will recover in view of the factual situation and the provisions of paragraph VI of the lease agreement. But we are concerned here with defendant's *right to assert a counterclaim* against the plaintiff based on nonpayment of commissions *alleged* to be due under the lease. Clearly, the counterclaim set out here is permissible in that it is an alleged existing cause of action connected with plaintiff's action. *Amusement Co. v. Tarkington,* 247 N.C. 444, 101 S.E. 2d 398; *Finance Co. v. Simmons,* 247 N.C. 724, 102 S.E. 2d 119; *Garrett v. Love,* 89 N.C. 205.

[2, 3] Defendant James H. Fair also contends that the court committed error in striking portions of his prayer for relief. It is not reversible error to strike parts of a prayer for relief even when a party is entitled to the relief set out in the prayer for relief. However, a denial of the relief to which a party is entitled is error, regardless of whether or not it is set out in the prayer for relief. It is well-settled law in North Carolina that a party is entitled to the relief which the allegations in the pleadings will justify. *Bruton v. Bland,* 260 N.C. 429, 132 S.E. 2d 910. It is not necessary that there be a prayer for relief or that the prayer for relief contain a correct statement of the relief to which the party is entitled. 2 McIntosh, N. C. Practice 2d, §§ 999(1), 1694.

Defendant assigns as error the failure of the court to submit more than one issue and contends that the issue submitted was ambiguous. G.S. 1-200 requires:

> "Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues arising upon the pleadings, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reduced to writing, before or during the trial."

[4] Ordinarily, it is within the sound discretion of the trial judge as to what issues shall be submitted to the jury and the form

thereof. The statute, however, requires the judge to submit such issues as are necessary to settle the material controversies arising on the pleadings. *Griffin v. Insurance Co.*, 225 N.C. 684, 36 S.E. 2d 225.

In *Denmark v. R. R.*, 107 N.C. 185, 12 S.E. 54, the Supreme Court said:

> "1. Only issues of fact raised by the pleadings must be submitted to the jury.
>
> 2. The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment.
>
> 3. Of the issues raised by the pleadings, the judge who tries the case may in his discretion submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence, through the medium of pertinent instructions on some issue passed upon."

In *Baker v. Construction Corp.*, 255 N.C. 302, 121 S.E. 2d 731, the Court said:

> " 'The submission of issues is not a mere matter within the discretion of the court, but it is now a mandatory requirement of the law, and a failure to observe this requirement will entitle the party *who has not in some way lost the right* to have the error of the court corrected.' . . .
>
> . . . 'If the parties consent to the issues submitted, or do not object at the time or ask for different or additional issues, the objection cannot be made later.' McIntosh, *opus* cited, § 510. If defendant had not tendered issues or otherwise objected to trial on the issue submitted, it could not do so on this appeal."

In the instant case the judge submitted the following issue:

> "Did the defendant James H. Fair receive from the plaintiff the sum of $7,750.00, which belonged to the plaintiff, as alleged in the Complaint?"

[5, 6] Defendant excepted to the submission of this issue and failed to tender issues. However, there is error in the judgment of the court below in that the verdict rendered by the jury will not support the judgment entered by the court. As noted above, one of the requirements laid down by the Court in *Denmark v. R. R., supra,* is that the verdict "must establish facts sufficient to enable the court to proceed to judgment." In the present case the verdict rendered by the jury in response to the single issue that was submitted to

them merely establishes that the defendant has received $7,750 "which belonged" to the plaintiff. It does not even establish that the defendant is indebted to the plaintiff. The words in the issue "as alleged in the complaint" are not sufficient to explain or justify the judgment entered. "It is thoroughly settled in law that in all cases tried by a jury the judgment must be supported by and conform to the verdict in all substantial particulars." *Russell v. Hamlett,* 261 N.C. 603, 135 S.E. 2d 547. See also *Supply Co. v. Horton,* 220 N.C. 373, 17 S.E. 2d 493. In the present case the judgment of the court goes far beyond those matters answered by the jury in its verdict. The judgment of the court that the plaintiff is entitled to recover $7,750 of the defendant, reduced by $3,750 for a total recovery of $4,000, is inconsistent with the verdict of the jury to the effect that the defendant had received $7,750 from the plaintiff. The jury did not pass on the issue of whether the money was wrongfully detained by the defendant or whether in fact the defendant was indebted to the plaintiff for money had and received or whether defendant was entitled to rent in the amount allotted by the court in the judgment.

[7] In the absence of issues answered by the jury, or admissions in the record sufficient to reasonably justify the judgment rendered, this case is remanded for a new trial.

For the reasons stated, there must be a

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. CONNIE BAKER #1586; RONALD CHAMBLEE #1589

No. 686SC327

(Filed 11 December 1968)

1. Criminal Law § 106— sufficiency of evidence to overrule nonsuit

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.

2. Robbery § 4— sufficiency of evidence

The circumstantial evidence presented by the State *is held* sufficient to be submitted to the jury as to defendants' guilt of armed robbery.

3. Criminal Law § 106— sufficiency of circumstantial evidence

The test of the sufficiency of circumstantial evidence to withstand a motion for nonsuit is the same as the rule applicable to direct evidence.

APPEAL by defendants from *Mintz, J.*, 8 April 1968 Session (second week), HERTFORD Superior Court.

The defendants were charged in separate bills of indictment with the felony of robbery with firearms on 5 January 1968 of money from the person of one Dennis Babb. Connie Baker was charged in case No. 1586, and Ronald Chamblee was charged in case No. 1589. The cases were consolidated for trial and for the purposes of this appeal. Upon their pleas of not guilty defendants were tried by jury which returned a verdict of guilty as charged as to each defendant. From the verdicts and judgments of confinement each defendant appealed.

T. W. Bruton, Attorney General, by Bernard A. Harrell, Assistant Attorney General, for the State.

Jones, Jones & Jones, by Joseph J. Flythe, for the defendants.

BROCK, J.

[1] The sole assignment of error brought forward for consideration is to the denial of defendants' motions for judgment of nonsuit. Each of the defendants rested without offering evidence, and we, therefore, must consider the State's evidence in the light most favorable to it. And 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, we must hold that the cases were properly submitted to the jury. *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374.

The evidence for the State consisted of the testimony of witnesses and of exhibits as follows:

Dennis Babb testified that on the night of 5 January 1968 he was in Hertford County riding with Jesse Hoggard and two girls. That he and one of the girls were in the back seat, that Jesse was driving and the other girl was in the front seat. That at about 9:30 p.m. they went to a place near Ahoskie called the "Big Oak," which he described as a parking place for teenagers. That after having been there about 15 or 20 minutes, two "fellows" came up to the driver's side of the car with a flashlight and indicated that they wanted the window rolled down. That Jesse rolled the glass down

and one of the two "fellows" poked a rifle in the window and demanded that Jesse turn over his wallet. That about that time an automobile pulled up approximately beside them and the person with the flashlight shined the light of the flashlight into the eyes of the driver of the other car and the driver of the other car drove on down the street. That then the two persons turned back to them and one of them said, "I will give you three seconds to hand over your wallet." That Jesse could not find his wallet and that the witness pulled out his wallet and handed the person outside the car $83.00. That the persons outside the car then told them "that man is going to the cops; there is going to be a raid back here in a few minutes; you'd better leave." That they drove away and went straight to the police station where they reported the incident. This witness further testified that he did not know who the people were that came up outside the car and got his money, but that he handed it to them because one was threatening him with a gun. That he could tell that both of them were male persons.

Jesse Hoggard testified that on the night of 5 January 1968 he was driving his father's 1966 blue Ford automobile and that Dennis Babb and two girls were riding with him. This witness's testimony corroborated that of Dennis Babb with respect to what transpired at the "Big Oak." In addition, this witness testified that the person that had the gun had on a black slick coat. That he could not tell much about the other person, but that both of them were wearing three-quarter length coats, and that the gun looked like a rifle to him because it was too long to be a pistol.

Glenn Carawan testified that he lived in a subdivision known as Colonial Acres near Ahoskie, and that the "Big Oak" is located near the subdivision and about the equivalent of two blocks from his home. That on the night of 5 January 1968 he arrived home from attending a ball game at about 9:30 and found a white 1962 Chevrolet automobile parked near the front of his house. That he drove his car up to the front of the white Chevrolet with his lights on and someone raised up from underneath the driver's wheel in that white car, and that a second person raised up in the back seat. That he told the person at the wheel that he would appreciate it if he would move because he did not like anyone parking in front of his home. That thereafter the person backed the white Chevrolet up and turned down a street near the end of the subdivision. He further testified that he decided to observe what was going on around the "Big Oak" and drove down to that location. That when he arrived, he saw a blue 1966 Ford automobile parked and saw two men with a flashlight standing on the driver's side of the parked blue Ford

automobile. That as he came near it, he determined that it was two colored boys about the age of 20 years. That each of them was wearing a three-quarter length black jacket and small-brimmed hats. That as he neared the parked Ford automobile, the colored boy with the flashlight shined the light in his eyes and he decided to drive on away. That he drove about 200 to 300 feet and turned around and was on his way back to the "Big Oak" when the blue Ford drove towards him with its bright lights on and that he could not see anything. That he decided that he would then go to the police station to report what he had seen.

Gloria Jean Beasley testified that on the night of 5 January 1968 she was riding in a beige, almost white, 1962 Chevrolet automobile with the two defendants and that one Thomas Chamblee was driving. That the driver parked the car and the two defendants got out and went into the woods. That while they were so parked, Mr. Carawan came up and asked them to move. That she was in the back seat. That Thomas Chamblee backed up and drove around the block and came back and parked and that the two defendants got back into the car and told Thomas to drive. That they had waited on the two defendants about 15 to 20 minutes. That she did not see the two defendants take anything with them when they got out of the car and walked into the woods, but when they came back to the car, they were both running and Ronald Chamblee had a gun in his hands. That when they got back into the car, they started talking about what good jobs they had done. That she asked Connie Baker what he had done, and he told her to shut up, and so she did not say anything else. That the defendant Ronald Chamblee had on a black leather coat and was wearing a hunting cap. That the defendant Connie Baker had on a short suede-like coat and a black hat.

Deputy Sheriff Liverman testified that he arrested the two defendants on the charge of armed robbery. That he arrested the defendant Ronald Chamblee at his home. That when he dressed, he put on a three-quarter length coat which was marked as State's Exhibit A. That when he arrested the defendant Connie Baker, that he put on the coat which was marked State's Exhibit B. That when he talked to them, both of them denied taking part in the robbery.

The two coats marked State's Exhibit A and State's Exhibit B were earlier identified by the witness Gloria Jean Beasley as the coats that the defendants were wearing the night of 5 January 1968.

The foregoing evidence is substantial evidence of the following elements of the offense charged: That two male persons, wearing dark three-quarter length coats, with the use of a gun whereby the

life of Dennis Babb was threatened, took from the person of Dennis Babb the sum of $83.00, the property of Dennis Babb, with the intent to permanently deprive Dennis Babb of the same, and to convert it to their own use.

The foregoing evidence is also substantial evidence of the following: That at the time of the felonious taking Dennis Babb was sitting in a car at the "Big Oak." That the two defendants rode in a car to a point approximately two blocks from the "Big Oak." That each of the two defendants was wearing a dark three-quarter, or short coat. That the defendants got out of their car and walked into the woods. That two male persons wearing dark three-quarter or short coats, came to the car at the "Big Oak" in which Dennis Babb was seated and, with a gun pointed into the window of the car, demanded his money. That the two male persons then told Dennis Babb that the police were going to raid the place and for them to leave, and that Dennis Babb and his companions drove away. That the defendants returned to their car in about 15 to 20 minutes after they had left it. That when they returned to the car they were running, and one of them had a gun. That they got into the car and told the driver to "drive," and remarked that they had done a good job.

[2] We hold that all of this evidence when taken together constitutes substantial circumstantial evidence that the two defendants were the two male persons who robbed Dennis Babb at the "Big Oak," and required submission of the cases to the jury.

[3] The test of the sufficiency of circumstantial evidence to withstand a motion for nonsuit is the same as the rule applicable to direct evidence. It is not necessary that the circumstantial evidence must exclude every reasonable hypothesis of innocence before the cases can be submitted to the jury. If the State has offered substantial evidence of defendants' guilt, it becomes a question for the jury whether this evidence excludes every reasonable hypothesis of innocence and convinces them beyond a reasonable doubt that the defendants, and not some other persons, committed the crime charged. *State v. Bailiff,* 2 N.C. App. 608; *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374.

In case No. 1586, No error.

In case No. 1589, No error.

BRITT and PARKER, JJ., concur.

LILLIE MAE BARBOUR v. CITY COACH COMPANY, A CORPORATION
No. 6827SC305

(Filed 11 December 1968)

1. Negligence § 34— sufficiency of evidence of contributory negligence

If there is any competent evidence tending to establish the defense of contributory negligence, whether from plaintiff or defendant, or inferences of fact fairly deducible therefrom tending to support the defendant's affirmative defense, the defendant is entitled to have the issue submitted to the jury with appropriate instructions from the court.

2. Carriers § 19; Negligence § 34— sufficiency of evidence of contributory negligence of bus passenger

In an action by plaintiff bus passenger for injuries received from a fall when defendant's bus started before plaintiff was seated, the issue of plaintiff's contributory negligence was properly submitted to the jury where there was evidence tending to show that plaintiff boarded a nearly empty bus and had ample opportunity to be seated, but chose instead either to pass numerous empty seats and negotiate her way toward the rear of the bus or to stand in the aisle of the bus while the bus was in motion.

3. Negligence §§ 26, 34— contributory negligence — allegation and proof

A defendant must prove contributory negligence substantially as alleged in the answer.

4. Carriers § 19; Negligence §§ 23, 33— contributory negligence — conformity of pleading and proof

In an action for personal injuries received when defendant's bus started before plaintiff was seated, an allegation in defendant's answer that plaintiff "stood in the aisle of the bus instead of being seated" *is held* to allege contributory negligence of plaintiff in substantial conformity with defendant's evidence tending to show that plaintiff had ample opportunity to be seated but chose to walk past empty seats to the rear of the bus.

5. Carriers § 19; Trial § 33— error in charge cured by further instructions

In an action for personal injuries received by a passenger on defendant's bus, error committed by the court in defining contributory negligence by its statement that the same rule of due care imposed upon the defendant applies equally to the plaintiff *is held* cured by the court's further instruction that "I told you about due care a little while ago, but this action is brought against what is known in law as a common carrier" and the court's statement of the proper standard of care required of the defendant common carrier.

APPEAL by plaintiff from *Froneberger, J.*, at the 13 May 1968 Session of GASTON Superior Court.

Plaintiff filed complaint 17 January 1967 alleging: That about 7:10 a.m. on 10 May 1966 she boarded defendant's bus at the inter-

section of Broad Street and East Main Avenue in the city of Gastonia, N. C.; that after she boarded the bus and paid her fare and as she was finding her seat, defendant's driver abruptly started the bus south on Broad Street and swerved west on Airline Avenue with such force that plaintiff was thrown down and fell into the rear stairwell of the bus, resulting in injury.

Defendant answered, denying plaintiff's allegations of negligence and alleging, as a further answer and defense, that defendant's agent waited until plaintiff could or ought to have been seated before starting the bus and that the plaintiff was negligent in "that the plaintiff carelessly and negligently stood in the aisle of the bus instead of being seated and was standing, talking to a passenger."

Plaintiff testified that, because the bus was nearly full, she was moving to the available seats in the rear of the bus; that she was holding on to seats until she was at a position even with the rear door where there were no seats, and that at that moment the driver swerved around the corner, resulting in her fall and injury.

The evidence favorable to defendant tended to show that there were only five or six passengers on the bus at the time of the accident and that there were many vacant seats near the front; that plaintiff was a regular passenger and defendant's driver waited for the customary interval after plaintiff entered the bus. Defendant's driver testified that after waiting he started the bus down Broad Street, stopped at the railroad tracks, and then drove on to the intersection of Broad Street and Airline Avenue, where the accident occurred, the total distance being some 204 feet.

The court submitted issues of negligence and contributory negligence, both of which were answered in the affirmative. Plaintiff appeals from judgment on this verdict.

Frank P. Cooke and Childers & Fowler by Henry L. Fowler, Jr., for plaintiff appellant.

Ernest R. Warren and Sanders & Lafar by Julius T. Sanders for defendant appellee.

BRITT, J.

The first issue presented by this appeal is whether the court erred in submitting an issue of contributory negligence to the jury.

[1] On the question of sufficiency of evidence of contributory negligence to require submission of the issue to the jury, the rule was well expressed in the case of *Kennedy v. Smith,* 226 N.C. 514, 39

S.E. 2d 380, where Devin, J. (later C.J.), stated: "True, there was other evidence on the part of plaintiff, and the burden of proof on the issue of contributory negligence was on the defendant, but if there was any competent evidence tending to establish this defense, whether from the plaintiff or defendant, or inferences of fact fairly deducible therefrom tending to support the defendant's affirmative defense, the defendant was entitled to have the issue submitted to the jury with appropriate instructions from the court." Likewise, in reversing for failure to submit the issue of contributory negligence, is the case of *Absher v. Raleigh,* 211 N.C. 567, 190 S.E. 897, where Stacy, C.J., states: "'* * * The right of trial by jury should be carefully preserved, and if there is any evidence, more than a scintilla, it is a matter for the jury and not the court' — Clarkson, J., in *Moseley v. R. R.,* 197 N.C., 628, 150 S.E., 184." See also *Phillips v. Nessmith,* 226 N.C. 173, 37 S.E. 2d 178.

[2] In the instant case, the evidence was sufficient, if believed, to show that the plaintiff boarded a nearly empty bus and had ample opportunity to be seated, but chose instead either to pass numerous empty seats and negotiate her way toward the rear of the bus, or to stand in the aisle while the bus was in motion. Such a showing was sufficient to justify the trial judge's allowing the jury to determine whether plaintiff, under all of the circumstances of the case, had exercised due care for her own safety.

We must next determine if contributory negligence was properly pleaded. G.S. 1-139 provides: "In all actions to recover damages by reason of negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial."

[3, 4] We hold that defendant has substantially complied with this statute. The defendant expressly alleged that the plaintiff "stood in the aisle of the bus instead of being seated"; it is not reasonable to make a distinction between this allegation and walking past empty seats to the rear of the bus. This conclusion is supported by the case of *Moore v. Hales,* 266 N.C. 482, 146 S.E. 2d 385, where the court stated: "A plaintiff must prove negligence substantially as alleged in his complaint. *Messick v. Turnage,* 240 N.C. 625, 83 S.E. 2d 654. It is equally true that a defendant must prove (contributory) negligence substantially as alleged in his answer."

In the *Moore* case, however, it was found that the defendant's proof of contributory negligence did not match his allegation, since he had alleged that he, the defendant, was in the intersection before the plaintiff reached the intersection, while his proof indicated that

plaintiff was contributorily negligent in that, at a time when she could have avoided the accident, she should have seen that the defendant would fail to obey the stop sign facing defendant at the intersection. The court concluded that the allegations and the proof of contributory negligence were based on two different sets of facts.

In the case at hand, the allegations and evidence are based upon the same facts, that is, that empty seats were available near the front, but the plaintiff undertook to go to the rear of the bus while the bus was in motion. Obviously, one must be standing in order to walk. Further support of this view is given by the case of *Douglas v. Mallison,* 265 N.C. 362, 144 S.E. 2d 138, where the defendant alleged that plaintiff was negligent in that "(e) Plaintiff knew or should have known by the exercise of reasonable care, observation and prudence, that the A-frame folded back towards where he was seated for the purpose of transportation * * * and plaintiff failed and neglected to take precautions to prevent said frame from falling back towards him * * *." This was held sufficient to support a nonsuit for contributory negligence as a matter of law on the view that plaintiff should have known that the machine, used in moving pulpwood logs, lacked a chain brace on the right side and was dangerous in that condition.

[5] Plaintiff contends that there was error in the charge, arguing that the charge confused the jury as to the standard of care imposed on the plaintiff relative to that imposed on the defendant, a common carrier. In defining contributory negligence, the court said: "The same rule of due care or ordinary care imposed upon the defendant in this matter applies equally to the plaintiff." Granting that left alone this would be error, it was cured a few moments later when the court said: "Ladies and gentlemen, I told you about due care a little while ago, but this action is brought against what is known in law as a common carrier." The court then went on to state the proper standard of care required of the defendant. By expressly relating the two passages of his charge, the judge obviated any possibility of confusion. 7 Strong, N. C. Index 2d, Trial, § 33, p. 330.

Plaintiff's contention that the court erroneously stated the contentions of the parties and the evidence cannot be sustained. The record shows no attempt by the plaintiff to correct any minor inaccuracies. As stated earlier, the pleadings support the contention that plaintiff had remained standing of her own accord at a time when she might have been seated. Moreover, the judge clearly instructed the jury that they were to be guided by their own recollec-

tion of the evidence, rather than any statements of the evidence that might be made by the court in explaining the law.

We have considered all assignments of error brought forward in plaintiff's brief, but finding them without merit, they are overruled. The judgment of the superior court is

Affirmed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. GARLAND LANGLEY
No. 687SC270

(Filed 11 December 1968)

1. Criminal Law § 143— notice of intention to pray revocation of probationary judgment — validity of service

It is not a requisite to the validity of the service of notice of intention to pray revocation of a probationary judgment that the defendant sign the notice. G.S. 15-200.1.

2. Criminal Law § 143— essentials of notice of intention to pray revocation of probation

When a defendant is not arrested pursuant to G.S. 15-200, it is the better practice for the probation officer's written notice of intention to pray revocation of suspension or probation to contain at least the date, time and place of the session of court at which the probation officer intends to pray the revocation, but a defendant is not prejudiced by the lack of such information in the notice when he voluntarily appears at the appointed time and place and participates in the hearing.

3. Criminal Law § 143— revocation of probation proceeding — motion for continuance

In a proceeding to revoke defendant's probation, motion by defendant's attorney for continuance in order to have another attorney present is addressed to the sound discretion of the trial court, whose ruling thereon will not be disturbed in the absence of abuse of discretion.

4. Criminal Law § 143— competency of probation officer's report

Where probation officer was present at the revocation hearing and was cross-examined by defendant's counsel, there was no error in admitting in evidence the officer's verified report asserting that defendant had violated the condition of probation.

5. Criminal Law § 143— terms of probation judgment — necessity for introduction of judgment

When the judge holding the revocation hearing has the probation judg-

ment before him, it is not necessary to formally introduce it into evidence, although some reference to the judgment and the specific terms thereof that the defendant is alleged to have violated should appear in the record of the hearing.

6. Criminal Law § 143— exception to order revoking probation — sufficiency of findings

An exception to the judgment or order revoking probation and putting into effect the suspended sentence challenges the sufficiency of the findings of fact by the judge to support his order.

7. Criminal Law § 143— judgment revoking probation — necessity to make specific findings

Where, in a proceeding to revoke a judgment of probation, the trial court fails to make specific findings as to what condition of probation defendant had violated, the order revoking the probation judgment will be vacated and the cause remanded for a specific finding relating thereto.

APPEAL by defendant from *Parker, J.*, March 1968 Criminal Session of NASH Superior Court.

On Friday, 22 March 1968, pursuant to a letter from J. Paul Shaw, Jr., a State Probation Officer, defendant went to Mr. Shaw's office. While there the defendant was given a paper writing notifying him that the probation officer intended to submit a report to the court, a copy of which was attached thereto, of the defendant's alleged violation of the conditions of the probation judgment. Defendant was orally notified to be in court on Monday, 25 March 1968. Defendant appeared in court on Monday, 25 March 1968, a hearing was had, and the following "Order Revoking Probation" was entered:

> "The Court having heard evidence from the State and the defendant not having offered any evidence but being represented by counsel, Hon. Harold D. Cooley, as appears of record in the case, and having heard argument on behalf of the defendant and the State, the Court finds as a fact that the defendant, Garland Langley, has failed and refused to comply with and has willfully violated the terms of his suspended sentence heretofore entered by the Hon. Elbert S. Peel, Jr., Judge Presiding at the May 31, 1966, Superior Court of Nash County;
>
> WHEREUPON, IT IS ORDERED that the probationary sentence is hereby revoked and that commitment issue to the end that the defendant serve the sentence of 3 years therein imposed.
>
> IT IS SO ORDERED, this 25th day of March, 1968."

Upon the entry of the order, the defendant appeals, assigning error.

Attorney General T. W. Bruton and Staff Attorney Dale Shepherd for the State.

Harold D. Cooley and Vernon F. Daughtridge for defendant appellant.

MALLARD, C.J.

[1, 2] Defendant was represented by his attorney, Harold D. Cooley, at the probation revocation hearing held on Monday, 25 March 1968. The probation officer had notified defendant in writing of the alleged violation of the probation judgment on Friday, 22 March 1968, and instructed him to be in court on 25 March 1968. Defendant refused to sign the instrument submitted to him by the probation officer acknowledging receipt of the notice. It is not a requisite to the validity of the service of the notice that the defendant sign it. The statute requires that the probation officer, or other named official, "shall inform the probationer in writing of his intention to pray the court to revoke probation or suspension and to put the suspended sentence into effect, and shall set forth in writing the grounds upon which revocation is prayed." G.S. 15-200.1. When a defendant is not arrested pursuant to G.S. 15-200, we think that it would be the better practice for the written notice of the probation officer to contain at least the date, time, and place of the session of court at which the probation officer intends to pray the court to revoke the probation and to put the suspended sentence into effect. However, when a defendant voluntarily appears at the appointed time and place and participates in the hearing as the defendant did in this case, he is not prejudiced by the failure of the written notice to contain such information.

[3] Defendant contends that the court committed error in failing to allow his oral motion for a continuance. The motion for continuance, in order to have another attorney present, made by one of defendant's attorneys, was addressed to the sound discretion of Judge Parker, and no abuse of discretion is shown. *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476.

[4] Defendant assigns as error the admission into evidence of the report of the probation officer. The verified report of the probation officer asserted that the defendant had violated the condition of probation that he shall "violate no penal law of any State or the Federal Government and be of general good behavior." The probation officer was present at the hearing and was cross-examined by counsel for the defendant. This assignment of error is overruled. *State v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53.

[5] Defendant contends that the trial judge committed error in taking judicial notice of the terms and conditions of the defendant's suspended sentence and conditions of probation without the State having introduced the judgment in evidence. In *State v. Duncan, supra,* it is said, "Proceedings to revoke probation are often regarded as informal or summary." When the judge holding the revocation hearing has the probation judgment before him, it is not necessary to formally introduce it into evidence. However, some reference to the judgment and the specific terms thereof that the defendant is alleged to have violated should appear in the record of the hearing.

[6] Defendant excepted to the entry of the order of revocation and assigns it as error. Defendant argues and contends that the trial court did not find sufficient facts to support the order revoking probation and putting a three-year suspended sentence into effect. "The exception to the judgment challenges the sufficiency of the findings of fact by the judge to support his judgment putting the six months jail sentence into effect." *State v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376.

[7] The only facts found by the trial judge are that the defendant "has failed and refused to comply with and has willfully violated the terms of his suspended sentence heretofore entered by the Hon. Elbert S. Peel, Jr., Judge Presiding at the May 31, 1966, Superior Court of Nash County."

Although the order revokes a "probationary sentence," the fact found was that the defendant had violated "his suspended sentence." There is no finding by the judge as to what were the terms of "his suspended sentence" or probationary sentence or whether one was still in effect. There is no finding in what manner the defendant may have violated the conditions imposed.

In *State v. Davis,* 243 N.C. 754, 92 S.E. 2d 177, which involved the revocation of a sentence suspended upon certain conditions, the Court said:

> "Ordinarily, in hearings of this character, the findings of fact and the judgment entered thereupon are matters to be determined in the sound discretion of the court, and the exercise of that discretion in the absence of gross abuse cannot be reviewed here. (citations omitted) But, where the finding of the court does not state wherein a defendant has violated the conditions and there is a question as to the validity of one or more of the conditions imposed, the defendant is entitled to have the cause remanded for a specific finding as to wherein he has violated the conditions upon which the sentence was suspended. It

is only by such a finding that a defendant may be able to test the validity of a condition he believes to be illegal and void in the event the purported violation is based on such condition."

In the case under consideration, there is no question raised as to the validity of any of the conditions of the probation judgment. However, in the order entered by Judge Parker there is no reference to a violation of any specific condition of the probation judgment.

The Attorney General argues that it is clear that the defendant was under a probationary judgment imposed after he had pleaded *nolo contendere* to violations of the liquor laws and that on this hearing the evidence of two men, in open court, and the probation officer's report was sufficient evidence to find another violation of the liquor laws by the defendant. Conceding this to be true, there is no specific finding to that effect.

"The judge's findings of fact should be definite and not mere conclusions." *State v. Robinson, supra.* It is ordered that the order revoking the probation judgment putting the prison term into effect be vacated. This proceeding is remanded for further hearing for the judge, in the exercise of his discretion, to determine and set out in his order whether the defendant has violated the terms of the probation judgment, and if so, what specific condition or conditions therein he has violated.

Remanded.

CAMPBELL and MORRIS, JJ., concur.

STATE v. ROBERT THOMPSON, ALIAS JUNE THOMPSON

No. 6816SC450

(Filed 11 December 1968)

1. Criminal Law § 109— motion for directed verdict — consideration of evidence

Where defendant offers evidence, the court must consider all of the evidence, including that offered by defendant, upon a motion for a directed verdict.

2. Homicide § 21— evidence of cause of death

The cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know

from his own experience or knowledge that the wound was mortal in character.

3. Homicide § 21— sufficiency of evidence of cause of death

In a homicide prosecution, evidence of the State tending to show that defendant intentionally shot the deceased, that the bullet entered deceased's body at a point five or six inches below the left arm pit, that deceased spoke only briefly immediately after the shot, and that deceased was removed to a hospital where he was pronounced dead within several minutes after the shot was fired *is held* sufficient to show causal relation between the shooting and death to withstand defendant's motion for a directed verdict.

APPEAL by defendant from *Carr, J.*, June 1968 Session, ROBESON County Superior Court.

The defendant was indicted for murder in the first degree for killing Lee Matthew Hall (Hall) on 4 May 1968. He was tried and convicted for murder in the second degree by a jury. From a sentence of not less than twenty-five nor more than thirty years in prison, he appealed, assigning as error the denial of his motion for a directed verdict of not guilty.

The evidence tends to show the following facts: that Lennis Moore (Moore), the defendant and Hall, the deceased, lived near each other in the town of Maxton, where the defendant and Hall worked in a plywood plant; the defendant borrowed Moore's automobile about 11:00 p.m., 4 May 1968, promising to be gone not over thirty minutes; the defendant failed to return the automobile; after some two hours had elapsed, Moore went looking for it; Moore, accompanied by Hall, was driving Hall's automobile; Moore found his automobile in Maxton in the recreation center yard across from the hotel, but he was unable to start it; he went into a nearby shop where he found the defendant, who upon inquiry denied that anything was wrong with the automobile; and then Moore and the defendant returned to the recreation center yard. During this time Hall had remained sitting in his own vehicle. The defendant went up to Hall and cursed him for bringing Moore to the recreation center yard. Defendant then struck Hall, who, being about forty years of age, six feet tall, and weighing 175 to 180 pounds, was much larger than the defendant. Hall requested the defendant to leave him alone as he was not bothering the defendant. However, the defendant drew a 32-caliber pistol; and, after a few more words, he stepped back and shot Hall. The deceased then stated, "June, you're killing me!" and he requested Moore to take him to the hospital. Moore and the defendant got in Hall's automobile, Moore driving and the defendant holding the deceased in his arms. They arrived at the hospital, a

trip of seven and one-half miles, in about five minutes. Hall, who never spoke again or moved, was pronounced dead at the hospital. The defendant himself testified: "I went to the hospital with him, sat right next to him on the way to the hospital, and had him in my arms when he died." There were no scratches or marks on the body other than the one bullet wound, which was located under the left arm, about five to six inches below the armpit.

T. W. Bruton, Attorney General, and Millard R. Rich, Jr., Assistant Attorney General, for the State.

William E. Timberlake and J. H. Barrington, Jr., by J. H. Barrington, Jr., Attorneys for defendant appellant.

CAMPBELL, J.

We are presented with the following as stated in the appellant's brief:

> "It is appellant's contention that in this case the State has offered evidence tending to show that deceased was shot with a pistol in the hands of appellant, that the bullet entered the body of deceased at a point six inches below the left armpit and to the rear of the center of the left arm, that deceased spoke only briefly immediately after the shot, that deceased was removed to a hospital where he was observed to be dead some several minutes after the shot; and that there is a total lack of evidence as to the proximate cause of death other than the above circumstances.
>
> Thus, appellant contends that his motion for directed verdict of not guilty entered at the close of the State's evidence should have been granted.
>
> So, also, does appellant contend his motion for directed verdict of not guilty entered at the close of all the evidence should have been granted. The only additional testimony elicited from appellant bearing on the question here argued was his testimony that deceased died 'within five minutes or so of the time he was shot.' "

[1] Had the defendant rested at the close of the State's case, he would have been entitled to have his motion for a directed verdict considered solely upon the State's evidence. Since, however, the defendant offered evidence, we must consider all of the evidence, including that offered by the defendant.

[2] There was no expert testimony showing any causal relation

between the bullet wound and the death. In *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844, Ervin, J., stated:

> "The State did not undertake to show any causal relation between the wound and the death by a medical expert. For this reason, the question arises whether the cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony. The law is realistic when it fashions rules of evidence for use in the search for truth. The cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character."

While the cause of death can be proven without the necessity of an autopsy or the opinion of a physician or other expert witness, nevertheless, we again call attention to the observation of Ervin, J., in *State v. Minton, supra.* ". . . (C)raftsmanship will undoubtedly prompt solicitors to offer expert medical testimony as to the cause of death in all prosecutions for unlawful homicide where such testimony is available." See also *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495.

[3] We hold that the evidence, including the shot fired by the defendant, the location of the bullet wound and the circumstances surrounding the death shortly thereafter, afford such causal relation between the shooting and the death as to withstand the motion of the defendant for a directed verdict and to require submission to the jury under proper instruction for a finding of fact as to the cause of death.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. CLARENCE FARRELL, JR.

No. 683SC433

(Filed 11 December 1968)

1. Criminal Law § 155— time for docketing record on appeal — extension of time by trial court for docketing record

If the record on appeal is not docketed within ninety days after the date of the judgment, order, decree, or determination appealed from, the

case may be dismissed under Rule 17 if the appellee shall file a proper certificate prior to the docketing of such record on appeal; provided, the trial tribunal may, for good cause, extend the time not exceeding sixty days for docketing the record on appeal. Rule of Practice in the Court of Appeals No. 5.

2. Criminal Law § 155— extension of time for docketing record on appeal

Authority of the trial tribunal pursuant to Rule 5 to extend, for good cause, the time for docketing the record on appeal in the Court of Appeals cannot be accomplished by an order allowing the appellant additional time to serve his case on appeal upon the appellee; therefore, an appeal docketed more than ninety days after the date of entry of judgment is subject to dismissal notwithstanding the trial court had extended the time for serving defendant's case on appeal upon the Solicitor until a date more than ninety days after entry of the judgment.

3. Criminal Law § 155— rule prescribing time for docketing appeal is mandatory

Neither the judges, solicitors, attorneys or parties have the right to ignore or dispense with the rule requiring docketing within the time prescribed, the Rules of Practice of the Court of Appeals being mandatory and not directory.

4. Criminal Law § 155— dismissal of appeal not aptly docketed

The Court of Appeals may *ex mero motu* dismiss an appeal where the record on appeal is not docketed within the time prescribed by the rules.

APPEAL by defendant from *Peel, J.*, 13 May 1968 Session, PITT Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the felony of burglary in the first degree. Upon his plea of not guilty he was tried by jury, which returned a verdict of guilty of breaking and entering without intent to commit a felony. The judgment of the court was that defendant be confined in the common jail of Pitt County for a term of 24 months and assigned to work under the direction of the Department of Correction. The court further recommended that defendant be confined in a youthful offenders' camp. From the verdict and judgment defendant gave notice of appeal.

T. W. Bruton, Attorney General, by Christine Y. Denson, Staff Attorney, for the State.

Chambers, Stein, Ferguson & Lanning, and John Harmon, by James E. Ferguson, II, for the defendant.

BROCK, J.

Both the judgment and the notice of appeal were entered in the Superior Court on 17 May 1968. At that time Judge Peel entered

an order allowing defendant 60 days to serve case on appeal and allowed the State 30 days thereafter to serve countercase or exceptions. If the full time allowed by this order had been used, the record on appeal could not reasonably have been docketed in this Court within the 90 days required by our rules.

[1, 2] We reiterate here what we explained in *Smith v. Starnes*, 1 N.C. App. 192, 160 S.E. 2d 547:

> "The judgment appealed from in this case was signed on the 4th day of November 1967. The record on appeal was docketed in the Court of Appeals on the 4th day of March 1968. This was 31 days too late, and therefore subject to dismissal. Rule 5 of the *Rules of Practice in the Court of Appeals of North Carolina* provides in part as follows:
>
> 'If the record on appeal is not docketed *within ninety days* after the date of the judgment, order, decree, or determination appealed from, the case may be dismissed under Rule 17, if the appellee shall file a proper certificate prior to the docketing of such record on appeal; provided, the trial tribunal may, *for good cause,* extend the time not exceeding sixty days, *for docketing the record on appeal.*' (Emphasis added.)
>
> "The time for docketing the record on appeal in the Court of Appeals is determined by Rule 5, *supra,* and should not be confused with the time allowed for serving case on appeal and the time allowed for serving countercase or exceptions. The case on appeal, and the countercase or exceptions, and the settlement of case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under Rule 5. The trial tribunal, upon motion by appellant, and upon a finding of *good cause* therefor, may enter an order extending the time *for docketing the record on appeal* in the Court of Appeals not exceeding a period of 60 days beyond the 90 days provided by Rule 5. However, this cannot be accomplished by an order allowing additional time to serve case on appeal."

In addition to the original order setting the time for service of case on appeal, on 15 July 1968 defendant obtained an order allowing him an additional 30 days to serve his case on appeal. Thereafter, on 15 August 1968, he obtained another order further allowing him an additional 30 days to serve case on appeal, and allowing the State 30 days thereafter to serve countercase or exceptions. (Each of these extensions of time was consented to by the Solicitor and upon this record we make no decision whether the trial judge

has the authority under G.S. 1-282, with or without the consent of the parties, to extend the time for serving case on appeal beyond that contained in the original order extending the statutory time.) With the entry of the last order extending time to serve case on appeal, the defendant had obtained a total of 120 days to serve his case on appeal with the State allowed 30 days thereafter to serve countercase or exceptions. If the parties were to use all of the time allowed, this would constitute 150 days before the record on appeal could be ready for docketing in this Court; and longer than 150 days if it became necessary for the trial judge to settle the case on appeal.

At no time did defendant secure an order, upon a showing of good cause, for an extension of time to docket the record on appeal in this Court. But, had he done so, the trial tribunal would have been authorized only to extend the time for docketing *not exceeding a period of 60 days beyond the 90 days provided by Rule 5, supra.* The judgment appealed from was entered 17 May 1968, and had the defendant obtained an order extending the time to docket for the full 60 days beyond the 90 days provided by Rule 5, *supra,* the time for docketing the record on appeal in this Court would have expired on 14 October 1968. The defendant docketed his record on appeal in this court on 17 October 1968. So, in any event, he would be late in docketing his record on appeal.

Presumably counsel prepared the appeal entries, and also prepared the orders extending time for serving case on appeal. Counsel is responsible for making certain that appellate rules are complied with. The Rules of Practice in the Court of Appeals of North Carolina were adopted by the Supreme Court of North Carolina on 25 September 1967, and copies were immediately distributed by the Clerk of this Court to the Clerks of the Superior Courts for use by the members of the Bar. The North Carolina Bar Association published our Rules in its November 1967 issue of *Bar Notes.* Our Rules were also published in pamphlet No. 4 of the Advance Sheets for Vol. 271 of the North Carolina Reports. Also, in 1967 West Publishing Company published a pamphlet containing the Rules and distributed them to its subscribers in this State. In addition, copies of the Rules have been at all times available by simply writing or calling the Clerk of this Court. We must assume, therefore, that all members of the Bar of this State have had copies of our Rules, or have had them available, for a sufficient length of time to enable compliance.

[3, 4] The Rules of Practice in the Appellate Division of The General Court of Justice are mandatory, not directory, and must be

uniformly enforced. Neither the judges, nor the solicitors, nor the attorneys, nor the parties have the right to ignore or dispense with the rule requiring docketing within the time prescribed. If the rules are not complied with, this Court may *ex mero motu* dismiss the appeal. *Carter v. Board of Alcoholic Control,* No. 519, Fall Term 1968, N. C. Supreme Court, filed 20 November 1968. And for failure to docket the record on appeal within the time prescribed by the rules, this appeal should be dismissed *ex mero motu.*

Nevertheless, in an effort to determine that justice is done, we have reviewed the record before us with respect to the assignments of error brought forward for review, and we find no prejudicial error.

No error.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. ROYCE STAMEY AND LEONARD AUSTIN

No. 6825SC375

(Filed 11 December 1968)

1. Criminal Law §§ 66, 89— evidence as to identity from photographs — corroborative evidence

Where State's witness in armed robbery prosecution positively identifies the two defendants on direct examination, defendants are not prejudiced by the witness' testimony on cross-examination that he had previously identified defendants from a group of pictures shown to him approximately two weeks after the robbery by an investigating S. B. I. agent, since the testimony was admissible as corroborating the witness' positive in-court identification.

2. Criminal Law § 66; Constitutional Law § 32— identification by photographs — necessity for defense counsel

The fact that defense counsel was not present when armed robbery victim identified defendants from photographs furnished by police during investigative stage does not render inadmissible on constitutional grounds testimony as to the victim's identification of defendants from the photographs.

3. Criminal Law § 66; Constitutional Law § 32— lineup identification of defendant

Evidence of out-of-court identification of a defendant in a pretrial lineup, when it is made to appear that defendant was not represented by counsel

at the lineup and had not intelligently and voluntarily waived his right to counsel, is inadmissible.

4. Criminal Law §§ 66, 84— evidence obtained unlawfully — effect of unconstitutional lineup

Where it appears during the course of a criminal trial that there has been an out-of-court lineup identification violating the accused's constitutional right to be effectively represented by counsel, the in-court identification is admissible only when the State establishes by clear and convincing evidence that the in-court identification had an origin independent of the lineup identification.

5. Criminal Law § 66— unconstitutional lineup — evidence of in-court identification — voir dire

Where it appears during the course of a criminal trial that the accused's right to be represented by counsel was violated at an out-of-court lineup identification, the admission in evidence of an in-court identification of accused is erroneous unless the trial court determines on *voir dire* that such in-court identification had a sufficiently independent origin and was not the result of the illegal out-of-court confrontation.

APPEAL by defendants from *May, J.*, March 1968 Term, BURKE Superior Court.

The two defendants were arrested on 23 August 1967 and were indicted for armed robbery. Each pleaded not guilty. At the trial the victim of the robbery on direct examination positively identified the defendants as being the two men who had entered his store in Valdese, North Carolina, on the morning of 25 February 1967 and, with drawn pistols and threats to kill him, had taken his money. On cross-examination this witness testified that after the robbery an S.B.I. Agent had brought him some pictures to see if he could identify either robber and he had picked out two of the pictures and told the agent that they were the two who had robbed him. On redirect examination by the solicitor, this witness testified as follows:

"Q. I say after you identified the two photographs, then did you later see these two defendants?

"A. That's right, in a line-up.

"Q. Were these two defendants the same ones as you had seen in the photographs?

"A. Same ones I had picked out in the photographs."

Defendants' objection made at this point was overruled.

Each defendant took the stand and testified to an alibi.

At the close of all evidence defendants moved to strike any reference in the testimony of the prosecuting witness with reference to

a "lineup" on the ground that there was no evidence that the defendants had been represented by counsel at the time. This motion was made on behalf of both defendants by the court-appointed attorney for one of the defendants, who stated to the court at the time of making the motion that to the best of his information the defendants did not have a lawyer at the time of the lineup. The motion to strike was denied.

The jury returned a verdict of guilty of armed robbery as to each defendant, and from judgments imposing prison sentences on each, defendants appealed.

Attorney General T. W. Bruton and Deputy Attorney General Harry W. McGalliard for the State.

Don Davis for defendant appellant Royce Stamey.

Ted S. Douglas for defendant appellant Leonard Austin.

PARKER, J.

[1] Defendants first assign as error the court's admitting the testimony of the victim of the robbery that he had identified the two defendants from a group of pictures shown to him approximately two weeks after the robbery by the investigating S.B.I. Agent. This testimony was elicited during cross-examination of the witness by counsel for each of the defendants, and the record shows that as to much of this testimony there was neither objection nor motion to strike made on behalf of either defendant. In any event there was no error prejudicial to defendants in the admission of this evidence. On direct examination at the trial the witness had already positively identified the two defendants as the robbers. The testimony relative to his prior identification of defendants from the pictures, brought out by cross-examination of the attorneys for the defendants themselves, was admissible as corroborating his positive in-court identification. Stansbury, N. C. Evidence 2d, § 50.

[2] Appellants contend, nevertheless, that admission of the testimony as to the witness's prior identification of defendants from the photographs violated their constitutional rights on the basis of the decision of the United States Supreme Court in *United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149. We do not agree. In our view the rationale of the Court in *Wade,* and in its companion cases, *Gilbert v. California,* 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178, and *Stovall v. Denno,* 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199, does not extend so far as to require that

when a victim of a crime is working with the police in the investigative stage in an effort to describe or to identify the criminals involved from pictures in order that they may be apprehended, that defense counsel for all suspected or identified criminals must be present. Those cases related only to situations in which identification was made when the accused was present in person.

[3-5] However, appellants also assign as error the admission of testimony of the prosecuting witness relative to his identification of the two defendants in a pretrial lineup. This assignment of error must be sustained. Evidence of out-of-court identification of a defendant in a criminal case in a pretrial lineup, when it is made to appear that defendant was not represented by counsel at the lineup and had not intelligently and voluntarily waived his right to counsel, is inadmissible. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581; *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353. In addition, if it appears during the course of a criminal trial that there has been an out-of-court lineup identification violating the accused's constitutional right to be effectively represented by counsel, then a question arises as to whether the in-court identification has been tainted by the prior lineup identification. Under such circumstances the in-court identification is admissible only when the State establishes by clear and convincing evidence that the in-court identification was based upon observations of the suspect other than the lineup identification. If the in-court identification had an independent origin it is competent. If it resulted from the illegal out-of-court confrontation it is incompetent. In this case there was evidence that the prosecuting witness had known one of the defendants, Royce Stamey, as a young boy and had known Stamey's father for many years. It may well be that the witness's in-court identification of both defendants was based on factors completely independent of the lineup identification. That question should be decided by the trial court on a *voir dire* examination at the next trial if the State again offers in-court identification testimony from the prosecuting witness. *State v. Wright, supra.*

For the error in admitting evidence of the pretrial lineup identification when defendants were not represented by counsel and in the absence of any evidence as to their voluntary waiver of right to counsel, and for error in admitting evidence of the in-court identification without determining on *voir dire* that such in-court identifi-

cation had a sufficiently independent origin and was not the result of the illegal out-of-court confrontation, the defendants are entitled to a

New trial.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT LOUIS STYLES

No. 6825SC258

(Filed 11 December 1968)

1. Burglary and Unlawful Breakings § 9— elements of unlawful possession of implements of housebreaking

In a prosecution under G.S. 14-55, the State has the burden of showing (1) defendant's possession of an implement of housebreaking which is enumerated in or which comes within the meaning of the statute, and (2) that such possession was without lawful excuse.

2. Burglary and Unlawful Breakings § 10— prosecution for unlawful possession of burglary tools — nonsuit

In a prosecution for unlawful possession of implements of housebreaking, defendant's motion for nonsuit was properly denied where the State's evidence tended to show that defendant escaped from a jail cell by picking the lock, that when defendant was arrested a leather case containing ten homemade lock-picking devices was found in the room occupied by defendant, and that the devices had no use other than for opening locks.

APPEAL by defendant from *Ervin, J.*, at the 13 November 1967 Session of BURKE Superior Court.

Defendant was charged at the February 1964 Session by indictment proper in form with having in his possession, on 21 November 1963, "without lawful excuse, implements of housebreaking, to wit: three lock picks, one skeleton key, two tension bars and four other lock picking devices, in violation of G.S. 14-55."

Pertinent facts appear in the opinion. Defendant was represented at trial by court-appointed counsel, was found guilty by a jury, and was given an active prison sentence of not less than three nor more than five years, sentence to begin at the expiration of any and all sentences being served by the defendant in the State prison system, including a four-months sentence for escape imposed in Burke County in July 1967, a twelve-months sentence for escape imposed in Halifax

county in September 1967, and two other cases from Burke County. Defendant appealed.

Attorney General T. Wade Bruton and Staff Attorney Mrs. Christine Y. Denson for the State.

Wheeler Dale for defendant appellant.

BRITT, J.

The sole assignment of error brought forward and argued in defendant's brief is the failure of the trial court to sustain his motions for nonsuit.

G.S. 14-55, under which defendant was indicted, provides as follows:

> "* * * 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 a felony or other infamous crime therein; or shall be found having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of housebreaking; or shall be found in any such building, with intent to commit a felony or other infamous crime 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."

Defendant is charged with possession of certain specific items condemned by the statute, therefore, it is not necessary for the court to determine whether tools or implements that have legitimate purposes were being possessed for an illegitimate purpose as was the case in *State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377.

[1] The gravamen of the offense charged in the bill of indictment in the instant case is the possession of burglar's tools without lawful excuse, and the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse. *State v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456; *State v. Vick,* 213 N.C. 235, 195 S.E. 779. In the light of these principles, we review briefly pertinent portions of the State's evidence.

[2] Bob Kester of the Spruce Pine Police Department testified that on 26 October 1963, just before midnight, defendant was in custody in the Spruce Pine Jail; that approximately three hours later, the door to the cell in which defendant was imprisoned was found

open, the Yale lock used to lock the cell was hanging on the door, and the defendant was gone. Mr. Kester obtained a warrant for defendant, charging him with escape, and next saw the defendant in Burke County at the home of Martha Silver on 21 November 1963 at about 6:30 a.m.

Robert Emerson, as a witness for the State, testified substantially as follows: From July 1963 until the date of trial, he was employed by the State Bureau of Investigation. On 21 November 1963, at about 6:30 a.m., in the company of Officer Kester of the Spruce Pine Police Department, two Burke County deputies sheriff and other officers, and armed with a warrant for the arrest of the defendant charging him with breaking and entering and larceny in Mitchell County, he went to the home of Martha Silver in Burke County. One of the officers knocked on the door, after which Martha Silver along with the defendant came to the door and admitted the officers. Mr. Emerson placed defendant under arrest and went into a bedroom which defendant was occupying and read the warrant to him. The defendant began dressing and the witness watched him dress, carefully observing what was going into his pockets. There was a dresser near the bed and defendant was dressing immediately beside the dresser. On top of the dresser were a ring, a watch, and some change which defendant began putting into his pockets. Also on the dresser along with the items mentioned was a small, leather key case with a zipper across the top. Mr. Emerson took the case and in it found ten lock-picking devices which were introduced in evidence. The witness described the manner in which the various items could be used to pick a lock, stating that he (the witness), by using some of the items, was able to open the padlock that was on the Spruce Pine Jail cell door when defendant escaped. In the Silver yard at the time defendant was arrested was a 1955 Ford automobile which had been stolen in Buncombe County shortly after the defendant escaped from the Spruce Pine Jail. The items in the leather key case were homemade and had no use other than for opening locks.

On cross-examination, Mr. Emerson testified that defendant told him on one occasion that he found the items in an automobile which he had stolen; defendant later told him that he stole the items from someone whose name he would not give.

[2] We hold that the evidence was ample to withstand the motions for nonsuit and to support the jury's verdict of guilty. We have

carefully reviewed the record and find that the defendant had a fair trial, free from prejudicial error.

No error.

BROCK and PARKER, JJ., concur.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. ELMER C. MOORE AND WIFE, JOAN C. MOORE; FIRST UNION NATIONAL BANK, TRUSTEE, AND WESSIE LEE DIAL WILLIAMS

No. 6828SC296

(Filed 11 December 1968)

Eminent Domain § 6— evidence of value — cross-examination of landowner as to purchase price

In highway condemnation proceeding, landowner's testimony on cross-examination as to the price paid by him for the subject property some seven years prior to the taking is properly admitted over his objection where (1) there is no evidence that the purchase was made at an involuntary sale, although the property was sold in the settlement of an estate, and (2) there was no change in the immediate vicinity of the property between the date of purchase and the date of taking.

APPEAL by defendants from *McLean, J.*, at the 6 May 1968 Session of BUNCOMBE Superior Court.

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. All allegations of plaintiff's complaint and declaration of taking were admitted except allegations pertaining to the amount of just compensation accruing to defendants.

Immediately prior to the taking on 5 June 1967, defendants were the owners of a tract of land containing approximately 36,730 square feet with frontage on a one-way ramp leading into Hanover Street in the city of Asheville, N. C. The taking consisted of approximately 5,367 square feet across the front of defendants' property, leaving them with frontage and access on a one-way ramp as before the taking.

The one issue submitted to the jury related to the amount of just compensation to defendants. The jury answered the issue $5,100.00, and from judgment entered on the verdict, defendants appealed.

Attorney General T. Wade Bruton, Deputy Attorney General Harrison Lewis and Trial Attorney Guy A. Hamlin for plaintiff appellee.

Elmore & Reynolds by Dennis J. Winner for defendant appellants.

BRITT, J.

The sole assignment of error brought forward in defendants' brief relates to questions asked defendant Elmer C. Moore on cross-examination. He was asked by plaintiff's counsel if he did not pay $12,500 for the property when he purchased it in 1960. Over objection by defendants' counsel, Mr. Moore was required to answer the question, which he did in the affirmative. Defendants contend that the trial court committed prejudicial error in admitting the testimony relative to the purchase price of the property in 1960.

In their briefs, counsel for plaintiff and defendants cite the case of *Palmer v. Highway Commission,* 195 N.C. 1, 141 S.E. 338. In that case, one of the owners was questioned on cross-examination as to the purchase price of the subject property eighteen years prior to the taking. Over objection, the witness was required to answer, and the Supreme Court ruled that the trial court committed no error in requiring an answer. In the opinion we find the following:

> "* * * It is accepted law that when land is taken in the exercise of eminent domain it is competent, as evidence of market value, to show the price at which it was bought if the sale was voluntary and not too remote in point of time. *R. R. v. Church,* 104 N.C., 525; *R. R. v. Mfg. Co.,* 169 N.C., 156. Certainly the value of property eighteen years before the taking, nothing else appearing, would be incompetent, but upon the present record it appears that the plaintiffs had testified that they had owned the property for eighteen years, and that the building was then upon the property. The plaintiffs had further testified that at the time of the taking the property was worth $3,000. It was therefore permissible on cross-examination to test the accuracy of the opinion of the witness as to the value of the property as well as to demonstrate the basis of his opinion as to the value thereof."

The principle of law declared in *Palmer v. Highway Commission, supra,* has been quoted in many decisions of our Supreme Court, including *Highway Commission v. Nuckles,* 271 N.C. 1, 155 S.E. 2d 772, (opinion by Sharp, J.). In *Highway Commission v. Nuckles,*

supra, it is also said: "The reasonableness of time is dependent upon the nature of the property, its location, and the surrounding circumstances, the criterion being whether the evidence fairly points to the value of the property at the time in question." (Citing *Highway Commission v. Coggins,* 262 N.C. 25, 136 S.E. 2d 265.)

Defendant E. C. Moore testified that he purchased the subject property at a court sale. The evidence indicates that the property was sold in connection with the settlement of an estate. His counsel contends that such sale was not voluntary, therefore, evidence pertaining to it should not have been allowed. We disagree with this contention. Defendants offered no evidence to show that the sale was not voluntary, and mere evidence of a "court sale" does not indicate an involuntary sale. It can be argued that many judicial sales are had as the result of *ex parte* or uncontested proceedings to sell land for partition. Furthermore, G.S. 1-339.28 provides that judicial sales must be confirmed by the clerk or judge of the superior court, or both, as set forth therein. It can be assumed that before confirming a judicial sale, the clerk or judge or both, as the case may be, would determine that the price offered for the property represented its fair market value.

Defendants also contend that the evidence should not have been admitted because of the remoteness of time between the date of the purchase and the date of the taking, a period of some seven years. Defendant E. C. Moore testified that from the time he bought the property and until the time of taking, there was no change in the location and the usage of the highways by the subject property. There was evidence to the effect that there was no change of the area in the immediate vicinity of the subject property; the evidence also showed that there was an old house on the land when the Moores purchased it and that it was still there on the date of the taking.

We hold that under the evidence presented in this case it was not error to show the purchase price of the property.

The assignment of error asserted by defendants is overruled, and the judgment of the superior court is

Affirmed.

BROCK and PARKER, JJ., concur.

HENRY J. GLOVER, PETITIONER v. STATE OF NORTH CAROLINA, DEFENDANT

No. 6828SC272

(Filed 11 December 1968)

Criminal Law §§ 156, 181— certiorari to review post-conviction judgment dismissed as improvidently granted

Petition for writ of *certiorari* to review a post-conviction judgment is dismissed as improvidently granted where it now appears that prior to filing the present post-conviction petition, petitioner had already obtained the relief requested as to certain escape sentences and had had a full post-conviction review of and was denied relief as to his remaining convictions, from which determination he had unsuccessfully petitioned for *certiorari* to the Supreme Court of North Carolina and to the Supreme Court of the United States.

ON *Writ* of *Certiorari,* to review an order of *Jackson, J.,* September 1967 Session of BUNCOMBE Superior Court.

In 1947 petitioner was given active prison sentences in Cumberland Superior Court on his pleas of guilty to seven different felonies. While serving one of these sentences he escaped in 1951 and committed additional offenses. For these he was indicted in Madison County for armed robbery, highway robbery, assault, and larceny. By consent of counsel appointed to represent him, trial was transferred to Buncombe Superior Court, where he pleaded guilty to armed robbery, highway robbery, and larceny. Thereupon, on 5 June 1951 judgment was entered in Superior Court of Buncombe County, sentencing petitioner to prison for a term of not less than 22 nor more than 25 years.

In August 1967 petitioner filed in Buncombe Superior Court a petition pursuant to G.S. 15-217 *et seq.* seeking post-conviction review of the 1951 criminal proceedings. In this petition he seeks to have the 22 to 25 year sentence vacated and in addition to have certain escape sentences, which had been imposed upon him in Yancey Superior Court in 1955 and 1957 and in Wake Superior Court in 1962 backdated and therefore declared already served. Upon petitioner's affidavit of indigency, an attorney was appointed to represent him in connection with his petition for post-conviction review. A hearing was held on his petition at the September 1967 criminal session of Buncombe Superior Court, the petitioner and his court-appointed counsel being present and participating. Following this hearing the court entered an order making full findings of fact and concluding as a matter of law that none of petitioner's constitutional or legal rights had been violated in the 1951 proceedings

and that the relief prayed for with reference to the escape sentences was premature.

From this order denying any relief, petitioner made application to this Court for *writ* of *certiorari,* which was granted.

Attorney General T. W. Bruton and Staff Attorney Dale Shepherd for the State.

T. E. L. Lipsey for the petitioner.

PARKER, J.

Subsequent to filing of the record on appeal pursuant to our *writ* of *certiorari* in this matter, examination of the records of the Appellate Division of the General Court of Justice disclose that in 1952 petitioner sought and obtained post-conviction review in the Superior Court of Buncombe County of the 1951 criminal proceedings against him; that an attorney was appointed to represent him and did represent him in that post-conviction proceeding; that on 15 April 1952 a plenary hearing was held before Judge William H. Bobbitt, then a judge of the Superior Court holding the Courts of Buncombe County; that as a result of this hearing an order of the superior court was entered making full findings of fact and denying petitioner relief; that petition for *certiorari* was filed with the Supreme Court of North Carolina and denied by that Court; that a further petition for *certiorari* was filed with the Supreme Court of the United States and denied by that Court on 7 June 1954, 347 U.S. 1021, 74 S. Ct. 878, 98 L. Ed. 1142. In his 1952 petition for post-conviction review, petitioner raised essentially the same questions, and could have raised all of the questions, which he now seeks to raise again in his 1967 petition.

Petitioner further sought to test the constitutionality of his 1951 conviction by a petition for *habeas corpus* filed in Superior Court of Wake County, which resulted in an order dated 7 January 1954 denying relief. Subsequently, in 1954 he filed in the Superior Court of Wake County a petition entitled to be a petition for a "writ of error coram nobis" which resulted in an order dated April 1954 denying relief. A petition for *certiorari* to the Supreme Court of North Carolina to review this last mentioned order of the Superior Court of Wake County was denied on 4 May 1954.

It further appears that by petition dated 4 March 1968 filed in Superior Court of Cumberland County, petitioner sought post-conviction review of the 1947 sentence which had been imposed upon

him in Cumberland County and in addition sought a determination of the dates from which the several escape sentences should run. A plenary hearing was had on this petition resulting in an order of the Superior Court of Cumberland County dated 27 May 1968 in which the court found that petitioner had completed service of all prison terms imposed on him by the Superior Court of Cumberland County in the 1947 cases and that petitioner had served in full the Yancey County escape cases.

Since it now appears that prior to the filing of the present petition for post-conviction review in the Superior Court of Buncombe County, petitioner had already obtained a full post-conviction review of the 1951 criminal proceedings and had been denied relief, from which determination he had unsuccessfully petitioned for *certiorari* to the Supreme Court of North Carolina and to the Supreme Court of the United States, and since petitioner has already obtained the relief which he sought as to the Yancey County escape sentences, we conclude that the petition for *writ* of *certiorari* to review the 1967 order of Buncombe Superior Court heretofore granted by this Court was improvidently granted, and said petition is hereby

Dismissed.

BROCK and BRITT, JJ., concur.

HARRY WILLIAMS, PETITIONER v. STATE OF NORTH CAROLINA, RESPONDENT

No. 687SC430

(Filed 11 December 1968)

1. Criminal Law §§ 129, 144, 181— power of Superior Court to review final criminal judgment

When the judgment in a criminal case becomes final, the Superior Court thereafter lacks jurisdiction to review the judgment in that case except upon a petition from defendant himself invoking the jurisdiction of the court, either by way of habeas corpus or under the post-conviction review statute, G.S. 15-217 *et seq.*

2. Criminal Law §§ 129, 144, 181— jurisdiction of Superior Court to review final criminal judgment

The Superior Court may not of its own motion or upon motion of the State acquire jurisdiction to review a final judgment in a criminal case absent the consent and over the protest of the defendant.

3. Criminal Law § 181— post-conviction review — consent of petitioner to new trial

Before a new trial may be granted as a result of a post-conviction review of a criminal case, the record must clearly show defendant's consent to be tried again.

4. Criminal Law § 181— post-conviction review — consent to new trial by facts alleged

Where a petitioner for post-conviction review under G.S. 15-217 *et seq.* alleges facts which, if true, entitle him to nothing else but a new trial, he thereby gives consent to be tried again, which consent continues unless the court permits him to withdraw the petition.

5. Criminal Law § 181— post-conviction review — consent to new trial by facts alleged

Where a petition for a post-conviction review of a felonious escape conviction alleges that petitioner's constitutional rights were violated in that he was not represented by counsel at his escape trial and was not advised of his right to counsel, the Superior Court may properly vacate the judgment in the escape case and order a new trial notwithstanding the petition requested no specific relief, the only relief to which petitioner is entitled under the facts alleged being a new trial.

6. Criminal Law § 181— post-conviction review — error affecting two convictions in consolidated trial — only one conviction attacked

Where a defendant convicted in a consolidated trial of felonious escape and armed robbery files a petition under G.S. 15-217 *et seq.* seeking post-conviction review only of the escape conviction on the ground that he was neither represented by counsel at his trial nor advised of his right to counsel, and the solicitor stipulates that petitioner's constitutional rights were violated in the respect alleged at his consolidated trial for felonious escape and armed robbery, the Superior Court acquires no jurisdiction thereby to order the judgment in the armed robbery case vacated or to direct that petitioner be retried on the original indictment for armed robbery over his protest.

ON *certiorari* from *Morris, J.*, at the May 1968 Session of NASH Superior Court.

At the November 1960 Term of Nash Superior Court petitioner was indicted in two separate bills of indictment, one charging him with felonious escape and the other with armed robbery. On motion of the solicitor the two cases were consolidated for trial. In each case defendant pleaded not guilty, was found guilty as charged, and received active sentences to be served consecutively.

In February 1968 petitioner filed a petition under G.S. 15-217 *et seq.* seeking post-conviction review of the judgment in the escape case. Petitioner alleged that his constitutional rights had been violated at his 1960 trial in that case in that he had neither been rep-

resented by counsel nor advised of the right to have counsel appointed. In response to this petition the solicitor stipulated that defendant had not been represented by counsel and had not been advised of his right to counsel at the time of the trial of the escape and the armed robbery cases and that thereby petitioner's constitutional rights had been violated. Acting upon petitioner's petition for post-conviction review of the escape case, the judge of superior court entered an order finding the foregoing facts and concluding as a matter of law that the trials in both the escape and the armed robbery cases were nullities and that since the two cases had been consolidated for trial, the judgments and verdicts in both must be set aside. In accordance with this conclusion the judge entered judgment vacating and setting aside the verdict and judgment in both the escape and the armed robbery cases and directing that the State retry the petitioner on the original bills of indictment in both cases. Petitioner filed petition for *writ* of *certiorari* to review this judgment, which was granted.

Attorney General T. W. Bruton and Staff Attorney Dale Shepherd for the State.

Fields, Cooper & Henderson, by Leon Henderson, Jr., for petitioner.

PARKER, J.

[1, 2] The petition for post-conviction review here under consideration referred only to the trial and judgment in the felonious escape case. No mention whatsoever was made therein of the armed robbery case. The judgment in the latter case having become final, the superior court thereafter lacked jurisdiction to review the judgment in that case except upon a petition from the defendant himself invoking the jurisdiction of the court, either by way of *habeas corpus* or under the post-conviction review statute, G.S. 15-217 *et seq.* The court could not on its own motion or upon motion of the State acquire jurisdiction to review a final judgment in a criminal case absent the consent and over the protest of the defendant. The escape and the armed robbery cases were entirely separate cases. The fact that they were consolidated for convenience of trial did not make them one case.

[3-6] Before a new trial may be ordered as a result of post-conviction review of a criminal case, the record must clearly show defendant's consent to be tried again. *State v. Case,* 268 N.C. 330, 150 S.E. 2d 509. Here, petitioner's petition for post-conviction review

of his trial for felonious escape did not request any specific relief even in that case. On the facts alleged in his petition, however, the only relief to which he would be entitled would be a new trial in that case. Where a petitioner for post-conviction review under G.S. 15-217 *et seq.* alleges facts which, if true, entitle him to nothing else but a new trial, he thereby gives consent to be tried again, which consent continues unless the court permits him to withdraw the petition. *State v. Case, supra.* Accordingly, that part of the judgment here reviewed which vacated the verdict and judgment and directed a new trial in the escape case was correct. However, for reasons above stated the court lacked jurisdiction to order the judgment in the armed robbery case vacated or to direct the petitioner to be retried on the original indictment therein over his protest.

Accordingly, this cause is remanded to the Superior Court of Nash County for compliance by the solicitor with that portion of the judgment entered by Morris, J., which directs that the State re-try petitioner defendant on the original bill of indictment in Case No. 8978, which charged defendant with the criminal offense of felonious escape. So much of the judgment of Morris, J. as vacates and sets aside the verdict and judgment and orders a new trial in Case No. 8979, in which petitioner defendant was convicted and sentenced for armed robbery, is vacated and in that case this cause is remanded to the Superior Court of Nash County with direction that petitioner be remanded to the custody of the North Carolina Department of Correction for service of the sentence imposed upon petitioner defendant at the November 1960 Term of Nash Superior Court in said Case No. 8979.

Error and remanded.

BROCK and BRITT, JJ., concur.

JOSEPH WILLIAM EDWARDS, BY HIS NEXT FRIEND, JOE S. EDWARDS
v. ROBERT ALLEN EDWARDS

No. 682SC254

(Filed 11 December 1968)

1. Negligence § 30— personal injury action — minor falling from rear of truck — nonsuit

In an action for personal injury allegedly sustained when the 14-year-old plaintiff fell off the rear of a pickup truck operated by defendant,

judgment of nonsuit is properly entered where the evidence tends to show that plaintiff was asked by his brother, the defendant, to help defendant move furniture from one house to another by means of the pickup and that plaintiff, when he fell, was riding on the rear of the truck at defendant's request in order to keep a wardrobe from falling therefrom, but there is no evidence to disclose why plaintiff fell off the truck other than he stopped holding on to the side rail.

2. Negligence § 29— judgment of nonsuit

If plaintiff's evidence fails to establish any of the essential elements of negligence, judgment of nonsuit is proper.

3. Negligence § 18— contributory negligence of 14-year-old plaintiff

In action for personal injury allegedly sustained when the 14-year-old plaintiff fell off the rear of a pickup truck operated by defendant, there is no evidence that the plaintiff did not have the capacity and discretion of the average person his age, and conceding that it was negligence for defendant to ask plaintiff to ride on the rear of the truck, it was also negligence for plaintiff to ride there.

APPEAL by plaintiff from *Cohoon, J.*, 29 April 1968 Civil Session of BEAUFORT County Superior Court.

Plaintiff alleges that he was injured when he fell off the rear of a pick-up truck operated by defendant and that such fall was proximately caused "by the negligence of the defendant in placing the plaintiff in the said position in which he was riding and by his failure to use the care necessary under such extraordinary circumstances and failing to drive at a very slow rate of speed."

At the close of plaintiff's evidence, upon motion of the defendant, judgment as of nonsuit was entered.

Plaintiff appealed, assigning error.

Wilkinson & Vosburgh by James R. Vosburgh for the plaintiff.
Rodman & Rodman by Edward N. Rodman for the defendant.

MALLARD, C.J.

[1] The evidence, in substance, tends to show that plaintiff on the date of the alleged occurrence was an infant, 14 years of age. The defendant, brother of plaintiff, was 23 years of age. On 16 September 1966 plaintiff was helping defendant move his furniture from one house to another about two and one-half miles distant. Defendant told plaintiff to stand up in the rear of the truck to keep the wardrobe from falling off the truck. The wardrobe and other furniture was placed within the body of the pick-up truck. The rear three feet of the body of the truck had nothing on it. Plaintiff put one

hand on the side of the truck, which was about three and one-half feet high, and held on to keep from falling off. He placed his other hand on the wardrobe to keep it from falling. Plaintiff could see and did see that the furniture was not tied down and that the tail gate was down. His brother was operating the truck at a speed of about 35 or 45 miles per hour on an asphalt road with rocks on top of it. They had travelled about a mile, had come around a curve, and were on a straight stretch of road when the plaintiff fell off the truck. The pick-up truck did not swerve. Plaintiff describes what happened as follows:

> "Well, I was squatted down with one hand on the side of the truck and the other hand on the wardrobe and it looked like it started back, so I stood up, looked like it started back. I put both hands on it. That is the last thing I remember."

The evidence further tends to show that the wardrobe did not fall. The plaintiff's arm or shoulder, the evidence is not clear which, was broken. He spent some time in the hospital, and he has some permanent disability to his shoulder.

> "In order to make out a case of actionable negligence the plaintiff must show (1) the defendant has failed to exercise proper care in the performance of a duty owed to the plaintiff; (2) that the negligent breach of that duty was the proximate cause of the plaintiff's injury; (3) that a person of ordinary prudence should have foreseen such result was probable under the conditions as they existed." *Burr v. Everhart,* 246 N.C. 327, 98 S.E. 2d 327.

[2] If the evidence fails to establish any of these essentials, the judgment of nonsuit is proper. *Pittman v. Frost,* 261 N.C. 349, 134 S.E. 2d 687.

We are of the opinion and so hold that when tested by applicable standards, the evidence is insufficient to make out a case of actionable negligence against the defendant.

Under the circumstances disclosed by the evidence, it was not actionable negligence for the defendant to ask and permit plaintiff to ride on the rear of the truck. *Skinner v. Jernigan,* 250 N.C. 657, 110 S.E. 2d 301. The evidence does not disclose why plaintiff fell out of the truck other than he stopped holding on to the side rail. It is probable that plaintiff would not have fallen if he had continued to hold on to the side of the truck with one hand.

> "An infant of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger and to have power to

avoid it, and this presumption will stand until rebutted by clear proof of the absence of such discretion as is usual with infants of that age." *Welch v. Jenkins,* 271 N.C. 138, 155 S.E. 2d 763. "A 14-year-old boy is presumed capable of contributory negligence to the same extent as an adult, and this presumption obtains as a matter of law in the absence of evidence that the boy did not have the capacity, discretion, and experience which would ordinarily be possessed by a boy of his age." 6 Strong, N. C. Index 2d, Negligence, § 18.

[3] There is no evidence or contention that plaintiff did not have the capacity and discretion of the average person of 14 years of age. Plaintiff knew the condition of the truck and the furniture when he undertook to ride on the rear of the truck. If it was negligence, and we hold it was not, for the defendant to ask plaintiff to ride on the rear of the truck, it was also negligence for the plaintiff to ride on it.

The evidence is that the plaintiff fell off the truck, not that he was thrown off. There is no evidence that the speed at which the defendant was operating the truck had any causal or contributing effect as to defendant's fall.

We are of the opinion and so decide that the evidence was not sufficient to require the submission of the case to the jury and that the entry of the judgment of nonsuit was correct.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT D. JEFFRIES

No. 687SC385

(Filed 11 December 1968)

1. Criminal Law § 86— cross-examination of defendant as to prior convictions

Admissions by defendant on cross-examination of prior convictions are competent to impeach him as a witness.

2. Criminal Law § 86— cross-examination of defendant as to prior convictions

Where, in a prosecution for aggravated assault, the defendant at first denied on cross-examination that he had previously been convicted of any

crimes, it was not error for the court to permit the solicitor to cross-examine the defendant further about crimes committed by him as a juvenile and after he ceased being a juvenile, no record or other evidence being introduced to contradict defendant.

3. Assault and Battery § 14— assault causing serious injury

The evidence in this case *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of assault causing serious bodily injury.

4. Assault and Battery § 11— *indictment for aggravated assault*

An indictment charging an assault "causing serious bodily injury" is sufficient to charge an aggravated assault, it not being necessary that the nature of the injury be described in order to charge more than a simple assault.

5. Assault and Battery §§ 15, 16— warrant charges aggravated assault

In a prosecution upon a warrant charging defendant with an assault "with his fists and his feet causing serious bodily injury," it was error for the court to instruct the jury that they could return a verdict of guilty as charged if they found defendant was guilty of an assault with a deadly weapon.

6. Assault and Battery § 16— prosecution for aggravated assault — submission of question of simple assault

In this prosecution for aggravated assault, the court erred in failing to submit to the jury, for its determination as warranted by the evidence in this case, the lesser included offense of simple assault.

APPEAL by defendant from *Parker, J.*, April 1968 Criminal Session of Superior Court of EDGECOMBE County.

Defendant was charged in a warrant with assaulting Danny Bone on 11 February 1968 "with his fists and his feet causing serious bodily injury." From a judgment of guilty and sentence imposed thereon in Recorder's Court, the defendant appealed. Upon his trial in Superior Court, the jury returned a verdict of guilty, sentence of two years was imposed, and defendant appealed.

Attorney General T. W. Bruton and Staff Attorney Mrs. Christine Y. Denson for the State.

Vernon F. Daughtridge for defendant appellant.

MALLARD, C.J.

[1, 2] Defendant contends that when he, as a witness for himself, denied that he had previously been convicted of any crimes, it was error to permit the solicitor to cross-examine him further about crimes committed by him, as a juvenile, as well as after he ceased

being a juvenile. Defendant contends that though he later admitted on cross-examination having committed crimes that the solicitor should not have been permitted to continue to cross-examine him after he had made a denial. This contention is without merit. Admissions by the defendant on cross-examination of prior convictions were competent to impeach him as a witness. The case of *State v. Brown,* 1 N.C. App. 145, cited by the defendant, does not hold that the defendant as a witness cannot be cross-examined. In Stansbury, N. C. Evidence 2d, § 112, the rule is stated as follows:

> "For purposes of impeachment a witness, *including the defendant in a criminal case, may be cross-examined* with respect to previous convictions of crime, but his answers are conclusive, and the record of his convictions cannot be introduced to contradict him." (emphasis added)

In this case no record or other evidence was offered to contradict him. The defendant contradicted himself. To hold that the solicitor could not continue to question the defendant after a simple denial of prior convictions would effectively eliminate cross-examination of him.

[3] Defendant's motion for judgment of nonsuit is also without merit. Since the case goes back for another trial, we refrain from discussing the evidence in detail. However, there was ample competent evidence for submission to the jury on the charge in the warrant of an assault causing serious bodily injury. G.S. 14-33(a); *State v. Jones,* 258 N.C. 89, 128 S.E. 2d 1; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777.

[4] Defendant contends that the indictment charges only the crime of simple assault. This contention is also without merit. In support of this contention the defendant cites *State v. Battle,* 130 N.C. 655, 41 S.E. 66 and *State v. Thornton,* 136 N.C. 610, 48 S.E. 602. These two cases were, in effect, overruled in the case of *State v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140, in which it is stated:

> "In our opinion, the statement in the indictment that the assault inflicted serious injury is sufficient without further elaboration, and the fact becomes a matter of proof upon the trial. Except as a convenience in determining the jurisdiction of the court in the first instance, it is questionable whether the insistence that so significant an expression as 'serious injury' be further explained served any useful purpose, even at common law. In the present instance, we feel that the more reasonable rules pertaining to indictments for statutory crimes should be pursued."

[5, 6] The defendant was not charged with an assault with a deadly weapon. The able trial judge inadvertently erred when he instructed the jury that they could return a verdict of guilty as charged if they found that the defendant was guilty of an assault with a deadly weapon. The judge also erred when he failed to submit to the jury, for its determination as warranted by the evidence in this case, the lesser included offense of simple assault. *State v. Worthey,* 270 N.C. 444, 154 S.E. 2d 515. Simple assault is a lesser degree of the crime of aggravated assault which was charged in the warrant. G.S. 15-170; *State v. Gooding,* 251 N.C. 175, 110 S.E. 2d 865. The judge is required to declare and explain the law arising on the evidence without being requested to do so. G.S. 1-180.

Since the foregoing instructions were prejudicial to the defendant, the verdict and judgment are vacated and the defendant is awarded a

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. CARROLL SUTTON
No. 6830SC460

(Filed 11 December 1968)

1. Criminal Law § 161— review of exception to the judgment

An assignment of error to the entry of judgment imposing sentences upon defendant's pleas of guilty to the charges against him presents the record proper for review, and there are no grounds for error where the record discloses that the trial court accepted the guilty pleas only after examining defendant and determining that such pleas of guilty were freely, understandingly and voluntarily made, without duress or promise of leniency, and only after defendant had been advised of his rights and of the maximum punishment which might be imposed.

2. Disorderly Conduct and Public Drunkenness § 2— prosecutions for public drunkenness — sentence

In a prosecution upon warrant charging defendant with public drunkenness and upon six warrants charging the commission of subsequent offenses within a twelve-month period, sentences which, *inter alia,* committed defendant to the custody of the Commissioner of Correction for an indeterminate period of not less than 30 days nor more than six months are within the statutory limits. G.S. 14-335.

STATE *v.* SUTTON

APPEAL by defendant from *Jackson, J.*, July 1968 Session of HAYWOOD Superior Court.

Defendant states in his brief that he was tried in the District Court of Haywood County on seven warrants charging him with public drunkenness in violation of G.S. 14-335. Six of the warrants charged commission of a subsequent offense within a twelve-month period. He further states in his brief that he pleaded guilty in the district court and from judgment pronounced appealed to the superior court. Upon call of the seven cases for trial in the superior court, defendant again pleaded guilty in each case. Three of the cases in which defendant was charged with commission of a subsequent offense were consolidated for purpose of judgment and judgment was entered in these cases committing defendant to the custody of the Commissioner of Correction for an indeterminant sentence of not less than 30 days nor more than six months. The three remaining cases in which defendant had been charged with commission of a subsequent offense under the statute were also consolidated for purpose of judgment and in these cases judgment was also entered committing defendant to custody of the Commissioner of Correction for a similar indeterminant sentence, suspended, however, with the consent of the defendant given in open court, for a period of two years upon condition that defendant be of good behavior and not violate any of the laws of the State. In the case in which defendant had been charged with the first offense of public drunkenness, judgment was entered that he be confined for twenty days, this sentence to run concurrently with the active sentence which had been imposed in the first three cases in which defendant had been charged with commission of a subsequent offense. From the judgments entered in the seven cases, defendant appealed.

Attorney General T. W. Bruton and Staff Attorney (Mrs.) Christine Y. Denson for the State.

W. R. Francis for defendant appellant.

PARKER, J.

Appellate's court-appointed counsel has with admirable candor stated in his brief that he has reviewed the record and can find no error. We agree.

The only assignment of error is to the entry of the judgment imposing sentences upon defendant on his pleas of guilty to the seven charges which had been made against him. This assignment presents the record proper for our review. 1 Strong, N. C. Index 2d,

Appeal and Error, § 26, p. 152. Examination of the record discloses that the pleas of guilty tendered by defendant were accepted by the trial court only after defendant had been carefully examined by the court and the court had determined that such pleas of guilty were freely, understandingly, and voluntarily made, and were made without undue influence, compulsion or duress, and without promise of leniency and only after defendant had been fully advised of his rights and the charges against him and of the maximum punishment which might be imposed for the offenses to which he pleaded guilty. All of defendant's rights were meticulously protected by the court at his trial. The sentences imposed were within statutory limits. G.S. 14-335. Defendant has no just cause to complain.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. EDITH THOMAS

No. 6820SC463

(Filed 11 December 1968)

1. Homicide § 31— sentence — involuntary manslaughter

Sentence of imprisonment to a term of three to seven years, imposed upon defendant's plea of guilty to involuntary manslaughter, does not constitute cruel and unusual punishment.

2. Criminal Law § 131— new trial for newly discovered evidence

Where the case is on appeal, a motion for a new trial on the ground of newly discovered evidence may be made at the next succeeding term of the trial court following affirmance of the judgment on appeal.

APPEAL by defendant from *Burgwyn, E.J.*, at the July 1968 Session of RICHMOND Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the murder of her husband. When the case was called for trial, the solicitor announced that he would not seek a verdict of first-degree murder but would seek a verdict of second-degree murder or manslaughter as the jury might find. Initially, the defendant entered a plea of not guilty but at the conclusion of the State's evidence tendered a plea of guilty of involuntary manslaughter, which plea was accepted by the State.

After hearing the defendant's testimony, the court sentenced her to a term of not less than three years nor more than seven years in the Woman's Division of the State's Prison. Defendant appealed.

Attorney General T. Wade Bruton and Assistant Attorney General Bernard A. Harrell for the State.

Webb, Lee, Davis & Sharpe by Benny Sharpe for defendant appellant.

BRITT, J.

[1] The sole assignment of error brought forward in defendant's brief is that the sentence imposed on defendant constituted cruel and unusual punishment.

In *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216, in an opinion by Parker, C.J., we find the following:

> "We have held in case after case that when the punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense. *S. v. Stansbury,* 230 N.C. 589, 55 S.E. 2d 185; *S. v. Welch,* 232 N.C. 77, 59 S.E. 2d 199; *S. v. Whaley,* 263 N.C. 824, 140 S.E. 2d 305; *S. v. Stubbs,* 266 N.C. 295, 145 S.E. 2d 899; *S. v. Davis,* 267 N.C. 126, 147 S.E. 2d 570."

The assignment of error is overruled.

[2] In their brief, defendant's counsel also state that additional evidence was brought to their attention after the trial session adjourned. They set forth as an exhibit what purports to be an affidavit of Dr. W. D. James stating that the deceased made certain statements favorable to defendant to Dr. James a short while before his death. Defendant's brief concludes with the following: "* * * [T]he defendant prays for a dismissal of the judgment and sentence of the court below and that a new trial be granted."

The procedure for moving for a new trial in a criminal action on the grounds of newly discovered evidence is well established in this jurisdiction. In *State v. Edwards,* 205 N.C. 661, 172 S.E. 399, in an opinion by Stacy, C.J., it is said:

> "* * * [W]hen a case is tried in the Superior Court, and no appeal is taken from the judgment rendered therein, motion for new trial on the ground of newly discovered evidence may be entertained only at the trial term. (Citing authorities) But if the case is kept alive by appeal, such motion may be made, as

a *dernier ressort,* in the Superior Court at the next succeeding term following affirmance of the judgment on appeal. (Citing authorities)."

See also *State v. Morrow,* 262 N.C. 592, 138 S.E. 2d 245, and *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520.

For the reasons stated, the judgment of the superior court is Affirmed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. HARLAN WILSON

No. 688SC437

(Filed 11 December 1968)

1. Criminal Law § 154— dismissal of appeal

Aside from the motion of the Attorney General the Court of Appeals may *ex mero motu* dismiss an appeal for failure to comply with the rules of practice of the Court. Rule of Practice in the Court of Appeals No. 48.

2. Criminal Law § 154— case on appeal — failure to comply with Rule 19(d)(2)

Where the record in a criminal appeal fails to indicate that the evidence in the case is submitted upon the reporter's transcript, or that the solicitor agreed to the correctness of the reporter's transcript, or that the transcript was settled by the trial tribunal, the appeal is subject to dismissal either *ex mero motu* or upon motion of the Attorney General. Rule of Practice in the Court of Appeals No. 19(d)(2).

3. Criminal Law §§ 161, 166— necessity for exceptions and assignments of error — the brief

Criminal appeal is subject to dismissal either *ex mero motu* or upon motion of the Attorney General where (1) no exceptions are grouped and assigned as error as required by Rule 19(c), (2) the assignments of error listed in the record on appeal are not based upon exceptions duly entered as required by Rule 21 of the Court of Appeals, and (3) appellant's brief does not set out the exceptions and assignments of error in the manner required by Rule 28.

APPEAL by defendant from *Burgwyn, J.,* 19 August 1968 Session, LENOIR Superior Court.

Defendant was originally charged in a warrant with the offense of operating a motor vehicle on 11 May 1968 upon the public roads while under the influence of intoxicating liquor. The case was originally scheduled for trial in the Lenoir County Recorder's Court, but, upon defendant's request for a trial by jury, the case was transferred

to the Superior Court. In the Lenoir County Superior Court defendant was tried upon a bill of indictment charging him with the offense of operating a motor vehicle upon the public roads while under the influence of intoxicating liquor. The jury returned a verdict of guilty as charged, and from the verdict and judgment entered thereon defendant appealed.

T. W. Bruton, Attorney General, by William W. Melvin, Assistant Attorney General, and T. Buie Costen, Staff Attorney, for the State.

Mercer, Thigpen & Mercer, by Ella Rose Thigpen, for the defendant.

BROCK, J.

[1] Before argument in this Court the Attorney General filed a motion to dismiss the appeal upon the grounds that defendant had failed in several respects to comply with the rules of practice in this Court. Aside from the motion of the Attorney General the Court may *ex mero motu* dismiss an appeal for failure to comply with the rules. Rule 48, Rules of Practice in the Court of Appeals of North Carolina; *Carter v. Board of Alcoholic Control,* No. 519, Fall Term 1968, N. C. Supreme Court, filed 20 November 1968; *State v. Farrell,* No. 683SC433, Fall Session 1968, N. C. Court of Appeals, filed 11 December 1968.

[2] The index on the front sheet of the record on appeal lists as one of the items contained therein "State's Evidence." The State's evidence is that of the testimony of only one witness, the arresting officer. Much of his testimony is narrated, and nowhere does the record indicate that the evidence in the case is submitted upon the reporter's transcript under Rule 19(d)(2), nor is there any indication that the solicitor agreed to the correctness of the reporter's transcript, or that it was settled by the trial tribunal, as required by Rule 19(d)(2). This Court became aware of the reporter's transcript only because occasionally in the narration of the testimony, a reference was inserted in parenthesis, for example as follows: "(T p 6)."

[3] Further, neither the transcript nor the mimeographed portion of the record on appeal contains any exceptions, and it follows that no exceptions are grouped and assigned as error as required by Rule 19(c). The mimeographed portion of the record on appeal lists nineteen assignments of error, but none of these assignments of error are based upon exceptions duly entered as required by Rule 21. Appellant's brief does not contain, properly numbered, the several

grounds of exception and assignment of error with reference to the pages of the record on appeal as required by Rule 28.

For the foregoing reasons this appeal should be dismissed either *ex mero motu* or upon the motion of the Attorney General. Nevertheless, in an effort to determine that justice has been done, we have reviewed the arguments advanced in defendant's brief and we find no prejudicial error.

No error.

BRITT and PARKER, JJ., concur.

STATE v. WILLIE LEWIS MILLER
No. 6826SC453

(Filed 11 December 1968)

Criminal Law § 23— plea of guilty — inquiry by trial court

The fact that trial court accepted plea of guilty tendered in open court by defendant's attorney without inquiring of the defendant personally if his plea was voluntarily made, etc., does not constitute error.

APPEAL by defendant from *Grist, J.*, 25 June 1968 Schedule "C" Criminal Session, MECKLENBURG County Superior Court.

The defendant was charged in a warrant with the misdemeanor of an escape on 22 May 1968 while serving a misdemeanor sentence imposed 17 May 1968. He was tried and convicted in the Mecklenburg County Recorder's Court, and a six months sentence was imposed. He appealed to the superior court, where, through his attorney, a plea of guilty was tendered. Before the imposition of sentence and at the request of his counsel, the defendant was permitted to testify in detail about his escape and the reason for escaping. From the imposition of a six months sentence to be served at the expiration of the sentence he was then serving, the defendant appealed.

T. W. Bruton, Attorney General, and Ralph Moody, Deputy Attorney General, for the State.

W. Herbert Brown, Jr., Attorney for defendant appellant.

CAMPBELL, J.

The only assignment of error is the fact that the trial judge accepted a plea of guilty tendered in open court by the defendant's attorney without inquiring of the defendant personally if his plea was voluntarily made, if he understood what he was doing and if he authorized his attorney to enter this plea in his behalf. There is no contention that the plea was not voluntarily made, that the defendant did not understand what he was doing when the plea was entered, or that his attorney was not authorized to enter such a plea. This same question has been before this Court and it would be an exercise in futility to discuss it again.

On the authority of *State v. Abernathy*, 1 N.C. App. 625, 162 S.E. 2d 114, the judgment of the superior court is

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. LOTHAR LYNCH

No. 687SC388

(Filed 11 December 1968)

Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of the evidence

Evidence of defendant's guilt of the felonies of breaking and entering an ABC store and larceny *is held* sufficient to be submitted to the jury.

APPEAL by defendant from *Parker, J.*, April 1968 Regular Session of Superior Court of EDGECOMBE County.

Defendant was charged in a bill of indictment with the felonies of breaking and entering and larceny.

Trial was by jury. The verdict was guilty as charged. From judgment imposing a prison sentence, the defendant appeals to the Court of Appeals, assigning error.

Attorney General T. W. Bruton and Assistant Attorney General George A. Goodwyn for the State.

George M. Britt for the defendant appellant.

MALLARD, C.J.

Each of defendant's assignments of error relating to the admission of evidence has been carefully examined and is found to be without merit. They require no extended discussion and are overruled.

Defendant contends that the trial court committed error in overruling his motion for judgment as of nonsuit at the close of the evidence. The defendant was charged with breaking and entering Edgecombe County A.B.C. Store #5, at Whitakers, on 30 October 1967 and stealing therefrom three cases of taxpaid whiskey of the value of $178.80. Defendant's nephew, Kenneth Lynch, an accomplice in the crime, testified as a witness for the State that the defendant ripped the back screen door out and broke in the back door of the whiskey store, and after entering the store handed him three cases of whiskey from inside the store. Kenneth testified that after receiving the whiskey from the defendant, he put it in the alley. At about that time the police came, the defendant ran "through the front door," and the police shot at him three times. The defendant offered no evidence. There was substantial direct evidence of every element of the crimes charged. The trial court did not commit error in overruling the motion for nonsuit. See 3 Strong, N. C. Index 2d, Criminal Law, § 176.

Defendant also contends that the court committed error in its charge to the jury and argues, among other things, that the general manner and tone of part of the charge "arrayed the evidence unequally against the defendant." We have carefully read the entire charge and find no prejudicial error that would entitle the defendant to a new trial.

Defendant has other assignments of error. Each has been carefully examined and no error is found therein.

We are of the opinion and so hold that the defendant has had a fair trial, free from prejudicial error.

No error.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. LLOYD SUTTON
No. 6830SC461

(Filed 11 December 1968)

Criminal Law § 161— assignment of error to entry of judgment

Assignment of error to the entry of the judgment presents the record proper for review.

APPEAL by defendant from *Jackson, J.*, 8 July 1968 Session, HAYWOOD Superior Court.

Defendant states in his brief that he was tried in the District Court of Haywood County on three warrants charging him with public drunkenness. He further states that he pleaded guilty in the District Court to each charge, and that after judgment was pronounced he appealed to the Superior Court. Each of the three warrants charged a subsequent offense within twelve months.

Upon the call of the three cases for trial in the Superior Court the defendant again entered pleas of guilty. Judgment was entered committing defendant to the custody of the Commissioner of Correction for an indeterminate sentence of not less than thirty days nor more than six months.

T. W. Bruton, Attorney General, by (Mrs.) Christine Y. Denson, Staff Attorney, for the State.

W. R. Francis for the defendant.

BROCK, J.

Defendant's only assignment of error is to the entry of the judgment. This assignment of error presents the record proper for review. 1 Strong, N. C. Index 2d, Appeal and Error, § 26, p. 152. We note that the pleas of guilty tendered by the defendant were accepted only after Judge Jackson had carefully examined the defendant and advised him of the possible consequences of his pleas. The sentence imposed was within statutory limits. G.S. 14-335.

With appropriate candor, defendant's court-appointed counsel has stated that his review of the record of the proceedings discloses no prejudicial error. We agree with counsel's appraisal.

No error.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. ROGER THOMPSON
No. 6815SC456

(Filed 11 December 1968)

1. Criminal Law § 161— review of exceptions to judgment

An assignment of error to the signing of the judgment presents the face of the record proper for review.

2. Burglary and Unlawful Breakings § 8; Larceny § 10— sentences

Sentence of two years imprisonment imposed upon plea of guilty to non-felonious breaking and entering, and sentence of one year's imprisonment imposed upon plea of guilty to non-felonious larceny, are within statutory limits. G.S. 14-3.

APPEAL by defendant from *Hall, J.*, August 1968 Criminal Session ALAMANCE Superior Court.

Defendant was charged on two counts in a single bill of indictment, proper in form, first, with felonious breaking and entering, and second, with larceny. At the trial he tendered, and the State accepted, pleas of guilty to non-felonious breaking and entering and to non-felonious larceny. Judgment was entered imposing an active sentence of two years upon the first count and a sentence of one year on the second count to begin at the expiration of the two year sentence imposed on the first count. From this judgment, defendant appealed.

Attorney General T. W. Bruton and Assistant Attorney General Millard R. Rich, Jr., for the State.

Harold T. Dodge for defendant appellant.

PARKER, J.

Appellant's sole assignment of error is to the signing of the judgment. This presents the face of the record proper for review. 1 Strong, N. C. Index 2d, Appeal and Error, § 26, p. 152. Appellant's brief admits that his pleas of guilty were freely and voluntarily entered. The sentences imposed were within statutory limits. G.S. 14-3. Appellant's court-appointed counsel has frankly stated in his brief that he is unable to suggest any error in connection with the proceedings in this case. After careful review of the record, we agree, and find

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. BILLY KEITH FOWLER
No. 6818SC447

(Filed 11 December 1968)

APPEAL by defendant from *Bowman, S.J.*, 29 January 1968, Regular Criminal Session, GUILFORD Superior Court, Greensboro Division.

The defendant was charged with the felony of armed robbery in a proper bill of indictment, which was returned at the 14 August 1967 Criminal Session of Superior Court of Guilford County. The defendant filed an affidavit of indigency on 30 October 1967 and an order was entered appointing counsel for the defendant.

The case was called for trial on 6 February 1968. During the second day of the trial, the defendant through his counsel withdrew his plea of not guilty and entered a plea of guilty. After informing the defendant of the nature of the charge and the possible consequences of his plea and after due inquiry, including a formal examination of the defendant, the trial court adjudicated that this plea of guilty was freely, understandingly, intentionally, and voluntarily made. The plea was, therefore, accepted and entered into the record. Sentence was imposed and the defendant was committed to the State Department of Correction on 9 February 1968.

On 13 February 1968 the defendant wrote to the clerk of court in Guilford County giving notice of his appeal.

A new attorney was appointed to perfect the appeal and to represent the defendant on the appeal.

T. W. Bruton, Attorney General, and Harry W. McGalliard, Deputy Attorney General, for the State.

Jerry S. Weston, Attorney for defendant appellant.

CAMPBELL, J.

This is a typical case where the system breaks down. The defendant, without expense to himself, called upon the taxpayers to furnish him with an attorney to advise him at the time of his trial. With the advice of this attorney, the defendant then, freely and voluntarily, entered a plea of guilty to the felony with which he was charged. Thereafter, he requested the Court of Appeals to review the trial and the sentence. The defendant again, without expense to himself, called upon the taxpayers to furnish him with an attorney to

present the matter to the Court of Appeals. This attorney has reviewed the proceedings and, after such review, has filed a brief in which it is frankly stated that he finds no errors. The Attorney General has reviewed the record on appeal and agrees with defense counsel that no prejudicial error has been made to appear.

We, likewise, have reviewed the record on appeal and we conclude that no error has been made to appear.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. JAMES A. WILLIAMS
No. 6821SC458

(Filed 11 December 1968)

APPEAL by defendant from *Armstrong, J.*, at the 27 May 1968 Criminal Session of FORSYTH Superior Court.

By indictment proper in form, defendant was charged with storebreaking and larceny. The jury found the defendant guilty as charged, and from sentence imposed thereon, defendant appealed.

Attorney General T. Wade Bruton and Deputy Attorney General Harry W. McGalliard for the State.

Hatfield, Allman & Hall by Raymond D. Thomas for defendant appellant.

BRITT, J.

Defendant's court-appointed counsel brings forward no assignment of error, frankly stating that he is unable to find prejudicial error but asks the court to carefully review the record and grant such relief as may be proper.

Accordingly, we have carefully reviewed the record before us and find that the defendant was given a fair trial, free from prejudicial error, and that the sentence imposed was within statutory limits.

State v. Hopper, 271 N.C. 464, 156 S.E. 2d 857; *State v. Campbell,* 2 N.C. App. 406, 163 S.E. 2d 78.

The judgment of the superior court is

Affirmed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. FRANK KELLER

No. 6825SC355

(Filed 11 December 1968)

APPEAL by defendant from *Falls, J.,* at the 16 May 1968 Session of CALDWELL Superior Court.

Defendant was indicted in two cases for forging checks and uttering said checks. The cases were consolidated for trial, and on a verdict of guilty as charged, defendant was given active prison sentences from which he appealed.

Attorney General T. Wade Bruton and Trial Attorney William F. Briley for the State.

Neil D. Beach for defendant appellant.

BRITT, J.

We have carefully reviewed the record filed in this case, with particular reference to the questions raised in the brief of defendant's court-appointed attorney. Not only do we fail to find prejudicial error, but we fail to find any question presented that merits discussion.

The defendant had a fair trial, free from prejudicial error, and the sentences imposed were within statutory limits.

No error.

BROCK and PARKER, JJ., concur.

GLADYS S. ELLISON, ADMINISTRATRIX OF THE ESTATE OF JOHN LOUIS ELLISON, DECEASED v. WILLIE WHITE

No. 683SC366

(Filed 18 December 1968)

1. Judgments § 34— motion to set aside default judgment — review of findings of fact

The findings of fact by the judge on a motion to set aside a judgment on the ground of excusable neglect are final unless exception is made that there was no evidence to support the findings of fact or that there was a failure to find sufficient material facts.

2. Judgments § 34— review of conclusions of law

The conclusions of law made by the judge upon the facts found by him are reviewable on appeal.

3. Judgments § 34— excusable neglect or meritorious defense — question of law

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

4. Judgments § 34— showing of meritorious defense but not of excusable neglect

If the facts found are insufficient to support the conclusion of excusable neglect, an order setting aside the judgment will be reversed notwithstanding defendant has shown a meritorious defense.

5. Judgments § 25—what constitutes excusable neglect

Whether neglect is excusable is to be determined with reference to the litigant's neglect and not that of his attorney or insurer.

6. Judgments § 25— excusable neglect — duties of party properly served

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

7. Judgments § 25— inexcusable neglect — delivery of suit papers to unknown person in insurer's office

Defendant's failure to file answer and defend a wrongful death action was not the result of excusable neglect where defendant left the summons and complaint served on him with an unknown person who was in the office of his liability insurer and thereafter did nothing further about the case until a motion to set aside the default judgment taken against him was filed over eleven months later, defendant having failed to give his defense of the wrongful death action the attention which a man of ordinary prudence usually gives to his important business.

APPEAL by plaintiff from *Peel, J.*, 19 February 1968 Civil Session of Superior Court of PITT County.

Plaintiff, as administratrix, sought to recover damages from the defendant for the alleged wrongful death of plaintiff's intestate growing out of an automobile collision which occurred on 14 August 1964. The action was commenced in Pitt County by the filing of the complaint and issuance of summons on 20 June 1966. The original summons not having been served, an alias summons was issued on 17 July 1966. The alias summons not having been served, a pluries summons was issued on 9 September 1966 and, with a copy of the complaint, was properly served on the defendant in Craven County on 12 September 1966. The defendant did not file answer, request an extension of time in which to answer, or otherwise plead. On 13 October 1966 judgment by default and inquiry was entered by the Clerk of Superior Court of Pitt County.

At the April 1967 Session of Superior Court of Pitt County, the issue of damages was submitted to a jury, and the jury returned a verdict in favor of the plaintiff in the amount of $11,700. On 18 April 1967 execution was issued against the defendant and personally served upon him on 27 April 1967.

Motion was filed on 17 August 1967 by defendant to set aside the judgment on the ground of excusable and justifiable neglect "or upon such other basis as the court deems proper." The motion was allowed and plaintiff appealed, assigning error.

Beech & Pollock by H. E. Beech for plaintiff appellant.

Gaylord & Singleton by L. W. Gaylord, Jr., for defendant appellee.

MALLARD, C.J.

The appellant contends, in substance, that the questions presented on this appeal are (1) whether there was sufficient evidence before the court to support the facts found, (2) whether the facts found support the conclusion of law reached that the defendant has a meritorious defense, (3) whether the facts found support the conclusion of law reached that there was excusable neglect, mistake, and inadvertence on the part of the defendant, and (4) whether the judge abused his discretion in setting aside the judgment by default and inquiry entered by the Clerk of Court, the jury verdict, and the final judgment entered in the Superior Court.

The "findings of fact" include many conclusions of law, as well as facts, and are set out by the trial court in detail, filling approximately six pages of the record. They are summarized, except where quoted, as follows:

The first "finding of fact" includes that the filing of the motion to set aside the judgments was filed in due time, the judgment by default and inquiry was signed under date of 13 October 1966, and the judgment of the Superior Court upon the jury verdict was signed 10 April 1967.

The second "finding of fact" includes the factual situation in which plaintiff's intestate was killed when an automobile operated by the defendant collided with a bicycle operated by plaintiff's intestate, the fact that defendant had an "assigned risk" insurance policy issued by Nationwide Mutual Insurance Company, the service of summons upon the defendant, and "that, upon service of the aforesaid pluries summons upon him under date of September 12, 1966, the defendant on the same date delivered the copy of the summons and complaint served upon him in this cause to a person situate in an office which said defendant determined to be that of Nationwide Mutual Insurance Company in the City of New Bern, North Carolina; that the defendant in this cause verily believed that the person to whom he delivered the aforesaid summons and complaint served upon him in this cause was an authorized representative or agent of Nationwide Mutual Insurance Company and believed at the time of the delivery of said summons and complaint to the aforesaid person that said summons and complaint — and the handling of the lawsuit initiated thereby — would be attended to and handled by Nationwide Mutual Insurance Company, his liability insurance carrier, and as said Company was obligated to do under the terms and provisions of the liability policy issued defendant by said Company; that the defendant in this cause has had but little formal schooling, knows little of the operations of law, and felt at the time he delivered the aforesaid summons and complaint to the person in and about the office of Nationwide Mutual Insurance Company in New Bern, North Carolina, that he was delivering same to an agent or employee of the said Company; that, in truth and in fact, the Court finds from the evidence offered in this cause that the person to whom defendant delivered the aforesaid copy of summons and complaint had no connection whatsoever with Nationwide Mutual Insurance Company, either as an agent, employee, or otherwise, and was not authorized to receive and deal with said copy of summons and complaint on its behalf, and that in truth and in fact the copy of summons and complaint was never delivered to or received by anyone authorized to act on behalf of defendant's liability insurance carrier or in its employ but that, as aforesaid, the defendant believed and had justifiable reason to believe that he

was delivering his copy of the summons and complaint to an authorized representative of his liability insurance carrier."

The third "finding of fact" includes that no agent, employee or any other person connected with Nationwide Mutual Insurance Company had any knowledge or notice of the filing of this cause of action until some time subsequent to 21 November 1967, (the trial court in its order does not find when such notice was received by the Insurance Company), and "as hereinbefore recited, the Court does find as a fact that the defendant in this cause did deliver the copy of the summons and complaint served upon him to some person in and about the office of Nationwide Insurance Company in New Bern, North Carolina, but that, as aforesaid, said person WAS NOT in any way connected with Nationwide Mutual Insurance Company or its New Bern (N. C.) office in any capacity whatsoever and was not authorized to do or perform any matter or thing whatsoever on behalf of Nationwide Mutual Insurance Company."

The fourth finding of fact is stated as follows:

"That the defendant in this cause did all which could be reasonably expected of a man in his position in life and considering his limited knowledge with respect to the workings of law, the courts, and legal processes of this State, and with respect to his handling of the copy of the summons and complaint served upon him in this cause, and further, that at the time of the delivery of said summons and complaint to the hereinbefore referred to person, the defendant herein felt that said person would give to said complaint the care and attention normally given to same by liability insurance companies in similar cases and on behalf of their insureds, and had reason to believe, and did believe that said action would be defended on his behalf by his liability insurance carrier as it was obligated to do under the terms and provisions of the liability policy issued him as aforesaid."

The fifth "finding of fact" is stated as follows:

"That the failure of the defendant to ascertain and determine with absolute certainty that the hereinbefore referred to copy of the summons and complaint served upon him was being delivered by him to an authorized agent or employee of his liability insurance carrier was due to excusable neglect, mistake, and inadvertence on the part of the defendant herein and that defendant filed his motion to set aside the judgment by default and inquiry and the final judgment taken against him as soon

as he could have been reasonably expected to do so following knowledge received by him that said judgments had been taken, and that in any event said defendant filed a motion to set the aforesaid judgments aside within one (1) year after notice thereof."

The sixth "finding of fact" includes that the defendant has a meritorious defense to the cause of action alleged in the complaint, the details are set forth with respect to the manner in which plaintiff's intestate came to his death, and "that it is probable that the accident complained of in plaintiff's complaint was caused solely and proximately on account of the negligence of John Louis Ellison, deceased, in riding and operating an unlighted bicycle on the paved portion of Rural Road #1725, and that if said accident was not caused on account of the sole negligence of the said John Louis Ellison, deceased, in any event the Court finds as a fact that the accident complained of in the complaint filed by plaintiff, and in which accident plaintiff's intestate met his death, was occasioned and brought about on account of contributory negligence on the part of the said John Louis Ellison, deceased."

The seventh and last "finding of fact" is stated as follows:

"That if the judgments entered in this cause are set aside as prayed by defendant, the plaintiff will still have her day in Court to litigate the matters and things alleged and referred to in the complaint filed in this cause."

In the judgment, immediately following the paragraph containing the "SEVENTH" finding of fact, there appear unnumbered paragraphs which read as follows:

"And the Court in the exercise of its discretion being of the opinion, based on the above-found facts, that the defendant's action and conduct with respect to the copy of the summons and complaint served upon him and his failure to ascertain and know that the lawsuit pending against him was not being defended constituted excusable neglect, mistake, and inadvertence and that the defendant in this cause has a meritorious defense to the action filed by plaintiff.

Further, it having been agreed in open Court by the Attorney for plaintiff and the Attorney for defendant that this judgment might be rendered and signed out of term and out of the District;

NOW, THEREFORE, BASED UPON THE FOREGOING FINDINGS OF

FACT, AND IN THE CONSIDERED DISCRETION OF THE COURT, IT IS ORDERED, ADJUDGED AND DECREED:

FIRST: That the judgment by default and inquiry entered in this cause by the Clerk Superior Court of Pitt County, North Carolina, under date of October 13, 1966, be, and same is hereby set aside and vacated.

SECOND: That the judgment entered in this cause under date of April 10, 1967, by the Honorable James F. Latham, Judge, and the jury verdict with respect to damages on which same was based, be, and the same are hereby set aside and vacated.

THIRD: That the defendant have thirty (30) days from the date of this Order within which to file answer or such other pleading as he may deem proper to the complaint filed in this cause."

The hearing upon the written motion to set aside the judgments on the ground of excusable neglect in this case was heard by the judge considering the verified written motion, affidavits, and the oral testimony received. McIntosh, N. C. Practice 2d, § 1717.

[1] The findings of fact by the judge on a motion to set aside a judgment on the ground of excusable neglect are final, unless exception is made that there was no evidence to support the findings of fact, or that there was a failure to find sufficient material facts. McIntosh, N. C. Practice 2d, § 1717; *Norton v. McLaurin,* 125 N.C. 185, 34 S.E. 269.

In the case before us the plaintiff made proper exceptions to the findings of fact.

[2] "The conclusions of law made by the judge upon the facts found by him are reviewable on appeal." *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507.

We have carefully read all of the evidence in the record and are of the opinion that although many immaterial facts were found, such as how the defendant felt about the situation, that the defendant was covered by "assigned risk" insurance, and with respect to the conduct of agents of his insurer, there is competent evidence to support the facts found by the trial court but not all of the court's conclusions that are intermingled with the findings of fact. Plaintiff's first contention that the evidence does not support the findings of fact is without merit.

[3] Whether there has been shown excusable neglect or meritorious defense 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, and whether or not they show a meritorious defense; and from such ruling either party may appeal." McIntosh, N. C. Practice 2d, § 1717.

We are also of the opinion that the findings of fact support the conclusion reached by the court that the defendant has a meritorious defense.

[4] "The absence of a sufficient showing of excusable neglect renders the question of meritorious defense immaterial, and a want of a sufficient showing of a meritorious defense renders the question of excusable neglect immaterial." 5 Strong, N. C. Index 2d, Judgments, § 29.

"Conclusions of law of the court from the facts found are reviewable. . . . Further, if the facts are insufficient to support the conclusion of excusable neglect, an order setting aside the judgment will be reversed." 5 Strong, N. C. Index 2d, Judgments, § 34.

The defendant testified with respect to the man to whom he said he gave the suit papers in the New Bern office of Nationwide Insurance Company that, "I did not find out who he was or nothing like that. I handed the papers to the man behind the desk. I left the office and felt that I had done all that I could do about it."

The court found that the defendant on 12 September 1966 was served with a copy of the summons and complaint, that he went to the New Bern office of Nationwide Insurance Company and left the summons and complaint with some unknown man there in the office. The findings disclose that the defendant did not do anything further about this case until over eleven months later when on 17 August 1967 a motion was filed to set aside the judgments herein on the ground of excusable and justifiable neglect by the attorney representing defendant.

[5] "Whether the neglect is excusable is to be determined with reference to the litigant's neglect, and not that of his attorney, or a defendant's insurer." 5 Strong, N. C. Index 2d, Judgments, § 25; *Rierson v. York*, 227 N.C. 575, 42 S.E. 2d 902; *Sanders v. Chavis*, 243 N.C. 380, 90 S.E. 2d 749.

[6] "Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable." 5 Strong, N. C. Index 2d, Judgments, § 25; *Jones v. Statesville Ice & Fuel Co.*, 259 N.C. 206, 130 S.E. 2d 324.

[7] The findings of fact and the evidence in this case reveal that the defendant failed to give the defense of this case the attention which a man of ordinary prudence usually gives his important business. He did not read the papers served on him and did not employ a lawyer to attend to this important business. He gave these papers to an unknown person who did not agree to look after the matter for him. According to the evidence, this unknown person told the defendant nothing. Plaintiff followed proper procedures in obtaining the judgments and causing execution to issue thereon. The execution on the judgment was served on the defendant on 24 April 1967, and the defendant testified he did not go to see a lawyer or his insurance company until his insurance company sent an adjuster to see him on 9 June 1967. It was inexcusable negligence on the part of the defendant to leave the summons and complaint served upon him with the unknown man and do nothing about them thereafter under the circumstances revealed by this record.

We are of the opinion that the findings of fact by the trial judge do not show excusable neglect, mistake, or inadvertence on the part of the defendant in failing to file answer and defend this case. In view of what has been said, we do not reach the question as to whether there was an abuse of discretion by the trial judge. The provisions of G.S. 1-220 are not available to give the defendant relief under the facts found.

Judgment reversed.

CAMPBELL and MORRIS, JJ., concur.

NATIONAL BANK OF ALASKA v. HAROLD W. SPRINKLE AND DEVERE C. LENTZ, JR.

No. 6828SC310

(Filed 18 December 1968)

1. Chattel Mortgages and Conditional Sales § 9— registration of contract executed in another state — comity

The general rule that comity protects the lien of a chattel mortgage or conditional sales contract duly executed and recorded in another state upon the removal of the property to this State without recording or filing in this State must yield to a local statute such as G.S. 47-20 which requires such a conditional sales contract to be recorded or filed within the State.

2. Chattel Mortgages and Conditional Sales § 9— effect of unrecorded contract executed in another state — subsequent creditors

Where a vehicle subject to a conditional sales contract executed in another state is brought into this State without the security being perfected in accordance with the law of the other state in effect at the time the security interest attached, and there is no showing that the security interest was ever perfected in this State, the conditional sales contract is not valid and enforceable against a subsequent creditor of the vendee who has perfected his lien by taking possession of the vehicle. G.S. 20-58(c).

3. Chattel Mortgages and Conditional Sales § 9— contract executed in another state — burden of proof

The burden of proof is on the person claiming under the lien of a conditional sales contract executed in another state to show that his lien was perfected under the law of such other state.

APPEAL by defendant Lentz from *Thornburg, S.J.*, March 1968 Term Superior Court of BUNCOMBE.

Plaintiff instituted action for recovery of the possession of a 1965 Ford one-half ton pickup truck with camper, alleging that defendant Sprinkle had purchased same from Superior Motors, Inc., of Anchorage, Alaska, on or about 10 May 1965. The complaint further alleged that at the time of purchase, defendant Sprinkle executed and delivered to the vendor "a chattel mortgage or conditional sale agreement" wherein he agreed to pay the balance of $3042.41 in 30 monthly installments, the first installment in the amount of $101.52 due on 10 June 1965 and 29 equal successive monthly installments of $101.41 due thereafter on the 10th of each month until the balance had been paid in full. Prior to the due date of the first of the installments, Superior Motors, Inc., for value, transferred and assigned "said conditional sale agreement" to the plaintiff. Defendant Sprinkle failed to pay the installments due in December 1965, and January, February, and March 1966, and by reason of this default plaintiff declared the outstanding balance immediately due and payable. The complaint alleges that demand has been made for payment or possession and both demands have been refused; that defendant Lentz has possession of the vehicle and refuses to deliver it to plaintiff although "he has been advised of the existence of plaintiff's lien thereon." The action was instituted on 4 April 1966. Defendant Sprinkle was not served with summons and did not answer. Defendant Lentz answered admitting the residence of defendant Sprinkle and defendant Lentz in Buncombe County and admitting his possession of the vehicle and his refusal to deliver it to plaintiff. All other allegations are denied. By further answer defendant Lentz averred that on 10 October 1965 defendant

Sprinkle, with consent of plaintiff, removed the vehicle from Alaska and arrived in North Carolina on 23 October 1965 and that the vehicle has been continuously in Buncombe County since that time. Defendant Sprinkle became indebted to defendant Lentz and on 31 December 1965 executed and delivered to defendant Lentz his note in the amount of $400 secured by chattel mortgage on the 1965 Ford truck. The mortgage was immediately recorded in the Buncombe County Registry. Prior to recording the mortgage, defendant Lentz communicated with plaintiff concerning the indebtedness due him by defendant Sprinkle. Plaintiff has never caused its "chattel mortgage or conditional sales contract" to be recorded in Buncombe County and has never caused the name of the lienholder to be registered with the North Carolina Department of Motor Vehicles "or to be perfected in this State" and defendant's lien and right to possession is superior to plaintiff's. As a second further answer and defense, defendant Lentz averred that the camper unit on the truck was purchased after the execution of the "Retail Installment Contract" and is not included under its terms and conditions. Defendant Lentz demurred to the complaint for that the plaintiff is not the real party in interest. The demurrer was overruled, and defendant Lentz excepted, but this exception is not brought forward in his assignments of error.

Plaintiff and defendant Lentz waived trial by a jury and stipulated that the allegations of the complaint and the averments of the first and second further answer and defense shall constitute the evidence in the case; that the judge might consider said evidence, enter findings of fact and conclusions of law, sign a final judgment and the findings of fact shall have the force and effect of the verdict of a jury. From judgment entered in favor of plaintiff, defendant Lentz appeals, assigning as error each of the court's conclusions of law.

Lee, Lee & Cogburn for plaintiff appellee.

Bruce J. Brown for defendant Lentz appellant.

MORRIS, J.

Upon the pleadings, which constituted the evidence in the case, the court found facts that defendant Sprinkle purchased a 1965 Ford one-half ton truck with camper from Superior Motors, Inc., on 10 May 1965 in Alaska, then his residence; that he "executed and delivered to Superior Motors, Inc., of Anchorage, Alaska, a conditional sale contract" in the amount of $3042.41, by which he agreed to pay said balance in monthly installments; that the conditional sale contract contained the following language:

> "Seller has retained title to, and shall have a lien upon and a security interest in the above described property until all amounts payable by buyer hereunder are fully paid in cash to seller. Buyer agrees to deliver to seller any certificate of title applicable to said property, which certificate shall show seller's interest in said property. Any accessories or equipment placed on the above described property shall be deemed to be a part thereof and a security interest therein shall immediately vest in seller. The term 'property' as used herein shall mean the above described property and all accessories and equipment placed thereon.";

that vendor for value transferred and assigned the conditional sale contract to plaintiff, the contract providing that in such an event, assignee "shall be entitled to all the powers and rights of the seller"; that defendant Sprinkle defaulted and plaintiff declared the entire balance due, demanded payment or possession of the vehicle and was refused; that the 1965 Ford pickup truck has been in North Carolina since 23 October 1965; that prior to 31 December 1965 defendant Sprinkle became indebted to defendant Lentz and, on 31 December 1965, executed his note for $400 secured by a chattel mortgage to defendant Lentz on the vehicle, the subject of this litigation; that defendant Lentz recorded said chattel mortgage in the Buncombe County Registry but prior to doing so, communicated with plaintiff concerning the indebtedness of defendant Sprinkle to defendant Lentz; that there is no evidence that defendant Lentz made any effort to perfect any lien which he might claim to have on the vehicle other than recording the chattel mortgage; that there is no evidence that plaintiff has recorded or attempted to record its conditional sale contract in the Buncombe County Registry or caused its name to be registered as lienholder with the North Carolina Department of Motor Vehicles; that defendant Lentz has possession of the vehicle and refuses to give it up.

Upon these findings of fact, the court entered the following conclusions of law:

> "(1) By virtue of the conditional sale contract entered into between the defendant, Harold W. Sprinkle and Superior Motors, Inc., of Anchorage, Alaska, title to the 1965 Ford one-half ton pickup truck was retained by Superior Motors, Inc., until all amounts due under the conditional sale contract had been fully paid in cash by the defendant, Harold W. Sprinkle.
>
> (2) The assignment of the conditional sale contract by Superior Motors, Inc., to the plaintiff vested in the plaintiff all

rights of Superior Motors, Inc., including the retained title to and security interest in said 1965 Ford one-half ton pickup truck.

(3) Since the defendant, Harold W. Sprinkle, failed to pay the amounts due under the conditional sale contract he never became vested with title to said 1965 Ford one-half ton pickup truck.

(4) Not having title to said motor vehicle, the defendant, Harold W. Sprinkle, could not create a valid security interest in said motor vehicle in North Carolina.

(5) The security interest which the defendant, Harold W. Sprinkle, attempted to create in favor of the defendant, DeVere C. Lentz, Jr., is invalid and has never been perfected according to the laws of North Carolina.

(6) The retained title and security interest in said 1965 Ford one-half ton pickup truck which is vested in the plaintiff is valid and superior to any claim of the defendant, DeVere C. Lentz, Jr., therein, and the plaintiff is entitled to the possession of said motor vehicle in order that it may foreclose its security interest therein in accordance with the terms of the conditional sale contract."

To each conclusion of law defendant Lentz excepted, and each is assigned as error.

At the outset it is noted that the record is devoid of any evidence as to whether the conditional sale agreement executed by defendant Sprinkle to Superior Motors, Inc. and assigned to plaintiff was ever recorded in Alaska or the security interest thereunder ever perfected in Alaska under the provisions of the Uniform Commercial Code in effect in that state at the time of this transaction. From the facts found, neither plaintiff nor defendant Lentz has perfected any lien or security interest under the provisions of G.S. 20-58 with respect to perfection of security interests in vehicles requiring certificates of title.

Based on the facts found by the trial court, the question presented by this appeal is this: Is the conditional sale contract in question valid and enforceable in this State as against the defendant Lentz under the common law, or is it void as against him by reason of North Carolina statutory provisions?

[1] "At common law a conditional sale contract is valid and effective even as against creditors and *bona fide* purchasers for value

from the conditional vendee. Under the reservation of title in the vendor, no assignable title vests in the conditional vendee." *Finance Corp. v. Quinn,* 232 N.C. 407, 61 S.E. 2d 192. Plaintiff contends that under the rule of comity, the conditional sale contract is enforceable in North Carolina as against defendant Lentz. Our Supreme Court has stated with approval the general rule that comity protects the lien of a chattel mortgage or conditional sales contract *duly filed and recorded in the state where it was executed* and the property was then located, after its removal to another state without recording or filing in that state. *Truck Corp. v. Wilkins,* 219 N.C. 327, 13 S.E. 2d 529; *Discount Corp. v. McKinney,* 230 N.C. 727, 55 S.E. 2d 513. The North Carolina Supreme Court has, however, expressly held that the rule of comity yields to a local statute which requires such a conditional sales contract to be recorded or filed within the state. *Credit Corp. v. Walters,* 230 N.C. 443, 53 S.E. 2d 520; *Bank v. Ramsey,* 252 N.C. 339, 113 S.E. 2d 723. In *Credit Corp. v. Walters, supra,* Barnhill, J., (later C.J.) speaking for the Court, said:

> ". . . comity is not permitted to operate within a State in opposition to its settled policy as expressed in its statutes, or so as to override the express provisions of its legislative enactments. *Applewhite Co. v. Etheridge,* 210 N.C. 433, 187 S.E. 588; *Ritchey v. Southern Gem Coal Corp.,* 12 F. 2d 605. Our Legislature in enacting our registration statutes, G.S. 47-20, 23, made no exception in favor of a conditional sale contract or chattel mortgage executed and effective in another State where the property embraced in such instrument is subsequently brought into this State."

G.S. 47-20 provides, in pertinent part, that "No . . . conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the . . . conditional sales vendee, but from the time of registration thereof as provided in this article;".

In *Credit Corp v. Walters, supra,* the automobile which was the subject of that action was purchased in Illinois. The purchaser executed a conditional sale contract to secure the purchase price. The contract was recorded in Illinois. It was not recorded in any other state. While the car was in North Carolina temporarily, it was attached to satisfy a judgment against the Illinois purchaser. Plaintiff instituted action in claim and delivery. The court there held that the requirements of our statute have no application to personal

property in transit through or temporarily within our State, saying "The lien of a mortgage or conditional sale contract validly executed and legally registered according to the laws of the State wherein the property was and the mortgagor resided will be recognized and enforced in this State against the claims of attaching creditors when the presence of such property in this State is of such a temporary or transient nature that it has not come to rest in the State so as to acquire a *situs* here."

The question of rights of parties to an automobile under a conditional sale contract executed in another state as opposed to a subsequent purchaser for value in this State was again before the Court in *Finance Corp. v. Quinn, supra.* There one Stewart on 6 November 1947 purchased the car in litigation in Rhode Island and executed a conditional sale contract. On 4 February 1948, the North Carolina Department of Motor Vehicles issued a certificate of title for the car to W. D. Pridgen, a North Carolina resident, on his application. The purchaser from Pridgen subsequently sold the car to the defendant who had possession when plaintiff instituted its action in claim and delivery. The conditional sale contract was never recorded in North Carolina and it was not required to be recorded in Rhode Island. There was no evidence as to how the conditional vendee, Stewart, parted with title and possession. The Court there held that mere possession without proof that title was acquired, either directly or by *mesne* conveyances, from the conditional vendee is not sufficient to bring the defendant within the protection of the statute, since the statute protects the title *conveyed by the conditional vendee* as against unrecorded liens and conditional sales contracts.

Credit Corp. v. Walters, supra, was decided prior to the enactment of G.S. 44-38.1. In *Finance Corp. v. Quinn, supra,* the Court noted that G.S. 44-38.1 was not applicable in that situation.

G.S. 44-38.1 provides the procedure for perfecting in this State liens on personal property created in another state. It provides that, for the purposes of the statute, personal property acquires a situs when brought into this State with the intent that it be permanently located here, and the keeping of personal property in this State for two consecutive months is *prima facie* evidence that it has acquired a situs here. Subsection (b) provides that when personal property covered by a conditional sale contract is brought into this State and acquires a situs here, the "encumbrance is valid prior to registration in this State as against lien creditors of, or purchasers for valuable

consideration from, the grantor, mortgagor or conditional sale vendee *only* upon fulfilling *all* of the following conditions:

(1) That such encumbrance was properly registered in the state where such property was located prior to its being brought into this State; and

(2) That such encumbrance is properly registered in this State within ten days after the mortgagee, grantee in a deed of trust, or conditional sale vendor has knowledge that the encumbered property has been brought into this State; and

(3) That such registration in this State in any event takes place within four months after encumbered property has been brought into this State." (Emphasis added.)

The court found as a fact that the 1965 Ford one-half ton pickup truck, the subject of this litigation, "has been in North Carolina since being brought here by the defendant, Harold Sprinkle, on October 23, 1965." This action was begun on 4 April 1966, so that at that time the vehicle had been in North Carolina considerably longer than two months. Under the statute the evidence and the findings of fact are sufficient to establish *prima facie* a situs in North Carolina. Plaintiff has met none of these conditions.

G.S. 44-38.1(c) further provides that where no situs is acquired, the encumbrance is valid "as against lien creditors of . . . conditional sale vendee only from the date of due registration of such encumbrance in the proper office in the state from which the property was brought." There is no evidence or finding of fact that plaintiff has registered its conditional sale contract in Alaska at any time.

Where the encumbrance is not required to be registered in the state from which the property is brought into this State, "such encumbrance is valid as against lien creditors of . . . conditional sale vendee only from the time of registration of such encumbrance in this State pursuant to G.S. 47-20." G.S. 44-38.1(d).

We find nothing in the findings of fact in this case to indicate compliance by plaintiff with any section of G.S. 44-38.1, the provisions of which modify and supersede the general rule of comity. *Bank v. Ramsey, supra.*

[2] However, we feel that G.S. 20-58, which was not relied on by the trial court, is more specifically applicable to this case than the statutes previously discussed. It would appear that prior to 1961, the statutes previously discussed would govern this situation. In 1961, however, extensive changes were made in the method for re-

cording a security interest in a vehicle of a type for which a certificate of title is required. Chapter 835, 1961 Session Laws. G.S. 20-58 states that a security interest for such a vehicle is not valid against creditors of the owner or subsequent transferees or lienholders unless the lien is recorded on the certificate of title.

Subsection (c) of G.S. 20-58 relates to vehicles which are subject to a security interest when they are brought into this State. There, it is provided that the validity of the security interest on a vehicle brought into this State from a foreign jurisdiction is to be determined by the laws of that jurisdiction.

Looking to the laws of Alaska, Alaska Statutes, § 28.10.270 (1953), provides that the owner of a vehicle is to apply to the department of vehicles for a certificate of title upon the form furnished by the department. This form is to contain a statement of the applicant's title, and a statement of liens or encumbrances upon the vehicle. Alaska Statutes, § 28.10.320 (1953) provides that the certificate of title, when issued, shall contain "a statement of the owner's title and of all liens and encumbrances upon the vehicle, and whether possession is held by the owner under a lease, contract of conditional sale, or other agreement." The title certificate is to be delivered to the person holding the first lien when the vehicle is encumbered. Alaska Statutes, § 28.10.330 (1953).

Section 28.10.470 (1951) of the Alaska Statutes provides:

> "No conditional sale contract, conditional lease, chattel mortgage or other lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession, is valid as against the creditor of an owner acquiring a lien by levy or attachment or a subsequent purchaser or encumbrancer without notice until the requirements of §§ 480-530 are complied with." (1964 amendment).

The Uniform Commercial Code as enacted in Alaska at the time of this transaction provides that a security interest of a type which is to be recorded on the certificate of title is excepted from the usual filing provisions of the Code. Alaska Statutes, § 45.05.734 (1962).

[2, 3] In summary, in looking to the laws of Alaska as we are required to do by G.S. 20-58(c), we find that the plaintiff's security interest could take priority under Alaska law only if it had (1) taken possession of the vehicle, or (2) had its lien recorded on the certificate of title and filed the encumbrance with the department of vehicles. Alaska Statutes, §§ 28.10.510 and 28.10.530. If the plaintiff's security interest was perfected by recordation on the certificate

of title and filing with the department as required by Alaska law — then this security interest would continue to be perfected in this State under G.S. 20-58(c)(2)(a), which provides:

> "If the name of the lien holder is shown on an existing certificate of title issued by that jurisdiction, his security interest continues perfected in this State."

However, we do not find anything in the pleadings, which, as stipulated by the parties, constitute the evidence in this case, or the findings of fact which show that the plaintiff's security interest was perfected in any manner. By the terms of the "conditional sale contract", the buyer was obligated to deliver the certificate of title to the seller showing the seller's interest in the vehicle. But, there is no evidence, or finding of fact, showing that this was done. The burden of proof was on the plaintiff to show that his lien was perfected under Alaska law. *Discount Corp. v. McKinney, supra.* Also, there is no showing that the plaintiff's security interest was ever perfected in this State. G.S. 20-58(c)(3).

[2] The question now arises — has the defendant perfected his lien under the requirements of G.S. 20-58? Again, there is no evidence before us which shows that the defendant has complied with the provisions of G.S. 20-58 by having his lien recorded on the certificate of title. However, there is evidence and finding of fact showing that he has taken possession of the vehicle.

> "There is, we think, clear implication in G.S. 20-58(a) that the Legislature did not intend to prevent a mortgagee who has actual possession of the pledged vehicle from acquiring a lien having priority over liens not then perfected.
>
> Neither party had a perfected lien prior to June 19, 1963. On that date, Long (the debtor) surrendered possession of the automobiles to plaintiff to hold as security for the sums loaned. It (debtor) acquired a valid lien from the moment it took possession." *Trust Co. v. Finance Co.*, 262 N.C. 711, 138 S.E. 2d 481.

The defendant, Lentz, perfected his lien by taking possession of the vehicle. Being the first to perfect, he has the superior lien. The decision below must be reversed and judgment entered accordingly.

Reversed.

MALLARD, C.J., and CAMPBELL, J., concur.

CABLEVISION OF WINSTON-SALEM, INC., PLAINTIFF v. CITY OF WINSTON-SALEM, A MUNICIPAL CORPORATION; THE BOARD OF ALDERMEN OF THE CITY OF WINSTON-SALEM; FLOYD S. BURGE, JR., ALDERMAN; RUSSELL T. BROWN, ALDERMAN; GEORGE W. CHANDLER, ALDERMAN; D. FLEET CHIDDIE, ALDERMAN; CARROLL E. POPLIN, ALDERMAN; C. C. ROSS, ALDERMAN; CARL H. RUSSELL, ALDERMAN; FRANKLIN R. SHIRLEY, ALDERMAN; M. C. BENTON, JR., MAYOR; JOHN M. GOLD, CITY MANAGER OF THE CITY OF WINSTON-SALEM, AND LEWIS CUTRIGHT, CITY SECRETARY OF THE CITY OF WINSTON-SALEM, ORIGINAL DEFENDANTS AND TRIANGLE BROADCASTING CORPORATION AND CRESCENT CABLEVISION COMPANY, INTERVENING ADDITIONAL DEFENDANTS

No. 68SC123

(Filed 18 December 1968)

1. Appeal and Error § 6— appeal from interlocutory injunction

Appeal from an interlocutory injunction is not premature and will be considered by the Court of Appeals if a substantial right of the appellant would be adversely affected by continuance of the injunction in effect pending final determination of the case.

2. Appeal and Error § 6— appeal from interlocutory injunction — substantial right of appellant adversely affected

In an action for a *writ* of *mandamus* directing the Board of Aldermen of the City of Winston-Salem to consider and act in good faith upon plaintiff's application for a cable television franchise and to adopt an ordinance granting plaintiff such a franchise, defendants may properly appeal from an order restraining the Board of Aldermen pending trial of the action from passing ordinances granting such franchises to two other applicants, the right of the governing body of the City to exercise its legislative function in dealing with a matter of large public interest to its citizens having been adversely affected by the restraining order.

3. Injunctions § 12— injunction as subsidiary remedy — continuance until final hearing

While the granting or refusal of an injunction sought as a subsidiary remedy in aid of another action is addressed to the sound discretion of the court, a restraining order may not be continued until the final hearing unless it is made to appear that there is probable cause the plaintiff will be able to establish its asserted right at the final hearing.

4. Appeal and Error § 58— review of findings in injunctive proceedings

In reviewing on appeal an order granting or continuing an interlocutory injunction in effect pending final adjudication of the case, the Court of Appeals is not bound by the findings of fact of the trial court, but may review and weigh the evidence and find facts for itself.

5. Municipal Corporations § 23— cable television franchises

G.S. 160-2(6a) authorizes a municipality to grant upon reasonable terms franchises for the operation of cable television systems and to prohibit the operation of such systems without a franchise.

6. Municipal Corporations § 23— ordinance relating to cable television franchises

The ordinance setting forth the procedure for the filing and consideration of applications for cable television franchises in the City of Winston-Salem *is held* to impose no positive duty upon the Board of Aldermen to grant cable television franchises to every qualified applicant, but gives the Board discretion to grant or refuse a franchise to any applicant. Chapter IX, Art. 15, Winston-Salem City Code.

7. Municipal Corporations §§ 23, 45; Injunctions § 12; Mandamus § 2— mandamus to grant cable television franchise — injunction to prevent grant of franchise to other applicants

In an action for a *writ* of *mandamus* directing the Board of Aldermen of Winston-Salem to consider and act in good faith upon plaintiff's application for a cable television franchise and to adopt an ordinance granting such a franchise to plaintiff, the court erred in restraining the Board of Aldermen pending final trial of the action from passing ordinances granting such franchises to two other applicants where the evidence shows that the Board has given careful consideration to plaintiff's application and where the applicable city ordinance imposes no mandatory duty upon the Board of Aldermen to issue plaintiff a cable television franchise which can be enforced by a *writ* of *mandamus*, there being no reasonable probability that plaintiff will be able to establish a right to a *writ* of *mandamus* at the final hearing.

8. Municipal Corporations § 23— power to grant cable television franchise

The power to grant or to refuse to grant a cable television franchise is essentially legislative in nature, and its exercise rests solely within the discretion of the governing body of the municipality.

9. Mandamus § 2; Municipal Corporations § 45— mandamus to compel discretionary action

Mandamus does not lie to compel performance of an act which requires the exercise of judgment and discretion on the part of the party against whom enforcement is sought.

10. Municipal Corporations § 23— reasons for granting cable television franchise

All factors involved, including the extent of local ownership and control, may be considered by a municipal governing body in the selection of one to whom a cable television franchise shall be granted.

11. Municipal Corporations § 23— review of grant of cable television franchise

Where ordinance granting a television franchise is valid on its face, the courts may not inquire into the motives which prompt a municipality's legislative body to enact the ordinance.

APPEAL by defendants from *Johnston, J.*, 29 January 1968 Schedule "B" Civil Session of FORSYTH Superior Court.

This is a civil action in which plaintiff seeks a *writ* of *mandamus* directing the original defendants, who were the City of Winston-Salem, its officials, and its governing Board of Aldermen, to consider and act in good faith upon the application which plaintiff had theretofore filed for a franchise to construct and operate a community antenna television system (CATV) in said City, "and thereupon to adopt an ordinance granting a franchise to the plaintiff as requested in plaintiff's application therefor." Plaintiff also prayed in its complaint for a temporary restraining order enjoining defendants pending the trial of this action from taking any action or voting upon ordinances which had been initially adopted by said Board at a meeting on 2 January 1968 purporting to grant franchises to Crescent Cablevision Company and to Triangle Broadcasting Corporation. The facts pertinent to this appeal may be summarized as follows:

On 6 November 1967 the Board of Aldermen of the City of Winston-Salem adopted, as a new Article IX, to Chapter 15 of the Winston-Salem City Code, a general ordinance providing for the granting of franchises for the operation and maintenance of community antenna television systems. This ordinance makes it unlawful for any person to engage in the business of providing a CATV service in Winston-Salem unless such person shall first obtain and shall hold a currently valid franchise granted pursuant to the provisions of the ordinance. Section 3(b) of the ordinance specifies the manner in which persons seeking issuance of a franchise shall file application therefor and specifies in detail the information which must be furnished by the applicant, including information as to the identity, ownership and control of the applicant; a statement showing applicant's experience, if any, in establishing and providing a CATV service; a certified financial statement showing applicant's financial status and ability to complete construction of the proposed CATV system and provide the contemplated service; a description of the CATV system which applicant proposes to construct; a statement setting forth any agreement with respect to ownership, control or transfer of the proposed franchise or CATV system; and a schedule of proposed rates and charges. The ordinance then provides in Section 3(c) as follows:

> "(c) Upon consideration of any such application, the Board shall determine the applicant's qualifications to construct, operate and maintain a CATV system and to provide a CATV service in accordance with the provisions of this ordinance. If the Board determines that the applicant is not so qualified, it may refuse to grant the requested franchise. If the Board de-

termines that the applicant is so qualified, it may, by ordinance, grant a nonexclusive franchise to such applicant. Provided, however, no provision of this ordinance may be deemed or construed as requiring the granting of a franchise when the Board determines that to do so would not be in the public interest. . . ."

On 9 November 1967 the plaintiff filed its application with the City Manager in accordance with the requirements of the ordinance. Applications for CATV franchises were also filed by Crescent Cablevision Company and by Triangle Broadcasting Corporation. These applications were referred to the Finance Committee of the Board of Aldermen for its recommendations. This committee held meetings on 5 December and 12 December 1967 for purposes of considering the three applications, and at these meetings representatives of all three applicants were present and were heard. A motion in the Finance Committee that all three applicants be granted CATV franchises failed for lack of a second. A motion that franchises be granted to two of the applicants, Triangle Broadcasting Corporation and Crescent Cablevision Company, resulted in a tie vote. The matter was then returned for consideration by the full Board of Aldermen without any committee recommendation. At the meeting of the Board of Aldermen held 2 January 1968, representatives of all three applicants were present and were heard from by the Board. None of the applications were rejected for failure to comply with formal requirements of the ordinance. At this meeting a motion was adopted by a four to three vote, with one abstention, to grant franchises to only two of the applicants, Triangle Broadcasting Corporation and Crescent Cablevision Company. Following adoption of this motion, all eight Aldermen present voted in favor of separate ordinances granting CATV franchises to Triangle Broadcasting Corporation and Crescent Cablevision Company. Since an ordinance granting a franchise must be voted on at two regular meetings before it shall be passed, G.S. 160-270, the matter then went over to the next regular meeting to be held 15 January 1968. On that day, Cablevision of Winston-Salem, Inc., plaintiff herein, instituted this suit and obtained a temporary restraining order enjoining the Winston-Salem Board of Aldermen from taking any action or voting at said regular meeting on 15 January 1968 or at any other meeting upon the two ordinances which had been initially adopted at the 2 January 1968 meeting granting CATV franchises to Crescent Cablevision Company and Triangle Broadcasting Corporation.

Triangle Broadcasting Corporation and Crescent Cablevision

Company moved to be permitted to intervene as additional defendants in this suit, which motions were allowed. The defendants then filed demurrers to the complaint, which were overruled.

The matter came on for hearing upon the order directing defendants to show cause why the temporary restraining order should not be continued in full force and effect until the trial of the case, and was heard upon the plaintiff's complaint, treated as an affidavit, and upon affidavits filed by plaintiff and defendants. After hearing, the judge of superior court entered order making findings of fact, including the following:

"(10) That plaintiff's aforesaid application was before the defendant Board of Aldermen at the meeting of the Board on January 2, 1968, and the defendant Board of Aldermen failed to consider the application submitted by the plaintiff and failed to determine whether or not the plaintiff was qualified to construct, operate and maintain a CATV system and to provide a CATV service in accordance with the provisions of Article IX of Chapter 15 of the Winston-Salem City Code, and the Board also failed to determine whether the granting of a franchise to the plaintiff would or would not be in the public interest;

"(11) That in considering the applications of Crescent Cablevision Company and Triangle Broadcasting Corporation and voting on January 2, 1968, in favor of the two ordinances purporting to grant CATV franchises to Crescent Cablevision Company and Triangle Broadcasting Corporation, the defendant Board of Aldermen did not consider or determine the qualifications of either Crescent Cablevision Company or Triangle Broadcasting Corporation to construct, operate and maintain a CATV system and to provide a CATV service, or determine whether it would or would not be in the public interest to grant franchises to either Crescent Cablevision Company or Triangle Broadcasting Corporation, but, instead, the defendant Board of Aldermen were actuated by the fact and circumstance that Crescent Cablevision Company and Triangle Broadcasting Corporation were and are 'home-owned companies'; . . ."

Based on these findings of fact, the judge of superior court concluded as a matter of law that there is probable cause the plaintiff will be able to establish the rights asserted in its complaint and reasonable probability that the plaintiff would prevail at the final hearing, and accordingly entered order continuing the temporary restraining order in full force and effect until the final hearing and trial of the case. From this order, defendants appealed.

Jordan, Wright, Henson & Nichols, by Welsh Jordan and William L. Stocks, for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by W. F. Womble and John L. W. Garrou, for original defendant appellants.

Craig, Brawley, Horton & Graham, by William L. Graham, for intervening defendant appellant, Crescent Cablevision Company.

Hatfield, Allman & Hall, by Weston P. Hatfield and C. Edwin Allman, for intervening defendant appellant, Triangle Broadcasting Corporation.

PARKER, J.

[1, 2] Appellants assign as error entry of the order continuing the injunction in effect *pendente lite.* Appeal from an interlocutory order of this type is not considered premature and will be entertained by this Court if a substantial right of the appellant would be adversely affected by continuance of the injunction in effect pending final determination of the case. G.S. 1-277; *Board of Elders v. Jones,* 273 N.C. 174, 159 S.E. 2d 545; *Conference v. Creech,* 256 N.C. 128, 123 S.E. 2d 619. In the present case the order appealed from restrained the governing body of the City of Winston-Salem from exercising its legislative function in dealing with a matter of large public interest to the citizens of that City. A substantial right of appellant City has been adversely affected. Appeal from the order is, therefore, not premature.

[3, 4, 7] While the granting or refusal of an injunction sought as a subsidiary remedy in aid of another action is addressed to the sound discretion of the court, in order to justify continuing the writ until the final hearing ordinarily it must be made to appear that there is probable cause the plaintiff will be able to establish its asserted right at the final hearing. *Edmonds v. Hall,* 236 N.C. 153, 72 S.E. 2d 221; 2 McIntosh, N. C. Practice 2d, § 2216. In the present case plaintiff seeks as its primary relief a *writ* of *mandamus* to compel the Board of Aldermen of the City of Winston-Salem to consider in good faith plaintiff's application for a CATV franchise, to act thereon in good faith pursuant to the provisions of Section 3(c) of the City's 6 November 1967 ordinance, "and thereupon to adopt an ordinance granting a franchise to the plaintiff as requested in the plaintiff's application therefor." This appeal, therefore, presents the question whether on the present record plaintiff has shown a reasonable probability that it will be entitled upon final determination of the case to the *writ* of *mandamus* which plaintiff asserts

it has a right to receive. Furthermore, in reviewing on appeal an order granting or continuing an interlocutory injunction in effect pending final determination of the case, this Court is not bound by the findings of fact made by the trial court, but may review and weigh the evidence and find the facts for itself. *Realty Corp. v. Kalman,* 272 N.C. 201, 159 S.E. 2d 193; *Milk Commission v. Food Stores,* 270 N.C. 323, 154 S.E. 2d 548; *Conference v. Creech, supra.* In this case the documentary evidence submitted to the trial court at the hearing which was held to determine if the restraining order should be continued in effect *pendente lite* included a copy of the minutes of the 2 January 1968 meeting of the defendant Board of Aldermen. This evidence shows, contrary to the finding of fact made by the trial court, that the defendant Board did give careful consideration to plaintiff's application for a CATV franchise.

[5-7] The nature and purposes of a community antenna television system, popularly referred to as CATV, have heretofore been made the subject of judicial consideration in our Supreme Court and require no further description here. See, *Kornegay v. Raleigh,* 269 N.C. 155, 152 S.E. 2d 186; *Shaw v. Asheville,* 269 N.C. 90, 152 S.E. 2d 139. A growing public interest and the need to clarify municipal authority in respect to CATV resulted in enactment of Chapter 1122 of the 1967 Session Laws, which added a new subsection (6a) to G.S. 160-2. This statute authorized a city or town "(t)o grant upon reasonable terms franchises for the operation of cable television systems, such grants not to exceed the period of 20 years, to levy reasonable franchise taxes under authority of G.S. 160-56 on the business of operating cable television systems, and to prohibit the operation of cable television systems without a franchise." Under authority of this statute the defendant Board of Aldermen of Winston-Salem on 6 November 1967 enacted a general ordinance as an addition, designated as a new Article IX to Chapter 15, to the Winston-Salem City Code.

G.S. 160-2(6a) is a grant of power to cities and towns. It imposes no duties. Plaintiff appellee recognizes this, and bases its case upon the contention that the duties, performance of which it seeks to enforce by *writ* of *mandamus,* were imposed upon defendant Board of Aldermen, not by the statute, but by the new Article IX of Chapter 15 of the Winston-Salem City Code. In particular, plaintiff appellee contends that the language of Section 3(c) of the new Article IX of Chapter 15 of the Winston-Salem City Code, imposes a mandatory duty upon the Board to consider any application made to it for a CATV franchise as provided for in Section 3(b) of said

Article and upon such consideration to "determine the applicant's qualifications to construct, operate and maintain a CATV system and to provide a CATV service in accordance with the provisions" of the ordinance. Plaintiff appellee then cites the following language of Section 3(c) of the ordinance:

> "If the Board determines that the applicant is not so qualified, it may refuse to grant the requested franchise. If the Board determines that the applicant is so qualified, it may, by ordinance, grant a nonexclusive franchise to such applicant. Provided, however, no provision of this ordinance may be deemed or construed as requiring the granting of a franchise when the Board determines that to do so would not be in the public interest."

Plaintiff appellee contends that under the above-quoted language of the ordinance, the defendant Board may refuse to grant a franchise only for either of two reasons: (1) That the applicant is not qualified or (2) that to grant the franchise would not be in the public interest. Plaintiff contends that absent a determination by the Board that one of these facts exist, the Board has no discretion in the matter and is under a positive duty to grant the franchise. We do not agree. In the first place, the language of the ordinance itself is permissive, not mandatory. Section 3(c) of the ordinance provides that if the applicant is found qualified, the Board *may,* by ordinance, grant a nonexclusive franchise to such applicant. Nothing in this language indicates that the Board is under a positive duty to grant franchises to every applicant found qualified to construct and operate a CATV system. The additional language in the proviso which makes it clear that the ordinance shall not be "deemed or construed as requiring the granting of a franchise when the Board determines that to do so would not be in the public interest," does not by implication make mandatory the preceding language which by its express provisions is permissive. Therefore, under the language of Section 3(c) of the Winston-Salem City Code, upon which plaintiff appellee bases its entire case, we find no mandatory duty imposed upon the Winston-Salem Board of Aldermen which can be enforced by a *writ* of *mandamus* requiring defendant Board to issue plaintiff a CATV franchise.

[8-11] There is, however, a more fundamental reason why plaintiff's action must fail. Such procedures as are provided for and such duties as are imposed by the new Article IX of Chapter 15 of the Winston-Salem City Code are self-imposed by the governing body of that City itself. Nothing in the general law requires that the

City either issue, or not issue, one or more CATV franchises to anyone. Nothing in the general law requires that it set up any procedures for the filing or consideration of applications for such franchises. The adoption by the City of a general ordinance setting forth the procedures for the filing and consideration of applications for CATV franchises did not vest in the plaintiff, or in any other applicant, any right which can be enforced by the Courts to force the City to grant to the plaintiff, or to any other applicant, a CATV franchise. The power to grant or to refuse to grant any such franchise remains vested solely in the governing body of the City. This power is essentially legislative in nature. *Monarch Cablevision v. City Council, City of Pacific Grove,* 239 Cal. App. 2d 206, 48 Cal. Rptr. 550; 12 McQuillin, Municipal Corporations, 3rd Ed., § 34.22. Its exercise is entirely discretionary. *Mandamus* does not lie to compel performance of an act which requires the exercise of judgment and discretion on the part of the party against whom enforcement is sought. 5 Strong, N. C. Index 2d, Mandamus, § 1, p. 290, *et seq.* In this case it is not for the Courts of the State but for the Board of Aldermen who are duly elected by the people of Winston-Salem to decide under the law how many, to whom, and under what conditions CATV franchises will be issued in that City. If in exercising that judgment the Board of Aldermen should be influenced by the fact that one applicant is considered by it to be "home-owned" while another is not, plaintiff still has no legal cause to complain. All factors involved, including the extent of local ownership and control, may properly be considered in the selection of one to whom a franchise shall be granted to serve the public of a particular locality. In any event, the Courts may not inquire into the motives which prompt a municipality's legislative body to enact an ordinance which is valid on its face. *Clark's v. West,* 268 N.C. 527, 151 S.E. 2d 5.

[7] Since on the record before us it does not appear that there is any reasonable probability that plaintiff will prevail at the final hearing of this cause, it was error to enter the order continuing the restraining order in effect and this cause is remanded to the Superior Court of Forsyth County for entry of an order in accordance with this opinion.

Reversed and remanded.

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

DAVID L. STONE, ADMINISTRATOR OF THE ESTATE OF BRUCE CHARLES CLAYTON, DECEASED v. THE CITY OF FAYETTEVILLE

No. 6812SC436

(Filed 18 December 1968)

1. Municipal Corporations § 12— tort liability — governmental function

In the absence of statutory provision, there can be no recovery against a municipal corporation for injuries occasioned by its negligence or nonfeasance in the exercise of functions essentially governmental in character.

2. Municipal Corporations § 5— governmental v. proprietary functions

Any activity of a municipality which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State rather than for itself is a governmental function; any municipal activity which is commercial or chiefly for the private advantage of the compact community is private or proprietary.

3. Municipal Corporations § 20— operation of storm drainage system — governmental function

A municipality exercises a governmental function in operating and maintaining a public storm drainage system and is immune from civil liability for personal injury or death resulting therefrom.

ON *certiorari* by defendant, City of Fayetteville, from *Braswell, J.*, at the 9 September 1968 Civil Session of CUMBERLAND Superior Court.

The allegations of plaintiff's complaint, filed 11 November 1964, are summarized as follows:

Plaintiff is the duly appointed administrator of Bruce Charles Clayton who was two years and ten months old at the time of his death on 25 September 1962. Sometime prior to said date, a storm drain was constructed under the supervision of and pursuant to plans and specifications approved by defendant City, to serve all or a portion of the Bordeaux section of Fayetteville. The storm drain pipe was 54 inches in diameter, extended several thousand feet, and terminated on a lot in the city near the Mary McArthur School. At its terminus, the drain pipe was incased in a concrete wall and was raised above a ditch or slight ravine into which it emptied. The drain extended through various sections of the Bordeaux area of Fayetteville and drained certain streets as well as other sections. Defendant City was solely responsible for the maintenance and control of the drain. At the terminus of the drain, the water flowing from it caused a hole to form in the ditch below the terminus, allowing water to pond for a depth of more than 3.5 feet. This condition existed with the full knowledge of the defendant's employees for sev-

eral months prior to intestate's death, and to the knowledge of defendant's employees several children had gotten into the water-filled hole. On 25 September 1962, plaintiff's intestate, while playing with other small children in the vicinity of the hole, fell into the water and was drowned.

Plaintiff alleged that the death of his intestate was proximately caused by the negligence of defendant. Defendant demurred to the complaint, contending that the complaint does not state facts sufficient to constitute a cause of action against defendant for that it appears upon the face of the complaint that defendant is a municipal corporation and that the alleged tort arose in connection with defendant's storm sewer drainage system, a governmental function for which defendant has no civil liability for personal injury or death.

Following a hearing, the demurrer was overruled and defendant petitioned this court for *certiorari* which was allowed.

Anderson, Nimocks & Broadfoot by Henry L. Anderson for plaintiff appellee.

Tally, Tally & Lewis by J. A. Bouknight, Jr., for defendant appellant.

BRITT, J.

[3] Was the defendant, in the maintenance of the storm drain described in plaintiff's complaint, exercising a governmental function from which it enjoyed immunity from tort action for wrongful death? We answer in the affirmative.

[1] A municipal corporation has a dual nature or capacity, one public and the other private, and exercises correspondingly twofold functions and duties. In determining the liability of a municipal corporation for tort under any particular circumstance, the courts very generally recognize that a distinction exists between the acts and duties which are strictly public and governmental in their nature and those which are of a private or proprietary nature. The rule almost universally recognized is that in the absence of statutory provision, there can be no recovery against a municipal corporation for injuries occasioned by its negligence or nonfeasance in the exercise of functions essentially governmental in character. In the exercise of such functions, the municipal corporation is acting for the general public as well as the inhabitants of its territory, and represents in such capacity and sovereignty of the state. 38 Am. Jur., Municipal Corporations, § 572, p. 261. This principle was declared

by our Supreme Court in the case of *Metz v. Asheville,* 150 N.C. 748, 64 S.E. 881, as follows: "* * * When cities are acting in their corporate capacity or in the exercise of powers for their own advantage, they are liable for damages caused by the negligence or torts of their officers or agents; but where they are exercising the judicial, discretionary or legislative authority conferred by their charters, or are discharging the duty imposed solely for the public benefit, they are not liable for the torts or negligence of their officers, unless there is some statute which subjects them to liability therefor." (Authorities cited).

In *Metz v. Asheville, supra,* the basis for the suit was the sewerage system maintained by the City of Asheville. In affirming judgment of the superior court in favor of defendant City, the Supreme Court said: "* * * The theory upon which municipalities are exempted from liability in cases like this is, that in establishing a free sewerage system for the public benefit it is exercising its police powers for the public good and is discharging a governmental function and, as expressed by the Supreme Court of Illinois, 'It is a familiar rule of law, supported by a long line of well-considered cases, that a city in the performance of its police regulations can not commit a wrong through its officers in such a way as to render it liable for a tort.' *Craig v. Charleston,* 180 Ill., 154; * * *."

[2] In numerous cases involving municipalities and the question of governmental immunity, our Supreme Court has pointed out the difference between governmental acts and proprietary acts. In *Carter v. Greensboro,* 249 N.C. 328, 106 S.E. 2d 564, in an opinion by Higgins, J., it is said:

> "Whether specific acts of a city are governmental or proprietary has been the subject of many of this Court's decisions. *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482; *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913; *Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371; *Klassette v. Drug Co.,* 227 N.C. 353, 42 S.E. 2d 411; *Hunt v. High Point,* 226 N.C. 74, 36 S.E. 2d 694; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42; *Broome v. Charlotte,* 208 N.C. 729, 182 S.E. 325; *Parks-Belk Co. v. Concord,* 194 N.C. 134, 138 S.E. 599; *Henderson v. Wilmington,* 191 N.C. 269, 132 S.E. 25. 'Any activity of the municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private ad-

vantage of the compact community, it is private or proprietary.' *Britt v. Wilmington,* 236 N.C. 446, 73 S.E. 2d 289. * * *"

In the case before us, the portion of the large storm drain which caused the hole or gully in which plaintiff's intestate was drowned was located some distance from a public street, therefore, defendant's liability cannot be determined by the rule of law pertaining to public streets or bridges or drains used solely in connection with streets. Here we are confronted with a 54-inch storm drain or sewer serving an entire area of the City of Fayetteville.

Defendant strongly relies on *Williams v. Greenville,* 130 N.C. 93, 40 S.E. 977. That case involved an open ditch which defendant City had constructed from higher land which went through a lot adjacent to plaintiff's lot and on into a street below plaintiff's lot. Apparently the ditch was used for drainage and to convey sewerage. Plaintiff contended that defendant allowed the ditch to become the depository of dead fowl and animals until it produced a disagreeable and unhealthy condition, resulting in water overflowing from the ditch onto plaintiff's lot and causing the sickness and death of two of plaintiff's children. In the opinion we find the following:

"* * * In actions for damage against a municipal corporation, where the act complained of was done in pursuance of its legislative or judicial powers, or in the exercise of its authorized police powers, the doctrine of *respondeat superior* does not apply, except as to property rights. And such defendant is only liable for injuries caused by neglect to perform some *positive duty* devolved upon it by reason of the incorporation, such as keeping the public streets in repair, or damage to property, or when it receives a pecuniary benefit from it. The reason for this distinction, that it is liable for damage, seems to lie in the fact of ownership — vested rights, which no one has the right to invade, not even the Government, unless it be for public purposes, and then only by paying the owner for it. This right to take property does not fall under the doctrine of police power, and the doctrine of *respondeat superior* applies."

Thus it appears that while our Supreme Court recognizes the right of recovery against a municipal corporation for property damage on the theory that one whose property is appropriated for public purposes is entitled to just compensation therefor, it recognizes immunity of a municipal corporation from liability for personal injury or death arising from the maintenance of a ditch used for drainage and sewerage.

In *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913, plaintiff, a resident of defendant municipality, allegedly was injured by the negligence of an employee of the city while an invitee in a municipal park; specifically, plaintiff was injured when struck on his head with a rock thrown from a rotary blade mower. In an opinion by Parker, J. (now C.J.), our Supreme Court quoted with approval from *Bolster v. Lawrence,* 225 Mass. 387, 114 N.E. 722, as follows: "The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is, there is no liability, if it is not, there may be liability." Our Supreme Court concluded that the receipt of net revenue from the park which plaintiff was visiting and during the year in question was sufficient to "import such a corporate benefit or pecuniary profit or pecuniary advantage to the City of Raleigh as to exclude the application of governmental immunity."

In the case before us, the City of Fayetteville received no fees or remuneration of any kind for the storm drain in question. Furthermore, in *James v. Charlotte,* 183 N.C. 630, 112 S.E. 423, our Supreme Court held that the defendant City in that case enjoyed governmental immunity from a tort committed by an employee of its Sanitation Department although the city made charges to its citizens covering the actual expense of removing garbage.

[3] *Metz v. Asheville, supra,* clearly established governmental immunity for North Carolina municipal corporations from wrongful death actions arising from the operation of a public sewerage system. *Williams v. Greenville, supra,* appears to establish the principle for a facility maintained by a city for sewerage and drainage. *James v. Charlotte, supra,* applies the doctrine to a sanitation department maintained by a city. We see no reason why the drainage facility described in plaintiff's complaint should not fall within the same category of governmental services.

The judgment of the superior court overruling defendant's demurrer is

Reversed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. DONALD W. SPAIN

No. 687SC398

(Filed 18 December 1968)

1. Rape § 18; Criminal Law § 34— assault with intent to commit rape — evidence of similar assaults

In a prosecution of defendant for assault with intent to commit rape upon his nine-year-old stepdaughter, testimony by the prosecuting witness that defendant had committed similar assaults upon her person on other occasions is competent.

2. Rape § 18; Criminal Law § 83— assault with intent to commit rape — competency of wife to testify against husband

In a prosecution of defendant for assault with intent to commit rape upon his nine-year-old stepdaughter, the child's mother is a competent witness against her husband to testify as to what she saw taking place between the defendant and her daughter at the time of the alleged offense. G.S. 8-57.

3. Rape § 18— assault with intent to commit rape — corroborative evidence

In a prosecution of defendant for assault with intent to commit rape upon his nine-year-old stepdaughter, testimony by the prosecutrix' mother as to what her daughter had told her about previous assaults by defendant is competent as corroborative evidence.

4. Criminal Law § 113— instructions as to corroborative evidence

In the absence of a request, the court is not required to instruct the jury that certain evidence is admitted solely for corroborative purposes.

5. Criminal Law §§ 89, 95— corroborative evidence — admission of evidence competent for restricted purpose

In a prosecution for assault with intent to commit rape upon a female child, the admission of testimony competent in part for the purpose of corroborating prosecutrix' testimony but incompetent in part in going beyond her testimony will not be held error where defendant interposed only a general objection to the evidence.

6. Criminal Law § 95— evidence for restricted purpose

As a general rule, the general admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by defendant that its admission be restricted, and a general objection to the testimony is insufficient.

7. Rape § 18— assault with intent to commit rape — nonsuit

In a prosecution of defendant for assault with intent to commit rape upon his nine-year-old stepdaughter, the testimony of the prosecutrix and her mother is sufficient to carry the issue of defendant's guilt to the jury, and the fact that a medical examination of the prosecutrix on the day after the assault revealed no bruises or anything of an abnormal condition upon the prosecutrix' body does not warrant nonsuit.

8. Rape § 18— instructions

In a prosecution for assault with intent to commit rape on a female child, instructions of the trial court correctly defined the elements of the offense, and the court's comparison of the offense charged with the offense of rape is not erroneous as confusing the jury, especially so when the defendant was found guilty of "assault upon a female" upon instructions correctly charging the necessary elements of that offense.

APPEAL by defendant from *Parker, J.*, 27 May 1968, Regular Criminal Session, NASH County Superior Court.

A bill of indictment, returned at the March 1968 Session, charged the defendant with a felonious assault with intent to rape Tanya Louise Peele (Tanya), his stepdaughter, on 10 February 1968. To this charge the defendant entered a plea of not guilty. The jury found him guilty of assault on a female, and from the imposition of a sentence of two years, he appealed.

The evidence on behalf of the State tends to show that on 10 February 1968 and for some time prior thereto, the defendant lived with his wife, their four-year old son, a fifteen-year old son of his wife by a former marriage, and Tanya, a nine-year old daughter of his wife by a former marriage.

Tanya testified that on 10 February 1968 she went in her room, which at that time was dark, to get her clothes; the defendant came in the room and would not let her go; her mother then came in the room, at which time the defendant let her go; but when her mother later left the house, the defendant caught her in the kitchen and would not let her go. Tanya also testified that on another occasion, while her mother was at work, the following episode occurred when she came home from school:

> "I was in the den trying to get up my homework when he picked me up and carried me up to his room. It was still light at that time. After he picked me up and took me to his room, I told him to let me go but he wouldn't. After that he started mashing his thing on me. I remember that I had on my school dress at that time. He took me to the bed in his room. He pulled off my underwear and his underwear too. After that he mashed his thing on me.
>
> . . .
>
> After he mashed his thing between my legs he just held me there. He held me there five or ten minutes. He did not say anything to me. I did have on my dress at that time. After he held me there for about five or ten minutes he let me go. There was no one else in the house at that time."

The defendant's wife testified that on 10 February 1968, about five o'clock in the afternoon, she told Tanya to go upstairs and get dressed; she went upstairs to get something about two or three minutes after Tanya had gone upstairs; when she reached the head of the stairs, she heard Tanya, who was crying, say, "Let me go"; she asked what was going on; Tanya answered, "Daddy won't let me go"; she asked the defendant what was going on and he replied, "I was just talking to her"; and she thought nothing of the episode, until later when she returned from an errand and entered the kitchen by the back door. She testified:

> "When I opened the swinging door to go into the kitchen I saw my husband squatted down on the kitchen floor with my daughter between his knees. When I walked in the door he stood up and Tanya ran out crying. I started to go out behind her. When I opened the door and turned around to ask him what he called himself doing, the light from the hall and from the back porch shone directly on where he was standing. He was standing about four feet in front of the door. When the lights hit him I saw that his clothes were undone and he was putting his privates in his pants and zipping his pants up."

T. W. Bruton, Attorney General, William W. Melvin, Assistant Attorney General, and T. Buie Costen, Staff Attorney, for the State.

W. O. Rosser, Attorney for defendant appellant.

CAMPBELL, J.

The defendant assigns as error the following: (1) the admission of Tanya's testimony about other episodes; (2) the admission of the mother's testimony about what she saw on 10 February 1968 and what Tanya told her about previous episodes; (3) the admission of Police Detective Horace Winstead's testimony about what Tanya told him; (4) the denial of the defendant's motion for judgment as of nonsuit; and (5) the failure of the trial judge to properly charge the jury.

[1] The defendant's first contention is that the trial court erred in admitting Tanya's testimony about other episodes. "Although the North Carolina Court has not expressly recognized a separate category for [sex] offenses . . ., the decisions are markedly liberal in holding evidence of similar sex offenses admissible for one or more of the purposes listed above [to show knowledge, intent, motive, etc.], especially when the sex impulse manifested is of an unusual or 'unnatural' character." Stansbury, N. C. Evidence 2d, § 92.

The Supreme Court has held evidence of similar prior occurrences competent in the following cases: *State v. Hartsell,* 272 N.C. 710, 158 S.E. 2d 785; *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740; *State v. Browder,* 252 N.C. 35, 112 S.E. 2d 728; *State v. Leak,* 156 N.C. 643, 72 S.E. 567.

This assignment of error is overruled.

[2] The defendant's second contention is that the trial court erred in admitting the mother's testimony about what she saw on 10 February 1968 and what Tanya told her about previous episodes. G.S. 8-57 (husband and wife as witnesses in criminal actions) provides, *inter alia,* ". . . that in all criminal prosecutions of a spouse for an assault upon the other spouse, or for any criminal offense against a legitimate . . . child of either spouse, . . . it shall be lawful to examine a spouse in behalf of the State against the other spouse. . . ."

[3, 4] The mother's testimony as to what her daughter Tanya had told her about previous occurrences was competent as corroborative evidence, and in the absence of a request for special instructions limiting the testimony to corroborative purposes, the court was not required to so instruct the jury. *State v. Rose,* 270 N.C. 406, 154 S.E. 2d 492; *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354; Stansbury, N. C. Evidence 2d, §§ 27, 51, 52, and 79. *State v. Hartsell, supra.*

This assignment of error is overruled.

[5, 6] The defendant's third contention is that the trial court erred in admitting Police Detective Horace Winstead's testimony about what Tanya told him. It was competent in part for the purpose of corroborating Tanya's testimony, but it was incompetent in part because it went beyond her testimony. However, the defendant's general objection was properly overruled since it was admissible for corroborative purposes. *State v. Cogdale,* 227 N.C. 59, 40 S.E. 2d 467. It was also unnecessary in the absence of a request by the defendant for the trial judge to limit its admissibility to purposes of corroboration. *State v. Walker,* 226 N.C. 458, 38 S.E. 2d 531.

> "As a general rule, the general admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by defendant that its admission be restricted, and a general objection to the testimony is insufficient." 2 Strong, N. C. Index 2d, Criminal Law, § 95, p. 628.

This assignment of error is overruled.

[7] The defendant's fourth contention is that the trial court erred in denying the motion for judgment as of nonsuit. The testimony of Tanya and her mother was sufficient to carry the case to the jury. The defendant concedes that this is true "except for the testimony of Dr. Benjamin E. Morgan." Since Dr. Morgan testified that he examined Tanya on 11 February 1968 and that the examination revealed no bruises or anything of an abnormal condition, the defendant contends that this contradicted the State's evidence. However, the testimony of Tanya and her mother and the testimony of Dr. Morgan are not contradictory, particularly since bruises and visible marks are not required for conviction. Even if there was contradictory testimony, it would be a matter for the jury and a motion for nonsuit would be properly denied.

This assignment of error is overruled.

[8] The defendant's fifth contention is that the trial court erred in the following charge to the jury:

> "Neither force nor intent is an element of this offense when committed on a child under the age of twelve years. Ordinarily, the definition in a situation of this kind where the child is above the age of twelve years is that an assault with intent to commit rape is an assault by a person 18 years of age or over upon a female person with the intent by force and violence and against the will of the female person to have carnal knowledge of her, that is, to have sexual relations with her, but in the situation where the female is under twelve years of age, the State is not required to prove force nor to prove the intent."

The defendant contends that this portion of the charge erroneously eliminated the element of "intent to commit rape" from the offense charged in the bill of indictment. However, a close reading of the charge reveals that the trial court was referring to the offense of "rape upon a female under the age of twelve" and not the offense of "an assault with intent to commit rape." Compare *State v. Browder, supra.* The trial court was merely making a comparison between the offense of "rape" and the offense of "an assault with intent to commit rape." Thereafter, the following charge correctly defined all of the necessary elements of "an assault with intent to commit rape":

> "So the court instructs you that in order for a jury to be justified in returning a verdict of guilty of the offense charged in the bill of indictment, the State of North Carolina must satisfy you from the evidence and beyond a reasonable doubt that the

defendant, Donald W. Spain, committed an assault upon the prosecuting witness, Tanya Louise Peele, intending to gratify his passion upon her body whether with her consent or not, the consent being immaterial."

Even if the comparison of "rape" with "an assault with intent to commit rape" was in any way confusing to the jury, the defendant was found guilty of only "an assault upon a female." The trial court correctly charged the jury as to the necessary elements of "an assault upon a female" and no exception was made to that portion of the charge. Therefore, any error in other portions of the charge was not prejudicial to the defendant. Since the entire charge, when read contextually, presents the law fairly and clearly to the jury, we find no prejudicial error. *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525.

This assignment of error is overruled.

We find no prejudicial error in the trial below.

No error.

MALLARD, C.J., and MORRIS, J., concur.

WILSON REDEVELOPMENT COMMISSION, PETITIONER v. BEST STEWART AND MARJORIE FULCHER STEWART, RESPONDENTS

No. 687SC432

(Filed 18 December 1968)

1. Eminent Domain § 6— evidence of value — cross-examination as to other property values for impeachment purposes

Where a witness for respondent in a condemnation proceeding brought by a municipal redevelopment commission testified as to the value of other property which he deemed comparable and on which he had relied in appraising the property in question, the court properly allowed petitioner to cross-examine the witness about those parcels and about the price paid by the witness himself for certain other property for the purpose of testing the witness' knowledge of values and for the purpose of impeachment; furthermore, respondent waived objection to the admission of the testimony by allowing evidence of similar import to be admitted without objection.

2. Eminent Domain § 6— evidence of appraised value at time prior to taking

Whether evidence of the appraised value of the property at sometime prior to the taking is admissible to show fair market value at the time

of the taking depends on whether, under all the circumstances, that appraisal fairly points to the value of the property at the time of the taking.

3. Eminent Domain § 6— evidence of appraised value at time prior to taking

In condemnation proceedings instituted by a municipal redevelopment commission, the court properly admitted expert testimony of the value of the property based upon appraisals made some eighteen months before the taking and an appraisal made more than three years before the taking where the evidence indicated there was no material change in the value of the property between the appraisals and the taking.

4. Eminent Domain § 7— instructions as to consideration of appraisal at time prior to taking

In condemnation proceedings in which evidence was presented of the value of the property based upon appraisals made eighteen months and more than three years before the taking, the failure of the court to instruct the jury that they "should give the appraisals either no consideration or substantial consideration, depending upon what conditions they found had influenced the value of the property during the intervening period, if any" is not error where neither party offered evidence of material change in conditions affecting the value of the property after the appraisals, the jury was instructed that it was the sole judge of the credibility of the testimony, and no request for the desired instructions was made.

APPEAL by respondents from *Parker, J.*, at the 3 June 1968 Session of WILSON Superior Court.

Petitioner filed its petition for condemnation on 21 December 1966, alleging that it was a duly organized and constituted redevelopment commission under Article 37 of Chapter 160 of the North Carolina General Statutes, that the Planning Board of the City of Wilson had certified an area of the city to be a blighted area in need of redevelopment, and that the public welfare, health and safety required that respondents' property in this area be taken and the slum conditions be abolished according to a plan by which they would not recur. Petitioner further alleged that the parties had been unable to agree on reasonable compensation for the taking and prayed for appointment of commissioners to appraise the property.

Respondents answered, denying the authority of the condemnor and praying for adequate compensation.

The clerk appointed commissioners who viewed the property and appraised it at $37,500. From a judgment of the clerk providing that the respondents recover this amount, respondents took exception and appealed to the superior court for a trial *de novo* on the issue of damages.

The testimony varied considerably in opinions as to value of the property. Petitioner's witnesses testified to values of $29,556 and $30,375. Respondents' witnesses testified to values of from $57,000 to $60,818.

The issue was submitted to the jury, and judgment was entered on their verdict in the amount of $38,000. Respondents appealed to this court, assigning errors in the admission of evidence and in the charge.

Lucas, Rand, Rose, Meyer & Jones by David S. Orcutt for petitioner appellee.

Carr & Gibbons by L. H. Gibbons and Farris & Thomas by Robert A. Farris for respondent appellants.

BRITT, J.

[1] The first assignment of error is stated thusly: Did the trial court err in overruling the objection to testimony brought out on cross-examination of respondents' witness regarding sales which petitioner deemed to be comparable to the property condemned without first making a preliminary finding that the sales were, in fact, comparable?

The respondents' witness testified to the value of certain property which he deemed comparable and on which he had relied in appraising the property in question. Thereafter, on cross-examination, the witness was questioned about these parcels and was then asked about the price paid by the witness himself for certain other property. Over respondents' objection, he was required to answer.

The view of our Supreme Court on this question was well expressed in the case of *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219, as follows: "It would seem that the utmost freedom of cross-examination with reference to sales and sales prices in the vicinity should be accorded the landowner, subject to the right and duty of the presiding judge to exercise his sound discretion in controlling the nature and scope of the cross-examination in the interest of justice and in confining the testimony within the rules of competency, relevancy and materiality." It follows that the condemnor should be accorded similar freedom. The *Barnes* case also sets out the prevailing view that sales prices of nearby property are admissible on cross-examination to test the witness' knowledge of values and for the purposes of impeachment. The *Barnes* decision was followed in *Templeton v. Highway Commission,* 254 N.C. 337,

118 S.E. 2d 918. See also the case of *Bennett v. R. R.*, 170 N.C. 389, 87 S.E. 133; Stansbury, N. C. Evidence 2d, § 100, p. 234.

The more desirable manner of framing the question was set out in *Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139, where the court also noted, as is true in the case before us, that the appellant had waived his objection by allowing evidence of similar import to be admitted without objection. The assignment of error is overruled.

[3] Appellants assign as error the admission of expert testimony of the value of the property based upon appraisals made some eighteen months before the taking and an appraisal made three years and four months before the taking.

On these assignments of error, respondents contend that the testimony of petitioner's witnesses Hackney, Chesson and Taylor should have been excluded, because it was on its face too remote in point of time to have any probative value and because there was no evidence before the court to show what relationship, if any, the value of the property at the time of the appraisals in July 1965 and August 1963 had to its value in December 1966, the date of taking,

In *Highway Com. v. Hartley*, 218 N.C. 438, 11 S.E. 2d 314, in an opinion written by Stacy, C.J., we find the following:

> "In determining the fair market value of property taken in condemnation, it is generally regarded as competent to show the value of the property within a reasonable time before and/or after the taking as bearing upon its value at the time of the appropriation. *Ayden v. Lancaster*, 197 N.C. 556, 150 S.E. 40; *DeLaney v. Henderson-Gilmer Co.*, 192 N.C. 647, 135 S.E. 791; *Wyatt v. R. R.*, 156 N.C. 307, 72 S.E. 383; *Grant v. Hathaway*, 118 Mo. App. 604; 8 R.C.L., 489. The rule is necessarily one of variableness in the time limits, depending upon the nature of the property, its location and surrounding circumstances, and whether the evidence offered fairly points to its value at the time in question. *Newsom v. Cothrane*, 185 N.C. 161, 116 S.E. 415; *Powell v. R. R.*, 178 N.C. 243, 100 S.E., 424; *Myers v. Charlotte*, 146 N.C., 246, 59 S.E., 674; *Wade v. Tel. Co.*, 147 N.C., 219, 60 S.E., 987."

[2] The rule allowing evidence of value at times before or after the taking is analogous to the rule which allows evidence of the purchase price paid for property sometime prior to the date of taking. The admissibility of such evidence and its probative value is not dependent solely on the time elapsed but on the similarity of conditions at the time of the appraisal or sale and at the time of the

taking. *Redevelopment Commission v. Hinkle,* 260 N.C. 423, 132 S.E. 2d 761. In determining whether evidence of the value at sometime prior to the taking is admissible to show fair market value at the time of the taking, the inquiry is whether under all the circumstances that appraisal fairly points to the value of the property at the time of the taking. *Shopping Center v. Highway Commission,* 265 N.C. 209, 143 S.E. 2d 244; *Redevelopment Commission v. Hinkle, supra.*

Not only is the record in the instant case void of evidence of any change in the subject property which would have made evidence of value eighteen months — or even forty months — before the taking completely invalid and without probative force to aid the jury in determining fair market value at the date of taking, but, to the contrary, the evidence indicated there had been no substantial changes. Witness Hackney testified that he viewed the property practically every month between July 1965 and December 1966 and that there was no substantial change in value. Petitioner's witness George Morris testified that he visited the area of the subject property several times weekly from 1962 until December 1966, on which occasions he viewed the subject property, and that there was no material change in value during that period.

[3] Considering all the evidence, we hold that the challenged testimony was not too remote in point of time, and the assignments of error relating thereto are overruled.

[4] Finally, respondents contend that the charge of the court failed to comply with G.S. 1-180 in that the judge failed to instruct the jury that they "should give the appraisals either no consideration or substantial consideration, depending upon what conditions they found had influenced the value of the property during the intervening period, if any."

There was no evidence offered by either party tending to show material change in conditions affecting the value of the property during the intervals in question, therefore, it is difficult to conceive of prejudice resulting from this omission. Moreover, it is not error to fail to instruct on a point not presented by the evidence. 7 Strong, N. C. Index 2d, Trials, § 33, p. 331.

The record shows no request for the desired instructions, and though it would not have been error for these instructions to have been given, *Highway Commission v. Coggins,* 262 N.C. 25, 136 S.E. 2d 265, the charge, when considered as a whole, was in compliance with G.S. 1-180. The judge noted the times when the appraisals were

taken and the amount of subsequent contact the witnesses had had with the property. Later, he charged the jury that they were authorized to believe all, none, or part of what any witness said, the jury being the sole judge of the credibility of the testimony. This was mentioned a second time in the charge, in the course of instructing on the burden of proof. There is no reason to believe that the jury was misled or misinformed. The assignment of error relating to the charge is overruled.

No error.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. BRUCE LILLEY
No. 682SC381

(Filed 18 December 1968)

1. Criminal Law § 115— submission of lesser degrees of the crime

Where there is evidence tending to show the commission of a lesser offense, the court, of its own motion, should submit such offense to the jury for its determination. G.S. 15-170.

2. Homicide § 6— involuntary manslaughter defined

Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner, and where fatal consequences of the negligent act were not improbable under all the facts existent at the time.

3. Homicide § 30— submission of issue of involuntary manslaughter

In a prosecution for second degree murder or manslaughter in which defendant offered evidence tending to show that he and deceased had been drinking together, that there were no ill feelings between them, that defendant got his rifle for the purpose of killing deer which were eating his crops, and that while defendant was playing with the rifle, it discharged and killed deceased, failure of the court to submit the issue of defendant's guilt of the lesser offense of involuntary manslaughter is fatal error notwithstanding the sentence imposed was within the maximum allowed for involuntary manslaughter.

4. Indictment and Warrant § 17— homicide prosecution — variance between allegation and proof as to date of offense

In a homicide prosecution there is no fatal variance between an indictment charging that the offense was committed on 3 April 1968 and

proof that the incident occurred on 30 April 1968, time not being of the essence of the offense charged, where the statute of limitations was not involved, defendant did not rely on an alibi, and the discrepancy was not used to ensnare defendant and thereby deprive him of an adequate opportunity to present his defense.

APPEAL by defendant from *Cohoon, J.*, from the June 1968 Criminal Session of Superior Court of MARTIN.

Defendant was tried upon a bill of indictment charging him with the murder of Irving Bembridge. Upon the call of the case for trial, the solicitor announced that he would not ask for a verdict of guilty of murder in the first degree but would seek a verdict of guilty of murder in the second degree or manslaughter.

On the night of 30 April 1968, the defendant, defendant's wife, Irving Bembridge, and Dock Clifton Davenport were in the defendant's home. Davenport had retired to a bedroom just prior to the time the incident in question occurred. The defendant and Bembridge, defendant's half-brother, had been drinking together during the day, but there was no showing of any ill feelings between them. The defendant testified that in the process of moving his rifle so that he could sit in a chair, he started "messing" with it; that as he did this, the rifle went off, killing Bembridge. Davenport, as a witness for the State, testified that he heard the defendant go into the dining room and get his rifle; that he heard him eject the bullets from it. He also testified that he heard the following conversation:

Defendant asked Bembridge, "Who do you think is boss . . .?"

Bembridge answered, "You are."

Defendant then said, "Do you think I will shoot you?"

Bembridge answered, "Yes." "Please don't."

Davenport then heard a shot.

There was other evidence showing that the witness Davenport had stated on another occasion that he had been awakened by the defendant's wife after the shooting had occurred.

The defendant appeals from a verdict of "guilty of manslaughter" and a sentence of imprisonment for a period of ten years.

Attorney General T. W. Bruton and Assistant Attorney General Millard R. Rich for the State.

Leroy Scott for defendant appellant.

MORRIS, J.

Defendant contends that the court's failure to instruct the jury on involuntary manslaughter constitutes prejudicial error.

[1] In *State v. Wenrich,* 251 N.C. 460, 111 S.E. 2d 582, the North Carolina Supreme Court held that where there is evidence tending to show the commission of a lesser offense, the court, of its own motion, should submit such offense to the jury for its own determination. G.S. 15-170 provides that a person may be convicted of the charge in the indictment or of a less degree of the same crime.

> "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545.

[2, 3] Testimony of Dock Clifton Davenport, when taken in the light most favorable to the State, would tend to show that the defendant intentionally shot the deceased. Based on this evidence the trial court correctly submitted the questions of second-degree murder and voluntary manslaughter to the jury. However, we feel that the trial judge should have also submitted the question of involuntary manslaughter to the jury. There was evidence offered at the trial, which if believed by the jury, would tend to show that the defendant and the deceased had been drinking together before the incident occurred and that there were no ill feelings between them; that they had planned to go to the defendant's field for the purpose of killing deer which were eating the defendant's crops, and for this purpose the defendant had gotten his rifle. The defendant ejected the bullets from the rifle. The evidence, if believed, would tend to show that the rifle was then placed in a chair so that, later, the defendant had to move it in order to sit down. In the process of moving the rifle, the defendant started playing with it, and it went off, killing Irving Bembridge, the defendant's half-brother.

> "Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner (*S. v. Durham,* 201 N.C. 724, 161 S.E. 398; *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580), and where fatal consequences of the negligent act were not improbable under all the facts existent at the time. . . . In *S. v. Rountree, supra* (181

> N.C. 535, 106 S.E. 669), it was said that 'Culpable negligence under the criminal law is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.' " *State v. Williams,* 231 N.C. 214, 56 S.E. 2d 574.

Also, see *State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485; *State v. Neal,* 248 N.C. 544, 103 S.E. 2d 722; and *State v. Satterfield,* 198 N.C. 682, 153 S.E. 155.

Although the sentence imposed by the trial court was within the maximum allowed upon a conviction of involuntary manslaughter, *State v. Adams,* 266 N.C. 406, 146 S.E. 2d 505, we feel that it was prejudicial error for the trial judge not to submit the question of involuntary manslaughter to the jury. Originally, G.S. 14-18 provided:

> "If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or State prison for not less than four months nor more than twenty years."

In 1933 the following proviso was added:

> "Provided, however, that in cases of involuntary manslaughter, the punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both."

Apparently, before this proviso, the punishment prescribed for a conviction of manslaughter was without any consideration of whether it was voluntary or involuntary manslaughter. Speaking on this new addition to G.S. 14-18, our Supreme Court in *State v. Dunn,* 208 N.C. 333, 180 S.E. 708, said:

> ". . . the proviso did not purport to create a new crime, to wit, that of involuntary manslaughter. . . . It is not thought that by enacting the proviso the Legislature intended to repeal the manslaughter statute and to set up in its stead involuntary manslaughter as a misdemeanor. Indeed, the Court is of the opinion, and so holds, that the proviso was intended and designed to mitigate the punishment in cases of involuntary manslaughter, and to commit such punishment to the sound discretion of the trial judge."

The jury may have found the defendant guilty of involuntary manslaughter, and, if so, he had the right to have this considered as a mitigating factor in the punishment he was to receive. In our opinion the failure of the court to charge on involuntary manslaughter constituted reversible error entitling defendant to a new trial.

The defendant's motion for a directed verdict made at the end

of the State's evidence and at the end of all the evidence was properly overruled.

> "The evidence, taken in the light most favorable to the State, was sufficient to support a finding that the defendant was handling the gun in a culpably negligent manner at the time it fired and killed Jones. . . . 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. Brooks,* 260 N.C. 186, 132 S.E. 2d 354.

Also, see *State v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564, and G.S. 14-34.

[4] The defendant argues that there is a fatal variance between the indictment and the evidence offered at the trial. The indictment shows that the offense was committed on 3 April 1968, while the proof offered at the trial showed that the incident occurred on 30 April 1968. G.S. 15-155 provides that a judgment upon an indictment shall not be reversed for ". . . omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened . . ." The statute of limitations was not involved and the defendant did not rely on an alibi. This discrepancy was not used to ensnare the defendant nor did it deprive him of an opportunity to adequately present his defense. *State v. Wilson,* 264 N.C. 373, 141 S.E. 2d 801. Time was not of the essence of the offense charged. *State v. Gore,* 207 N.C. 618, 178 S.E. 209. The variance between the time shown in the indictment and the time shown by the proof was not fatal.

The defendant brings forth several assignments of error in his brief, many of them pertaining to the admission of evidence at the trial. Because these same questions are not likely to arise in a new trial, and because we deem it desirable to comment on the evidence only insofar as is necessary for the sake of clarity, *MacClure v. Casualty Co.,* 229 N.C. 305, 49 S.E. 2d 742, we have not discussed the assignments of error relating to the admission of evidence.

For the reason stated herein, there must be a

New trial.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE OF NORTH CAROLINA v. BAXTER PARK HUNSUCKER

No. 6814SC459

(Filed 18 December 1968)

1. Criminal Law § 66; Constitutional Law § 32— in-court identification of defendant — prior "confrontation" — absence of counsel

Where robbery victim identified defendant as the perpetrator of the offense from police photographs and did not see the defendant in person from the date of the robbery until the day the case was scheduled for trial when defendant appeared in the courtroom unannounced and with no suggestion as to his identity, the victim's in-court identification of defendant is not rendered incompetent on ground that defendant was submitted to his view in the courtroom in the absence of counsel.

2. Criminal Law § 66; Constitutional Law § 32— right to counsel at lineup or other prearranged confrontation

The rationale underlying the rule requiring presence of counsel at the lineup or other confrontation between accused and State's witness for purposes of identification is (1) that unfairness in the lineup or other arranged identification process may arise by exhibiting the accused so as to suggest his identity to the witness and thereby obtain a positive identification from the witness which he will not later admit was indefinite or mistaken and (2) that absence of counsel at this stage would prevent any effective cross-examination of the witness relative to the identification process.

3. Criminal Law § 66— evidence as to identity of defendant — cross-examination

In a prosecution for robbery allegedly committed by defendant and a co-felon who was not apprehended, defendant was not prejudiced by refusal of the trial court to allow him to cross-examine State's witness, who had identified him, as to witness' failure to recognize the other robber in a lineup conducted in an extradition hearing in another State, since the testimony sought to be elicited by this examination was immaterial upon the question of the witness' ability to recognize the present defendant.

4. Criminal Law § 168— harmless error in instructions

In the absence of a specific request for further instructions, it was not prejudicial error in this case that the trial court failed to instruct the jury in the charge to disregard certain argument by the solicitor not supported by any evidence, since the action of the trial court in sustaining the defendant's immediate objection to the solicitor's remarks on the stated grounds of lack of evidence to support such remarks was tantamount to an instruction to disregard the argument.

APPEAL by defendant from *Clark, J.*, 15 July 1968 Session, DURHAM Superior Court.

The defendant and one John Morris O'Neill were jointly charged in a bill of indictment with the felony of robbery of $113.00 from Lewis Walker and the Dairy Farm Store with the threatened use

of firearms. John Morris O'Neill was not apprehended and defendant was placed on trial alone.

At the trial the State's evidence tended to show: That during the evening of 16 October 1967 Lewis Walker was alone operating the Dairy Farm Store at 944 Washington Street in Durham, North Carolina. About 9:30 p.m. Mr. Walker was in the act of dialing the number of a local bakery to place an order for delivery the following morning when the defendant and another came into the store. The store has an entrance on each side and the defendant came in through one side entrance and the other person came in through the other; both entering at approximately the same time. The person with the defendant pointed a pistol at Mr. Walker and jerked the telephone from its mount on the wall and threw it under the counter. The defendant took Mr. Walker into the bathroom and bound his hands and feet with lengths of baling wire. Defendant then took all of the money from Mr. Walker's billfold and all of the change from his pockets. The entire area was well lighted and Mr. Walker observed the defendant for about seven to eight minutes. Mr. Walker also observed the other person taking money from the cash register and placing it in a paper bag. A customer and his small daughter came into the store and defendant brought them into the bathroom, closed the door, and told them to stay there. After defendant and the other person left the store the customer untied Mr. Walker.

About 11:00 p.m. on 16 October 1967 the defendant and another person were picked up by a taxicab in front of Claudia's Grill in Durham, and were driven out Guess Road to Umstead Road where they got out of the taxicab in the country.

Mr. Walker had never seen the defendant before, but after looking through the police files for about one and one-half days, found a photograph of the defendant. The first time that Mr. Walker positively identified the defendant in person as one of those who had robbed him was while sitting in the courtroom at an earlier session at which the case had originally been scheduled for trial. The circumstances of this confrontation will be fully set out later in the opinion.

The defendant did not testify, but offered in evidence the depositions of seven witnesses taken in the State of New York. Each of these depositions tended to show that the defendant was in New York City continuously from some time in July 1967 until his return to North Carolina on 23 October 1967, one week after the date of the alleged offense charged against him.

The jury returned a verdict of guilty as charged. From the verdict, and judgment of imprisonment for a period of not less than twenty nor more than twenty-five years, defendant appealed.

T. W. Bruton, Attorney General, by (Mrs.) Christine Y. Denson, Staff Attorney, for the State.

A. William Kennon for the defendant.

BROCK, J.

The defendant was represented at his trial, and is represented for this appeal, by counsel appointed by the court. The County of Durham will pay for the printing of the record on appeal, for the reporter's transcript, and for printing defendant's brief.

[1] The defendant brings forward three assignments of error. Assignment of error number one is stated as follows: "The court erred in allowing the State's witness, Lewis Walker, to make an in-court identification of the defendant in that it was the sole product of and rested entirely on a previous confrontation between the accused and the witness wherein the accused was submitted to the view of the witness in the absence of court-appointed or retained counsel."

During the direct examination of Lewis Walker, the solicitor asked him if he had seen the defendant the evening of 16 October 1967. At this point the defendant objected and Judge Clark allowed an examination of the witness out of the presence of the jury. The testimony of Lewis Walker upon this examination disclosed in substance the following: That immediately after the robbery he called the police and reported the incident. That he gave them a general description of the defendant. That after looking through the police picture files for about one and one-half days he found a photograph of defendant. That he did not see the defendant in person from the time of the robbery until he saw him in the courtroom on or about 22 February 1968 when the case was first scheduled for trial. That he was subpœnæd to court as a witness on or about 22 February 1968. That he went into the courtroom and took a seat in the spectator section. That he did not talk to the solicitor or any of the officers, and did not see any of the other State's witnesses. That while seated in the courtroom he saw the defendant enter a door to the courtroom and he immediately and positively recognized him as one of the persons who robbed him on 16 October 1967. That defendant was not announced before he entered, nor had his case been called by the solicitor. That defendant was not dressed in prison clothes or in any fashion to indicate that he was a prisoner. That no one

suggested to him that defendant was the one who robbed him. That as soon as he saw defendant enter the door he recognized him as one of the robbers. That some time later the case was called by the solicitor and the defendant stood up and announced that he did not have an attorney. That Judge C. W. Hall, who was presiding at that session, appointed counsel for the defendant and continued the case to a subsequent session. That the witness did not divulge to anyone the fact that he had recognized the defendant.

The defendant concedes in his brief that "nothing in the record indicates that the purpose of the confrontation was for identification purposes." However he argues that the circumstances warrant an inference that the action of the State was designed to give the witness an opportunity to make a positive identification of the accused. And further, that the accused being without counsel at the time, the in-court identification at the time of the trial was the product of an illegal identification process and therefore not admissible. Defendant cites *United States v. Wade,* 388 U.S. 218, 18 Law. Ed. 2d 1149; *Gilbert v. California,* 388 U.S. 263, 18 Law Ed. 2d 1178; *Stovall v. Denno,* 388 U.S. 293, 18 Law Ed. 2d 1199; and *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581, in support of his argument.

[1, 2] The rationale underlying the decisions in the cases relied upon by defendant is that unfairness in the "lineup" or other arranged identification process may arise by exhibiting the accused so as to suggest his identity to the witness and thereby obtain a positive identification from the witness which the witness will not later admit was indefinite or mistaken; and that the absence of counsel at this stage of the proceeding would prevent any effective cross-examination of the witness relative to the identification process. It was never intended by the decisions that the victim of, or witness to, a crime should have to keep his eyes closed from the time of the event until he is seated in the witness chair, except when the accused is accompanied by counsel. The recognition complained of by defendant was as unplanned and free of suggestion as though the witness had recognized the accused as he walked down the street. True, it occurred in the courtroom at a session of court to which the witness had been subpœnæd to testify in the trial of the accused; but there were others present, spectators, attorneys, witnesses, and defendants in other cases. There was nothing about the accused to suggest to the witness that he was the robber, except his person which the witness immediately recognized. There was no communication by the witness to any of the other witnesses, the officers, or the solicitor that he had recognized the defendant as one of the robbers; and there-

fore there was no compulsion upon the witness to "stick to his identification." None of the facts here present a case which falls within the rationale of *Wade, Gilbert, Stovall,* or *Wright.* This assignment of error is overruled.

[3] Defendant next assigns as error that he was not allowed to cross-examine the State's witness, Lewis Walker, upon his failure to recognize the other robber in a lineup conducted in New York in an extradition proceeding. Judge Clark allowed such examination out of the presence of the jury but excluded it from consideration by the jury. The examination upon this question disclosed that Lewis Walker had stated from the outset to the investigating officers that he was not certain he could identify the other robber; that he had not had an opportunity to observe him as closely or for as long a period as he had observed this defendant. That when he went to New York in June 1968 to undertake an identification he told the judge there "I do not think I can make positive identification." That there were approximately twelve people standing against the wall in the judge's chambers, and the judge asked him if he saw one of the men there who held him up on 16 October 1967. That he told the judge "No, I don't think so." That the judge asked if he was sure and he told him that one of the men looked very much like one of the men and pointed to that one. That the judge stated "that is not him," and dismissed the proceeding.

With respect to this second robber the witness had stated from the beginning that he felt unable to identify him. The fact that he was unable to do what he had always felt he was unable to do seems to us to lend credence to his identification of the accused prior to that time. This failure to do what he had felt from the beginning that he could not do seems to us to have no bearing upon his ability to recognize the defendant with whom he was more directly involved at the time of the robbery. The testimony sought to be elicited by this examination was immaterial upon the question of the witness's ability to recognize this defendant, and its exclusion cannot, therefore, be held to be error. This assignment of error is overruled.

[4] Defendant next assigns as error that the trial judge failed to instruct the jury to disregard certain argument by the solicitor which was not supported by any evidence.

The only evidence offered by the defendant was by way of seven depositions of witnesses taken in New York. These depositions tended to show that the defendant was in New York at the time of the alleged offense on 16 October 1967. During the course of his argument to the jury the solicitor referred to the depositions and stated that

there was no Bible present when the defense witnesses were sworn. Defense counsel immediately objected to this statement on the grounds there was no evidence to support such an argument. Judge Clark sustained this objection, stating there was no evidence in the record of such a state of facts. Counsel made no request for instruction to the jury to disregard this statement by the solicitor, and no specific instruction to this effect was given by the judge.

Defendant's objection was made and promptly sustained by the judge in the presence of the jury. Certainly the stopping of the solicitor's argument to the jury by lodging the objection, and the ruling of the judge, attracted the attention of the jurors. It is clear that the jurors were apprised that the solicitor's argument was without evidentiary foundation. Under these circumstances the sustaining of the defendant's objection and the statement by the judge in the presence of the jury was tantamount to an instruction to disregard the argument. Absent a specific request for further instruction, we hold that it was not prejudicial error in this case to fail to further instruct the jury to disregard the portion of the solicitor's argument which was the subject of the objection. This assignment of error is overruled.

No error.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES CURTIS MOORE, BOBBY RAY DAWSON AND CARL PATRICK SPEIGHT

No. 687SC413

(Filed 18 December 1968)

1. Criminal Law § 75— admissibility of inculpatory statements — effect of unlawful arrest

Evidence of incriminating statements by defendants following their unlawful arrests for a misdemeanor is not rendered inadmissible because of the unlawful arrests, the trial court finding upon a *voir dire* hearing that the statements were made freely and understandingly, without promise or hope of reward, and without threat, coercion or any other undue influence.

2. Constitutional Law § 31— identity of informer — moot question

Where defendants' arrests without warrants were found to be illegal in prosecution for a misdemeanor, such finding renders moot defendants'

assignment of error relating to trial court's refusal to allow them to ascertain identity of police informer in order to determine if police had sufficient information to legally arrest defendants without warrant.

3. Constitutional Law § 31— identity of informer

The propriety of disclosing the identity of an informer must depend upon the circumstances of the case and at what stage of the proceedings the request is made.

APPEAL by defendants from *Parker (Joseph W.), J.*, at the 24 June 1968 Session of WILSON Superior Court.

Each defendant was tried and convicted in the Recorder's Court of the City of Wilson on a warrant charging that he "did unlawfully, wilfully and wantonly and maliciously did damage and destroy real property of Bargin [sic] Grocery." Upon a plea of guilty, each defendant was sentenced to two years in prison and appealed to the superior court.

The evidence indicated the following: Police investigated damage to the grocery immediately after it was inflicted on Saturday night, 6 April 1968. The owner was notified after midnight that his store had been looted, and when he arrived he found the plate glass windows smashed, merchandise burned and scattered throughout the store, and that considerable water damage necessitated by the fire had been incurred. On Monday, 8 April 1968, the police arrested and imprisoned the defendants but did not obtain warrants for them until after they were arrested and had made certain inculpatory statements. There was no evidence that the misdemeanors charged in the warrants were committed in the presence of the officers.

Each defendant offered evidence tending to establish an alibi. Upon a jury verdict of guilty, each defendant was sentenced to two years in prison, from which he appealed to this court.

Attorney General T. Wade Bruton and Assistant Attorney General Bernard A. Harrell for the State.

Chambers, Stein, Ferguson & Lanning by James E. Ferguson, II, for defendant appellants.

BRITT, J.

Defendants are represented in this court by the same attorney who represented them in the superior court.

[1] They first assign as error the admission into evidence, over their objection, the testimony of police officers concerning inculpatory statements made by defendants after they were arrested, They con-

tend that each defendant was charged with a misdemeanor, that the offense complained of was not committed in the presence of the arresting officers, and that the arrest of each defendant, made before the issuance of a warrant, was illegal.

Defendants' counsel relies very heavily on the case of *Wong Sun v. United States,* 371 U.S. 471, 9 L. Ed. 2d 441, contending that the arrest of each defendant being illegal, any inculpatory statements made by him following the arrest fall within the "fruit of the poisonous tree" doctrine enunciated in *Wong Sun.*

Conceding *arguendo* that the arrests of the defendants were illegal, we think that the facts in the instant case are materially different from those in *Wong Sun* and that the circumstances that caused the court to condemn the statement of defendant Toy in that case do not exist in the case before us.

In *Wong Sun,* there were two defendants including defendant Toy. The evidence indicated that an unnamed person arrested while possessing narcotics, who never before had acted as an informer, told federal narcotics officers that he had bought an ounce of heroin the night before from one known to him only as "Blackie Toy," proprietor of a laundry on a certain street. Without procuring an arrest warrant, some six or seven federal officers went to the laundry, where Toy also lived, at an early morning hour; one of them rang the bell and told Toy that he was calling for laundry and dry cleaning, but when Toy refused to admit them and started to close the door, the officer identified himself as a federal narcotics agent. Toy slammed the door and started running away, but the officers broke open the door and pursued Toy to his bedroom where his wife and child were sleeping. He was immediately handcuffed and arrested and within a matter of minutes thereafter made an inculpatory statement. It was under these circumstances that the United States Supreme Court held that verbal evidence, derived so immediately from an unlawful entry *and* an unauthorized arrest, was inadmissible. "Under such circumstances it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the *unlawful invasion.*" (Emphasis added).

In the case before us, the traumatic effect of an illegal invasion is nonexistent. We will briefly review the record as to each defendant following his arrest. As to defendant Moore, the record discloses that at around 4:00 p.m. two police officers drove up in front of Moore's home and told someone outside of the home that they wanted to speak with Moore. Thereafter, Moore came out of his home, got in the patrol car, and the police advised him that they

were arresting him in connection with malicious damage to the Bargain Grocery and other business establishments. Officer Davis then advised him of his constitutional rights as declared in *Miranda*. We quote from his testimony as follows: "(I) told him he didn't have to tell us anything; that anything he did tell us could be used against him in a court of law; that he had a right for an attorney and had a right to have one present at the time of any questioning; that if he couldn't afford to pay one, one would be appointed for him at the time by the court. Asked him did he understand what we had told him, and he said he did." While still in the car traveling between Moore's home and the police station — approximately one-half mile — Moore made his incriminating statement.

The evidence indicates that shortly after defendant Moore was arrested, defendant Speight was arrested at his home. He was similarly advised of his rights and also acknowledged his understanding. Around lunch time on the day following and while defendant Speight was in jail, someone sent word to Officer Davis that Speight and some others wanted to see him. Davis went to the cell where they were, and Speight proceeded to make his incriminating statement.

Shortly after the arrest of Speight, defendant Dawson was taken into custody. He was advised of his rights in the same manner as defendant Moore was advised and acknowledged his understanding. On the following morning — some eleven or twelve hours later — he made his incriminating statement.

The circumstances which rendered Toy's statement in the *Wong Sun* case inadmissible were completely absent in the cases now before us. After a full *voir dire* hearing, the trial judge found as a fact that the statements made by the three defendants were made freely, voluntarily and understandingly, without promise or hope of reward, and without threat, coercion, duress, or any other undue influence.

We hold that the evidence pertaining to incriminating statements made by defendants was not inadmissible because of their unlawful arrests, and their assignment of error relating thereto is overruled.

[2, 3] Defendants' second assignment of error relates to the sustaining of the solicitor's objections to questions by defendants' counsel to police officers as to the identity of the person who gave them information connecting defendants with the crime. It appears that information from an unnamed informant prompted the police to arrest and question the defendants. Defendants' counsel argues that they were entitled to have their questions answered in order to determine if the police had sufficient information to legally arrest the

defendants without warrants. This assignment of error also relates to the legality of the arrests; inasmuch as we have conceded, *arguendo,* that the arrests were illegal, but having held the incriminating statements of defendants admissible, the question raised by the second assignment of error becomes moot. Furthermore, our State Supreme Court, in *State v. Boles,* 246 N.C. 83, 97 S.E. 2d 476, held that the propriety of disclosing the identity of an informer must depend on the circumstances of the case and at what stage of the proceedings the request is made. The court held in that case that the trial court did not commit error in failing to require the witness to provide the name of the informer. "Had the defendant * * * requested the name of the confidential informer as a possible defense witness, a more serious question would have been presented." We hold that under the circumstances in this case it was not error for the trial judge to sustain the objections of the solicitor to questions relating to the identity of the informer, and the assignment of error relating thereto is overruled.

Defendants assign as error the denial of their motion for nonsuit. Without summarizing the State's evidence, we hold that it was plenary to override the motion for nonsuit, and defendants' assignment of error relating thereto is overruled.

We have considered the other assignments of error brought forward in defendants' brief, but finding them to be without merit, they are overruled.

No error.

BROCK and PARKER, JJ., concur.

D. L. H., INC. v. MACK TRUCKS, INC. AND RALEIGH MACK SALES

No. 683SC257

(Filed 18 December 1968)

1. Trial § 21— motion to nonsuit — consideration of evidence

On motion for judgment of compulsory nonsuit, plaintiff's evidence is to be taken as true and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence.

2. Sales § 15— action for breach of warranty — burden of proof

In an action to recover upon oral warranty of a truck motor allegedly made by an agent of the manufacturer, the burden is on the buyer to

establish the warranty or guarantee relied on and to show by competent evidence that the alleged agent of the manufacturer had the authority to make an oral warranty or guarantee which would be binding on his principal.

3. Principal and Agent § 4— proof of agency

The existence and extent of agency cannot be proved by the extra-judicial declarations of an alleged agent, but they must be established *aliunde*, by the agent's testimony or otherwise, before his admission will be received.

4. Principal and Agent § 4— proof of agency — admission of extra-judicial declarations

Even when the fact of agency is proved by evidence *aliunde*, extra-judicial declarations of the agent are not competent against the principal unless it is also made to appear by evidence *aliunde* that the declarations were within the actual or apparent scope of the agent's authority.

5. Principal and Agent § 5— scope of agent's authority

One who deals with an agent must, to protect himself, ascertain the extent of the agent's authority.

6. Principal and Agent § 4— proof of agency and scope of authority to make oral warranty — nonsuit

In an action to recover upon an oral warranty on a truck motor allegedly made by an agent of the defendant manufacturer, plaintiff's evidence consisted of defendant's answer which admitted the fact of agency but denied the existence of any warranty, oral or written, other than its standard written warranty and further denied authority in anyone to make an oral warranty. Testimony of plaintiff's witnesses attempting to show the existence of the oral warranty and the scope of the agent's authority by testifying as to the agent's out-of-court declarations was properly excluded. *Held:* In the absence of competent evidence to prove the oral warranty and the authority of the agent to make the oral warranty, defendant's motion for nonsuit is properly allowed.

APPEAL by plaintiff from *Peel, J.*, January 1968 Session, CRAVEN County Superior Court.

The plaintiff D. L. H., Inc., filed an original complaint 12 February 1965, an amended complaint 4 June 1965, and a second amended complaint 6 January 1966. The defendant Mack Trucks, Inc., (Mack) filed an answer 18 February 1966. The defendant Raleigh Mack Sales (Sales) filed no pleadings.

The second amended complaint alleged that the plaintiff desired to purchase a truck for use in its long hauling for hire business; that the defendants, through their respective agents, warranted and guaranteed to the plaintiff that a Mack truck with a 711 motor installed therein would perform perfectly and satisfactorily in all respects; that if the plaintiff would take a Mack truck with a 711

motor installed therein and if the motor was not satisfactory and did not perform satisfactorily in every respect, the defendants would take the motor out and install one in said truck which was satisfactory and which would do the work properly, without any cost to the plaintiff; that these warranties were made by both defendants through their respective authorized agents and representatives, who acted in the furtherance of the defendants' business and within the scope of their authority; that Gene McCarthy was the sales manager and agent of Sales; and that S. P. Birkitt was the agent and district representative of Mack. The second amended complaint further alleged that the motor was unsatisfactory in that it used excessive oil and would not pull in fifteenth or high gear; that plaintiff demanded that the defendants remove the motor and install a larger 250 Cummings motor; that the defendants worked on the truck from time to time, but the defects were not corrected; that between October 1962, when the truck was received, and April 1965 the plaintiff lost 23 weeks of use of the truck, resulting in $9,950 loss of use damages; and in April 1965 the plaintiff, at its own expense, had the motor removed and the larger 250 Cummings motor installed, at a cost of $4,250. The second amended complaint prayed to have and recover of the defendants $14,200.

The answer admitted that Birkitt was Mack's duly appointed and authorized agent. However, it denied any warranty, oral or written, other than its standard written warranty, and it denied authority in anyone to make an oral warranty or guarantee. It also denied that Sales was anything other than an independent distributor, which purchased the truck and motor in question from Mack and denied that McCarthy was ever an agent or employee of Mack.

At the close of the plaintiff's evidence, Mack's motion for nonsuit was sustained. The plaintiff appealed from the judgment of nonsuit and the dismissal of this action.

Robert G. Bowers, Attorney for plaintiff appellant.

Ward & Tucker by J. E. Tucker, David L. Ward, Jr., and J. Troy Smith, Jr., Attorneys for defendant, Mack Trucks, Inc., appellee.

CAMPBELL, J.

[1] "'On a motion for judgment of compulsory nonsuit, plaintiff's evidence is to be taken as true, and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence. Plaintiff's evidence must be considered in the

light of his allegations to the extent the evidence is supported by the allegations. . . .'" *Gibbs v. Light Co.*, 268 N.C. 186, 150 S.E. 2d 207.

[2] Applying this rule to the facts in the instant case and assuming that the motor, as delivered, was unsatisfactory, there still remains the question of whether there was competent evidence of any warranty or guarantee, other than the standard written warranty, which would be binding on Mack. The burden was on the plaintiff to establish such a warranty or guarantee, and it was incumbent upon it to show by competent evidence that Birkitt was an agent of Mack and that Birkitt had the authority to make an oral warranty or guarantee which would be binding on his principal.

[3, 4] The plaintiff undertook to do this by introducing in evidence the portion of the answer which admitted that Birkitt was the duly appointed and authorized agent of Mack in September 1962. The plaintiff then undertook to establish the oral warranty or guarantee and the authority of Birkitt by the testimony of its witnesses, Cleve and Howell, who attempted to testify as to the conversation which they had with Birkitt at the time the truck was purchased. However, the trial court correctly sustained objections to this testimony since the plaintiff could not establish the agent's authority against the principal through out-of-court statements made by the agent.

"The existence of the agency cannot be proved by the agent's statement out of court; it must be established *aliunde*, by the agent's testimony or otherwise, before his admission will be received. The same is true, it seems, as to the fact that he was acting in the course of his agency at the time in question." Stansbury, N. C. Evidence 2d, § 169.

> "Even when the fact of agency is proved by evidence aliunde the declarations of the alleged agent, the extrajudicial declarations of the agent are not competent against the principal unless it is also made to appear by evidence aliunde that the declarations were within the actual or apparent scope of the agent's authority. . . .
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> . . .
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> In the absence of proof of agency and that the act forming the basis of the action was within the scope of the agent's authority, evidence of acts, representations, or warranties made by the agent are incompetent as against the alleged principal." 6 Strong, N. C. Index 2d, Principal and Agent, § 4, p. 405.

In *Commercial Solvents v. Johnson,* 235 N.C. 237, 69 S.E. 2d 716, there was an analogous situation in that the agency was admitted but its extent was controverted. In that case the defense was to the failure to prove the scope and authority of the admitted agent. The Court there stated:

> "Conceding, but not deciding, that the excluded testimony [which consisted of extra-judicial declarations and statements allegedly made by an agent] may have probative force as tending to establish the facts alleged in the [complaint], nevertheless it would seem that no sufficient foundation was laid to make the evidence admissible.
>
> While proof of agency, as well as its nature and extent, may be made by the direct testimony of the alleged agent . . ., nevertheless it is well established that, as against the principal, evidence of declarations or statements of an alleged agent made out of court is not admissible either to prove the fact of agency or its nature and extent. . . .
>
> And in applying this rule, ordinarily the extra-judicial statement or declaration of the alleged agent may not be given in evidence, unless (1) the fact of agency appears from other evidence, and also unless it be made to appear by other evidence that the making of said statement or declaration was (2) within the authority of the agent, or (3) as to persons dealing with the agent, within the apparent authority of the agent."

[4] In the instant case the plaintiff, who did not offer Birkitt as a witness, failed to make out a *prima facie* case against Mack. The proffered evidence was properly excluded since the following was not established: (a) that the excluded statements of Birkitt were made within the actual scope of his authority or (b) that, as to the plaintiff, these statements were made within the scope of his apparent authority. *Commercial Solvents v. Johnson, supra; Cordell v. Sand Co.,* 247 N.C. 688, 102 S.E. 2d 138.

[5] Plaintiff, who asked Birkitt how he had authority to guarantee the truck, falls under the rule that "(o)ne who deals with an agent must, to protect himself, ascertain the extent of the agent's authority." *Nationwide Homes v. Trust Co.,* 262 N.C. 79, 136 S.E. 2d 202.

". . . (T)he party offering evidence of the alleged agent's admission must first prove the *fact and scope* of the agency of the declarant for the adverse party. This he may of course do by the testimony of the asserted agent himself, or by anyone who knows,

or by circumstantial evidence." (Emphasis added) McCormick on Evidence, § 244, p. 519.

[6] In the instant case, the fact of Birkitt's agency was proven by the admission in the answer, but the scope of this agency was not proven. The answer alleged that the truck was covered by a standard written warranty and that Birkitt had no authority to make any oral warranty or guarantee. Plaintiff failed to offer competent evidence of such authority or to prove any oral warranty or guarantee. Therefore, the trial court committed no error in allowing the motion for judgment of nonsuit. The other questions presented need not be discussed.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

RESORT DEVELOPMENT COMPANY, INC. v. ILA FREEMAN PHILLIPS (WIDOW); LULA FREEMAN HILL AND HUSBAND, FRANK C. HILL; CELESTE BURNETT EATON AND HUSBAND, HUBERT A. EATON; FOSTER F. BURNETT, JR., AND WIFE, GLORIA M. BURNETT; MARIE GAUSE (WIDOW); VICTOR FREEMAN (SINGLE); VIOLA F. RODICK AND HUSBAND LEWIS RODICK; GENEVA CROMARTIE (WIDOW); OLIVER DINKINS, JR., AND WIFE, MERCEDES DINKINS; MARTHA HOLIDAY HAWKINS AND HUSBAND, JESSE C. HAWKINS; JAMES H. DINKINS; MARY ELEANOR SPICER AND HUSBAND, HARLEE SPICER; ALICE LEOLA HANKINS AND HUSBAND, WADE HANKINS; VICTOR DINKINS (SINGLE); LORETTA DINKINS (SINGLE); ELECTRA FREEMAN (WIDOW); RONALD FREEMAN AND WIFE, ...; KATHERINE ONEDA FREEMAN AND HUSBAND, ...; MARY ALWIDA FREEMAN FORD AND HUSBAND, WALTER LEE FORD; ARCHIE FREEMAN (SINGLE); AVIE FREEMAN WILSON AND HUSBAND, DOGAN H. WILSON; MILDRED FREEMAN (SINGLE); BERTHA MAE COLE AND HUSBAND, ROBERT L. COLE; LONICE FREEMAN (WIDOW OF WILLIAM GASTON FREEMAN); F. E. LIVINGSTON, TRUSTEE, AND JOHN BRIGHT HILL, AND ALL OTHER PERSONS, FIRMS, CORPORATIONS WHO HAVE OR CLAIM ANY INTEREST IN LAND DESCRIBED HEREIN

No. 685SC438

(Filed 18 December 1968)

1. Appeal and Error § 45— necessity for citation to official North Carolina Reports

The official volumes of the North Carolina Reports should be cited when counsel seek to rely on North Carolina case law in support of their position, it being insufficient to merely cite the Southeastern Reporter. Court of Appeals Rule No. 46.

2. Reference § 3— admission by party of necessity for reference — issues submitted

Where defendants in an action to quiet title have admitted the necessity of a reference by filing a motion for the appointment of a referee on the ground that the action involves a complicated question of boundary which requires a personal view of the premises, they may not demand that the judge limit a compulsory reference to those issues which they requested.

3. Reference § 3— discretion of court to order compulsory reference

In an action to quiet title, the trial court did not err in ordering on its own motion a compulsory reference as to all of the issues, both of fact and of law, where the case involves a complicated question of boundary. G.S. 1-189.

4. Reference § 11— right to jury trial

A compulsory reference does not deprive one of the right to trial by jury.

5. Appeal and Error §§ 6, 16— power of judge to allow or refuse an appeal

A Superior Court judge can neither allow nor refuse an appeal.

6. Appeal and Error § 6; Reference § 3— appeal from compulsory reference

As a rule no appeal may be taken until the reference is completed and a final judgment rendered; but in a compulsory reference ordered against objection when a plea in bar has been interposed or when the parties demand a jury trial, the party objecting has the option to appeal at once or to note an exception, proceed with the trial before the referee, and have the exception considered on appeal from the final judgment.

ON *certiorari*, from *Bundy, J.*, September 1968 Session of Superior Court of NEW HANOVER County.

This action was instituted by the plaintiff to quiet title to lands allegedly owned by it in fee simple. The basis for plaintiff's action is the claim of the defendants that plaintiff and defendants are owners of the lands in question as tenants in common. Defendants in their answer assert their ownership of part of the lands described in the complaint. The plaintiff denies that any of the lands claimed by defendants is within the boundaries of the lands described in the complaint. On 26 October 1965, on motion of the defendants, a court survey was ordered, and Henry Von Oesen was appointed to conduct such survey.

On 14 June 1966 defendants filed a verified motion to vacate the order for survey. In this motion it is asserted:

"That defendants verily believe that the failure of Mr. Von Oesen to make the survey as ordered is ample proof of the cir-

cumstances compelling a reference in this matter, this being a complicated question of boundary which requires a personal view of premises; that the necessity for a reference in this matter was delineated in a motion dated in September, 1965, which Motion is on file in this action and is referred to herein with the same effect as if physically annexed hereto."

The motion referred to as being dated in September 1965 is not a part of the record here.

In a letter dated 22 August 1966 Mr. Von Oesen's firm submitted a survey to the court which showed only the contentions of the plaintiff and stated further that from the information supplied to them by the defendants, they had been unable to locate a starting point from which to begin a survey of the defendants' contentions. The defendants now assert that subsequent to Mr. Von Oesen's report to the court, they have had a survey of their contentions made at their own expense. When the case was called for trial, the trial judge on his own motion ordered a compulsory reference. The following appears in the record after the order of compulsory reference:

"APPEAL ENTRY

To the entry of the foregoing order the plaintiff objects and reserves its exception.

RESORT DEVELOPMENT COMPANY, INC.
By: James R. Swails
CARR & SWAILS, Attorneys.

DEFENDANTS, through their counsel, Evelyn A. Williams and Robert Bond, take exception to the order made by this Court for a Compulsory Reference and hereby file notice of an appeal from such order and request that an appeal bond be ordered and a term of time within which defendants can perfect their appeal.

EVELYN A. WILLIAMS

The Court being of the opinion that an appeal at this time is premature, declines to fix an appeal bond.

WILLIAM J. BUNDY"

Defendants' petition for *certiorari* was allowed on 10 October 1968.

Carr & Swails by James B. Swails for plaintiff appellee.

Evelyn A. Williams for defendants appellants.

MALLARD, C.J.

[1] We note at the outset that appellants in their brief have not cited the official North Carolina Reports when citing cases decided by the Supreme Court of North Carolina in support of their argument and contentions. Rather, they have cited only the Southeastern Reporter to support their view of the applicable law. Rule 46 of the Rules of Practice in the Court of Appeals of North Carolina states that as to the citation of reports, "Supreme Court Rule No. 46 applies." We interpret Rule No. 46 of the Supreme Court of North Carolina to mean that the official volumes of the North Carolina Reports should be cited when counsel seek to rely on North Carolina case law in support of their position.

Defendants contend that the trial court committed error in ordering a compulsory reference. It should be noted that defendants had moved, in writing, for the appointment of a referee and that this motion was still pending at the time the court on its own motion ordered a compulsory reference. Defendants argue here that their request for a reference is different in scope from that ordered by Judge Bundy. Perhaps there was a difference in defendants' motions dated in September 1965 and 14 June 1966, and this was noted by the judge, and that is why, on his own motion, he ordered that all of the issues, both of fact and of law, be referred as provided by the statute.

Defendants asserted in their pending motion for a reference that this case presents a complicated question of boundary requiring a personal view of the premises. The statute, G.S. 1-189, in pertinent part provides:

> "Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:
>
> . . .
>
> 3. Where the case involves a complicated question of boundary, or one which requires a personal view of the premises.
>
> . . .
>
> The compulsory reference under this section does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the referee."

[2] Having admitted the necessity of a reference, the defendant appellants were not in a position to demand that the judge limit the

reference only to those issues requested by the appellants. G.S. 1-172 provides that:

> "An issue of law must be tried by the judge of court, *unless it is referred.* An issue of fact must be tried by a jury, unless a trial by jury is waived or a *reference ordered.* Every other issue is triable by the court, or judge, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or *may refer it.*" (emphasis added)

Clearly under the provisions of this statute, Judge Bundy was authorized to order a compulsory reference as to "all of the issues, both of fact and of law . . ."

[3] In addition to the verified motion filed by the defendants in this cause, the pleadings and the record on appeal reveal that this case is one involving a complicated question of boundary. Judge Bundy correctly, in conformity with the course and practice of our courts and in the exercise of his discretion under the statute, ordered a compulsory reference. G.S. 1-189; *Sledge v. Miller,* 249 N.C. 447, 106 S.E. 2d 868; *White v. Price,* 237 N.C. 347, 75 S.E. 2d 244; *Veazey v. Durham,* 231 N.C. 354, 57 S.E. 2d 375; *Fibre Co. v. Lee,* 216 N.C. 244, 4 S.E. 2d 449.

[4] A compulsory reference does not deprive one of the right to trial by jury. The contention of the appellants that the compulsory reference has denied them the right to a trial by jury is without merit and requires no discussion.

Another of defendants' assignments of error relates to Judge Bundy's making the following entry declining to fix an appeal bond. "The court being of the opinion that an appeal at this time is premature, declines to fix an appeal bond."

[5, 6] "A Superior Court Judge can neither allow nor refuse an appeal." *Harrell v. Harrell,* 253 N.C. 758, 117 S.E. 2d 728. "As a rule no appeal may be taken until the reference is completed and a final judgment rendered; but in a compulsory reference ordered against objection when a plea in bar has been interposed or when the parties demand a jury trial, the party objecting has the option to appeal at once, or to note an exception, proceed with the trial before the referee and have the exception considered on appeal from the final judgment." McIntosh, N. C. Practice 2d, § 1407; *Harrell v. Harrell, supra.*

We granted *certiorari* upon the petition of the defendants, and after carefully reviewing all of the assignments of error are of the

opinion that the entry of the order of compulsory reference was a proper exercise of discretion by Judge Bundy.

The order of compulsory reference is affirmed and the cause is remanded for further proceedings according to law.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT LEE FURR, ALIAS BOBBY FURR

No. 6818SC446

(Filed 18 December 1968)

1. Criminal Law § 161— objection on certain ground — review on appeal

When an objection is made upon certain grounds stated, only those stated can be made the subject of review, except where the evidence is excluded by statute.

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

The assignments of error must be based on exceptions duly noted, and may not present a question not embraced in an exception.

3. Criminal Law § 162— assignments of error — question not embraced in exception

Where no objection was made to the question asked a witness, but objection and exception were made to only one word in the witness' answer, an assignment of error to the admission of the witness' testimony presents a question not embraced in the exception and will not be considered on appeal.

4. Arrest and Bail § 3— arrest without a warrant

Defendant's arrest in Maryland by an F. B. I. agent without a warrant was lawful where the agent had reasonable grounds to believe that the defendant had committed the felony of unlawful flight to avoid confinement for housebreaking in North Carolina. 18 U.S.C. § 3052.

5. Searches and Seizures § 1; Criminal Law § 84— search without warrant incident to lawful arrest

Where F.B.I. agents lawfully arrested defendant without a warrant and immediately thereafter searched an adjacent bedroom from which defendant had just come when arrested, a pistol found in the bedroom was lawfully seized without a search warrant as an incident to a lawful arrest and was properly admitted into evidence.

STATE *v.* FURR

APPEAL by defendant from *Fountain, J.*, April 1968 Session of Superior Court of GUILFORD County.

Defendant was tried upon a bill of indictment charging him with the crime of armed robbery, in which it is alleged that he took $25,000 in money from Lloyd Park on 5 August 1967.

Upon his plea of not guilty, trial was by jury and verdict was guilty as charged. From a judgment of imprisonment, defendant appeals, assigning error.

Attorney General T. W. Bruton and Assistant Attorney General Bernard A. Harrell for the State.

Shreve & Carrington by Kenneth M. Carrington for defendant appellant.

MALLARD, C.J.

Defendant contends that the following two questions are properly presented on this appeal: (1) Did the court err in allowing D. E. Faulkner to testify as to what he found during a search of the defendant's room on the date of the defendant's arrest? (2) Did the court err in allowing the introduction into evidence of State's Exhibit No. VIII, a pistol taken from the defendant's room at the time of his arrest?

As to the defendant's first question, the transcript of the testimony reveals that while the State's witness, David E. Faulkner, was being questioned by the solicitor, the following occurred:

"Q I hand you now an exhibit marked State's Exhibit No. VIII which is a pistol, and I want to ask you if you can identify that.

A Yes, sir, this is a Smith & Wesson revolver with serial no. C849198. This revolver was observed by me to be in the bookcase headboard in the bedroom where Mr. Furr was hiding prior to his arrest.

MR. CARRINGTON: Objection to the word, 'hiding.'

THE COURT: Overruled." EXCEPTION No. 1

[3] "The objection is to be made to the question asked, and not to the answer . . ." McIntosh, N. C. Practice 2d, § 1532(4). There was no objection to the question asked, and objection was to only one word in the answer. Defendant contends that the first question is based on his first assignment of error which is supported by his

"Exception No. 1." The defendant objected only to the word "hiding" which does not present the question sought to be presented or any other question. The trial judge ruled on the objection actually made. The exception is only to the objection made.

[1] "When an objection is made upon certain grounds stated, only those stated can be made the subject of review, except where the evidence is excluded by statute." McIntosh, N. C. Practice 2d, § 1532(7).

The objection was limited to the use of the word "hiding" and its use here is not prohibited by statute.

[2] "The assignments of error must be based on exceptions duly noted, and may not present a question not embraced in an exception." 1 Strong, N. C. Index 2d, Appeal & Error, § 24.

The testimony reveals that a pistol marked State's Exhibit No. VIII was identified by the victim of the robbery as having been taken from him at the time of the robbery. This pistol was also identified by the witness Faulkner who testified that on 8 August 1967 he was a Special Agent with the Federal Bureau of Investigation stationed in Baltimore. The witness Faulkner testified that he knew there was a Federal arrest warrant outstanding for the arrest of the defendant for unlawful flight to avoid confinement for housebreaking in North Carolina and that the defendant was also an escapee from a Federal prison sentence for the crime of interstate transportation of stolen motor vehicles, the sentence for which the defendant was serving concurrently. The defendant was in a bedroom of an apartment in Baltimore, Maryland, the door of which closed as the witness Faulkner and other Federal officers were inquiring as to the whereabouts of the defendant. Upon command to come out of the bedroom, the door to the bedroom opened, the defendant came out of the bedroom with his hands raised, as ordered, and was placed under arrest. The pistol identified as State's Exhibit No. VIII was one of two weapons in a bookcase headboard of the bed which were visible to the witness Faulkner as he entered the same bedroom to search immediately after the defendant was arrested.

[4] Defendant had been lawfully arrested by a Special Agent of the Federal Bureau of investigation without a warrant. Under the facts in this case the FBI agent had reasonable grounds to believe that the defendant had committed the felony of unlawful flight to avoid confinement for housebreaking in North Carolina, in violation of 18 U.S.C. § 1073. A violation of the provisions of 18 U.S.C. § 1073 is made a felony cognizable under the laws of the United States

under the provisions of 18 U.S.C. § 1. The power of agents of the Federal Bureau of Investigation to arrest a person without a warrant is prescribed by 18 U.S.C. § 3052 (1967 Cumulative Annual Pocket Part) which, among other things, provides that such agents may arrest without a warrant for felonies cognizable under the laws of the United States where the agent making the arrest has reasonable grounds to believe that the person arrested has committed such a felony.

[5] From the evidence in the case, we are of the opinion and so hold that the pistol introduced into evidence was seen and seized, without a search warrant, by a Special Agent of the Federal Bureau of Investigation, immediately after and incident to the arrest of the defendant under circumstances not requiring a search warrant. It was not error to permit it to be introduced into evidence. A reasonable search and seizure without a search warrant made incident to a lawful arrest is lawful and evidence obtained thereby is admissible. *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269; *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544; *Draper v. United States,* 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327; *Preston v. United States,* 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777.

In this case the pistol was taken at the time of his arrest from the room in which defendant was first seen and adjacent to the room in which he was lawfully arrested. In our opinion the seizure of the pistol was proper and was not the result of an illegal search.

In the trial we find no prejudicial error.

No error.

CAMPBELL and MORRIS, JJ., concur.

ELIZABETH L. JENKINS v. R. T. BROTHERS AND WIFE, GRACE J. BROTHERS

No. 681SC319

(Filed 18 December 1968)

1. Negligence §§ 52, 59— invitee v. licensee — guest in defendants' home who performs minor services

Where plaintiff cooked lunch in her home for defendants and defendants' scrub woman pursuant to an arrangement whereby plaintiff and

femme defendant each cooked lunch for the other and the scrub woman while the scrub woman was assisting the other in housecleaning, plaintiff was a licensee, not an invitee, when she entered defendants' home for the purpose of telling defendants that the meal was ready, the cooking of the meal and the notification that it was ready being minor or trifling services which did not change plaintiff's status from a guest to an invitee.

2. Negligence § 57— action by invitee — sufficiency of evidence

Evidence that plaintiff entered defendants' home as an invited guest and slipped and fell on a dark colored scatter rug which femme defendant had dropped while housecleaning on a light colored vinyl floor, and that plaintiff was familiar with defendants' home and knew that no rug had previously been in that location, *is held* insufficient to be submitted to the jury, even if plaintiff had been an invitee.

APPEAL by plaintiff from *Cowper, J.*, 3 June 1968 Session of Superior Court of PASQUOTANK County.

Plaintiff seeks to recover damages resulting from an injury which she sustained after entering the home of the defendants.

Plaintiff offered evidence which, in substance, tends to show: Plaintiff, who was 69 years old at the time, is the mother of the femme defendant and mother-in-law of the male defendant. The defendants reside in their home immediately South of plaintiff's home. Both parties frequently visit each other. Plaintiff and defendants used the respective side doors to each other's home when visiting the other. The side door was on the south side of plaintiff's home and on the north side of defendants' home. The side door to defendants' home enters the den. There is a white cement driveway between the two houses. The houses are both painted white. On the date alleged, 8 November 1966, the sun was shining and it was a bright, clear day.

On this date the femme defendant was housecleaning and had a scrub woman by the name of Pleasant Copeland assisting her. Pleasant Copeland was paid by the hour and, in addition, was furnished lunch. Plaintiff was familiar with the terms of this employment. Pleasant Copeland also worked for plaintiff, and the same manner of payment was used. There was an arrangement existing between the parties to the effect that when femme defendant was housecleaning, the plaintiff would furnish the food for defendants and the scrub woman which would be prepared at plaintiff's home; and when the plaintiff was housecleaning, the femme defendant would furnish the food for plaintiff and the scrub woman and do the cooking at defendants' home.

On the date alleged plaintiff went to defendants' home at about

ten o'clock A.M. After discussing the preparation of the noon meal, the femme defendant requested plaintiff to come back over there and let her know when the meal was ready because femme defendants' husband would have to get back to his work.

Plaintiff on this occasion had entered and left through the den and side door of defendants' home. There was no rug on the floor of the den at either of these times.

After plaintiff had prepared the meal, she went back to the home of the defendants to inform them it was ready. As she entered the den, it was darker in the den than it was outside. The floor of the den was covered with a light colored vinyl linoleum. Upon entering, she first stepped with her right foot, and as she took her next step and put her left foot down, she slipped. Her left foot struck and became entangled with a scatter rug which was about 36 inches long and 18 inches wide and considerably darker than the floor. She fell and sustained a broken left foot. She did not see the rug before she fell. When she saw the rug after the fall, it was "doubled, kinda rolled up." The femme defendant told plaintiff that she, the defendant, had started to the laundry room to take the rug to be washed as she always did when she was housecleaning, the telephone bell rang, she dropped or threw the rug, and went to answer the telephone.

Plaintiff has only ten per cent vision in her right eye, and although she does not have good vision in her left eye, she testified that "with my glasses on I can see how to read and everything," and can see "how to get around." Plaintiff also testified that, "If I had known it (rug) was there and had been looking for it I could have seen it."

At the close of plaintiff's evidence, the defendants moved for judgment as of nonsuit. The motion was allowed and judgment entered accordingly. Plaintiff appeals, assigning error.

J. Kenyon Wilson, Jr., and Gerald F. White for plaintiff appellant.

Leroy, Wells, Shaw & Hornthal by L. P. Hornthal, Jr., for defendant appellees.

MALLARD, C.J.

[1] The plaintiff contends, among other things, that because she supplied dinner for defendants and defendants' scrub woman, she was an invitee in the home of the defendants at the time she re-

ceived her injury. The authorities, however, support the view that she was a bare licensee. *Murrell v. Handley,* 245 N.C. 559, 96 S.E. 2d 717; 6 Strong, N. C. Index 2d, Negligence, §§ 52, 59.

Plaintiff also contends, as the appellant did in *Murrell v. Handley, supra,* that since she was engaged at the time of her injury in a specific task for the benefit of, and at the request of the femme defendant, her status was changed to that of an invitee, citing *Thompson v. DeVonde,* 235 N.C. 520, 70 S.E. 2d 424.

The following statement by Justice Denny, later C.J., distinguishing *Thompson v. DeVonde* in *Murrell v. Handley, supra,* is also applicable in this case:

> "The facts in the *DeVonde* case were substantially different from those in the instant case. Among other things, the plaintiff Thompson, in the *DeVonde* case, was a paying guest of the defendant's boarding house. The *DeVonde* case and others of similar import, cited by the appellant, are not controlling on the facts set forth in the record on this appeal.
>
> It is said in Anno.: 25 A.L.R. 2d 600: 'It has generally been held . . . that one who enters upon premises as a social guest will not escape the liabilities of that status merely by performing incidental services beneficial to the host in the course of the visit.'
>
> Minor services performed by a guest for the host during the course of a visit will not change the status of the guest from a licensee to an invitee. Anno.: 25 A.L.R. 2d 607; *O'Brien v. Shea,* 326 Mass. 681, 96 N.E. 2d 163."

In this case plaintiff was performing the minor or trifling service of telling the femme defendant that dinner was ready. The cooking of the meal for the defendants and the scrub woman was also a minor service that each customarily performed for the other. In going upon the premises of the defendants, the plaintiff was neither a customer nor a servant nor a trespasser.

[2] In this case the femme defendant was cleaning house and the plaintiff knew this. The fact that a scatter rug was on the light colored floor of the den where it had not been before does not constitute negligence. There is no evidence as to the condition of the rug prior to plaintiff's fall. The use of a scatter rug on a floor is not negligence. It is not negligence for a person in her own home, while cleaning house, to drop a dark colored scatter rug on a light colored vinyl linoleum covered floor, even though one had not previously been in such location. Plaintiff's own evidence also discloses that if

she had been keeping a proper lookout she would have seen the rug on the floor.

In our opinion the evidence was insufficient to justify the submission of this case to the jury, even if the plaintiff had been an invitee.

The ruling of the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. CARL L. RUFFIN
No. 686SC380

(Filed 18 December 1968)

Criminal Law § 161— effect of appeal

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

APPEAL by defendant from *Mintz, J.*, June 1968 Criminal Session of HALIFAX Superior Court.

Defendant was indicted by bill of indictment, proper in form, for the crime of escape from the State Prison System while serving a sentence for larceny, which is a felony. Defendant, through his court-appointed counsel, pleaded guilty. After examining the defendant, the trial court determined and adjudged that the plea of guilty had been freely, understandingly and voluntarily made and without any undue influence, compulsion or duress, and without promise of leniency or reward. Judgment was thereupon entered, sentencing defendant to prison for six months, this sentence to run consecutively with the sentence which had previously been imposed upon defendant for larceny. Defendant appealed.

Attorney General T. W. Bruton and Deputy Attorney General Harry W. McGalliard for the State.

W. Lunsford Crew for defendant appellant.

PARKER, J.

There is no assignment of error in the record, appellant's court-appointed counsel frankly submitting that he is of the opinion that

no prejudicial error was committed in this case but requesting this Court to review the same. An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper. 1 Strong, N. C. Index 2d, Appeal and Error, § 26, p. 152. We have carefully reviewed the record proper, and find the bill of indictment proper in form, the plea of guilty freely and voluntarily entered, and the sentence imposed to be within statutory limits. G.S. 148-45.

We find

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES ELLIS COOPER

No. 6827SC462

(Filed 18 December 1968)

Escape § 1; Criminal Law § 40— admissibility of commitment

In a prosecution for felonious escape, an unverified copy of a commitment containing the signature of an assistant clerk of Superior Court and bearing the seal of the clerk of the Superior Court is admissible to show the lawfulness of defendant's confinement at the time of the alleged escape.

APPEAL by defendant from *Snepp, J.*, 22 July 1968 Session, GASTON Superior Court.

Defendant was tried upon an indictment charging him with a felonious escape. The jury returned a verdict of guilty as charged. From the verdict and judgment of imprisonment for a period of two years defendant appealed.

T. W. Bruton, Attorney General, by Dale Shepherd, Staff Attorney, for the State.

Verne E. Shive for the defendant.

BROCK, J.

The crux of defendant's appeal relates to his exception to the introduction of an unverified copy of commitment taken from the defendant's file at the prison unit from which he is alleged to have

escaped. This exhibit was offered by the State to show the lawfulness of defendant's confinement at the time of the alleged escape. This commitment contained the signature of an assistant clerk of Superior Court of Mecklenburg County, and bore the imprint of the official seal of the Clerk of Superior Court of Mecklenburg County.

This precise question has been decided adversely to defendant's position in the case of *State v. Beamon,* 2 N.C. App. 583, filed 16 October 1968. Upon authority of *Beamon* defendant's assignments of error are overruled.

No error.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION, AND DUKE POWER COMPANY v. UNION ELECTRIC MEMBERSHIP CORPORATION

No. 6810UC395

(Filed 31 December 1968)

1. Electricity § 2— consumer's choice of supplier

Upon request of a consumer, an electric supplier may provide electric service to such consumer on premises initially requiring electric service after 20 April 1965 if such premises are located outside of a municipality, are not located wholly within 300 feet of the lines of any electric supplier, are not located partially within 300 feet of the lines of two or more electric suppliers, and are not located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) of G.S. 62-110.2. G.S. 62-110.2(b)(5).

2. Electricity § 2; Utilities Commission § 4— assignment of rural territory — authority of the Commission

The purposes of Chapter 287, Session Laws of 1965, are (1) to vest the Utilities Commission with authority and responsibility to assign territory to electric suppliers and (2) to declare certain rights of electric suppliers in areas outside of municipalities pending the assignment of territory. G.S. 62-110.2(c)(1), G.S. 62-110.2(b).

3. Electricity § 2; Utilities Commission § 4— jurisdiction of Commission where consumer has right to choose supplier

G.S. 62-110.2(b)(5) applies in factual situation where consumer of electricity requests electric services for premises initially requiring such ser-

vices after 20 April 1965 and premises are located outside of a municipality, are not wholly within 300 feet of the lines of any electric supplier, are not located partially within 300 feet of the lines of two or more suppliers, and are not located wholly or partially within an area assigned to an electric supplier pursuant to G.S. 62-110.2(c); other provisions of G.S. Ch. 62 deal with general powers and responsibilities of the Utilities Commission and are not applicable to give the Commission authority, in factual situation clearly within the provisions of G.S. 62-110.2(b)(5), to make a determination that the choice of supplier would cause an unnecessary duplication of electric facilities.

4. Statutes § 5— statutory construction — particular v. general provisions

Where there are two provisions in a statute, one of which is special or particular and the other general, which, if standing alone, would conflict with the particular provision, the special will be taken as intended to constitute an exception to the general provision, as the General Assembly is not to be presumed to have intended a conflict.

5. Statutes § 5— statutory construction — particular v. general statutes

Where one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling, especially when the particular statute is later enacted.

6. Statutes § 5— statutory construction

If the words of the law are clear and precise and the true meaning evident on the face of the enactment, there is no room for construction.

7. Utilities Commission § 4— right of electric supplier to deny service

Conclusion of the Utilities Commission that a consumer has the unrestricted choice of electric supplier under G.S. 62-110.2(b) *is held* subject to the right of the chosen electric supplier to deny the service unless required by the Utilities Commission.

BROCK, J., dissenting.

APPEAL by Union Electric Membership Corporation from Utilities Commission order of 8 May 1968.

The facts pertinent to this appeal are not in substantial dispute. Union Electric Membership Corporation (Union) is a duly organized, nonprofit electric membership corporation which is both a wholesale customer and retail competitor of Duke Power Company (Duke), a duly organized corporation and public utility.

Both Union and Duke are electric suppliers as defined in G.S.

62-110.2(a)(3). No service areas have been assigned in Union County as between the two pursuant to G.S. 62-110.2.

In 1966, William L. Carter acquired a tract of land fronting on the west side of Griffith Road (S. R. 2139) in Union County about two miles south of the corporate limits of Monroe and about 2,000 feet south of Richardson Creek. Since 1939 and until the construction complained of, Union's facilities have been located on and along Griffith Road south of Richardson Creek, and Duke's facilities were on and along the same road north of Richardson Creek. At the time Carter purchased the aforesaid tract and continuing to the present, Union's distribution line ran in a north-south direction along the eastern edge of Griffith Road opposite the road frontage of the tract. Union also had a line generally parallel to the tract's southern boundary line for a distance of about 250 feet, averaging approximately 150 feet from said boundary line. There was no service on the tract itself when purchased. At the time of purchase, Union served a house on the property adjoining the tract on the south and a house on the property adjoining the tract on the north. Duke's nearest facilities to the tract at purchase and until April 1967 were some 3,400 feet north, on the west side of Griffith Road.

Carter purchased the tract for residential development purposes and, in December 1966, began to clear and develop it, laying out and constructing an entry road in the approximate center of the tract and running generally east-west off of Griffith Road. The tract was subdivided into some thirty residential building lots.

In response to legitimate inducements offered by Duke generally, Carter requested Duke, about the first week of April 1967, to construct facilities to his subdivision and to serve a house which he had begun on the entry road some 600 feet west of Griffith Road and 352 feet from Union's line parallel to the subdivision's south property line. Pursuant to the request, Duke, on or about 7 April 1967, constructed its line from its existing facilities on Griffith Road north of Richardson Creek down and with Griffith Road south about 3,000 feet to the south property line of the subdivision, thence westerly 507 feet along the south edge of the subdivision to a dead end, thence northeast 300 feet to the aforesaid house under construction. All of Duke's construction on Griffith Road was placed on poles installed by a telephone company for its primary use with pole rental rights to Duke. Duke's line from Griffith Road into the subdivision was on its own poles. Duke's new construction on Griffith Road crossed over the road twice and crossed over Union's lines twice before reaching the subdivision. Duke's lines are directly parallel to Union's lines on the op-

posite side of Griffith Road for about 700 feet as it approaches and reaches the back property line of the subdivision. The line in the subdivision is directly parallel to Union's for about 225 feet at an average distance of approximately 125 feet. Since Duke's construction, Carter has started an additional house in the subdivision on Griffith Road. This house is 157 feet from Union's lines and about 80 feet from Duke's new line. Union provides construction power to this house and the parties' lines also cross each other at this point on Griffith Road.

Union filed complaint with the Utilities Commission asking that it issue orders restraining Duke from further construction of facilities in the area west of Richardson Creek and from furnishing any service whatever from the facilities already constructed; also requiring Duke to take down and remove the facilities constructed by it in the area.

The Utilities Commission ruled that the facts of this case bring it within the provisions of G.S. 62-110.2(b)(5) and dismissed Union's complaint. Union appealed.

Edward B. Hipp and Larry G. Ford for North Carolina Utilities Commission.

William I. Ward, Jr., and George W. Ferguson, Jr., for plaintiff appellee, Duke Power Company.

Crisp, Twiggs & Wells by William T. Crisp and Hugh A. Wells and Clark & Huffman by Richard S. Clark for defendant appellant, Union Electric Membership Corporation.

BRITT, J.

The majority order adopted by the Utilities Commission was based upon the premise that the provisions of G.S. 62-110.2(b)(5) are applicable to the factual situation covered by this case. Said section reads as follows:

> "(b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:
>
> * * *
>
> (5) Any premises initially requiring electric service after April 20, 1965 which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such

premises are located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) hereof, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises."

[1] Duke contends, and the Utilities Commission concluded, that the facts of this case fall squarely within the quoted statute. The question presented can be stated as follows: May an electric supplier, upon a request of a consumer, provide electric service to such consumer on premises initially requiring electric service after 20 April 1965, if such premises are located outside of a municipality, are not located wholly within 300 feet of the lines of any electric supplier, are not located partially within 300 feet of the lines of two or more electric suppliers, and are not located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) of G.S. 62-110.2? We answer the question in the affirmative.

[2] Determination of this appeal necessitates a consideration of Chapter 287 of the 1965 Session Laws codified as G.S. 62-110.1, *et seq.* Clearly, one of the purposes of Chapter 287 is to vest the Utilities Commission with authority and responsibility to assign territory to electric suppliers; this purpose is set forth in G.S. 62-110.2(c)(1) as follows:

"(c) (1) In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign, as soon as practicable after January 1, 1966, to electric suppliers all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments; provided, that the Commission may leave unassigned any area in which the Commission, in its discretion, determines that the existing lines of two or more electric suppliers are in such close proximity that no substantial avoidance of duplication of facilities would be accomplished by assignment of such area. The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers."

[2] It is equally clear that another purpose of Chapter 287 of the 1965 Session Laws, and particularly the section codified as G.S. 62-110.2(b), is to declare certain rights of electric suppliers in areas outside of municipalities pending the assignment of territory. Thus,

in the action before us, we must consider certain rights given an electric supplier and a consumer by the General Assembly.

[3] Appellant contends that a determination of this appeal does not rest entirely upon the consideration of the provisions of G.S. 62-110.2 but also upon certain other provisions of Chapter 62 of the General Statutes, particularly G.S. 62-2, 62-30, 62-31, 62-32, 62-42, and 62-73. Appellant contends that G.S. 62-110.2 must be considered and construed in *pari materia* with said other sections of Chapter 62.

[4] Our Supreme Court has spoken many times on the question of interpretation of statutes. "Where there are two provisions in a statute, one of which is special or particular and the other general, which, if standing alone, would conflict with the particular provision, the special will be taken as intended to constitute an exception to the general provisions, as the General Assembly is not to be presumed to have intended a conflict." *Davis v. Granite Corporation,* 259 N.C. 672, 131 S.E. 2d 335; 7 Strong, N. C. Index 2d, Statutes, § 5, p. 73.

[5] It is also a rule of statutory construction that "[w]here one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto, especially when the particular statute is later enacted." 7 Strong, N. C. Index 2d, Statutes, § 5, p. 73.

[6] In *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505, Barnhill, J. (later C.J.), said: "If the words of the law are clear and precise, and the true meaning evident on the face of the enactment, there is no room for construction." In *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22, our Supreme Court through Branch, J., declared: " 'When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly.' *Long v. Smitherman,* 251 N.C. 682, 111 S.E. 2d 834."

[3] G.S. 62-110.2(b)(5) deals with the specific factual situation presented by this appeal. The other sections of Chapter 62 referred to by Union deal with general powers and responsibilities of the Utilities Commission.

In *Membership Corp. v. Light Co.,* 255 N.C. 258, 120 S.E. 2d 749, our Supreme Court, in an opinion written by Bobbitt, J., declared:

"In *Light Co. v. Electric Membership Corp.*, 211 N.C. 717, 192 S.E. 105, decided in 1937, this Court held that an electric membership corporation and a public utility corporation were free to compete in rural areas. Unless restricted by the provisions of Article 8 of their contract of January 5, 1956, plaintiff and defendant may continue to do so."

Finding of fact No. 16 of the Utilities Commission order, which was not excepted to by Union, states:

"16. Prior to March 12, 1965, complainant and defendant had a contract between them which provided, inter alia, 'nor shall either party, unless ordered to do so by a properly constituted authority, duplicate the other's facilities.' On March 12, 1965, counsel for all of the electric membership corporations in the State and all electric public utilities entered into an agreement that their territorial relationships would be governed by G.S. 62-110.2 rather than by the provisions of any contracts as herein referred to."

Inasmuch as the contract existing between Union and Duke prior to 12 March 1965 was terminated and they, along with other electric membership corporations and electric public utilities in North Carolina, agreed that their territorial relationships would be governed by G.S. 62-110.2, the "freedom to compete in rural areas" declared in *Membership Corp. v. Light Co., supra,* would be applicable unless forbidden by some provision of G.S. 62-110.2. Subsection (b) (5) of G.S. 62-110.2 is clear and precise in declaring the rights of an electric supplier in the factual situation presented by this appeal.

[3] As stated in the Commission order, to accept the argument of Union, the Commission or the court would, in effect, amend G.S. 62-110.2(b) (5) by adding a clause providing "unless the Utilities Commission shall find that the consumer's choice creates unreasonable duplication of facilities." We cannot accept this argument. In *Board of Architecture v. Lee,* 264 N.C. 602, 142 S.E. 2d 643, a case dealing with statutory construction, Parker, J. (now C.J.), speaking for our Supreme Court, said: "* * * The General Assembly having thus formally and clearly expressed its will, the Court is without power to interpolate or superimpose conditions and limitations which the statutory exception does not of itself contain. * * *"

Union insists that it is the duty and responsibility of the Utilities Commission to assert itself in the case at bar and similar instances in order to prevent the unnecessary, extravagant and wasteful duplication of electric facilities. We do not hold that the Utilities Commission lacks authority, in a proper proceeding, to prohibit the con-

struction by an electric power utility of a proposed extension or expansion of its facilities, if the Commission should determine on competent evidence that such construction would be an unnecessary and wasteful investment of the utility's funds. *Membership Corp. v. Light Co., supra.* We do hold that on the facts presented in the case before us, and in the face of the provisions of G.S. 62-110.2(b)(5), the Commission was justified in not taking such action in this case. The Commission found as a fact, and Union made no exception to the finding, that the construction in this case was at a cost of $2,335.00; that the cost to Union would have been $1,485.00; that "it would be profitable for either Duke or Union to provide service in the entire subdivision, particularly to the 29 homes which are to be all electric."

[7] The first paragraph of "Conclusions" in the Utilities Commission order reads as follows:

> "The facts found above would seem to present in the present case the following issue for decision by the Commission: 'Does a consumer, residing outside the boundary of a municipality and in an area not yet assigned to any electric supplier under G.S. 62-110.2(c), have the right to select and obtain electricity from the electric supplier of his choice when the structure to be served is not wholly within 300 feet of an existing line of any electric supplier?' "

Union excepted to, and assigns as error, this conclusion. We hold that the quoted conclusion is subject to the right of the electric supplier chosen to deny the service unless required by the Utilities Commission.

Union's exception No. 6 relates to the following conclusion of the Commission:

> "We feel that under the language of G.S. 62-110.2(b)(5), it is abundantly clear that the Legislature intended that, pending assignment of a rural area to any one electric supplier, a consumer requiring initial service to premises not within 300 feet of any existing supplier's lines has the *unrestricted* choice of suppliers and the chosen supplier has the *unrestricted* right to serve such consumer. Furthermore, as specifically stated in the final clause of the statute, 'any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.' "

We hold that the "unrestricted choice of suppliers" on the part of the consumer is subject to the willingness of the chosen supplier to serve unless compelled by the Utilities Commission.

Except for the modification above-mentioned, we hold that the

final order of the Utilities Commission was without error and the assignments of error brought forward by appellant are overruled.

The Utilities Commission will modify its order in accordance with this opinion.

Modified and affirmed.

PARKER, J., concurs.

BROCK, J., dissents.

BROCK, J., dissenting:

I cannot agree with the majority opinion that by the enactment of G.S. 62-110.2(b)(5) the legislature intended to divest the Utilities Commission of power to inquire into the question of duplication of facilities which might be caused by a consumer's choice of an electric supplier where the conditions of the statute are otherwise met. And it seems to me that the majority opinion has conceded a right to the exercise of discretion under the statute by the supplier and the Utilities Commission with its statement as follows: "We hold that the 'unrestricted choice of supplier' on the part of the consumer is subject to the *willingness of the chosen supplier* to serve unless *compelled by the Utilities Commission.*" (Emphasis added.) Nevertheless the majority opinion affirms the dismissal of this proceeding by the Utilities Commission upon the grounds that G.S. 62-110.2(b)(5) deprives it of power to make and enforce a determination of whether the extension of Duke's lines in this case is reasonable, or whether it constitutes an unreasonable and wasteful duplication of facilities as alleged by Union Electric.

In my opinion the statute in question does not divest the Utilities Commission of the power and the duty to make and enforce a determination from the facts of the case whether the choice of supplier made by a consumer, otherwise qualified to make a choice under this statute, would cause an unwarranted duplication of facilities. It may be that the extension of its lines by Duke in this case is proper under the criteria permitting duplication, but the Utilities Commission should be required to make an appropriate determination.

I vote to remand for appropriate findings and conclusions.

STATE OF NORTH CAROLINA, EX REL., UTILITIES COMMISSION; CAROLINA POWER & LIGHT COMPANY AND ACME ELECTRIC CORPORATION AND ACME ELECTRIC CORPORATION OF LUMBERTON, NORTH CAROLINA v. LUMBEE RIVER ELECTRIC MEMBERSHIP CORPORATION

No. 6810UC390

(Filed 31 December 1968)

Utilities Commission § 4; Electricity § 2— jurisdiction of Commission where consumer has right to choose supplier

Where a manufacturer's plant building is located outside of a municipality and initially required electric service after 20 April 1965, and the building is not located wholly within 300 feet of the lines of any electric supplier and not located partially within 300 feet of the lines of two or more electric suppliers and is not located wholly or partially within an area assigned to any electric supplier pursuant to G.S. 62-110.2(c), G.S. 62-110.2 (b)(5) is squarely applicable to give the manufacturer the right to choose a power company, rather than an electric membership corporation, to be its electric supplier, and the Utilities Commission properly dismissed the complaint of an electric membership corporation that the manufacturer's choice of the power company constituted an unnecessary and wasteful duplication of facilities.

BROCK, J., dissenting.

APPEAL by Lumbee River Electric Membership Corporation from Utilities Commission Order of 8 May 1968.

This is a complaint proceeding instituted on 6 October 1967 by Lumbee River Electric Membership Corporation (Lumbee) before the North Carolina Utilities Commission against Carolina Power & Light Company (CP&L). In its complaint, Lumbee alleged that CP&L had wrongfully extended its electric lines to a new manufacturing facility owned by Acme Electric Corporation (Acme) in Robeson County, and that by so doing it had unlawfully duplicated Lumbee's existing facilities. Lumbee sought to restrain CP&L from rendering the proposed electric service to Acme and to compel CP&L to remove its newly constructed electric lines. The facts pertinent to this appeal are admitted by the pleadings and stipulations of the parties and are not in substantial dispute.

Lumbee is a duly organized nonprofit electric membership corporation, organized and existing pursuant to G.S., Chap. 117, and is engaged in supplying electricity at retail to its members in and near Robeson County. CP&L is a duly organized public utility corporation engaged in generation, transmission, distribution and sale of electricity in Robeson County and in other areas of North Carolina pursuant to G.S., Chap. 62. Lumbee is a wholesale customer of

CP&L. Both Lumbee and CP&L are electric suppliers as defined by G.S. 62-110.2(a)(3). No service areas have been assigned in Robeson County as between Lumbee and CP&L pursuant to G.S. 62-110.2 (c)(1).

Acme is a manufacturing corporation engaged in the business of manufacturing and distributing various types of electrical equipment. On 17 July 1967 Acme acquired a tract of land containing about 36 acres located at the southeastern quadrant of the intersection of Interstate Highway 95 and U. S. Highway 74 in Robeson County for the purpose of building thereon a manufacturing plant. Acme caused the eastern portion of this tract, consisting of approximately 20 acres, to be conveyed to its wholly owned subsidiary, Acme Electric Corporation of Lumberton, which subsidiary corporation proceeded to commence erection thereon of a manufacturing plant building containing approximately 60,000 square feet. Acme will lease this manufacturing plant from its subsidiary and electric service will be in the name of Acme. The Acme plant site is approximately three miles southwest of Lumberton and is outside of any municipality.

At the time Acme acquired its new plant site, Lumbee had a single-phase electric line running along a portion of the northern edge of the Acme property adjacent to highway I-95, serving a tenant house and two motel signs then on the property but which were to be removed to make way for construction of the Acme plant. The Acme plant requires three-phase electric service. Lumbee had an existing three-phase electric line located along but on the opposite side of highway I-95 from the Acme plant site. No part of the Acme plant building is located within 300 feet of the existing Lumbee three-phase line. A portion, but not all, of the Acme plant building is located within 300 feet of Lumbee's existing single-phase line. The Acme plant building is 240 feet long, in its north to south dimension, and extends 62 feet beyond the 300 foot boundary of the Lumbee single-phase line on the east end of the building and fifteen feet beyond the 300 foot boundary on the west end of the plant building.

After it acquired the plant site property, Acme chose CP&L as its electric supplier and requested Lumbee to remove its single-phase line from the premises. On or about 15 August 1967 Acme entered into a contract with CP&L for supplying Acme's industrial electric load requirements. In order to furnish this service CP&L converted 0.6 miles of one of its existing single-phase lines to a three-phase line and installed 3.63 miles of entirely new construction of a new three-phase line. It is this new construction which is the subject matter of the present proceeding.

CP&L filed answer to Lumbee's complaint in which it alleged that it was lawfully entitled to extend its facilities to render service to Acme. CP&L contends that under the express provisions of G.S. 62-110.2(b)(5) Acme is entitled to seek and receive electric service from CP&L and Lumbee is prohibited from rendering electric service to Acme. Acme and its subsidiary petitioned to be permitted to intervene in this proceeding, which petition was granted, and Acme filed answer consistent with the answer of CP&L.

On the admitted and stipulated facts, CP&L and Acme moved to dismiss Lumbee's complaint as a matter of law. From order of the Utilities Commission allowing this motion and dismissing the complaint, Lumbee appealed.

Edward B. Hipp and Larry G. Ford, for North Carolina Utilities Commission.

Sherwood H. Smith, Jr., Charles F. Rouse and W. Reid Thompson, for plaintiff appellee, Carolina Power & Light Company.

McLean & Stacy, by H. E. Stacy, Jr., for intervenor appellees, Acme Electric Corporation and Acme Electric Corporation of Lumberton, North Carolina.

Crisp, Twiggs & Wells, by William T. Crisp and Hugh A. Wells, for defendant appellant, Lumbee River Electric Membership Corporation.

PARKER, J.

The complainant in this proceeding, Lumbee River Electric Membership Corporation, contends that it is entitled to have the Carolina Power & Light Company electric service to the Acme premises discontinued and the newly constructed CP&L line removed because such facility is duplicative of Lumbee's electric line facilities which were already in the area. While granting that CP&L may realize a profit in relation to the incremental costs of extending and operating its new three-phase line facilities herein complained of, Lumbee contends that such an extension of CP&L's facilities nevertheless constitute an unnecessary, extravagant and wasteful duplication of facilities, the effect of which is to impose on the general public an aggregate cost that is unnecessary and undesirable. Lumbee contends that the North Carolina Utilities Commission has the legal power to prevent such duplication of electric line facilities on the part of utilities subject to its regulatory jurisdiction and that under the circumstances here presented the Utilities Commission has the legal duty to exercise

that power. A majority of the Utilities Commission concluded, however, that the facts of this case bring it squarely within the provisions of G.S. 62-110.2(b)(5), and that the provisions of that statute require the dismissal of Lumbee's complaint. We agree with that conclusion.

G.S. 62-110.2 was enacted as part of Chap. 287 of the 1965 Session Laws. A principal purpose of that statute was to provide an orderly method for allocation of service areas as among competing suppliers of electricity and thereby to eliminate unnecessary duplication of electric line facilities. For that purpose, G.S. 62-110.2(c)(1) provides that the Utilities Commission "is authorized and directed to assign, as soon as practicable after January 1, 1966, to electric suppliers all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the date of the assignments. . . . The Commission shall make assignments of areas in accordance with public convenience and necessity, considering among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers."

When the present proceeding was commenced no electric service area had been assigned in Robeson County by the Utilities Commission as between Lumbee and CP&L. This proceeding, therefore, presents the question of the respective rights of the parties and the powers of the Utilities Commission during the interim period pending assignment of service areas.

G.S. 62-110.2(b)(5) provides as follows:

> "(b) In areas outside of municipalities, electric suppliers shall have the rights and be subject to restrictions as follows:
>
> * * * * *
>
> "(5) Any premises initially requiring electric service after April 20, 1965 which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) hereof, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises."

Acme's new plant building is a "premises" within the definition

of the statute. G.S. 62-110.2(a)(1). It is located outside of a municipality. It initially required electric service after April 20, 1965. It was not located wholly within 300 feet of the lines of any electric supplier and not located partially within 300 feet of the lines of two or more electric suppliers. It was not located wholly or partially within an area assigned to any electric supplier pursuant to G.S. 62-110.2(c). And finally, Acme chose CP&L to be its electric supplier. Thus, the facts of this case bring it squarely within the express and clear provisions of G.S. 62-110.2(b)(5), and under that section Acme had the right to choose CP&L, and CP&L had the right to serve as Acme's supplier of electricity.

This appeal presents essentially the same question as was presented by the appeal in *State of North Carolina, ex rel. Utilities Commission and Duke Power Company v. Union Electric Membership Corporation,* and our decision in that case, handed down this date, is determinative of this case. Since G.S. 62-110.2(b)(5) deals expressly and explicitly with the factual situation here presented, since its language is clear and unambiguous and presents no problem of construction, we must presume that the Legislature intended exactly what the statute says.

The order of the Utilities Commission dismissing the complaint is Affirmed.

BRITT, J., concurs.

BROCK, J., dissents.

BROCK, J., dissenting:

For the reasons stated in my dissent from the majority opinion in *State of North Carolina, ex rel. Utilities Commission, and Duke Power Company v. Union Electric Membership Corporation,* which is filed this same date, I dissent from the majority opinion in this case.

STATE OF NORTH CAROLINA v. ERNEST BEASLEY, SR.

AND

STATE OF NORTH CAROLINA v. STANLEY LEE BEASLEY

No. 681SC435

(Filed 31 December 1968)

1. Mayhem § 1— elements of crime of maliciously maiming a privy member — G.S. 14-28

Elements of the offense of maliciously maiming a privy member as condemned by G.S. 14-28 are: (1) the accused must act with malice aforethought, (2) the act must be done on purpose and unlawfully, (3) the act must be done with intent to maim or disfigure a privy member of the person assaulted, and (4) there must be permanent injury to the privy member of the person assaulted.

2. Mayhem § 1— maiming privy member without malice aforethought — G.S. 14-29

The offense of maiming a privy member condemned by G.S. 14-29 is a lesser included offense of G.S. 14-28, proof of malice aforethought, or of a preconceived intention to commit the maiming of the privy member, not being necessary to conviction under G.S. 14-29.

3. Criminal Law § 104— nonsuit — consideration of evidence

In passing upon a motion for nonsuit, the court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom; only the evidence favorable to the State will be considered, and defendant's evidence in conflict with that of the State will not be considered.

4. Mayhem § 2— maiming of a privy member — sufficiency of evidence

In a prosecution for maiming a privy member without malice aforethought, defendant's motion for nonsuit is properly denied where the State's evidence tends to show that defendant waited for and intercepted the prosecuting witness, viciously and brutally beat the prosecuting witness and threw him about the ground, and that defendant jabbed his knee to the groin of the prosecuting witness, injuring his testicle and necessitating its surgical removal.

5. Mayhem § 2; Criminal Law § 105— prosecution for maliciously maiming privy member — nonsuit where evidence sufficient to show maiming without malice

In a prosecution upon an indictment charging a malicious maiming of a privy member in violation of G.S. 14-28, defendant's motion for nonsuit of the "felony charge" is properly denied where there is sufficient evidence to support conviction under G.S. 14-28 of maiming a privy member without malice aforethought, both offenses being felonies, and the offense condemned by G.S. 14-29 being a lesser included offense of G.S. 14-28.

6. Mayhem § 2— presumption of intent to disfigure

An intent to maim or disfigure a privy member is *prima facie* to be inferred from an act which does in fact disfigure, unless the presumption be repelled by evidence to the contrary.

7. Criminal Law § 9— aiders and abettors

When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty without regard to any previous confederation or design.

8. Criminal Law § 9— aiders and abettors

A person aids or abets in the commission of a crime when he shares in the criminal intent of the actual perpetrator, and renders assistance or encouragement to him in the perpetration of the crime.

9. Mayhem § 2; Criminal Law § 9— aiding and abetting in offense of maiming a privy member — sufficiency of evidence

In a prosecution for maiming a privy member without malice aforethought, evidence tending to show that a father and son waited in a position to intercept the prosecuting witness, that the son assaulted and committed the offense of maiming a privy member of the prosecuting witness, that the father stood between the gathering crowd and the altercation to prevent any interference and struck the brother of the prosecuting witness to prevent his interference *is held* sufficient to be submitted to the jury on the issue of the father's guilt as an aider and abettor in the offense of maiming a privy member.

APPEAL by defendants from *Fountain, J.*, 2 September 1968 Session, CURRITUCK Superior Court.

This appeal arises from four criminal charges; two against each defendant. In case No. 480, Ernest Beasley, Sr. was charged with an assault upon Robert Lee Broome on 29 May 1968, inflicting serious bodily injury, a general misdemeanor. In case No. 516, Ernest Beasley, Sr. was charged with maliciously maiming Norman Steven Broome on 29 May 1968, with malice aforethought, a felony. In case No. 481, Stanley Lee Beasley was charged with an assault upon Norman Steven Broome on 29 May 1968, inflicting serious bodily injury, a general misdemeanor. In case No. 515, Stanley Lee Beasley was charged with maliciously maiming Norman Steven Broome on 29 May 1968, with malice aforethought, a felony. The four cases were consolidated for trial.

Ernest Beasley, Sr. was 41 years of age, and the father of Stanley Lee Beasley, who was 19 years of age. Norman Steven Broome was 15 years of age, and was a brother of Robert Lee Broome, who was 14 years of age.

On 29 May 1968, the last day of school at Moyock Elementary School in Currituck County, Ernest Beasley, Sr., drove his automobile to the school at about 11:30 a.m. to pick up two of his children, ages 12 and 13. He parked on the school grounds at the south end of the building and waited while the principal sent his children out. While

Beasley, Sr. was waiting at the school, a Mrs. Ferebee also came to the school to pick up her children. Stanley Lee Beasley, the 19 year old son of Ernest Beasley, Sr., was in the car with Mrs. Ferebee. After Mrs. Ferebee arrived there was some conversation between the occupants of the two cars.

Stanley Lee Beasley then got into the car with his father and when the 12 and 13 year old Beasleys came out of the school building and joined their father and older brother, Beasley, Sr., with his three sons in the car with him, drove to a Mr. Chalk's to get some cigars. He then drove back and parked across the street from the schoolhouse. Up to this point there was no substantial conflict in the evidence as to what transpired.

The State's evidence tended to show that about a month before the last day of school a controversy had developed between the Beasleys and the Broomes over the ownership and right to possession of a baseball glove. On the particular day in question the State's evidence tended to show: That the Beasleys' car was parked on the opposite side of the street from the schoolhouse, in the route the Broome children usually walked on their way home from school. That the Beasleys were seated in their car as Norman Steven Broome approached the street. That Stanley Lee Beasley stepped out of the car and called to Steven Broome to wait, saying, "I want to talk to you." Steven waited at about the center of the street and when Stanley got up to him Stanley said something about Steven beating on his brother. Steven denied this, Stanley called him a liar and hit him three or four times with his fist. The remainder of the event is best described in the testimony of Steven Brooms as follows:

"Q. Then what occurred?

"A. Well, he began to sling me around, and I began to hit the ground, and come back up, trying to get away, and as soon as I would get to my feet I would go back down again.

"Q. Did he hit you any more at this time? While he was slinging you around?

"A. I don't recall. He may have.

"Q. Do you remember how many times he threw you around, and how many times you got up?

"A. No, sir.

"Q. Was it more than once?

"A. Yes, sir.

"Q. What else, if anything, did he do to you?

"A. Well, after I remember being right by the little walk pavement in front of the Woman's Club, little concrete pavement, and then I went to get up one time on my feet and he grabbed me by my shoulders, and snatched me to him, and kicked me, I mean kneed me.

"Q. Where did he kneed you?

"A. In my testicles.

"Q. How many times?

"A. Once.

"Q. With reference to whether the blow was relatively mild, or hard, can you describe it?

"A. It was hard. I mean it was a feeling I had never been hurt — I had never had anything to hurt me that bad.

"Q. What did you do after he kneed you?

"A. I went straight to the ground.

"Q. What happened after you fell to the ground?

"A. Well, then he tried to stomp me.

"Q. How many times?

"A. I don't remember, about four.

"Q. I ask you whether or not he did in fact stomp you?

"A. No, sir, he never hit me.

"Q. Why not?

"A. I began to roll to try to get out of his way.

"Q. What else, if anything, did he do after you rolled out of his way when he tried to stomp you?

"A. I finally got up on one knee, and was trying to get up, and he pulled me on up and slung me up against the car, and hit me a couple of more times in the face and in the stomach.

"Q. Was anyone else there in the road where you all were having this difficulty?

"A. After he slung me up against the car, and hit me a couple of times, he throwed me on the ground, and he climbed on top of me, and I remember Annie Ferebee coming up there and sticking her finger right in my nose.

"Q. Where were you when Mrs. Ferebee stuck what, her finger next to your nose?

"A. She stuck her finger next to my nose.

"Q. Where were you when she stuck her finger in your nose?

"A. I was down on the ground, with Stanley on top of me.

"Q. Do you know where she came from?

"A. No, I don't. She just up and appeared.

"Q. Had you seen her before this difficulty started between you and Stanley?

"A. Not that day.

"Q. After he threw you on the ground this last time, and Mrs. Ferebee stuck her finger in your nose, what else, if anything, occurred then?

"A. Well, for some reason or other, I don't remember why —

"Q. He did what?

"A. For some reason or other he got up, and I got up, and I was trying to get away, and then my testicles were hurting me so bad then that I couldn't even hardly walk, and then he hit me a couple of more times, and finally I got out of his range.

"Q. And where did you go?

"A. I went straight home.

"Q. Had you known Stanley Beasley before this?

"A. No, sir, not that I can recall. I don't think I ever saw him before in my life."

The State's evidence further tended to show that Ernest Beasley, Sr., got out of the car and stood between the altercation and the crowd gathering on the school grounds. That Robert Lee Broome went over to the scene and told Stanley Beasley to get off his brother, and Ernest Beasley, Sr., hit Robert Lee with his fist, knocking him to the ground, unconscious, and damaging his glasses and hearing aid. That Ernest Beasley, Sr., did not at any time try to stop his son Stanley Lee from fighting Steven Broome. That as a result of the blow inflicted by Stanley Lee Beasley it was necessary for Steven Broome to undergo surgery for the removal of one testicle.

The evidence for the defendants tends to show: That the Beasleys were waiting for Mrs. Ferebee to get her children so they could follow her home because she was afraid she might run out of gas.

That while they were waiting, Stanley Lee was leaning against the front of the Beasley car. That Steven Broome came out of school, walked up to Stanley, cursed him and hit him about the same time. That a fight ensued and while Stanley was trying to protect himself from being "kneed in the groin" someone shoved Steven Broome into Stanley's knee causing any injury Steven may have sustained.

The evidence for defendants further tends to show that Ernest Beasley, Sr. did not at any time strike Robert Lee Broome, and did not see anyone else strike him.

The jury returned verdicts as follows:

Case No. 480 — State v. Ernest Beasley, Sr., guilty of assault.

Case No. 516 — State v. Ernest Beasley, Sr., guilty of malicious maiming without malice aforethought.

Case No. 515 — State v. Stanley Lee Beasley, guilty of malicious maiming without malice aforethought.

Case No. 481 — State v. Stanley Lee Beasley, dismissed by the Court because the same elements are incorporated in the offense charged in case No. 515.

Judgment of confinement for a period of not less than seven nor more than ten years was entered in case No. 515 (Stanley Lee Beasley); judgment of confinement for a period of not less than seven nor more than ten years was entered in Case No. 516 (Ernest Beasley, Sr.); and judgment of confinement for a period of thirty days was entered in case No. 480 (Ernest Beasley, Sr.) to run concurrent with the sentence in case No. 516. From the verdicts and the judgments both defendants appealed.

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

Leroy, Wells, Shaw & Hornthal, by Dewey W. Wells, for the defendants.

BROCK, J.

Each defendant presents as his first assignment of error the denial by the court of their respective motions for nonsuit made at the close of the State's evidence and again at the close of all of the evidence. Their argument is that there is not substantial evidence of each of the elements of the offense of malicious maiming, with or without malice aforethought. And Ernest Beasley, Sr., argues further that the State failed to offer evidence that he maimed or aided and abetted in maiming.

[1] An examination of the composite of the North Carolina opinions dealing with the offense of maiming discloses the following to be the elements of the offense of maiming a privy member as condemned by G.S. 14-28:

(1) The accused must act with malice aforethought.

(2) The act must be done on purpose and unlawfully.

(3) The act must be done with intent to maim or disfigure a privy member of the person assaulted.

(4) There must be permanent injury to the privy member of the person assaulted. See *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580; *State v. Malpass,* 226 N.C. 403, 38 S.E. 2d 156; *State v. Skidmore,* 87 N.C. 509; *State v. Ormond,* 18 N.C. 119; *State v. Crawford,* 13 N.C. 425; *State v. Evans,* 2 N.C. 281.

[2] The offense of maiming a privy member condemned by G.S. 14-29 is a lesser included offense of G.S. 14-28, and for a conviction under G.S. 14-29 proof of malice aforethought, or of a preconceived intention to commit the maiming of the privy member, is not necessary. *State v. Girkin,* 23 N.C. 121.

[3, 4, 9] In passing upon a motion for nonsuit the court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Only the evidence favorable to the State will be considered, and defendant's evidence in conflict with that of the State will not be considered. 2 Strong, N. C. Index 2d, Criminal Law, § 104, p. 648. When the evidence favorable to the State is viewed in accordance with this principle it will justify a finding: That Ernest Beasley, Sr., and his nineteen year old son Stanley Lee parked their car and waited in a position to intercept Norman Steven Broome, a fifteen year old elementary school student, on his way home from school. That they did this because of some earlier conflict between Broome and one of the younger Beasley boys over a baseball glove. That when Broome started home Stanley Lee Beasley intercepted him and viciously and brutally whipped him with his fists, jerked and threw him about on the ground, held him while he jabbed his knee to his groin injuring his testicle, tried to "stomp him" while he was on the ground, pulled him up from the ground and hit him more with his fists while he was against the car, and continued to hit him until he could run away. That during this time Ernest Beasley, Sr., stood between the gathering crowd and the altercation to prevent any interference and when Steven Broome's younger brother Robert tried to come to his aid, Ernest Beasley, Sr.,

viciously struck this fourteen year old boy with his fist, rendering him unconscious and damaging his glasses and hearing aid.

[5] It is not necessary in this case for us to determine whether the evidence is sufficient to support a finding that defendants acted with malice aforethought, or premeditated design; the motion for nonsuit was specifically addressed to a dismissal of the "felony charge," and the offense condemned by G.S. 14-29, a lesser included offense of G.S. 14-28, is also a felony. Therefore, maiming a privy member without malice aforethought being a lesser included offense of maiming a privy member with malice aforethought, if the evidence was sufficient to support a conviction under G.S. 14-29 of maiming a privy member without malice aforethought the trial judge was correct in overruling defendants' motions. 2 Strong, N. C. Index 2d, Criminal Law, § 105, p. 652. Therefore we omit discussion of whether the first element listed above (acting with malice aforethought) is supported by the evidence.

[4, 6] That the acts of the defendants were on purpose and were unlawful (the second element listed above) is clearly supported by the evidence. That the acts of the defendants were with intent to maim or disfigure a privy member (the third element listed above) is *prima facie* to be inferred from an act which does in fact disfigure, unless the presumption be repelled by evidence to the contrary. *State v. Girkin,* 23 N.C. 121; *State v. Crawford,* 13 N.C. 425; *State v. Evans,* 2 N.C. 281. That there was permanent injury to the privy member (the fourth element listed above) is clearly supported by the testimony of Dr. Jenkins that the testicle had a large stellate laceration which was obviously from trauma, and necessitated the surgical removal of the testicle. There was no error in the refusal to nonsuit the felony charge against Stanley Lee Beasley.

[7, 8] "It is thoroughly established law in this State that without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty." *State v. Keller,* 268 N.C. 522, 151 S.E. 2d 56. "A person aids or abets in the commission of a crime within the meaning of this rule when he shares in the criminal intent of the actual perpetrator, and renders assistance or encouragement to him in the perpetration of the crime." *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169.

[9] The evidence in this case clearly supports a finding that Ernest Beasley, Sr., was present at the time Stanley Lee assaulted Norman Steven Broome; that he gave active encouragement to Stanley Lee by his failure to try to stop the altercation and by his

preventing others from interfering in the altercation; and that he made it known to Stanley Lee that he was standing by to render assistance if necessary. Such findings would constitute aiding and abetting by Ernest Beasley, Sr., and would make him a principal, equally as guilty as Stanley Lee. There was no error in the refusal to nonsuit the felony charge against Ernest Beasley, Sr.

We have carefully examined the remaining assignments of error and find them to be without merit.

No error.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. GEORGE F. DORSETT
AND
STATE OF NORTH CAROLINA v. LARRY FRANKLIN DORSETT
No. 6818SC455

(Filed 31 December 1968)

1. Statutes § 3; Municipal Corporations § 8— validity of statute or ordinance

A statute or ordinance is presumed to have meaning and will be upheld if its meaning is ascertainable with reasonable certainty by proper construction.

2. Statutes § 4— construction in regard to constitutionality

If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional, the former will be adopted.

3. Municipal Corporations § 8— construction of anti-noise ordinance

An ordinance proscribing unreasonably loud and unnecessary noise is criminal in nature and is subject to the rule of strict construction, nevertheless the courts must construe it with regard to the evil which it is intended to suppress.

4. Statutes § 10— construction of criminal statutes

The rule that statutes will be construed to effectuate the legislative intent applies to criminal statutes.

5. Municipal Corporations §§ 29, 37— validity of anti-noise ordinance

The protection of the well-being and tranquility of a community by the reasonable prevention of disturbing noises is within the city's power to control nuisances. G.S. 160-200.

6. Municipal Corporations § 37— anti-noise ordinance — degree of noise intensity

It is not required that municipal ordinance proscribing unreasonably loud and unnecessary noise define in decibels the intensity of the noise to be prohibited.

7. Municipal Corporations § 37— anti-noise ordinance — constitutionality

Municipal ordinance proscribing the creation of unreasonably loud and unnecessary noise of such intensity and duration as to be detrimental to the life or health of any individual, including the creation of any loud and unnecessary noise by the use of a motorcycle, is not unconstitutional for vagueness or indefiniteness.

8. Municipal Corporations § 37— prosecution for loud use of motorcycle — competency of evidence — nonsuit

In a prosecution under a municipal ordinance charging the two defendants with the offense of disturbing the peace by the use of motorcycles in such a manner as to create loud and unnecessary noise, it is competent for the prosecution to show the intensity of the noise made by the group of motorcycles in which defendants were voluntarily riding without having to show the decibels contributed by each defendant, and where the State's evidence tends to establish that the contribution of each defendant made the total intensity of noise into an offense condemned by the ordinance, the case is properly submitted to the jury.

APPEAL by defendants from *Exum, J.*, 29 April 1968 Session (second week), GUILFORD Superior Court, Greensboro Division.

The defendants were charged in identical warrants with the offense of disturbing the peace by the use of motorcycles in such a manner as to create loud and unnecessary noise in the City of Greensboro. Each of the warrants was drawn to allege a violation of Section 13-12(b)(4) of the Greensboro Code of Ordinances.

Section 13-12 of the Greensboro Code of Ordinances provides:

> (a) Subject to the provisions of this section, the creation of any unreasonably loud, disturbing and unnecessary noise in the city is prohibited. Noise of such character, intensity, and duration as to be detrimental to the life or health of any individual is prohibited.
>
> (b) The following acts, among others, are declared to be loud, disturbing and unnecessary noises in violation of this section, but said enumeration shall not be deemed to be exclusive, namely:
>
> (1) *Blowing horns.* The sounding of any horn or signal device on any automobile, motorcycle, bus, or other vehicle, except as a danger signal, so as to create any unreasonable

loud or harsh sound, or the sounding of such device for an unnecessary and unreasonable period of time.

(2) *Radios, phonographs, etc.* The playing of any radio, phonograph or other musical instrument in such manner or with such volume, particularly during hours between eleven o'clock p.m. and seven o'clock a.m. as to annoy or disturb the quiet, comfort, or repose of any person in any dwelling, hotel, or other type of residence.

(3) *Pets.* The keeping of any animal or bird, which, by causing frequent or long continued noise, shall disturb the comfort and repose of any person in the vicinity.

(4) *Use of vehicle.* The use of any automobile, motorcycle, or vehicle so out of repair, so loaded, or in such manner as to create loud or unnecessary grating, grinding, rattling or other noise.

(5) *Blowing whistles.* The blowing of any steam whistle attached to any stationary boiler, except to give notice of the time to begin or stop work or as a warning of danger.

The defendants, along with one Tommy Yow (who was charged also with this offense) were tried in the Municipal-County Court on 6 July 1967 upon their pleas of not guilty. Each of the defendants was found guilty as charged, and each perfected his appeal to the Guilford County Superior Court, Greensboro Division. In the Superior Court each of the defendants moved to quash the warrants on the grounds (1) that the City Ordinance under which he was charged is unconstitutional for vagueness, and (2) that the warrants failed to allege a violation of the City Ordinance. Judge Crissman, presiding over the 28 August 1967 Session of Guilford Superior Court, Greensboro Division, allowed the motion of each defendant to quash on the ground that each warrant failed to allege a violation of the Ordinance. Judge Crissman specifically did not rule upon the constitutionality of the ordinance.

From the orders allowing defendants' motions to quash for failure of the warrants to allege a violation of the ordinance, the State appealed. G.S. 15-179. In the Fall Term 1967 our Supreme Court in an opinion by Bobbitt, J., reversed the judgment quashing the warrants. The opinion stated ". . . [E]ach of the warrants under consideration sufficiently charges the commission of the criminal offense created and defined by the ordinance." However, the opinion had earlier stated that because Judge Crissman had expressly declined to rule on the constitutionality of the ordinance, the Supreme Court

would not rule upon that question. *State v. Dorsett* and *State v. Yow*, 272 N.C. 227, 158 S.E. 2d 15.

Thereafter the cases were called for trial at the 29 April 1968 Session, Guilford Superior Court, Greensboro Division, at which time each defendant again moved to quash upon the grounds that the Ordinance was unconstitutional on account of vagueness and indefiniteness. Judge Exum denied each motion and each defendant entered a plea of not guilty.

The State's evidence tended to show that during the night of 8 June 1967 each of the defendants, along with two or three others, were riding motorcycles up and down Trogdon Street and nearby Streets in Greensboro. That there were at least five motorcycles in the group. That the two Dorsett defendants lived at 1806 Trogdon Street. That the group rode into and out of the Dorsett driveway several times and intermittently up and down Trogdon Street until about 11:30 p.m. That more than twice that night the occupant of 1808 Trogdon Street could not hear her television because of the noise from the motorcycles, and that the windows of her house rattled from the vibration created by the noise. That the motorcycles were making loud and disturbing noises up and down the street in front of 1809 Trogdon Street. The motorcycles' noise sounded like a race car "revving up to start off." That the noise from the motorcycles was so loud when they were "revved up" that one couldn't hear the person sitting beside him on the porch at 1905 Trogdon Street. That the occupant of 1708 Trogdon Street arrived home about 10:15 p.m. and about 11:15 to 11:30 heard the motorcycles making a lot of noise.

Each of the defendants testified and offered other witnesses. The defendants' evidence tended to show that each owned a motorcycle and were riding them along with several others the night of 8 June 1967 on and near Trogdon Street. That each of the motorcycles was in good mechanical condition and did not make loud or unusual noise. That the mufflers were in good condition and they did not unnecessarily "rev" up their engines. That city police officers were in the area all that night and they did not arrest them for making loud or unnecessary noises with their motorcycles. That they were not charged with a violation of the Ordinance until 13 June 1967 (five days later) when the warrants were issued at the insistence of neighbors.

The jury returned verdicts of guilty as charged as to each of the three defendants, and the trial judge entered judgment of confine-

ment for thirty days which was suspended upon condition defendants each paid a fine of $50.00 and costs, and other conditions.

Defendants George F. Dorsett and Larry Franklin Dorsett appealed. Defendant Tommy Yow did not appeal.

T. W. Bruton, Attorney General, by William W. Melvin, Assistant Attorney General, and T. Buie Costen, Staff Attorney, for the State.

Jordan, Wright, Nichols, Caffrey & Hill, by Luke Wright, for the defendants.

BROCK, J.

Defendants assign as error that the trial judge ruled the Ordinance to be constitutional and denied the motions to quash the warrants.

[1-4] A statute or ordinance is presumed to have meaning and will be upheld if its meaning is ascertainable with reasonable certainty by proper construction. *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1. If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional, the former will be adopted. *Milk Commission v. Food Stores,* 270 N.C. 323, 154 S.E. 2d 548. The ordinance attacked in this case is clearly criminal in nature and is subject to the rule of strict construction, nevertheless the courts must construe it with regard to the evil which it is intended to suppress. *State v. Brown,* 221 N.C. 301, 20 S.E. 2d 286. Also, the rule that statutes will be construed to effectuate the legislative intent applies to criminal statutes. *State v. Humphries,* 210 N.C. 406, 186 S.E. 473.

The defendants complain that the use of the words *loud or unnecessary* in the ordinance renders it vague and indefinite. They contend that these words do not meet the test of reasonableness because an average man cannot understand at what point he would incur the penalty of the ordinance. Similar arguments were advanced in *Smith v. Peterson,* 131 Cal. App. 2d 241, 280 P. 2d 522, 49 A.L.R. 2d 1194; and *Kovacs v. Cooper,* 336 U.S. 77, 93 L. Ed. 513, 10 A.L.R. 2d 608. In *Kovacs* an ordinance of the City of Trenton, New Jersey, which forbade *loud and racous noises* from loud speakers or amplifiers attached to vehicles was attacked as vague, obscure and indefinite. The court stated that this argument "merits only a passing reference." It stated further: "While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." In *Smith* a statute

requiring that vehicles be equipped with mufflers to prevent any *excessive* or *unusual* noise was attacked as uncertain, indefinite and vague. The court held that when viewed in the context in which they are used in the statute, the words excessive or unusual are sufficiently certain to inform persons of ordinary intelligence of the nature of the offense which is prohibited.

[5, 6] The protection of the well-being and tranquility of a community by the reasonable prevention of disturbing noises are within the city's power to control nuisances. G.S. 160-200; *Kovacs v. Cooper, supra.* The ordinance in question does not define in decibels the intensity of the noise to be prohibited thereby, but such exactness is not required. *State v. Dorsett,* and *State v. Yow,* 272 N.C. 227, 158 S.E. 2d 15. "A criminal statute is not rendered unconstitutional by the fact that its application may be uncertain in exceptional cases, nor by the fact that the definition of the crime contains an element of degree as to which estimates might differ, or as to which a jury's estimate might differ from defendant's, so long as the general area of conduct against which the statute is directed is made plain. It is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the duty of care and even of caution, provided there is sufficient warning to one bent on obedience that he comes near the proscribed area. Nor is it unfair to require that one who goes perilously close to an area of proscribed conduct take the risk that he may cross the line." 21 Am. Jur. 2d, Criminal Law, § 17, p. 100.

The defendants in this case, and others operating motorcycles, are not placed at their peril by the ordinance. The words loud or unnecessary have a commonly accepted meaning and they give sufficient warning to anyone who has the desire to obey the ordinance. It may be, as suggested by the defendants, that their motorcycles operated singly did not make a loud or unnecessary noise, and that it was only when operated in a group that the noise was amplified. The purpose of the ordinance is to prevent loud or unnecessary noise, and if the defendants voluntarily joined with others to create such loud or unnecessary noise, it would be no less a violation of the ordinance. They cannot do with impunity as a group the very thing that they cannot do individually.

[7] In our opinion, and we so hold, the ordinance in question is not unconstitutional for vagueness or indefiniteness, and the trial judge was correct in refusing to quash the warrants. Defendants' first assignment of error is overruled.

[8] Defendants' assignments of error numbers two and three can

be disposed of as one. They contend that evidence of noise from the group of motorcycles, not identified specifically as coming from their motorcycles, was inadmissible as against them; and that their motion for nonsuit should have been allowed because of the lack of evidence of noise from their individual motorcycles. These assignments of error are without merit.

The defendants voluntarily engaged with a group in operating motorcycles up and down and near Trogdon Street. Defendants are in no position to complain that the intensity of the noise from the group was allowed in evidence. It was competent for the prosecution to show the intensity of the group noise without having to show the decibels contributed by each defendant. Having joined in the violation of the ordinance as a group, defendants cannot now be heard to complain that their conduct standing alone would not have constituted a violation. If the contribution of each made the total into an offense condemned by the ordinance, then each would be guilty of the offense.

No error.

BRITT and PARKER, JJ., concur.

STATE v. ALBERT LELAND CRAWFORD

No. 688SC247

(Filed 31 December 1968)

1. Criminal Law § 89; Witnesses § 5— testimony competent for corroboration

In a prosecution for breaking and entering, where a police officer testified in detail as to what occurred at the crime scene from the time the officer arrived until defendant was arrested, the court properly admitted the testimony of a deputy sheriff as to what the officer told him had occurred at the crime scene for the purpose of corroborating the officer's testimony, the testimony not being prejudicial in allowing the deputy sheriff to repeat and emphasize the officer's testimony since the court repeatedly cautioned the jury that they should consider the deputy's testimony only insofar as it corroborated that of the officer.

2. Criminal Law § 89; Witnesses § 5— slight variances in corroborative testimony

Slight variances in corroborating testimony do not render such testimony inadmissible.

3. Burglary and Unlawful Breakings § 2— intent to steal — ownership of the property

In a prosecution for feloniously breaking and entering with intent to steal, the State must establish that at the time defendant broke and entered he intended to steal something, but the State need not establish the ownership of the property which he intended to steal.

4. Burglary and Unlawful Breakings § 5; Indictment and Warrant § 17— intent to steal — ownership of the property

In a prosecution for breaking and entering a building with intent to steal, the fact that the indictment alleges an intent to steal the property of a named corporation while the evidence discloses the property actually stolen belonged to another is not fatal.

5. Larceny § 7; Indictment and Warrant § 17— variance — ownership of the property

In a prosecution upon an indictment charging larceny of money of a named corporation, defendant's motion for nonsuit is improperly denied where the evidence discloses the money was stolen from a vending machine owned by another company and that the money in the machine was under the control and ownership of the vending machine company, there being a fatal variance between allegation and proof.

6. Burglary and Unlawful Breakings § 6; Criminal Law § 111— instructions — jury finding that defendant was one of two persons involved in crime

In a prosecution for breaking and entering and larceny, the court's instruction that defendant could be convicted if he was found by the jury to be one of the two men involved in the crime *is held* justified by the testimony of a police officer that when he arrived at the crime scene he saw two men run from the back door of the building.

APPEAL by defendant from *Burgwyn, E.J.*, February 1968 Special Session, WAYNE County Superior Court.

The defendant was tried pursuant to two valid bills of indictment. The first bill of indictment charged him with the felonious breaking and entering on 31 July 1967 of a building, which was occupied by Barry of Goldsboro, Inc., (Barry) with intent to steal; with larceny of $76.10 cash belonging to Barry; and with receiving $76.10 cash belonging to Barry when he knew same had been stolen. The second bill of indictment charged him with assault upon R. K. Whaley on 31 July 1967 with a 25-caliber pistol.

At the commencement of the trial, the State elected to dismiss the charge of receiving. The remaining cases were consolidated for trial.

The evidence on behalf of the State tended to show that on Sunday, 30 July 1967, Barry carried on a business operation in a building located at 1700 South John Street, Goldsboro, North Carolina;

a lunchroom, which contained eight different vending machines, was located in the building; the building had an alarm system which gave a signal in the Wayne County Sheriff's Office when any outside door was opened; about 2:00 p.m., Sunday, 30 July 1967, the building was vacated, and after all outside doors and windows had been secured, the alarm system was set; about 3:30 a.m., Monday, 31 July 1967, Police Officers R. K. Whaley and Voyd A. Davis, Jr., received a call to proceed to the Barry building; they responded to this call; and upon their arrival, Whaley got out of the police car at the southeast corner of the building, while Davis proceeded to the northeast corner.

Whaley testified as follows:

> ". . . I went to a small metal door on the south corner about a third of the way down the side of the building. I was examining this door that had been pried by some object when I heard voices inside the building sounded like they were at the back. I ran to the back corner of the building and I saw two subjects run from the back door of the building. The door is on the west, and about four or five feet from the corner."

He later stated that by "two subjects" he meant "two male persons." He further testified that he saw a big slide door open almost to the top; he ordered the two male persons to stop; they did not stop; the defendant fired at him; he pursued them; while following the defendant and before overtaking him, the defendant threw away a box; he caught the defendant in a ditch; he had the defendant in sight at all times; and the defendant threw a 25-caliber automatic pistol on the railroad track while he was putting a handcuff on him. Both the box, which contained money, and the pistol, which the defendant had fired at Whaley, were recovered and introduced in evidence.

The glass in a loading dock door, located on the south side of the building, was broken out about twelve or eighteen inches above a handle located on the inside. The door was opened from the inside by means of this handle, and a padlock, located just inside, was also broken. Another door, located on the side of the building, had a mark on the outside near the lock, and this mark made such an indentation that it had to be repaired before the door could be used.

The vending machines in the lunchroom were owned by Ward Vending Machine Company (Ward), and the only access to them was by means of keys, which were in the exclusive control of Ward's employees. Ward paid a percentage of the profit from the operation of these machines to Barry direct. Two machines, a change machine from which $81.60 was missing and a cigarette machine from which a coin box containing $8.40 was extracted, had been broken into.

The State offered in evidence the testimony of James Sasser, Chief Deputy Sheriff of Wayne County. He testified that he went to the premises of Barry about 3:40 a.m., Monday, 31 July 1967, in response to a telephone message, and upon his arrival he saw Whaley, Davis, Captain Jones, and the defendant. Over the defendant's objection, Sasser then testified as to what Whaley told him had occurred.

The defendant offered no evidence.

The jury returned a verdict of not guilty on the assault charge, but a verdict of guilty was returned on the breaking and entering and larceny charges. The trial court entered a judgment confining the defendant in the State prison for a period of not less than seven nor more than ten years on the breaking and entering charge and for a period of twelve months on the larceny charge. The second sentence was to run concurrently with the first sentence. From this judgment, the defendant appealed.

T. W. Bruton, Attorney General, and Andrew A. Vanore, Jr., Staff Attorney, for the State.

Herbert B. Hulse, Attorney for defendant appellant.

CAMPBELL, J.

The defendant presents three questions for decision. (1) Was it improper to permit the testimony of the witness Sasser? (2) Should the motion for judgment as of nonsuit have been allowed? (3) Did the trial court commit error in the charge to the jury?

[1] The defendant's first contention is that the testimony of Sasser was unfair and prejudicial since this witness was permitted to repeat, emphasize and reiterate the testimony of Whaley. The defendant, relying on *State v. Fowler*, 270 N.C. 468, 155 S.E. 2d 83, argues that this was "over corroboration." However, *Fowler* is readily distinguishable from the instant case. The testimony objected to in *Fowler* was offered for purposes of corroboration, but in fact it was flatly contradictory. The trial court there emphasized this purported "corroborative" testimony by interrupting the witness in order for the judge to make a written note and by calling attention to it in the charge. In the instant case, the testimony objected to was clearly corroborative, and it closely followed the testimony of Whaley, except in two minor details. It was in no way contradictory.

Whaley testified: ". . . I saw two subjects run from the back door of the building." Sasser testified that Whaley told him: ". . .

(A)s he got to the corner of the building two people ran out of the back of the building. . . ." Whaley also testified: "I was about fifteen or twenty yards from the defendant Albert Leland Crawford when he shot at me." Sasser testified that Whaley told him: ". . . (T)hat some time during this chase across the field that he fired a weapon several times at him. . . ."

During the testimony of Sasser, the trial court instructed the jury as follows:

> "Anything he says he told him is to be received as corroborative testimony, ladies and gentlemen of the jury, corroborating Sgt. Whaley, if you find in fact it does do so; otherwise you will not consider it at all."

In addition to this admonition to the jury, the trial court cautioned the jury on five different occasions that they would consider Sasser's testimony only insofar as it tended to corroborate Whaley and that they should disregard it and dismiss it from their mind and memory if it did not corroborate Whaley. With regard to the firing of the pistol, the trial court told the jury: "The Court does not recall that Sgt. Whaley said the alleged defendant fired several times. The Court recalls that he said he fired once. Do not consider the words 'several times'."

[1, 2] The action of the trial court in so instructing the jury as to the manner and method of considering the testimony of Sasser prevented any prejudicial effect of such testimony. We hold that in this case the testimony of Sasser was proper and in keeping with the liberal North Carolina rule which permits the introduction of corroborative evidence in support of the credibility of another witness. Stansbury, N. C. Evidence 2d, §§ 50, 51 and 52. "Slight variances in corroborating testimony do not render such testimony inadmissible." *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429.

[3, 4] The defendant's second contention is that the motion for judgment as of nonsuit should have been allowed. The first bill of indictment charged the crime of feloniously breaking and entering the Barry building with intent to steal, an offense set out in G.S. 14-54. In the instant case, it was incumbent upon the State to establish that, at the time the defendant broke and entered, he intended to steal something. However, it was not incumbent upon the State to establish the ownership of the property which he intended to steal, the particular ownership being immaterial. Therefore, the fact that the bill of indictment alleged "intent to steal, take, and carry away the merchandise, chattels, money, valuable securities of the said

Barry of Goldsboro, Inc.," when the stolen property actually belonged to Ward, was not fatal.

> "Under G.S. 14-54, if a person breaks or enters one of the buildings described therein with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent or whether, if successful, the goods he succeeds in stealing have a value in excess of $200.00. In short, his criminal conduct is not determinable on the basis of the success of his felonious venture." *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165.

In *State v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751, we find:

> "Felonious intent is an essential element of the crime defined in C.S., 4235 [now G.S. 14-54]. It must be alleged and proved, and the felonious intent proven, must be the felonious intent alleged, which, in this case, is the 'intent to steal.' "

There was ample evidence to justify the submission of the case to the jury on the charge of feloniously breaking and entering the Barry building with the intent to steal therefrom and to justify the jury in finding the defendant guilty of that crime.

[5] The second count of the first bill of indictment charged the defendant with larceny of $76.10 "of the goods, chattels, and moneys of the said Barry of Goldsboro, Inc." However, the State's evidence revealed that "(t)he money was strictly and absolutely under the control and ownership of Ward Vending Machine Company and no one at Barry's [handled] the money or [did] anything about it. The machine [was] owned by Ward Vending Company and the only access to the machine was by employees of Ward Vending Company." While the evidence disclosed that Ward paid a percentage of the profit from the operation of the vending machines to Barry, the money itself belonged to Ward. Hence, there was a fatal variance, because the State charged larceny of property belonging to Barry, but proved larceny of property belonging to Ward. In view of this, the defendant's motion for judgment as of nonsuit should have been sustained as to the charge of larceny. *State v. Law,* 227 N.C. 103, 40 S.E. 2d 699; *State v. Brown,* 263 N.C. 786, 140 S.E. 2d 413.

[6] The defendant's third contention is that the trial court committed error in its charge to the jury. The trial court, referring to the involvement of two men, instructed the jury that the defendant could be convicted if he was found by the jury to be one of the two men. The defendant contends that there was no evidence of another

man being involved and that this, therefore, was prejudicial to him. However, the testimony of Whaley was sufficient to justify this charge. We have reviewed all of the defendant's exceptions to the charge, and we do not find any prejudicial error.

Reversed as to the charge of larceny.

Affirmed as to the charge of breaking and entering.

MALLARD, C.J., and MORRIS, J., concur.

WAYNE CRAWFORD, B/N/F MARY V. CRAWFORD v. WAYNE COUNTY BOARD OF EDUCATION

No. 688IC298

(Filed 31 December 1968)

1. State § 7— tort claim against State — requisites of affidavit

It is necessary to recovery under the Tort Claims Act that the affidavit of the claimant set forth the name of the allegedly negligent employee and the acts of negligence relied upon.

2. Pleadings § 33— scope of amendment — jurisdiction

A pleading may not be amended so as to confer jurisdiction in a particular case stated, but there may be an amendment to show that the jurisdiction exists.

3. Master and Servant § 85— determination of jurisdiction of Industrial Commission

Determination of jurisdiction is the first order of business in every proceeding before the Industrial Commission, and the determination of facts must be found from judicial admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court, after all parties have been given full opportunity to be heard.

4. Master and Servant § 93— procedure of the Commission

The manner in which the Industrial Commission transacts its business need not necessarily conform to court procedure.

5. State § 7— amendment of tort claim

In a proceeding under the Tort Claims Act, the Industrial Commission properly allowed amendment of claimant's affidavit to allege the name of the negligent state employee, since the amendment served the purpose of showing the existence of jurisdiction rather than conferring it.

6. Pleadings § 32— effect of amendment allowed in open court

An amendment allowed in open court, appearing in the record, is self-executing, although the better practice is to reduce it to writing.

7. State § 7— proceeding before Industrial Commission — waiver of objection to second hearing before another Commissioner

In this Tort Claims Act proceeding, where defendant county board of education made no objection to the member of the Industrial Commission who conducted the second hearing, the first hearing and award being conducted by another member of the Commission, the defendant *is held* to have waived any objection thereto, especially when defendant joined in the request for a second hearing and had sufficient notice beforehand as to the identity of the Commissioner.

8. State § 8— tort claims proceeding — contributory negligence of minor claimant

Where Industrial Commissioner found as a fact that minor claimant was not guilty of contributory negligence in a school bus accident, the question is not presented whether the Commission erred in its conclusion of law that the claimant was conclusively presumed incapable of contributory negligence, since the Commission's finding of fact supported by competent evidence is binding on appeal.

APPEAL by defendant from opinion and award of Industrial Commission filed 7 May 1968.

This is a proceeding under the Tort Claims Act, the claimant filing affidavit on 12 September 1966 in purported compliance with G.S. 143-300.1 and G.S. 143-297.

Claimant's affidavit was substantially in the form prescribed by the statutes aforesaid, except that the space provided for the name of the allegedly negligent employee on the printed form used was left blank.

When the claim came on for hearing before Deputy Commissioner Thomas, defendant demurred *ore tenus,* contending that the affidavit was fatally defective for failure to contain the name of the allegedly negligent employee. Plaintiff's counsel advised the deputy commissioner that he would like to amend the affidavit to include the name of Roy Batten, the driver of bus 116. The deputy commissioner granted the request, and although the record contains the request and permission to amend, the amendment was never written into the affidavit.

The record discloses that the deputy commissioner inquired of defendant's counsel if he was being taken by surprise by the amendment. Defendant's counsel replied that he had discussed the proposed amendment with plaintiff's counsel prior to the hearing.

At the suggestion of the deputy commissioner, defendant's counsel expressed his willingness to stipulate that Roy Batten was an employee of the defendant and that Roy Batten was paid out of the nine-months school fund.

Thereafter, evidence was introduced by the plaintiff. Because of the unavailability of certain witnesses at the original hearing, an additional hearing was held on 2 October 1967 before Commissioner Shuford, at which time defendant put on its evidence. Later, on 15 February 1968, the parties stipulated narrative medical reports into evidence. Deputy Commissioner Thomas filed his order 16 February 1968, awarding the claimant $8,000, which award was affirmed by the full Commission on 7 May 1968.

The facts of the case were not in substantial controversy and tended to show the following:

The claimant was a six-year-old first grade student at Pikeville School in Wayne County, N. C. The school had a half-circle driveway with the entrance at the north end and exit at the south end. Defendant's bus was driven by Milton Leroy (Roy) Batten. When Batten arrived at the school, two other buses were there. The children riding on Batten's bus (No. 116) were lined up in front of bus No. 121. Batten drove to the left of bus 121 with his left wheels off the edge of the 19-foot-wide drive at a speed of about 15 miles per hour. As bus 116 neared the front of bus 121, the claimant ran into the path of bus 116 to retrieve his shoe. Batten applied the brakes of the bus when he saw the claimant but skidded some twelve feet over the claimant's left leg, severely tearing the muscle of the left calf. When the bus was stopped, the front door of bus 116 was approximately even with the front end of bus 121.

From the order and award of the Industrial Commission, the defendant appealed to this court, assigning errors of law.

Braswell & Strickland by Roland C. Braswell for plaintiff appellee.

George K. Freeman, Jr., and Attorney General T. Wade Bruton by Staff Attorney Richard N. League for defendant appellant.

BRITT, J.

At the outset of their brief, defendant's counsel state: "This appeal is based primarily on procedural and technical points, and the facts of the occurrence and legal inferences from them resulting in the claim are only of secondary interest. The finding of negligence is not appealed to this Court."

The first question presented is whether the absence of the name of the allegedly negligent employee in the affidavit filed pursuant to G.S. 143-300.1 results in a failure of the Industrial Commission to acquire jurisdiction.

[1, 2] It has been held that it is necessary to *recovery* that the affidavit of the claimant set forth the name of the allegedly negligent employee and the acts of negligence relied upon. *Brooks v. University,* 2 N.C. App. 157, 162 S.E. 2d 616; *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703. It also appears that, as a general rule, "[a] pleading may not be amended so as to confer jurisdiction in a particular case stated; but there may be an amendment to show that the jurisdiction exists." 1 McIntosh, N.C. Practice 2d, § 1285, p. 713.

[3] In every proceeding before the Industrial Commission, determination of jurisdiction is the first order of business. Determinative facts upon which rights of parties are made to rest must be found from judicial admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court, after all parties have been given full opportunity to be heard. *Letterlough v. Atkins,* 258 N.C. 166, 128 S.E. 2d 215. See also *Tabron v. Farms, Inc.,* 269 N.C. 393, 152 S.E. 2d 533; *Biddix v. Rex Mills,* 237 N.C. 660, 75 S.E. 2d 777; and 5 Strong, N. C. Index 2d, Master and Servant, § 85, p. 455.

[4] In *Maley v. Furniture Co.,* 214 N.C. 589, 200 S.E. 438, the court, in dealing with the reception of hearsay evidence, stated:

> "The Industrial Commission is an administrative board, with *quasi*-judicial functions. The manner in which it transacts its business is a proper subject of statutory regulation and need not necessarily conform to court procedure except where the statute so requires, or where, in harmony with the statute, or where it fails to speak, the Court of last resort, in order to preserve the essentials of justice and the principles of due process of law, shall consider rules similar to those observed in strictly judicial investigations in courts of law to be indispensable or proper. * * *"

To the same effect, see 5 Strong, N. C. Index 2d, Master and Servant, § 93, p. 476.

It remains to apply these principles to the case before us. The name Milton Leroy Batten (also referred to herein as Roy Batten) did not appear anywhere on the claim at the time it was filed. In *Tucker v. Highway Commission,* 247 N.C. 171, 100 S.E. 2d 514, while the name R. W. (Bob) Moore did appear in the affidavit, it did not appear as the allegedly negligent employee. A stipulation at the hearing was allowed to correct this defect. In the present case, the attorney for the defendant School Board, having demurred, declared his willingness to stipulate that Roy Batten was an employee of the Board and that he was paid from the nine-months school fund.

Thereupon, the hearing officer overruled the demurrer and allowed claimant's motion to amend his affidavit to allege the negligence of Milton Leroy Batten. At the same time, counsel for the defendant admitted that the School Board had not been taken by surprise by claimant's motion to amend.

[5, 6] The knowledge that the Industrial Commission is not expected to perform in its proceedings as strictly as a court, together with a conviction that the amendment has no effect on the essentials of justice in this case, when combined with an understanding of the discretion permitted trial judges in this State with regard to amendments, leads us to the conclusion that the amendment served the purpose of showing the existence of jurisdiction in the case, rather than conferring it. It has been held that an amendment allowed in open court, appearing in the record, is self-executing, though the better practice is to reduce it to writing. *State v. Yellowday,* 152 N.C. 793, 67 S.E. 480; *Holland v. Crow,* 34 N.C. 275; *Shearin v. Neville,* 18 N.C. 3; *Ufford v. Lucas,* 9 N.C. 214.

[7] The defendant next contends that the Industrial Commission erred in allowing Commissioner Shuford to preside at the hearing in which defendant put on the bulk of its evidence, when the first hearing was held and the opinion and award entered by Deputy Commissioner Thomas. The record discloses that Commissioner Shuford served with the full Commission in reviewing the findings and affirming the order of Deputy Commissioner Thomas. Defendant joined in requesting the additional day of hearing and had notice of the identity of the presiding officer prior to the second hearing. It made no objection to Commissioner Shuford's conducting the second hearing, either at or before the time of the hearing. Without conceding that this procedure was improper, we conclude that defendant waived any objection thereto. This conclusion is supported, on the point of waiver, by *Ostrowski v. Zolnierowicz,* 125 N.J.L. 516, 16 Atl. 2d 803; *Worden v. Alexander,* 108 Mont. 208, 90 P. 2d 160, and 48 C.J.S., Judges, § 56, p. 1021. Furthermore, as indicated in the quoted statement from defendant's brief, the facts in this case are not seriously controverted — even the finding of negligence is not challenged.

[8] Finally, defendant contends that the Commission erred in its conclusion of law that the claimant was conclusively presumed incapable of contributory negligence, contending that G.S. 143-291 leaves no room for the exclusion of a minor claimant from its operation. It is not necessary for us to pass on this question, as the Commission found as a fact that there was no contributory negligence in

this case, and the finding, being supported by competent evidence, is binding on us. *Eaton v. Klopman Mills, Inc.*, 2 N.C. App. 363, 163 S.E. 2d 17.

Contained in the record is a written demurrer evidently filed by the defendant with the Industrial Commission on 12 January 1968. The decision and order of Deputy Commissioner Thomas, filed 16 February 1968, makes no reference to the written demurrer; neither does the opinion and award for the full Commission filed 7 May 1968. Nevertheless, defendant filed an almost identical demurrer with this court on 26 November 1968. For the reasons hereinbefore stated, the demurrer filed in this court is overruled, and we hold that the defendant was not prejudiced by the failure of the Industrial Commission to rule on the written demurrer which it filed with the Commission.

The opinion and award of the Industrial Commission appealed from is

Affirmed.

BROCK and PARKER, JJ., concur.

NANNIE D. VINSON v. MINNIE V. CHAPPELL, ADMINISTRATRIX C. T. A. OF JOHN A. VINSON, DECEASED, MINNIE V. CHAPPELL, INDIVIDUALLY, LIZZIE SASSER, MERL C. McCLENNY, ADMINISTRATOR OF THE ESTATE OF DAVID J. VINSON, DECEASED, SALLIE H. VINSON, WIDOW, MARGARET V. McCLENNY AND FRANCES V. BRYANT

No. 688SC445

(Filed 31 December 1968)

1. Statutes § 4— constitutionality presumed

The constitutionality of a statute is presumed, and the courts must hold a statute constitutional unless it is in conflict with some constitutional provision.

2. Statutes § 5— construction of statute — function of court

The function of a court is to declare what the law is and not what the law ought to be.

3. Statutes § 4— determination of constitutionality

Unless a statute is plainly obnoxious to some constitutional provision, a court will not ordinarily substitute its judgment for that of the Legislature.

4. Statutes § 4— determination of constitutionality

Statutes must be upheld unless their unconstitutionality appears clearly, positively and unmistakably.

5. Descent and Distribution § 1— right of intestate succession

There is no natural or inherent right to succeed to intestate property, such succession being at the will of and subject to the sovereign political power of the State which alone has the inherent right to succeed to such property.

6. Wills § 61— dissent from will by second spouse — lineal descendants of former marriage but none by second marriage

G.S. 30-3(b), which provides that a second or successive spouse who dissents from the will of his deceased spouse shall take only one-half the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no surviving lineal descendants by the second or successive marriage, *is held* not to create a classification or distinction that is arbitrary and unjustifiable so as to be offensive to the Federal or State Constitutions.

APPEAL by plaintiff from *Cowper, J.*, in chambers on 8 July 1968, WAYNE Superior Court.

This action was filed under the Declaratory Judgment Act, and the facts are not in dispute.

Plaintiff and John A. Vinson were married on 7 January 1953 and thereafter lived together as husband and wife until his death on 26 January 1968. Plaintiff was the second wife of John A. Vinson and no children were born to their marriage. Mr. Vinson left surviving him three children by a former marriage and left a Last Will and Testament, dated 10 September 1964, in which he devised and bequeathed a portion of his property to plaintiff and the balance to his three children.

The will was duly admitted to probate, and plaintiff filed a dissent to the will pursuant to G.S. 30-2. Thereafter, she filed the petition in this proceeding alleging that by reason of her dissent she is entitled to one-third of the net estate of her late husband, contending that G.S. 30-3(b) is unconstitutional.

Answer was filed by other beneficiaries of the estate, and the matter was heard by Cowper, J., upon the pleadings and certain evidence and stipulations of the parties. He concluded that G.S. 30-3(b) is a constitutional enactment as applied to the facts in this case and adjudged that plaintiff is entitled to only one-sixth of the estate of the said John A. Vinson, deceased. Plaintiff made numerous exceptions to the conclusions of law set forth in the judgment and appealed.

Herbert B. Hulse and Sasser, Duke & Brown by John E. Duke for plaintiff appellant.

Futrelle & Baddour by Philip A. Baddour, Jr., for defendant appellees.

BRITT, J.

[6] Plaintiff asserts that the provisions of G.S. 30-3(b) should be declared illegal and unconstitutional. This statute provides in substance that whenever a second or successive spouse dissents from the will of his or her deceased spouse, he or she shall take one-half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him a lineal descendant by a former marriage but there is no surviving lineal descendant by the second or successive marriage. Plaintiff contends that the statute sets up a category or classification which is illegal and unconstitutional.

[1] The constitutionality of a statute is presumed, and the courts must hold a statute constitutional unless it is in conflict with some constitutional provision. *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768; 90 A.L.R. 2d 804.

[2] The function of a court is to declare what the law is and it is not concerned with what the law ought to be. *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731; 7 A.L.R. 2d 407.

What the Legislature is not forbidden to do by the Constitution, it should not be prevented from doing by the courts. *Manning v. Sims,* 308 Ky. 587, 213 S.W. 2d 577; 5 A.L.R. 2d 1154.

[3] Unless a statute is plainly obnoxious to some constitutional provision, a court will not ordinarily substitute its judgment for that of the Legislature. *Chattanooga v. Fanburg,* 196 Tenn. 226, 265 S.W. 2d 15, 42 A.L.R. 2d 1200.

[4] Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears; a mere doubt does not afford sufficient reason for a judicial declaration of invalidity. *Smith v. Peterson,* 280 P. 2d 522 (Cal.), 49 A.L.R. 2d 1194.

[5] Although there is some authority that the succession to intestate property is a natural or inherent right which, although it may be regulated within reasonable limits, cannot be taken away or substantially impaired, it is generally held that there is no such natural right and that such succession is at the will of and subject to the sovereign political power of the state. The theory of the law is that

any participation in the estate of a deceased person is by grace of the sovereign political power, which alone has any natural or inherent right to succeed to such property. 23 Am. Jur. 2d, Descent and Distribution, § 11, p. 758.

The Supreme Court of North Carolina has consistently followed the general rule above stated. In *Pullen v. Commissioners,* 66 N.C. 361, in an opinion by Rodman, J., we find the following:

> "* * * Property itself, as well as the succession of it, is the creature of positive law. The legislative power declares what objects in nature may be held as property; it provides by what forms and on what conditions it may be transmitted from one person to another; it confines the right of inheriting to certain persons whom it defines heirs; and on the failure of such it takes the property to the State as an escheat.
>
> The right to give or take property is not one of those natural and inalienable rights which are supposed to precede all government, and which no government can rightfully impair. There was a time, at least as to gift by will, it did not exist; and there may be a time again when it will seem wise and expedient to deny it. These are the uncontested powers of the Legislature upon which no article of the Constitution has laid its hands to impair them.
>
> * * *"

[6] In their brief, plaintiff's counsel contend that the challenged statute is an arbitrary, unjust, unreasonable and illegal discrimination in violation of the Fourteenth Amendment of the Federal Constitution and of section 17 of Article I of the Constitution of North Carolina. In *Motley v. Board of Barber Examiners,* 228 N.C. 337, 45 S.E. 2d 550, plaintiffs challenged the constitutionality of an act of the General Assembly, contending that it was in violation of the constitutional provisions aforesaid as well as others. Our Supreme Court, in an opinion by Seawell, J., declared:

> "These provisions of the Constitution are not so naive as not to contemplate the classifications and distinctions which orderly government is required to make with respect to the subjects of its control. 'Discrimination' does not ordinarily connote unfairness nor can it be used as a label to disqualify and condemn a statute as 'class legislation.' It is only when the classification, or the distinction, is arbitrary and unjustifiable upon any reasonable view that it becomes invidious and offensive to the Constitution, so that the Court may undertake to exercise the extraordinary power it possesses to declare the statute void. The Un-

constitutionality must clearly appear before the Court can so declare it. *Brumley v. Baxter,* 225 N.C. 691, 36 S.E. (2d), 281; *S. v. Brockwell,* 209 N.C., 209, 183 S.E., 378."

More recently, in *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749, our State Supreme Court reasserted that all reasonable doubt must be resolved in favor of the constitutionality of an act of the General Assembly, and a statute will not be declared unconstitutional unless it is clearly so.

Of like effect have been decisions of the Supreme Court of the United States as indicated in *McGowan v. Maryland,* 366 U.S. 420, 6 L. Ed. 2d 393. We quote the text of the first three headnotes of the opinion.

"1. While no precise formula has been developed, the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others; the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.

2. State legislatures are presumed to have acted within their constitutional power despite the fact that in practice their laws result in some inequality.

3. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In applying the principles of law hereinbefore stated to the question now before us, we point out first that the challenged statute has no application in cases of intestacy; it is only when a spouse dies testate that the statute may become applicable.

That being true, the real effect of the statute is to allow a spouse, who leaves a child or other lineal descendant by a previous marriage but none by the spouse who survives him, more testamentary freedom than he would have otherwise. It is not for us to "second guess" the General Assembly on the wisdom of this distinction, but we believe the statute was enacted in good faith and it creates a classification based upon real distinctions which are not unreasonable.

Plaintiff argues that the statute has resulted in a hardship to her, but many examples of hardship could be cited if the statute did not exist.

[6] We hold that G.S. 30-3(b) does not create a classification or distinction that is arbitrary and unjustifiable so as to be offensive to our Federal or State Constitutions.

Plaintiff's assignments of error to the judgment of the superior court are overruled, and said judgment is

Affirmed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. MELVIN LANE

No. 686SC320

(Filed 31 December 1968)

1. Homicide § 21; Criminal Law § 90— manslaughter — introduction of exculpatory statement — sufficiency of evidence

In a prosecution for manslaughter of deceased with a knife, nonsuit is properly denied notwithstanding the State introduced a statement by defendant in which he asserted the death was accidental where defendant's statement further tended to show that at the time of the death he and deceased were arguing and that defendant was holding the knife in such a manner as to indicate the intentional use thereof.

2. Homicide § 28— instructions — burden of proof of accidental death

In this homicide prosecution, the court's charge did not place the burden on defendant to establish accidental death.

APPEAL by defendant from *Mintz, J.*, April 1968 Session, HERTFORD County Superior Court.

The defendant was charged in a proper bill of indictment with the crime of murder in the first degree. Prior to the commencement of the trial, the solicitor announced that he would not seek a verdict of murder in the first degree, but that he would seek a verdict of murder in the second degree or manslaughter. The defendant entered a plea of not guilty.

The evidence on behalf of the State tended to show that on 27 January 1968 Cleveland Lane, a brother of the defendant, died from a puncture wound in the mid portion of his left thigh, two inches below the groin. The wound was in front and was "cross ways the thigh." The evidence also tended to show that the defendant told the investigating deputy sheriff that he had bought a scouting knife Saturday afternoon, 27 January 1968, and had put in on his belt; that he went to a dance hall that night; that he began to argue with the deceased outside the dance hall; that deceased reached over and

took the knife out of its case and cut the defendant a little place on his finger about a quarter of an inch long; that they then went inside the dance hall and stood at the bar talking kind of loud; that their brother-in-law went over to them and asked the deceased to give the defendant back his knife; that the deceased initially refused to do so, but he later returned it to the defendant; that the brother-in-law then got the knife and took it over to the table where he was sitting; that a short time later the defendant went over to the table and told the brother-in-law, "if you are my friend, give me back my knife"; that the knife was returned; that the deceased thereafter approached the defendant on the dance floor and asked the defendant to buy him a drink of whiskey; and that he refused to buy the drink. The investigating deputy sheriff testified: "He said he was holding the knife in position with the blade up, while he was arguing with his brother and his brother fell over on it and stabbed himself, and said that his brother fell on the floor and he dropped the knife, he said his brother did not have anything in his hands at that time." A girl who was with the defendant on the occasion in question testified that she did not see the brother-in-law get the knife, "but I had told him to get it and keep it so that they wouldn't get in no trouble."

The defendant did not offer any evidence.

The jury returned a verdict of guilty of involuntary manslaughter, and from the imposition of a sentence of not less than six nor more than eight years in prison, the defendant appealed.

Attorney General T. W. Bruton and Staff Attorney (Mrs.) Christine Y. Denson for the State.

Jones, Jones & Jones by Joseph J. Flythe for defendant appellant.

CAMPBELL, J.

The defendant assigns as error (1) the failure of the trial court to sustain the motion for judgment as of nonsuit and to dismiss the action and (2) the charge of the trial court.

[1] The defendant contends that the motion for judgment as of nonsuit should have been sustained because all of the evidence tends to show that the death was accidental. He argues that where the State relies upon a statement made by the defendant, which statement tends to exculpate the defendant, the State is bound by it and the case should be dismissed as of nonsuit. He cites the following cases in support of this contention: *State v. Church,* 265 N.C. 534, 144 S.E. 2d 624; *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169; *State v. Roop,* 255 N.C. 607, 122 S.E. 2d 363; *State v. Carter,* 254

N.C. 475, 119 S.E. 2d 461; *State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485; *State v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *State v. Todd,* 222 N.C. 346, 23 S.E. 2d 47; *State v. Fulcher,* 184 N.C. 663, 113 S.E. 769. However, each of these cases is readily distinguishable from the case at bar.

The statement made by defendant Melvin Lane to the investigating deputy sheriff not only asserted that the death was accidental, it indicated that there had been some difficulty between the defendant and deceased outside the dance hall; that the deceased had taken the knife away from the defendant and had cut the defendant on the finger with this knife; that the argument continued inside the dance hall; and that while they were arguing, the defendant was holding the knife in position with the blade up when the deceased was stabbed. The evidence did not completely exculpate the defendant because accidental death was not conclusively shown. There was some intimation of ill will or a quarrel between the defendant and the deceased, and the defendant was holding the knife in such a manner as to indicate an intentional use thereof.

> "Upon a motion for judgment of nonsuit the evidence offered by the State must be taken in the light most favorable to the State and conflicts therein must be resolved in the State's favor, the credibility and effect of such evidence being a question for the jury." *State v. Church, supra.*

Applying this rule to the case at bar, the conflicts in the testimony presented a question for the jury to determine. Therefore, the case was properly submitted to the jury. *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889.

This assignment of error is overruled.

[2] The defendant contends that the trial court's charge erroneously placed the burden of establishing accidental death on him. However, "involuntary manslaughter" was properly defined and the burden of satisfying the jury beyond a reasonable doubt of all the necessary elements of the offense was placed upon the State. No burden was placed upon the defendant. There was no prejudicial error in this charge and a review of the record discloses that the trial was fair and impartial.

This assignment of error is overruled.

No error.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. JIMMY PERRY

No. 687SC466

(Filed 31 December 1968)

1. Criminal Law § 113— instruction on weight and credibility of evidence

Instructions of the trial court fully and adequately explained to the jury that the questions of whether there was evidence and its weight and credibility were for the jury to decide.

2. Criminal Law § 103— admission and weight of evidence

The question of the admissibility of evidence is for the judge; whether there is evidence and its weight and credibility are for the jury.

3. Criminal Law § 161— review of exception to the judgment

An exception to the judgment presents the face of the record proper for review.

4. Criminal Law § 171— error relating to one or more charges in consolidated cases

Where the sentence and judgment in eleven consolidated cases impose no additional burden on defendant in that the sentence is to run concurrently with a valid judgment and sentence imposed in another case, error in defendant's plea of guilty to two of the nine consolidated cases is not prejudicial and the judgment in the consolidated cases will be allowed to stand.

APPEAL by defendant from *Mintz, J.*, August 1968 Criminal Session of Superior Court of WILSON County.

Defendant was charged in ten separate bills of indictment with the two felonies of forgery and uttering a forged instrument. In two other bills of indictment, nos. 2363 and 2367, the defendant was charged with the felony of obtaining property by means of false pretense. These twelve bills of indictment are numbered consecutively beginning with no. 2356 through 2367, inclusive.

The solicitor elected to try the defendant on bill of indictment no. 2360 which charged the crime of forgery as the first count therein and for a second count, charged the uttering of a forged instrument. Upon the call of this case for trial, the solicitor announced that he would not seek a verdict on the first count of forgery but would seek a conviction for the crime of uttering a forged instrument knowing it to have been forged, as charged in the second count in the bill of indictment. Upon the plea of not guilty, trial was by jury and the verdict was guilty of uttering a forged instrument as charged.

Upon the coming in of a verdict of guilty of uttering a forged instrument, the record shows that "the defendant entered pleas of guilty

to uttering a forged instrument in each of the remaining cases numbered 2356 through 2367 with the State taking a nol pros as to the forgery charge in each count."

Judgment was entered in case no. 2360 sentencing the defendant to the State's prison for not less than five nor more than seven years. The other cases numbered 2356 through 2367 (with the exception of no. 2360) were consolidated, and judgment was entered sentencing the defendant to the State's prison for not less than five nor more than seven years, with the sentence in these consolidated cases to run concurrently with the sentence imposed in case no. 2360.

To the entry of the judgment in both case no. 2360 and consolidated cases nos. 2356 through 2367 (except no. 2360), the defendant excepted, assigned error, and appealed.

Attorney General T. W. Bruton and Staff Attorney (Mrs.) Christine Y. Denson for the State.

Lucas, Rand, Rose, Meyer & Jones by Louis B. Meyer for defendant appellant.

MALLARD, C.J.

The State on *voir dire* offered evidence which, in substance, tended to show that the defendant, after being warned as to his constitutional rights against self-incrimination, voluntarily and understandingly made a statement admitting to the officers that he took part in the crime charged. The statement made by the defendant was admitted in evidence in case no. 2360 after the court found as a fact that it was voluntarily made. The evidence for the State also tended to show that the check for $10.00 described in the bill of indictment in case no. 2360 was forged. The defendant, knowing the check was a forgery, took it to a place of business operated by Mrs. R. E. Deans and cashed it, receiving $4.70 in cash after telling Mrs. Deans he wanted to pay $5.30 on the account of Mrs. Rachel Perry. Mrs. Rachel Perry is the mother of the defendant.

[1] Defendant contends that the trial judge did not explain the law arising on the evidence as required by G.S. 1-180. Defendant also contends that the court failed to instruct the jury that they should give the testimony as to defendant's admission such weight as it, the jury, found it was entitled to have after considering whether it was freely and voluntarily made.

[1, 2] This contention is without merit. Upon reading the charge as a whole, we are of the opinion and so hold that the trial judge

fully and adequately explained to the jury, as required, that the questions of whether there was evidence and its weight and credibility were for the jury to decide. The question of the admissibility of evidence is for the judge. *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481. Whether there is evidence and its weight and credibility are for the jury. *State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51; *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833. Defendant's exception to the entry of the judgment in case no. 2360 is without merit, requires no discussion, and is overruled.

[3] Defendant also excepts to the entry of the judgment in the eleven consolidated cases in which guilty pleas were entered. An exception to the judgment presents the face of the record proper for review. 1 Strong, N. C. Index 2d, Appeal and Error, § 26. In *State v. Newell,* 268 N.C. 300, 150 S.E. 2d 405, the Court said:

> "Defendant having pleaded guilty, his appeal presents for review only whether error appears on the face of the record proper."

In two of the cases consolidated for judgment (cases nos. 2363 and 2367), the defendant was charged in each case with the felony of obtaining property by means of false pretense, and the charges in these bills of indictment did not include the charge of uttering a forged instrument. The other nine cases did include such charge. On each of these nine cases the court could have imposed a sentence of imprisonment in the State's prison for more than the five to seven years imposed in the consolidated judgment. Unless there was a waiver of the finding and return of a bill of indictment, the defendant could not plead guilty in these two cases to crimes not included in the charge contained in the bill of indictment. No waiver appears. This question is not argued. It is not properly presented. However, counsel for the defendant in his brief requests the Court to examine the face of the record for prejudicial error. We have done so.

[4] The conviction and sentence in case no. 2360 is without prejudicial error and must stand. The sentence and the judgment in the consolidated cases imposes no additional burden upon the defendant because the sentence imposed is to run concurrently with the sentence in case no. 2360. To permit the present judgment in the consolidated cases to stand would give the defendant his freedom when the valid sentence is served. To grant him a new trial in the two false pretense cases would permit as to them a further prosecution. Another trial on those charges might result in a consecutive sentence, and hence be prejudicial to the defendant. To remand the nine cases for resentencing in which there is a proper charge of uttering a forged instru-

ment and to which pleas of guilty were entered might result in a consecutive sentence or sentences, and hence be prejudicial to the defendant. *State v. Booker,* 250 N.C. 272, 108 S.E. 2d 426; *State v. Cephus,* 241 N.C. 562, 86 S.E. 2d 70. See also *State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377.

In our opinion, there is no *prejudicial* error on the face of the record as to the consolidated cases, and there is no prejudicial error in the trial and sentencing of the defendant in case no. 2360.

No error.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. RUBY HUGHES HEFNER

No. 6819SC452

(Filed 31 December 1968)

1. Homicide § 21— sufficiency of evidence — extra-judicial admission

In this prosecution for second degree murder or manslaughter, defendant's motion for nonsuit was properly denied where the State's evidence tended to show that defendant, after being fully warned of her constitutional rights concerning self-incrimination, admitted to the investigating officer that she intentionally shot deceased.

2. Homicide § 23— instructions — status of deceased in home where shot

In this prosecution for a homicide which occurred in the home in which defendant was staying, the court did not express an opinion on the evidence in violation of G.S. 1-180 in instructing the jury as to their duty to determine the status of deceased in the home at the time of his death.

3. Homicide § 28— instructions — self-defense

In this homicide prosecution in which defendant relied on self-defense, the charge, when viewed as a whole, correctly stated and applied the law to the facts in the case and left it to the jury to determine whether defendant used excessive force or was justified in taking the life of deceased.

APPEAL by defendant from *Mintz, J.,* June 1968 Session of Superior Court of RANDOLPH County.

Defendant was tried upon a bill of indictment charging her with the crime of first-degree murder. Upon the call of the case for trial, the solicitor announced that the State would not seek a verdict of

murder in the first degree but would ask for a conviction of murder in the second degree, or manslaughter, as the law and the evidence might warrant.

Upon defendant's plea of not guilty, trial was by jury, and the verdict was guilty of manslaughter. From the judgment of imprisonment for not less than four years nor more than six years, the defendant appeals, assigning error.

Attorney General T. W. Bruton and Deputy Attorney General Ralph Moody for the State.

Coltrane & Gavin by T. Worth Coltrane for defendant appellant.

MALLARD, C.J.

Following is a brief summary of the substance of the evidence of the State, except where quoted. The deceased, Robert L. Sizemore, was a normally developed male person about 27 years old. The defendant shot him with a .22-calibre pistol. The shot entered the body of the deceased underneath his right armpit. There was no exit hole for the bullet on the body of the deceased. Deceased was dead when the officers arrived on the night of 31 December 1967 shortly after the shooting. Defendant was divorced, and the deceased was separated from his wife. The defendant and deceased were engaged, and on the night of 31 December 1967 the defendant and the deceased got into an argument because the defendant was not wearing her ring. The deceased and defendant then got some of the deceased's clothes out of the defendant's home because the deceased said they were through. Deceased accused defendant of not being a wife to him, slapped her, and shoved her into some toys there in her bedroom in her father's house, where defendant lived. Defendant's five-year-old daughter and another child came in, and the deceased, who always carried a pistol with him (and one was found on his body after his death), told defendant that she had better get the children to bed or she might not see them alive again. The defendant took the children into the bedroom, and the deceased went to use the telephone. The defendant, who had been fully warned of her constitutional rights concerning self-incrimination, related to the investigating officer what then occurred in the following words:

> "I went to my father's room and proceeded to look for his gun. As I was very nervous, I overlooked it the first time in the first drawer, and when I went to the second drawer, I couldn't find it. I went back to the first drawer and put — found it and put it in my pocket. I walked out of the bedroom and he was trying

to call information and get the number. He got the police department, and that is when I took the gun out. I told him to get out and he just looked, so I told him again. He put the telephone down, and that is when I shot him. Question: Where was Mr. Sizemore standing when you shot him? He was in the middle of the end of the counter, in between the telephone (sic). He was standing right there at the middle and walking back around the end of the bar towards me. Question: How far were you from Mr. Sizemore when you fired the pistol? I was standing seven or eight feet from Mr. Sizemore then, and when he started backing towards me that is when I shot him. He turned around and looked at me, or I think he looked at me, and that is when he fell."

The defendant offered no evidence other than that elicited from the State's witnesses on cross-examination.

[1] Defendant's motion for judgment of nonsuit made at the close of the evidence is without merit and was properly denied.

[2] Defendant also assigns as error a portion of the court's charge in which the jury was instructed that it was their duty to determine what the status of the deceased was there in that home at the time of his death. We do not think that the judge expressed an opinion in violation of G.S. 1-180 when he instructed the jury:

"There was — I would characterize it as limited evidence — about the status of these two principals, that is the deceased and the defendant with respect to their association with this home. The evidence did indicate that the defendant was living with her parents. There was some evidence that indicated — but it's for you to say — what the status of the deceased was in that home, or his presence in that home was. It was not clear to the court whether he was a boarder, or whether he was a guest, or whether he was living there under some circumstances not clear to the court not fully revealed by the evidence."

[3] The judge instructed the jury on self-defense to which there was no objection. We are of the opinion that the charge of the court, when viewed as a whole, correctly stated and applied the law to the facts in this case and left it to the jury to determine what the facts were. It was simply a question for the jury as to whether the defendant used excessive force or was justified in taking the life of the deceased. *State v. Marshall*, 208 N.C. 127, 179 S.E. 427; *State v. Jernigan*, 231 N.C. 338, 56 S.E. 2d 599.

Defendant's other assignments of error are formal ones, are without merit, and require no discussion.

No error.

CAMPBELL and MORRIS, JJ., concur.

JUNIUS KELLY v. DANIEL WASHINGTON AND WIFE, LUCILLE WASHINGTON

No. 688SC283

(Filed 31 December 1968)

1. Appeal and Error § 39— time for docketing record on appeal

The record on appeal must be docketed in the Court of Appeals 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. Court of Appeals Rule No. 5.

2. Appeal and Error § 39— failure to aptly docket record on appeal

Where the judgment appealed from was entered on 15 February 1968, and the trial court thereafter extended the time for docketing the record on appeal until 1 July 1968, defendant's appeal docketed on 2 July 1968 is dismissed by the Court of Appeals *ex mero motu* for failure to comply with the rules. Court of Appeals Rules Nos. 5 and 48.

APPEAL by defendant Daniel Washington from *Braswell, J.*, at the January-February 1968 Civil Session of WAYNE Superior Court.

This is an action on contract brought by plaintiff to recover $2,025.00, plus interest, which he alleges is due him by defendants as balance for his services rendered in connection with the construction of an apartment building in the City of Goldsboro.

Defendants answered and also filed a counterclaim against the plaintiff, alleging breach of contract on the part of plaintiff and praying for the recovery of $6,307.24.

During the course of the trial, the court dismissed the counterclaim and also dismissed plaintiff's action as to the feme defendant.

Three issues relating to existence of a contract, breach of contract, and amount of damages, if any, were submitted to and answered by the jury in favor of plaintiff. From judgment entered on

the verdict for $2,025.00, plus interest and costs, defendant Daniel Washington appealed.

Smith & Everett by W. Harrell Everett, Jr., for plaintiff appellee.

Whitted & Cherry by Earl Whitted, Jr., for defendant appellant.

BRITT, J.

[1] Rule 5 of the Rules of Practice in the Court of Appeals of North Carolina requires that the record on appeal be docketed in this Court within ninety days after the date of the judgment, order, decree, or determination appealed from; provided, the trial tribunal may, for good cause, extend the time not exceeding sixty days, for docketing the record on appeal. Rule 48 provides that if the rules of this Court are not complied with, the appeal may be dismissed.

[2] The judgment entered in this action is dated 15 February 1968. Thereafter, Braswell, J., entered an order extending the time for docketing the record on appeal for thirty days after 31 May 1968. The effect of the order was to extend the time for docketing the record on appeal until 30 June 1968. Inasmuch as that date fell on Sunday, the defendant had through Monday, 1 July 1968, within which to docket the record on appeal. It was not docketed until 2 July 1968, and for failure of the defendant to comply with the rules, this Court, *ex mero motu,* dismisses the appeal.

Nevertheless, we have carefully considered the record and the briefs, with particular reference to the two assignments of error brought forward in defendant's brief, and find that there was no prejudicial error committed by the trial judge.

The appeal is

Dismissed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. TOMMY JUSTICE AND CLEVELAND BANKS

No. 687SC418

(Filed 15 January 1969)

1. Criminal Law § 155— failure to aptly docket record on appeal

Where the record on appeal was not docketed in the Court of Appeals within ninety days after the date of the judgment appealed from, and the

trial court did not extend the time for docketing the record on appeal, the record was not docketed within the time prescribed by the rules and the appeal is dismissed. Court of Appeals Rule No. 5.

2. Criminal Law § 75— confessions — voluntariness

A confession is considered voluntary in law only if in fact it was voluntarily made.

3. Criminal Law § 76— confessions — findings as to voluntariness — conclusiveness

The findings of fact by the trial judge upon the *voir dire* as to the voluntariness of a confession are conclusive on appeal if supported by competent evidence.

4. Criminal Law § 75— coerced confessions — physical force not necessary

A confession may be unlawfully coerced without the use of any physical force.

5. Criminal Law § 76— confessions — voluntariness — inducement by statements of other suspects implicating defendant

In a prosecution for armed robbery, evidence on *voir dire* that defendant confessed his part in the robbery after police officers brought all five of the robbery suspects together and elicited statements which incriminated defendant from two of the suspects who had already separately confessed to the officers *is held* not to compel a finding that defendant's confession was given under such circumstances as to have deprived him of free exercise of his own volition.

6. Criminal Law §§ 76, 103— whether defendant confessed — jury determination

Whether defendant did or did not make a confession attributed to him is a question of fact to be determined by the jury from the evidence admitted in its presence.

7. Constitutional Law § 31; Criminal Law §§ 76, 95— joint trials — admissibility of confession by defendant which implicates co-defendant

In a joint trial of three defendants for armed robbery, defendant's Sixth Amendment right to confront the witnesses against him is violated by the admission into evidence of a portion of a nontestifying co-defendant's extrajudicial confession which incriminated defendant, but defendant's right to confrontation is not violated by the admission of another co-defendant's extra-judicial confession implicating defendant where such co-defendant took the stand and testified at the trial.

8. Constitutional Law § 31; Criminal Law § 95— admission of confession implicating defendants made by persons not on trial — invitation by cross-examination

In a prosecution for armed robbery, defendants cannot complain of the admission of extrajudicial confessions implicating defendants made by two others who were not on trial where the complete confessions were admitted

only after defendants had themselves brought out portions of the confessions in cross-examination of police officers to whom the confessions were made.

APPEAL by defendants Tommy Justice and Cleveland Banks from *Morris, J.*, May 1968 Criminal Session of NASH Superior Court.

The appealing defendants, Tommy Justice and Cleveland Banks, were jointly indicted with three other persons, Roosevelt Richardson, Truman Dancy, and Jesse Bell, for the crime of armed robbery. Roosevelt Richardson and Truman Dancy were tried separately and pleaded guilty. Tommy Justice, Cleveland Banks and Jesse Bell were tried together and each pleaded not guilty. At their trial the State presented testimony of the clerk who had been in charge of the Cokey Road Package Store in Rocky Mount on 15 February 1968, who testified that at 9:30 p.m., two men had entered the store, one wearing a mask and one carrying a pistol, and had robbed him at gunpoint of approximately $300.00, some cigarettes and wine. No one else was in the store at the time, but the witness did see a third person walk by the front of the store while the robbery was in progress.

The State then offered the evidence of a detective of the Rocky Mount Police Department who testified that he had arrested the three defendants, Justice, Banks, and Bell, as well as Truman Dancy, for armed robbery; that at the time of these arrests Roosevelt Richardson was already in custody; that on the morning following the arrests the witness, together with a lieutenant of the Rocky Mount Police Department, had questioned the three defendants in the detective's office at the Rocky Mount Police Department, and each of the three defendants while in the presence of each other and of the two officers had confessed to the part he had played in the robbery. The confession of the defendant Justice, as related by this witness, was in substance that he had gotten into Cleveland Banks' car in South Rocky Mount with Banks, Bell, Richardson and Dancy; that they had talked about robbing the Cokey Road Package Store; that they drove to the package store and parked nearby; that he, Roosevelt Richardson, and Truman Dancy got out of the car and went to the package store where Truman Dancy and Roosevelt Richardson went in while he waited outside and acted as lookout man; that after Dancy and Richardson came out of the store they returned to the car, where Jesse Bell and Cleveland Banks were waiting; that they then went to South Rocky Mount where they parked back of a warehouse, drank the wine, and divided the money; that he got approximately $22.00. The confessions of the other two defendants, Cleveland Banks and Jesse Bell, as related by this witness, were substan-

tially to the same effect. None of the three confessions had been reduced to writing.

The testimony as to these confessions was admitted over objection of the defendants after the trial judge had conducted a *voir dire* examination on the basis of which he had made findings of fact that the confessions made by each of the three defendants had been given only after each had received full, complete and proper admonition as to his constitutional rights and that the statements made by each of the defendants to the officers had been freely, understandingly and voluntarily made.

On cross-examination of the detective by the attorneys for the defendants it was brought out that Roosevelt Richardson and Truman Dancy had also been present when the two officers had interrogated the three defendants; that in the presence of all five of the accused the officers had talked to Truman Dancy first, who had admitted his part and that he had been the one who had the gun; that they then talked to Roosevelt Richardson, who also admitted his part; that after Dancy and Richardson had talked, each of the three defendants had made statements confessing his part. On further cross-examination the State's witness also testified that Dancy and Richardson had already confessed prior to the time all five of the men had been brought together and that "they were all there to tell it in front of each other and each one knew what the other had told."

On redirect examination by the solicitor, this witness was permitted to testify over objection of the attorneys for the defendants as to the substance of the statements which Dancy and Richardson had made in the presence of the three defendants. These statements were substantially to the same effect as the statements which the witness had testified had been made by each of the three defendants and which incriminated the defendants.

The State then offered the testimony of the other police officer who had been present at the interrogation of the five men, who testified as to what each of the five had said in front of the others. This testimony was admitted over objection of defendants after the court had conducted a second *voir dire* examination and had again found as a fact that the statements had been made after each of the declarants had been fully advised as to his constitutional rights to remain silent, to be represented by counsel, that any statement made could be used against them, and that the statements had in fact been freely and voluntarily made. The statements made by each of the five men, as testified to by the second police officer, were in effect the same as had been testified to by the first officer.

After conclusion of the State's evidence, the defendants Justice and Bell each took the stand and each testified that he had been in the Banks' car with the other and with Banks, Dancy and Richardson on the night in question when they drove to the package store; that Dancy and Richardson had gotten out of the car and gone in the store and had returned to the car bringing wine; that they had each participated in drinking the wine; that Dancy had given each of them some money, but at the time they had drunk the wine and received the money they did not know it had been stolen. Each denied that there had been any mention of committing a robbery prior to the time Dancy and Richardson left the car to go into the store and each testified they did not know that Dancy had a gun with him. Justice testified he had been drinking since morning and the others had started drinking when they got into the car together; that he had gotten out of the car when Dancy and Richardson had gone into the store, but only for the purpose of relieving himself, and that he had not left the vicinity of the car. Both Justice and Bell denied they had made any statements to the officers admitting any prior knowledge or discussion relative to the commission of a robbery prior to the time Dancy and Richardson had gone into the store. Banks did not take the stand.

The jury found all three defendants guilty of armed robbery. From judgments imposing prison sentences, the defendants Tommy Justice and Cleveland Banks appealed. The defendant Jesse Bell did not appeal.

Attorney General T. W. Bruton, Assistant Attorney General William W. Melvin and Staff Attorney T. Buie Costen for the State.

Fields, Cooper & Henderson, by Leon Henderson, Jr., for defendant appellant Tommy Justice.

W. O. Rosser for defendant appellant Cleveland Banks.

PARKER, J.

[1] The judgments here appealed from were entered on 15 May 1968. The record on appeal was docketed in this Court on 20 September 1968. Rule 5 of the Rules of Practice of this Court provides that if the record on appeal is not docketed within ninety 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. As to the defendant Tommy Justice, the trial judge did extend the time for docketing the case on appeal in this Court to 130 days from the date of the judgment. Therefore, as to

the appellant Tommy Justice, the record on appeal was docketed in this Court in apt time. However, as to the appellant Cleveland Banks, no order was entered extending the time for docketing the case on appeal, and the appeal as to the appellant Cleveland Banks should be and is dismissed. *Smith v. Starnes,* 1 N.C. App. 192, 160 S.E. 2d 547. *Williams v. Williams,* 1 N.C. App. 446, 161 S.E. 2d 757.

On the appeal of the defendant Justice, appellant assigns as error the court's action in allowing the police officers to testify that Justice had confessed to them that he had discussed and planned the robbery with the other defendants and had acted as lookout man for the two who had actually carried out the robbery. The testimony of the officers as to this confession was admitted only after the trial judge had conducted extensive *voir dire* examinations in the course of which the solicitor and counsel for defendants were given full opportunity to develop all of the circumstances under which Justice's confession had been made. The appellant Justice himself testified during one of the *voir dire* examinations and admitted that at the time he had been interrogated by the officers he had been told about some "rights" and that he had signed a paper which the officer had read to him concerning his rights. Both officers testified in detail that prior to any interrogation all defendants, including the appellant Justice, had been given the warnings as required by *Mirandi.* Appellant's brief admits that the officers had complied with the requirements of *Miranda* and also concedes that no threats or violence or promise or inducement had been made to get appellant to confess. Appellant's contention is that his confession was nevertheless involuntary since it was elicited under circumstances which made it extremely difficult for the defendant not to have made some incriminating statement, pointing to the fact that, as shown by the uncontradicted evidence taken on the *voir dire* examinations, the officers, with all five of the accused persons present, first interrogated the two men who had already separately confessed to them and who later pleaded guilty, and only after eliciting statements from these two which incriminated the appealing defendant did they start to interrogate him. Appellant Justice contends these circumstances subjected him to such a "psychological bombardment" as to render any statement he may have made to the officers involuntary and therefore inadmissible.

[2-5] A confession is considered voluntary in law only if in fact it was voluntarily made. *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841. Whether a confession is voluntary or involuntary must be determined from the particular circumstances of each case. In this case

the trial court properly conducted *voir dire* examinations in the absence of the jury. On the basis of competent evidence, including defendant appellant's own testimony concerning the circumstances under which he had been interrogated by the officers, the court found as a fact that appellant's confession had been voluntarily given. This finding is conclusive on the appellate courts. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344. While it is well established that a confession may be unlawfully coerced without the use of any physical force, that there may be "torture of the mind as well as of the body," and that a confession so induced is inadmissible, *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620, the evidence in the present case was not such as to compel a finding that appellant's confession was given under such circumstances as to have deprived him of free exercise of his own volition.

[6] Appellant denied, both in the *voir dire* examination and in his testimony before the jury, that he had ever confessed to the officers that he had played any part in the robbery, though he admitted having been in the car with the others and that without knowledge of any robbery he had drunk some of the wine and received some of the money. However, whether the appellant did or did not make the statement attributed to him is a question of fact to be determined by the jury from the evidence admitted in its presence. *State v. Gray, supra.* There was here no error in the court's admission of evidence of defendant appellant's own confession to the jury and the assignment of error based on that ground is without merit.

[7] Appellant Justice also assigns as error the court's allowing introduction in evidence over his objection of the extrajudicial confessions of his codefendants, all of which incriminated him. The problem presented by this assignment of error was dealt with by the North Carolina Supreme Court recently in the case of *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492, in which Justice Sharp, speaking for the Court and after analyzing the impact on our practice of the decisions in *Bruton v. United States,* 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620, and *Pointer v. Texas,* 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065, said (p. 291):

> "The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The fore-

going pronouncement presupposes (1) that the confession is inadmissible as to the codefendant (see *State v. Bryant, supra*), and (2) that the declarant will not take the stand. If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation."

In the case presently before us the extrajudicial confessions of Justice's codefendants were all made in his presence and, according to the testimony of the officers, were acquiesed in by his confession. This was the situation presented in *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128, cited by Justice Sharp. Further, the codefendant Bell did take the stand and thus as far as evidence of his confession is concerned the appellant Justice cannot complain, since he was thereby accorded his right to confrontation. However, the codefendant Banks did not take the stand, and therefore introduction into evidence of testimony as to that portion of Banks' extrajudicial confession which incriminated Justice was error as to appellant Justice, since he was thereby denied his Sixth Amendment right to be confronted by the witness against him. For this error the appellant Justice must be awarded a new trial.

[7, 8] While, as above stated, the appeal of the defendant Banks must be dismissed for failure to have the record docketed as far as his appeal is concerned within the time prescribed by the rules of this Court, it should be noted that as to him there was no error in allowing introduction in evidence of testimony of the confessions of his codefendants, Justice and Bell, since both of these codefendants did take the stand and his confrontation rights were thereby protected. Furthermore, the evidence concerning the confessions of Dancy and Richardson was admitted only after the defendants had themselves brought out portions of these confessions in their cross-examination of the officers. Having opened this door in order to obtain the benefit of that part of the confessions of Dancy and Richardson which they felt might be helpful to them, defendants do not have a right to complain that the State was thereafter permitted to put in evidence the complete statements made by Dancy and Richardson.

The appeal of the defendant, Cleveland Banks, is

Dismissed.

On the appeal of the defendant Tommy Justice, there must be a

New trial.

BROCK and BRITT, JJ., concur.

MARY BREVARD ALEXANDER HOWELL, BILLY SHAW HOWELL, JR., AND WIFE, BOBBY J. HOWELL, AND SYDENHAM BREVARD HOWELL, JOHN MARK HOWELL, SARAH FAIRLEY HOWELL, AND MARY ROBERTSON HOWELL, BY THEIR NEXT FRIEND, E. OSBORNE AYSCUE, JR. v. MARY R. ALEXANDER AND THE UNBORN ISSUE OF THE PLAINTIFF MARY BREVARD ALEXANDER HOWELL

No. 6826SC399

(Filed 15 January 1969)

1. Appeal and Error §§ 26, 28— exceptions to conclusions of law and to entry of judgment

Exceptions to the conclusions of law and an exception to the entry of the judgment present the questions whether the facts found support the conclusions of law and the judgment entered pursuant thereto.

2. Wills § 40— devise with power of appointment — rule of construction

A will creating a power of appointment is to be interpreted so as to ascertain the intention of the donor and to give it effect unless some rule of law prevents.

3. Wills § 28— rule of construction

The intention of a testator as gathered from an entire instrument is the primary object in interpreting a will and must be given effect unless it is contrary to some rule of law or at variance with public policy.

4. Wills §§ 34, 40— devise of life estate with power of disposition

A life estate expressly created by the language of an instrument will not be converted into a fee or into any other form of estate greater than a life estate merely by reason of there being coupled with it a power of disposition, however general or extensive.

5. Wills § 40— scope of life estate with full power of disposition

Where a will bequeaths and devises all of testator's property, real and personal, to testator's wife for her life with full powers of disposition, with remainder in fee simple absolute to testator's daughter, the wife is not authorized to acquire in her individual name fee simple title to a tract of land purchased with proceeds from a note payable to testator, otherwise testator's disposition of the remainder interest would be wholly frustrated.

6. Wills §§ 34, 40— powers of life tenant with power of disposition

Under a will giving to testator's wife a life estate in all of testator's property with full powers of disposition, with remainder in fee simple absolute to testator's daughter, the life tenant administers the life estate property in the nature of a trustee for benefit of herself and the remainderman, and, although she may have the unbridled discretion to subject the entire estate to her own use during her lifetime, even to the extent of a complete dissipation of the estate, she cannot take title in herself to the exclusion of the remainderman's interest.

7. Wills § 34; Estates § 3— right of remainderman to relief in equity

A remainderman may have relief in equity when the life tenant is claiming a right to the property adverse to that of the remainderman.

8. Trusts § 14— creation of constructive trust

A constructive trust arises when land is acquired through fraud, or when, though acquired originally without fraud, it is against equity that land should be retained by him who holds it.

9. Equity § 2— laches

Where the action is barred by the applicable statute of limitations, the question of laches does not arise; when an action is not barred by the statute of limitations, equity will not bar relief on the ground of laches except upon special facts demanding exceptional relief.

10. Equity § 2— laches

Laches will not generally bar a party when the adverse party has not been prejudiced by delay.

11. Trusts § 15— constructive trust — limitations

A resulting or constructive trust, as distinguished from an express trust, is governed by the ten year statute of limitations (G.S. 1-56) and not by the three year statute of limitations (G.S. 1-52).

12. Wills § 34; Trusts § 15— claims of life tenant adverse to remaindermen — action for constructive trust — limitations

The fact that life tenant having broad powers of disposition acquired fee simple title in her own name to property in 1935 by use of proceeds from property subject to the remainder interest is not sufficient to put remaindermen on notice that the life tenant was acting in a manner adversely to their interests, but remaindermen were put on notice of the life tenant's adverse claim when the life tenant in 1962 executed deeds to two of the remaindermen asserting that she was seized in fee of the property purchased in 1935 and purporting to convey life estate to one remainderman with remainder over to the other remainderman; consequently, the ten year statute of limitations applicable to constructive trusts began to run in 1962, not in 1935, and would not bar the remaindermen's action instituted in 1967 to impose a constructive trust on property in life tenant's possession subject to the remainder interest.

13. Wills § 34; Equity § 2— action by remaindermen to impose constructive trust — laches

In remaindermen's action to impose a constructive trust on property held by life tenant which is subject to the remainder interest, the life tenant is not entitled to the exceptional relief of the doctrine of laches where neither the life tenant nor any purchaser for value from the life tenant has been prejudiced by the delay of five years in bringing the action.

APPEAL by plaintiffs and defendants, except Mary R. Alexander, from *Ervin, J.*, 27 May 1968, Schedule "A" Session, MECKLENBURG Superior Court.

The principal defendant, Mary R. Alexander, is the widow of S. B. Alexander, Jr. The other defendants are the unborn issue of the principal plaintiff, Mary Brevard Alexander Howell.

The principal plaintiff, Mary B. Alexander Howell, is the daughter and only child of S. B. Alexander, Jr., deceased, and Mary R. Alexander, the principal defendant. The plaintiff Billy Shaw Howell, Jr., is the son and only child of the principal plaintiff, and the remaining plaintiffs are his wife and four children.

S. B. Alexander, Jr., died testate 6 May 1935, and his will was duly admitted to probate. The two items of his will which are pertinent to this controversy are as follows:

> "ITEM II: I do hereby give, devise and bequeath unto my dear wife, Mary R. Alexander, for and during the term of her natural life, all of my property and estate, real, personal and mixed, of every kind and description and wheresoever situated, to have and to hold to her, my said wife, for and during the term of her natural life; provided, however, that I do hereby fully authorize and empower my said wife to sell and convey any part or all of my said property and estate, at any time and upon such terms as she may desire, and to use, invest and reinvest the proceeds from such sale, in such manner and for such objects as she may deem advisable, and she shall not be held, expected or bound to account to any court or to any person for any part of said property or any of the proceeds of any sale thereof.
>
> "ITEM III: Subject to the provisions of the foregoing Item and upon the death of my said wife, Mary R. Alexander, I do give, devise and bequeath all of my said property and estate to my beloved daughter, Mary Brevard Howell, to be hers in fee simple and absolute; provided, however, that if my said daughter shall die before the death of my said wife, leaving a child, children or the issue of such her surviving, then in such event my said property and estate shall go and belong to the said child, children or issue of such of my said daughter, the issue of such of my daughter's children as may have predeceased her to stand in the place of and take the share of their ancestor, taking per stirpes and not per capita."

Prior to his death, S. B. Alexander, Jr., conveyed a 107.11 acre tract of land to Charlotte Airport, Inc. and as part of the purchase price received a note in the amount of $65,708.58, secured by deed of trust. (This deed of trust also secured payment of a note in the amount of $28,290.72 given by Charlotte Airport, Inc. to City View

Development Company for the balance of purchase price for another tract of land. This note and tract of land are not involved in this controversy, and no further mention will be made of them.) Because of default in payment of the note the property described in the deed of trust was duly offered at public sale by the trustee. On 16 September 1935 the estate of S. B. Alexander, Jr., acting through Mary R. Alexander as executrix, became the last and highest bidder for the property.

Subsequent to the foreclosure sale, by letter dated 11 October 1935, the defendant Mary R. Alexander as executrix of the estate of S. B. Alexander, Jr., authorized and directed the trustee to convey the 107.11 acre tract of land to Mrs. Mary R. Alexander upon the payment of the bid by cash to the extent of the foreclosure expenses and by credit of the balance of the $65,708.58 note. Pursuant to this arrangement the trustee, by deed dated 11 October 1935, recorded in Mecklenburg County deed book 876 at page 34, conveyed the 107.11 acre tract to defendant Mary R. Alexander. This deed purports to convey a fee simple title to Mary R. Alexander; it does not mention a life estate.

Since acquiring this deed to the 107.11 acre tract Mary R. Alexander has made several conveyances in fee from the tract and has entered into several lease agreements respecting other portions of the tract. These conveyances are summarized in paragraph 10 of the stipulations entered into in this action; but, since Mary R. Alexander would have had the right to make the conveyances either as the holder of the fee simple title under the deed to her or as the holder of a life estate with power of sale under the will of S. B. Alexander, Jr., no contention is made by any of the parties with respect to these conveyances.

Plaintiffs bring this action to impose a constructive trust on the remainder of the 107.11 acre tract, and to have the court declare that Mary R. Alexander is the owner of a life estate therein, with the powers of disposition as contained in the will of S. B. Alexander, Jr., and that the remainder interests therein are those set forth in said will.

In addition to the pleadings and stipulations which establish the foregoing facts, the plaintiffs offered evidence which tends to show that plaintiffs first learned in April 1966 that the conveyance by the Trustee to Mary R. Alexander of the 107.11 acre tract had been made in the manner above described.

This cause was heard by Judge Ervin without a jury, by consent

of the parties. At the conclusion of the hearing the judge made findings of fact in accordance with the stipulations and the pleadings; and concluded and decreed as follows:

"1. This case is now at issue and the parties have duly waived the right of jury trial on any questions of fact arising hereunder.

"2. Under the provisions of the Last Will and Testament of her husband, S. B. Alexander, Jr., the defendant Mary R. Alexander acquired a life interest in the assets of his Estate (including the $65,708.58 Note referred to in paragraph 5 of the Findings of Fact of this Judgment) with the power to use and dispose of any portion thereof as she desired or deemed advisable without having to account to any Court or to any person. This power gave her the right to apply or appropriate any part of the assets of her husband's Estate for her own separate use and ownership to the exclusion of any interest of the remaindermen therein.

"3. The defendant Mary R. Alexander intended to acquire, and by virtue of the Deed from C. D. Taliaferro, Trustee, dated October 11, 1935, and recorded in Book 876 at page 34, in the Mecklenburg Registry (referred to in paragraph 9 of the Findings of Fact of this Judgment) did acquire, the Subject Property in fee simple absolute, free and clear of any interest therein of the remaindermen under the Last Will and Testament of S. B. Alexander, Jr.

"4. The defendant Mary R. Alexander does not hold any portion of the Subject Property in constructive trust for any of the plaintiffs or any of the defendant unborn issue of the plaintiff Mary Brevard Alexander Howell.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

"1. Excepting only the interests heretofore conveyed by her, the defendant Mary R. Alexander is now the beneficial fee simple and absolute owner of the Subject Property and holds the same free and clear of any interest of the remaindermen under the Last Will and Testament of S. B. Alexander, Jr.

"2. The defendant Mary R. Alexander does not hold any portion of the Subject Property in constructive trust for any of the plaintiffs or any of the defendant unborn issue of the plaintiff Mary Brevard Alexander Howell."

Plaintiffs, and the defendant unborn issue of Mary B. Alexander Howell, appeal; they except to and assign as error conclusions of law numbers 2, 3 and 4, and the signing and entry of the Judgment.

McCleneghan, Miller, Creasy & Johnston, by F. A. McCleneghan and H. Morrison Johnston, for appellants.

Ervin, Horack & McCartha, by Benjamin S. Horack, and William S. Lowndes for Mary R. Alexander, appellee.

BROCK, J.

[1] The exceptions to the conclusions of law and the exception to the entry of the judgment present the questions whether the facts found support the conclusions of law and the judgment entered pursuant thereto. *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590.

It seems evident that the trial judge concluded that the will granted to the life tenant an unrestricted power of appointment with respect to the real and personal property in which she was given a life estate by the will, even to the extent of appointing it to herself in fee simple adversely to the interests of the remaindermen. This interpretation would allow the life tenant, by the simple expedient of appointing all of the real and personal property to herself in fee simple, to completely frustrate any testamentary disposition of the remainder interest; and, in effect, to convert her life estate to an estate in fee simple in the entire property devised and bequeathed by the testator.

[2, 3] We must therefore examine the instrument in the light of well established rules of construction to determine the extent of the power granted to the life tenant. "An instrument, such as a deed or will, creating a power of appointment is to be interpreted so as to ascertain the intention of the donor and to give it effect unless some rule of law prevents. Effect should, if possible, be given to every word or clause in the instrument, so long as they are not inconsistent with the general intent of the instrument as a whole." 41 Am. Jur., Powers, § 9, p. 812. "The intention of a testator as gathered from an entire instrument is the primary object in interpreting a will, and must be given effect unless it is contrary to some rule of law or at variance with the public policy, for the intent of the testator is his will." 7 Strong, N. C. Index 2d, Wills, § 28, p. 595.

In Item II of the will testator clearly granted to his wife a life estate in all of his property. Then, by proviso, he gave to her broad

powers to sell, convey, use, invest and reinvest the proceeds from such sales, and provided that she was not accountable to anyone for any of the property or the proceeds of any sale. In Item III testator gave, upon the death of his wife, all of his estate to his daughter, subject to the provisions of Item II. Thereafter followed provisions in the event his daughter predeceased his wife.

[4] "The rule followed generally now in almost all jurisdictions is that a life estate expressly created by the language of an instrument will not be converted into a fee, or into any other form of estate greater than a life estate, merely by reason of their being coupled with it a power of disposition, however general or extensive. In other words, where an estate for life, with remainder over, is given, with a power of disposition in fee of the remainder annexed, the limitation for life of the first taker will control, and the life estate will not be enlarged to a fee, notwithstanding the power of the life tenant to dispose of the fee." 28 Am. Jur. 2d, Estates, § 81, p. 182; *Darden v. Boyette,* 247 N.C. 26, 100 S.E. 2d 359; *Harris v. Distributing Co.,* 172 N.C. 14, 89 S.E. 789. "It is also well settled that a general power of appointment conferred upon a life tenant does not enlarge his estate." *Harris v. Distributing Co., supra.*

[5] In this case, defendant Mary R. Alexander used a note which was payable to testator, and in which she was given a life estate with the power of disposition, and she exchanged, or invested, it in a 107.11 acre tract of land which was not a part of the estate; in doing so she caused the deed to her to be drawn so as to convey to her a fee simple title in the real estate. The trial judge concluded that she did this intentionally, and that this intent coupled with the powers set out in the will served to vest in her a fee simple title to the 107.11 acre tract free and discharged of any interest in the remaindermen. This we hold to be error.

By Item II and Item III of his will, S. B. Alexander, Jr., intended that his widow, the defendant Mary R. Alexander, should have a life estate in all of his property, and that the remainder after the life estate should go to his daughter, the plaintiff Mary Brevard Alexander Howell. During the pendency of the life estate testator intended that his widow should not suffer or be in need so long as any of his property remained. Therefore, he gave his widow, as life tenant, plenary authority to absolutely dispose of his property for her best interests, comfort, luxury, and support during her lifetime. She was authorized to exchange, invest and reinvest for the obvious purpose of maintaining income producing property in the estate, and for the obvious purpose of making any other advantageous sale or exchange.

All of this the life tenant could do in her discretion, but it was testator's intention that these powers be exercised for her personal benefit during her lifetime. He did not intend that these powers might be exercised by the life tenant to convert his devise and bequest to her into a fee simple title whereby the property would be disposed of at her death as her estate, either by will or intestacy; otherwise his disposition of the remainder interest would be wholly frustrated.

In *Anderson v. Kennon,* 353 S.W. 2d 241 (Tex. 1961), the court, stating that a life tenant could not by fraudulent means defeat the rights of the remainderman by dealing with himself, reversed a judgment dismissing a suit brought by remainderman to set aside a conveyance by the life tenant to a corporation which reconveyed the property to the latter. Although the language of the will which created the life estate was very broad in empowering the life tenant to dispose of the property ("she may from time to time, in any manner or to any extent as she may deem best, mortgage, sell, convey and dispose of, conveying fee simple title thereto, for such consideration and on such terms as she may desire, without limitation or restriction whatever"), the court said that the will did not authorize her to convey the land, or any part of it, to herself as her separate property. Annot., 89 A.L.R. 2d 651 (1963).

In *Cales v. Dressler,* 315 Ill. 142, 146 N.E. 162, a deed by life tenant to her lawyer's stenographer, and reconveyance of the stenographer to the life tenant which was done in order that the property might pass under her will instead of the will of her testator were held ineffective to defeat the testator's intention that the remainder should pass by his will to the remainderman designated by him in the will. Annot., 89 A.L.R. 2d 650 (1963).

Under will giving widow life estate with full power to sell or use, but disposing of remainder at wife's death, wife had power to dispose of property only for her personal use and benefit during her lifetime, and purported conveyance to trustee with gifts over to others at wife's death was ineffective. *Parsons v. Smith,* 190 Kan. 569, 376 P. 2d 899. Annot., 89 A.L.R. 2d 649 (1963), (Later Case Service 1968).

"Questions as to what title, if any, a life tenant has to proceeds (or property obtained with proceeds) coming to his hands by reason of his exercise of a power of sale or disposal are of course wholly dependent upon the terms and intent of the will or other instrument creating the power and property interests. However, under nearly all instruments thus far in litigation, especially where the case has been merely the simple one of a life estate with superadded power of sale,

the proceeds (or property obtained therewith) have been regarded as taking the place of the property sold so that title was held to be in the remainderman subject to such rights of possession, user, investment, reinvestment, expenditure, or consumption as may have been given the life tenant." Annot., 158 A.L.R. 480 (1945). See, *Darden v. Matthews,* 173 N.C. 186, 91 S.E. 835.

[6] A life tenant with such broad discretionary powers of disposition as are contained in this will administers the life estate property in the nature of a trustee for the benefit of herself and the remainderman. And, although she may have the unbridled discretion to subject the entire estate to her own use during her lifetime, even to the extent of a complete dissipation of the estate, she cannot take title in herself to the exclusion of the interest of the remainderman.

[7] "The conduct of a life tenant with respect to the property in which the estate exists may be such that it will justify the intervention of equity to preserve the property not only for the remainderman but also for the life tenant, and to protect the interests of all." 31 C.J.S., Estates, § 60, p. 122. "A remainderman may have relief in equity when the life tenant is claiming a right to the property adverse to that of the remainderman." 31 C.J.S., Estates, § 60, p. 123.

[8] In this action the plaintiffs seek the equitable aid of the court to impose a constructive trust on the remaining portion of the 107.11 acre tract for the benefit of the life tenant, with the powers of disposition contained in the will, and for the benefit of the remainderman as set forth in the will. A constructive trust arises when land is acquired through fraud, or when, though acquired originally without fraud, it is against equity that it should be retained by him who holds it. *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83.

The defendant has affirmatively pleaded adverse possession for seven years under color of title and specifically pleaded adverse possession for twenty years; however, the defendant by her statement in open court affirmatively withdrew the pleas of adverse possession.

The defendant has affirmatively pleaded laches and the limitations of G.S. 1-52 and 1-56 as a bar to this action. The facts for ruling with respect to laches or the running of the statutes of limitations seem to have been before the court; but, because of the trial court's disposition, no ruling with respect thereto was made. Since the trial court is the finder of the facts, and has made no findings with respect to the brief testimony offered by plaintiffs at the trial, we cannot assume what these findings would be. However, a finding from that testimony which would be most favorable to defendant appellee

and most against the plaintiff appellants would be for the judge to disbelieve and reject the testimony, which would amount to no finding of fact from the testimony. Therefore we exclude all of the testimony from our consideration, and proceed upon the stipulations of fact entered into by the parties.

From the stipulations the following appears with respect to the question of laches or the running of the statutes of limitation: In 1935 defendant appellee, as Executrix of S. B. Alexander, Jr., entered the high bid at a public sale of the 107.11 acre tract. Later, by letter, she directed the trustee under the foreclosed deed of trust to convey the 107.11 acre tract to her individually, and she paid the purchase price with a note which was a part of the estate of S. B. Alexander, Jr. On 11 October 1935, the trustee conveyed the 107.11 acre tract to Mary R. Alexander by deed sufficient in form to convey the fee simple title. Thereafter, during the period 1936 to 1963, defendant appellee conveyed several portions of the tract in fee, and entered into lease agreements with respect to other portions of the tract. Defendant appellee has received and used the proceeds of those sales and leases for her own purposes. By deed dated 24 May 1962, defendant appellee conveyed to plaintiff appellant Mary Brevard Alexander Howell, in consideration of love and affection, a life estate in a portion of said 107.11 acre tract which deed contains the covenant that grantor is seized in fee of the premises described therein. This deed was filed for recording in Mecklenburg County on 4 June 1962. By deed dated 24 May 1962, defendant appellee conveyed to plaintiff appellant Billy Shaw Howell, Jr., in consideration of love and affection, the remainder in fee simple to the portion of the 107.11 acre tract described in the conveyance of the life estate to his mother, Mary Brevard Alexander Howell; and this deed contains the covenant that grantor is seized in fee of the premises described therein. It also was filed for recording in Mecklenburg County on 4 June 1962.

The record shows that this action was instituted 31 August 1967, approximately thirty-one years and ten months after the date of the deed from the trustee (under the foreclosed deed of trust) to defendant appellee Mary R. Alexander.

[9, 10] Where the action is barred by the applicable statute of limitations, the question of laches does not arise. And when an action is not barred by the pertinent statute of limitations, equity will not bar relief on the ground of laches except upon special facts demanding exceptional relief. Generally laches will not bar a party when the adverse party has not been prejudiced by delay. 3 Strong, N. C. Index 2d, Equity, § 2, p. 551.

[11] A resulting or constructive trust, as distinguished from an express trust, is governed by the ten year statute of limitations (G.S. 1-56), and not by the three year statute of limitations (G.S. 1-52). *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289.

Counsel have not cited, nor has our research disclosed, a decision of our Supreme Court with respect to the time at which the statute of limitations begins to run in a situation as presented by this case. Defendant appellee cites *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83, as standing for the proposition that the cause of action arose at the time of the alleged wrong and that the statute began to run at that time. Under such an application of the statement in *Teachey,* the ten year statute would have started to run in 1935 in this case, and plaintiffs' action would be barred. While it may be true that a statement to this effect was made, nevertheless the opinion in *Teachey* was concerned with an *express trust* not a trust imposed by equity. It was held in *Teachey* that the three year statute was applicable to the case and that it began to run when the *cestui que trust* was made aware of the repudiation or disavowal of the trust by the trustee. The statement for which defendant appellee cites *Teachey* was not necessary to a disposition of the case, it was not applicable to the theory or the facts of the case, and we do not consider that the statement as made is controlling under all circumstances.

[12] We have here a situation where a life tenant, with broad powers of sale or exchange of the estate property, did exchange estate property for the 107.11 acre tract which she had conveyed to her in 1935 by deed sufficient to convey a fee simple estate. She thereafter assumed possession and control, and actually made conveyances of the property. Was this conduct sufficient to put her daughter and grandson on notice that she was asserting a claim to the property adverse to them? We think not. Had the 107.11 acre tract been properly conveyed to her as life tenant, with power of disposition as contained in the will, she could have appropriately done everything that she did do. Therefore no conduct on her part, until 1962, would serve to raise in anyone's mind the thought that she claimed adverse to the remaindermen. We hold that the recording of the deed conveying fee simple title to defendant appellee, instead of conveying to her a life estate, was not notice to plaintiff appellants of a claim adverse to them; they had no cause to be and were not parties to the transaction.

For a comprehensive discussion, and collection of cases, upon the question of when the statute of limitation starts to run against en-

forcement of a constructive trust, see, Annot., 55 A.L.R. 2d 220 (1957), and 55 A.L.R. 2d 220, (Later Case Service, 1968).

Under the circumstances of this case we hold that the ten year statute of limitations did not begin to run until defendant life tenant exercised dominion over the property inconsistent with her rights as life tenant with power of disposition, and in a manner adverse to the interests of the plaintiff remaindermen, which would put the remaindermen on notice that she was claiming the property adversely to them. Cf., *Pearson v. Pearson,* 227 N.C. 31, 40 S.E. 2d 477.

In 1962 defendant life tenant executed deeds to two of plaintiff remaindermen asserting that she was seized in fee, and purporting to convey a life estate to one remainderman, with remainder over to the other remainderman. This record discloses that remaindermen were fully aware of the content of these deeds; that the deeds were accepted and recorded by the two plaintiff remaindermen; therefore, the remaindermen were thereby put on notice that the life tenant claimed the fee simple title to the 107.11 acre tract adverse to their interests as remaindermen. The ten year statute of limitations began to run in 1962, and this action was instituted in 1967. The plaintiffs' action is not barred unless by laches.

[13] There is nothing to indicate that defendant life tenant is entitled to the exceptional relief of the doctrine of laches; no purchaser for value from her can be prejudiced because even as life tenant she had the right to convey fee simple title; and the defendant life tenant herself has not been prejudiced by the delay of five years in bringing the action, except that possibly her plans to dispose of the property contrary to her husband's will might be frustrated. Plaintiffs' action is not barred by reason of laches.

The judgment appealed from is reversed, and this cause is remanded for entry of judgment decreeing that Mary R. Alexander holds the undisposed portion of the 107.11 acre tract in trust for herself as life tenant, with full power and authority to sell and convey any part or all of said tract, at any time and upon such terms as she may desire, and to use, invest and reinvest the proceeds from such sale, in such manner and for such objects as she may deem advisable, and that she shall not be held, expected or bound to account to any court or to any person for any part of said tract or any of the proceeds of any sale thereof; and further decreeing that she holds the remainder after her life estate in said tract in trust for Mary Brevard Alexander Howell, but that in the event Mary Brevard Alexander Howell predeceases the life tenant, that she holds said remainder in

trust for Billy Shaw Howell, Jr.; all in accordance with Item II and Item III of the will of S. B. Alexander, Jr.

Reversed and remanded with instructions.

Britt and Parker, JJ., concur.

NORFOLK SOUTHERN RAILWAY COMPANY AND MARTIN-MARIETTA CORPORATION v. MARVIN V. HORTON

AND

NORFOLK SOUTHERN RAILWAY COMPANY AND MARTIN-MARIETTA CORPORATION v. J. I. OAKLEY

No. 683SC367

(Filed 15 January 1969)

1. Trial § 6— stipulations encouraged

Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save costs to parties.

2. Trial §§ 6, 56— stipulation to abide result of another suit — waiver of jury trial

As a general rule a stipulation to abide the event of another suit is binding as long as the causes of action remain the same; it operates as a waiver of the right of trial by jury and forecloses all questions which might have been, but were not, presented in the other cause.

3. Trial § 6— stipulation to abide result of another suit

Three actions were instituted by the corporate parties seeking injunctions to prevent interference with a railroad right of way, and two actions were instituted against the corporate parties seeking removal of the right of way easements as a cloud on title, the basic question in all the actions being whether the right of way easements had been abandoned. The parties to all five actions stipulated "that the rulings and judgments rendered" in the consolidated trial of two of the cases "shall be the rulings affecting and applied to" the remaining three cases. *Held:* Where judgments of involuntary nonsuit were entered in the two cases which were tried, judgments of nonsuit were properly entered in the three remaining cases on the basis of the stipulation without regard to whether the facts in the cases are the same, it being the intention of the parties to dispose of all five cases by the trial of two which were representative of the entire controversy.

4. Trial § 6— stipulations — method of setting aside

A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding, ordinarily by motion to set aside the stipulation in the court in which the action is pending.

5. Trial § 6— setting aside a stipulation

Application to set aside a stipulation must be seasonably made.

Appeal by plaintiffs from *May, J.*, 8 April 1968 Session, Pitt Superior Court.

These two actions, and three others, which will be referred to herein, concern controversies over a railroad right of way between the towns of Fountain and Farmville in Pitt County, North Carolina. The right of way was part of the line of the East Carolina Railroad Company from Tarboro to Farmville. The East Carolina Railroad Company operated a railroad as a common carrier over this right of way from the time it was organized prior to 1900 until 16 November 1965. At that time it ceased operation in accordance with an order of the Interstate Commerce Commission dated 14 October 1964. Thereafter East Carolina Railroad Company conveyed the right of way to its parent, the Atlantic Coast Line Railroad Company. Subsequently the Atlantic Coast Line Railroad Company conveyed the right of way to the Norfolk Southern Railway Company. By lease dated 1 January 1967, Norfolk Southern Railway Company leased the said right of way to Martin-Marietta Corporation for a term of fifty years for the purpose of hauling by its own (Martin-Marietta) motive power cars of crushed stone from its quarry at Fountain to the connection point with the Norfolk Southern Railway tracks at Farmville.

All of the individual parties in the five lawsuits claim to be the successors in title to the various grantors of the original easements to the East Carolina Railroad Company, and it is their contention that the right of way was abandoned for railroad purposes by the action of East Carolina Railroad Company, that no railroad operations have been conducted thereon since that time, and that they now own the fee unencumbered by the easements.

The corporate parties contend that they are assignees of the right of way and have the right to the continued use of same.

Four of the five lawsuits were instituted prior to 1 January 1967, and the corporate party in those four was the Atlantic Coast Line Railroad Company. However, through various motions and orders the present corporate parties have been substituted. The present corporate parties are originally named in the fifth action which was instituted after 1 January 1967. In the order of the date upon which the complaints were filed, the five actions are as follows:

One: Norfolk and Southern Railway Cmpany, and Martin-Marietta Corporation vs. Marvin V. Horton. Complaint in this action was filed 23 June 1966, wherein the relief sought was the issu-

ance of an injunction to prevent the placing of barricades across the subject right of way.

Two: Madeline H. Rountree, Novella H. Murray and husband, W. C. Murray vs. Norfolk and Southern Railway Company and Martin-Marietta Corporation. Complaint in this action was filed 25 August 1966 wherein the relief sought was the removal of the subject right of way easement as a cloud on plaintiffs' title to the unencumbered fee.

Three: Howard M. Allen and wife, Mary Jo Allen, and W. G. Allen and wife Joy A. Allen vs. Norfolk and Southern Railway Company, and Martin-Marietta Corporation. Complaint in this action was filed 8 September 1966, wherein the relief sought was the removal of the subject right of way easement as a cloud on plaintiffs' title to the unencumbered fee.

Four: Norfolk and Southern Railway Company, and Martin-Marietta Corporation vs. J. I. Oakley. Complaint in this action was filed 19 September 1966 wherein the relief sought was the issuance of an injunction to prevent the threatened removal of the tracks from portions of the subject right of way.

Five: Norfolk and Southern Railway Company, and Martin-Marietta Corporation vs. Howard N. Allen, Frances O. Starling, Annie Lee Fulford, J. L. Nanney, C. G. Morgan, Johnnie J. Wooten, Georgia Pollard, A. C. Monk, Jr., R. T. Monk, W. C. Monk, J. Roderick Harris, Mrs. Sallie Ruth Horton, Novella Horton Murray, and Tabitha M. DeVisconti. Complaint in this action was filed 3 April 1967, wherein the relief sought was the issuance of an injunction to prevent threatened interference with the repair and maintenance of the tracks on the subject right of way, and the operation of trains thereon.

As can be seen from the above summary, three of the five actions (Numbers One, Four and Five) were instituted by the corporate parties seeking injunctions to prevent interference with their use of the subject right of way. Two of the five actions (Numbers Two and Three) were instituted by the individual parties seeking the removal of the right of way easements as a cloud on their title.

At the 23 October 1967 Session of Pitt Superior Court, Bone, J., presiding, two of the five cases were consolidated for trial. They were numbers Two and Five, number Two having been instituted by the individual parties, and number Five having been instituted by the corporate parties. Upon entry into the trial of the two cases all of the parties entered into a stipulation as follows: "That the

rulings and judgment rendered in the above case shall be the rulings affecting and applied to the following cases appearing on this docket:" (there followed then a listing by title and docket number of the cases summarized above as numbers One, Three and Four; numbers One and Four being the two cases which have been appealed to this Court.)

At the conclusion of all of the evidence in the trial of the two cases at the 23 October 1967 Session, Judge Bone entered separate judgment of nonsuit in each case. The plaintiffs in each case (the individual parties in one, and the corporate parties in the other) gave notice of appeal, but the appeal was not perfected in either case. Thereafter the corporate parties petitioned this Court for *writ* of *certiorari* to perfect their appeal (68SC149PC, filed 2 May 1968) which was denied by this Court in conference 22 May 1968. This petition for *certiorari* to review the order of Bone, J., entered at the 23 October 1967 Session was filed in this Court twenty-one days after the entry of the judgment of Judge May on 11 April 1968 from which the corporate parties now appeal.

Motion was duly filed by the individual parties seeking judgments of nonsuit, in accordance with the stipulation, in the three remaining cases (numbers One, Three and Four). This motion was heard before Judge May at the 8 April 1968 Session and he ruled, in effect, that the stipulation entered into by the parties before Judge Bone was binding upon them as to the disposition of the three remaining cases, and entered judgments of nonsuit in each of the three remaining cases. From this ruling and the entry of judgments of nonsuit in the three cases, the corporate parties appealed in the two cases in which they are plaintiffs (numbers One and Four). The individual parties did not appeal in the one case in which they are plaintiffs (number Three).

James, Speight, Watson & Brewer, by W. H. Watson, for Norfolk Southern Railway Company, appellant.

Joyner & Howison, by W. T. Joyner, Jr., for Martin-Marietta Corporation, appellant.

H. Horton Rountree, Kenneth G. Hite, Sam O. Worthington, E. Burt Aycock, Jr., and Marvin V. Horton, by Marvin V. Horton, for appellees.

Brock, J.

[3] Plaintiffs assign as error the signing and entry of the judgments of nonsuit in the two cases.

Plaintiffs succinctly state their contention to be that the stipulation entered into at the 23 October 1967 Session provides that "the rulings and judgment rendered" in the two cases tried at that session would be binding on the parties in the other three cases *only* to the extent that those rulings were applicable to the *facts* of the other three cases. They contend, therefore, that the facts of all the cases must be compared to determine the extent to which the stipulation is binding in the other three cases. This seems to be another way of saying that the stipulation is binding in the other three cases only to the extent that the facts are the same as in the first two.

Even without knowledge of any of the evidence in any of the five cases, we can readily surmise that the facts in each case are different; they concern different parties, about different conduct, and different sources of title. The construction of the stipulation now sought by plaintiffs would render it inefficacious.

At the 23 October 1967 Session all of the parties in the five lawsuits solemnly agreed "that the rulings and judgment rendered" in the two cases tried at that session "shall be the rulings affecting and applied to" the remaining three cases. At that time all of the parties were aware that the facts of each of the five cases would be different, and plaintiffs are in no position to now complain that the court has held them to their solemn agreement. Stipulations should receive a fair and liberal construction, in harmony with the apparent intention of the parties.

[1] Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save costs to parties, and such practice is encouraged. *Heating Co. v. Construction Co.,* 268 N.C. 23, 149 S.E. 2d 625.

[2] "As a general rule a stipulation to abide the event of another suit is binding as long as the causes of action remain the same; it operates as a waiver of the right of trial by jury, and forecloses all questions which might have been, but were not, presented in the other case." 83 C.J.S., Stipulations, § 19, p. 40.

In *Commercial Assurance Co. v. Lumber Co.,* 130 Ga. 191, 60 S.E. 554, plaintiff lumber company sued defendant assurance company on a fire insurance policy. In addition to the policy in suit, there was another policy issued by a different insurance company covering the same property on which the lumber company had brought an action. It was stipulated that the present case would abide the result of the other and that the final result of the other was to be the final result in the present case. Judgment was recov-

ered against the other insurance company for the full amount of the policy. When the case against the present insurance company came on for trial, it was contended by the insurance company that it was bound by the former judgment only to the extent of determining a liability on the policy. It was held that there was no error in the trial court ruling in favor of the plaintiff lumber company for the full amount of the policy in the present suit in view of the stipulation which had been made to abide the result in the other case. See also, *Jarrett v. McLaughlin,* 123 Ga. 256, 51 S.E. 329.

In *North Mo. R. R. Co. v. Stephens,* 36 Mo. 150, 88 Am. Dec. 138, several suits were brought by the same plaintiffs against different defendants. The attorneys for the parties agreed that all of the cases should abide the final decision in one case, and it was held that such agreement was binding upon the parties. This was held to be so although the question involved in the case which was tried had been changed by an act of the legislature which might have changed the result in the remaining cases except for the stipulation.

Plaintiffs argue in their brief the principles of *res adjudicata* in support of their position that the evidence must be compared to determine whether the cases are the same. However, we are not concerned with the application of the principles of *res adjudicata;* we are concerned with the interpretation of a stipulation.

[3] All five of the cases are concerned with the one basic question: Does the conduct of the corporate parties, or their predecessors in interest, constitute an abandonment of the easements of right of way? It is the resolution of this basic question which would determine whether any of the parties are entitled to the relief prayed in their complaints. Different factual situations would likely develop in each case with respect to the conduct and claims of the individual parties, but it is the conduct of the corporate parties and its effect which is the basic inquiry. The evidence of this, it seems, would be the same in each case. All of the parties were aware of these circumstances at the time of entering into the stipulation, and it was their intention to dispose of all five cases by the trial of two which were representative of the entire controversy. We do not know why Judge Bone entered judgments of nonsuit in the two cases that were tried; those cases are not before us for review, and Judge Bone's judgment is presumed to be correct. Nevertheless, the fact that the two cases were not disposed to the present liking of the corporate plaintiffs does not in any way change the effect of the stipulation.

Under our Rule 27 plaintiffs cite to us as additional authority the cases of *The Carso,* 69 F. 2d 824, and *Huegel v. Huegel,* 329 Mo.

571, 46 S.W. 2d 157. In *Carso* the parties stipulated that "the issues" in the present suits "shall be deemed to be controlled by the decision to be rendered" in *The Carso,* except "the special issues claimed to exist" and "now submitted." Clearly such a stipulation controlled only to the extent that the issues were similar, and the case is distinguishable upon that ground. *Huegel* was a *caveat* proceeding alleging undue influence. Another action was pending to set aside a stock transfer on the grounds of undue influence. In *Huegel* the parties stipulated to abide the result of the suit to set aside the stock transfer. Thereafter, in the stock transfer suit the plaintiff was allowed to amend to allege a constructive trust, and obtained a judgment declaring the subject stock to be held in trust. The court in *Huegel* held that the stipulation was not binding because the theory of the stock transfer case was changed after the stipulation was entered. This case is also clearly distinguishable upon its facts from the case now under consideration.

We note that after the judgments of nonsuit were entered in the two cases tried at the 23 October 1967 Session, plaintiff appellants did not seek relief from the stipulation which they now contend is not binding. So far as the record discloses they took no action until the motion of individual parties for judgments in accordance with the stipulation was heard before Judge May in April 1968.

[4, 5] "A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding, and, ordinarily, such relief may or should be sought by a motion to set aside the stipulation in the court in which the action is pending, on notice to the opposite party." 83 C.J.S., Stipulations, § 36, p. 93. "Application to set aside a stipulation must be seasonably made; delay in asking for relief may defeat the right thereto." 83 C.J.S., Stipulations, § 36, p. 94.

The judgments appealed from are

Affirmed.

Britt and Parker, JJ., concur.

IN THE MATTER OF: McCRAW CHILDREN: VALERIE CLAIRE AND CARL GREAVES, III

No. 6826SC410

(Filed 15 January 1969)

1. Appeal and Error § 57— conclusiveness of findings supported by evidence

Findings of fact by the trial court are conclusive on appeal if supported by any competent evidence, and judgment supported by such findings will be affirmed even though there is evidence to the contrary or some incompetent evidence may have been admitted.

2. Divorce and Alimony § 24; Infants § 9— custody proceedings — failure to find one parent "abandoned" the other

In a proceeding to determine the custody of minor children, failure of the court to find that petitioner "abandoned" respondent rather than merely finding that "the parents separated" is not error, since the determining factor in custody proceedings is the welfare of the children and not the technicality of which parent was at fault in bringing about the state of separation.

3. Appeal and Error § 25— exception to favorable ruling

Where the order in custody proceedings granted primary custody of minor children to the mother, the father's assignments of error to portions of the order granting the father visitation rights are ineffectual, since a party may not take exception to a ruling of the court in his favor.

4. Divorce and Alimony § 24; Infants § 9— custody proceedings — evidence of adultery

Evidence of adulterous conduct is relevant upon an inquiry of fitness of a person for the purpose of awarding custody of minor children.

5. Divorce and Alimony § 24; Infants § 9— conclusiveness of custody determination

In custody proceedings, the trial judge is present where he can observe and hear the parties and their witnesses, and ordinarily his determination of custody will be upheld if supported by competent evidence.

6. Divorce and Alimony § 24; Infants § 9— custody proceedings — effect of proof of adultery

In a custody proceeding in which the petitioner admitted that she had committed adultery, failure of the court to make findings in its order awarding custody to petitioner that she had committed adultery is not error, since the establishment of adultery does not *eo instanti juris et de jure* render the guilty party unfit to have custody of minor children.

7. Divorce and Alimony § 23— support of minor children — determination of reasonable needs

In proceedings in which the custody of two minor children was awarded to petitioner, petitioner's testimony that while she, respondent and their two children lived together, respondent gave her $800 each month to pay the expenses of groceries and running the house is incompetent to estab-

lish the reasonable needs of the children, and where no competent evidence of the needs of the children was before the court, an award to petitioner of $1000 per month for support of the children is erroneous.

APPEAL by respondent, Carl Greaves McCraw, Jr., from *Grist, J.*, 13 May 1968 Schedule "C" Session, MECKLENBURG Superior Court.

This proceeding was originally instituted by Patricia Tafe McCraw in the Mecklenburg County Domestic Relations Court on 20 February 1968 by petition wherein she sought to have custody of the two minor children awarded to her. By order dated 10 April 1968, the Domestic Relations Court awarded primary custody of the two minor children to the respondent, Carl Greaves McCraw, Jr., with certain rights of visitation reserved to petitioner. From this order petitioner appealed to the Superior Court.

Pending petitioner's appeal from the Domestic Relations Court, she instituted a separate action in the Superior Court on 15 May 1968 (Patricia Tafe McCraw v. Carl Greaves McCraw, Jr.) seeking, under G.S. 50-16.1, *et seq.*, alimony, support for the minor children (she did not pray for custody in this action), a writ of assistance to obtain possession of the residence, and for counsel fees.

The appeal from the Domestic Relations Court and the separate action under 50-16.1, *et seq.*, were consolidated by consent for hearing in the Superior Court; however, at the conclusion of the hearing a separate order was entered in each case by Judge Grist.

Both parties were afforded ample opportunity to offer witnesses in their own behalf and to cross-examine witnesses offered by the other. The hearing was complete in developing each party's contentions and accusations against the other. Counsel for both parties were diligent in representing the interests of their respective clients, and the trial judge was patient in presiding over the hearing. We do not choose to summarize and preserve here the substance of the revealing testimony.

In the action for alimony, etc., instituted in the Superior Court Judge Grist made findings of fact which are not the subject of exceptions by either party. The order entered in that action was a *pendente lite* order, and no appeal is undertaken from it by either party; it is therefore not before this Court for review.

In the hearing *de novo* upon the appeal by Patricia Tafe McCraw from the Domestic Relations Court, Judge Grist entered an order finding that she was a fit and proper person to have custody

of the two minor children, and awarded their primary custody to her.

The respondent, Cary Greaves McCraw, Jr., appealed to this Court from the findings and entry of the custody order granting primary custody to Patricia Tafe McCraw, and awarding support to her for the two minor children.

Reginald S. Hamel and Ernest S. DeLaney, Jr., for Patricia Tafe McCraw, petitioner appellee.

Warren C. Stack, by James L. Cole, for Carl Greaves McCraw, Jr., respondent appellant.

BROCK, J.

[1] Respondent appellant sets forth twenty-nine assignments of error, the first nine of which are addressed to what respondent labels as findings of fact by the trial judge. The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence to the contrary, or even though some incompetent evidence may have been admitted. 1 Strong, N. C. Index 2d, Appeal and Error, § 57, p. 223. Appellant recognizes this rule to some extent, for he specifically abandons assignments of error numbers 2 and 5.

Assignments of error numbers 1, 3 and 4 are based upon exceptions to findings of fact numbers 3, 5 and 6. These findings are as follows:

> "3. The parents separated on February 16, 1968 and since that time have lived separate and apart.
>
> "5. Patricia Tafe McCraw has been an excellent mother to her children. She has been attentive to their health and needs and she has spent many hours playing with the children; she has taken them to Sunday School regularly; she has seen that they had friends to play with; she has regularly read to the children at bedtime.
>
> "6. According to all the witnesses, including several mothers of good character in the community and the father of the children, the relationship between the children and their mother has been and is excellent and the court finds this to be a fact."

[2] Respondent complains that the court found that "the parents separated" instead of finding that petitioner "abandoned" respondent, in accordance with a finding tendered by respondent. According to

Webster's Third New International Dictionary (1968) to separate means "to set or keep apart," "to sever conjugal ties," "to cause to live apart." It may be true that the finding by the court would connote to the legal profession that the separation was by mutual conduct, or at least not the result of an abandonment of one by the other. But in the proceeding *sub judice* we are not dealing with an order for alimony or a decree of absolute divorce; we are concerned with an order awarding custody of two minor children to one of the parents. The crux of the finding is that the parents are living in a state of separation, whatever the cause may have been. All of the evidence was before the trial judge, and we conceive that had he found as requested by respondent it would not have affected the award of custody. In a custody hearing it is the welfare of the children which is the concern of the courts, not the technicality of which parent was at fault in bringing about the state of separation. Assignment of error number 1 is overruled.

The first sentence of finding number 5 is clearly a conclusion of the trial judge drawn from the remainder of findings numbers 5 and 6. The remainder of findings numbers 5 and 6 are supported by plenary evidence, and therefore the assignments of error numbers 3 and 4 are overruled.

Respondent contends by his assignments of error numbers 6 and 7 that there is no evidence to support findings numbers 9 and 11. These findings are as follows:

> "9. The mother is a fit and suitable person to have primary custody, care and control of the two minor children.
>
> "11. The best interests 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."

Though not so denominated these are clearly conclusions drawn by the trial judge from the facts, and are supported by the facts, previously found. Assignments of error numbers 6 and 7 are overruled.

Assignments of error numbers 8, 9 and 13 are in substance addressed to the same subject matter; the subject of support payments by respondent to petitioner for the two minor children. We will return to a discussion of these three assignments of error later in this opinion.

[3] Assignments of error numbers 11 and 12 are to two portions of the order which grant visitation rights to the respondent. Having

awarded primary custody of the two children to petitioner the two portions of the order providing for visitation rights are beneficial to respondent. "A party may not take exception to a ruling of the court in his favor. . . ." 1 Strong, N. C. Index 2d, Appeal and Error, § 25, p. 150. Assignments of errors numbers 11 and 12 are overruled.

Respondent's assignment of error number 10 is addressed to the order of the court in which primary custody of the children is awarded to petitioner. This assignment, along with assignments of error numbers 14 through 24 which are addressed to the refusal of the court to make tendered findings of fact, and along with assignments of error numbers 25 through 27 which are addressed to the refusal of the court to make tendered conclusions of law, present the main thrust of this appeal and consumed almost the entire oral argument.

[6] In substance respondent contends that the court should have found that petitioner had committed adultery and was therefore not a fit and proper person to have the care, custody and control of the children. As stated earlier, the order entered in the action under G.S. 50-16.1, *et seq.,* (Patricia Tafe McCraw v. Carl Greaves McCraw, Jr.) is not before us for review, but the pleadings and the order entered in that case are included in the record on appeal. In the *pendente lite* order in that case Judge Grist found as facts that Mrs. McCraw had committed acts of adultery, and that Mrs. McCraw had abandoned Mr. McCraw without just cause or provocation.

It is respondent's contention that the two orders, entered upon the same evidence after a joint hearing, are inconsistent. Respondent urges with much fervor that the petitioner having been found by Judge Grist to have committed adultery and abandoned her husband, that Judge Grist committed an error of law and exceeded his discretionary authority in thereafter refusing to make the same findings in the custody proceeding. Respondent contends that such findings would, as a matter of law, preclude an award of custody of the two children to Mrs. McCraw. Respondent cites *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871, as establishing the rule that a finding of adultery on the part of one spouse impels a finding of unfitness for custody on the part of that spouse. We do not agree with such an interpretation. *Thomas* merely holds that such a finding of adultery is sufficient to support a conclusion that the guilty party is unfit to have custody. There are many findings which would be sufficient to support a conclusion of unfitness, but it does not follow that they would always impel such a conclusion.

[4-6] Evidence of adulterous conduct, like evidence of other conduct, is relevant upon an inquiry of fitness of a person for the purpose of awarding custody of minor children to him or to her. But in a custody proceeding it 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 seek to act for the best interests and welfare of the minor child. The trial judge is present where he can observe and hear the parties and their witnesses, and ordinarily his decision on custody will be upheld if supported by competent evidence. *Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E. 2d 73. It clearly appears from petitioner's own testimony that she was for a period of time untrue to her marriage vows, but nowhere is there any indication that she was ever neglectful of the care of her children. The establishment of adultery does not *eo instanti juris et de jure* render the guilty party unfit to have custody of minor children.

[6] As stated earlier, Judge Grist's findings of fact are supported by competent evidence, and the findings of fact support his conclusions of law with respect to the award of custody. The finding requested by respondent which he considers crucial (that petitioner had committed acts of adultery) would be supported by the evidence before the judge and may have been a proper finding, but it was not a necessary finding. The evidence was before the judge and certainly his finding in the other case indicates his complete awareness of the evidence. Nevertheless, after a full hearing, in the exercise of his sound discretion he awarded primary custody of the children to petitioner. Respondent has shown no prejudice by the failure of the trial judge to make such findings as were tendered and refused; there is no reason to believe the results would have been different. Respondent's assignments of error numbers 10, and 14 through 27 are overruled.

[7] Respondent's assignments of error numbers 8, 9 and 13, which we deferred until this point, concern the award of support payments. Judge Grist found that respondent received an annual salary of $36,000.00, and had additional income in excess of $15,000.00 last year. There was no exception to this finding of fact. The judge then concluded that the sum of $1,000.00 per month was a reasonable sum for respondent to pay to petitioner for support of the two children. There is no contention that respondent cannot afford to pay the $1,000.00 monthly, but respondent assigns as error that this conclusion is not based upon any finding of fact. Respondent further assigns as error that there was no competent evidence before the

judge from which he could make a finding as to the needs of the two children. These assignments of error are well taken.

Petitioner testified, over respondent's objection, that while she, respondent, and the two children were living together, respondent gave her $800.00 each month to pay the expenses of groceries and of running the house. This testimony was incompetent to establish the reasonable needs of the children; and no other evidence was offered.

The order as it relates to the award of custody and visitation rights is affirmed; but, insofar as the order relates to support payments, it is vacated and this cause is remanded to the Superior Court of Mecklenburg County for a hearing upon competent evidence to determine appropriate payments to be made by respondent to petitioner for the support of the two minor children.

Affirmed as to the award of custody.

Reversed and remanded as to the support payments.

BRITT and PARKER, JJ., concur.

MARY OWNLEY JONES, WIDOW v. HENRY FRANKLIN SMITH AND HILL MANUFACTURING COMPANY OF NORTH CAROLINA, INC.

No. 681SC250

(Filed 15 January 1969)

1. Automobiles § 83— pedestrian's contributory negligence

Plaintiff's evidence tending to show that her minor son was struck by defendant's automobile as he was crossing a highway at a place other than a crosswalk in the daytime, that the highway was straight at this point and that the weather was clear and the road dry, and that there was no other traffic on the road at that time, *is held* to disclose contributory negligence on the part of the son as a matter of law. G.S. 20-174(a).

2. Negligence § 12— doctrine of last clear chance

In order for doctrine of last clear chance to apply, there must be proof that after plaintiff by his own negligence had gotten into a position of helpless peril defendant discovered plaintiff's helpless peril, or, being under a duty to do so, should have discovered the peril, and thereafter defendant, having the means and the time to avoid the injury, negligently failed to do so.

3. Automobiles § 89— last clear chance — sufficiency of evidence

In action for injuries sustained when plaintiff's minor son was struck by defendant's automobile as the minor was attempting to cross a highway at a place other than a crosswalk, the evidence is insufficient to require submission of the case to the jury on the last clear chance doctrine, there being no proof that by the exercise of reasonable care defendant discovered or could have discovered the minor's peril in time to avoid the injury.

4. Trial § 22— sufficiency of evidence to overrule nonsuit

In order for the evidence to be such as to justify a finding in favor of the party having the burden of proof, the evidence must do more than raise a suspicion, conjecture, possibility or chance; it must reasonably tend to prove the fact in issue, or reasonably conduce to its conclusion as a fairly logical and legitimate deduction.

APPEAL by plaintiff from *Cowper, J.*, April 1968 Session, Superior Court of PASQUOTANK.

Plaintiff, the mother of Joseph Robert Jones, a minor, sues to recover for past, present, and prospective medical expenses for the treatment of her minor son for injuries resulting from his being struck by an automobile driven by the defendant, Henry Franklin Smith, on 30 July 1964. Also, she seeks to recover for loss of services and earnings during her son's minority. At the end of the plaintiff's evidence the trial judge entered judgments of involuntary nonsuit on behalf of both defendants. Plaintiff appeals.

The plaintiff alleges that the defendant Smith was negligent in the operation of his automobile in that he did not keep a proper lookout, failed to use proper care in respect to speed or control of his automobile, or to give timely warning of his approach. Also, plaintiff says the defendant was negligent in that he failed to reduce his speed to avoid a special hazard and that he operated his automobile at a speed greater than was reasonable and prudent under the conditions then existing.

The plaintiff also alleged that at the time of this accident, the defendant Smith was employed by defendant Hill Manufacturing Company, Inc., and that he was about his master's business at the time plaintiff's minor son was injured.

The individual defendant answered denying the allegations of negligence and, as a further answer and defense, alleged that the plaintiff's minor son was contributorily negligent in that he left a place of safety on the shoulder of the highway and suddenly and without warning ran, or darted or otherwise moved in front of and in the path of the automobile operated by the individual defendant;

that the minor son collided with the automobile in the general area of the left front fender and windshield of the vehicle; that the minor son entered the highway in such a manner that the defendant did not have time or opportunity to take any sufficient evasive action to avoid the collision; that the minor son did not give adequate notice of his intention to enter the highway; and, that the minor son failed to yield the right of way upon the highway to the automobile being driven by the defendant.

The corporate defendant answered denying that Smith was within the employment of the corporate defendant at the time of the accident. By way of further answer and defense, the corporate defendant alleged acts of contributory negligence on the part of the minor son substantially the same as those alleged by the individual defendant.

Plaintiff replied to these allegations of contributory negligence denying that her son was contributorily negligent, but alleging that if it should be found that he was contributorily negligent, then it should also be found that the defendant Smith had the last clear chance to avoid the accident because, through the exercise of ordinary care, he saw or should have seen in time to avoid the collision that the plaintiff's son was in a position of peril and was oblivious to the impending danger.

Russell E. Twiford, O. C. Abbott, and John S. Kisiday for plaintiff appellant.

Leroy, Wells, Shaw & Hornthal by Charles C. Shaw, Jr., and J. Fred Riley for Henry Franklin Smith, defendant appellee.

Hall & Hall by John H. Hall, Jr., for Hill Manufacturing Company of North Carolina, Inc., defendant appellee.

MORRIS, J.

The evidence presented at the trial, taken in the light most favorable to the plaintiff, tells the following story.

On 30 July 1964, at approximately 5:30 p.m. Charles Jones picked up his brother, Joseph Robert Jones, who was 16 years of age, at his mother's home and carried him to the Webb Drive-In Theater where he held a part-time job. The Webb Drive-In Theater is located on the Weeksville Road, south of Elizabeth City, North Carolina. The highway at this point is straight, and the weather on the day in question was clear, and the road was dry. Charles Jones pulled off on the west side of the Weeksville highway to let his

brother out of the truck, the drive-in being located on the east side of the highway.

At approximately the same time Charles Jones picked up his brother at his mother's home and was taking his brother, Joseph Robert Jones, to the drive-in theater, the defendant Henry Franklin Smith was leaving the William Jennings Service Station, which is located on the Weeksville highway south of the drive-in. Smith was driving north toward the drive-in theater.

Charles Jones, heading south, pulled over on the west shoulder of the road in front of the drive-in in order to let his brother out of the truck. His brother stepped out of the truck on the passenger side, and Charles Jones pulled back on the highway heading south toward Weeksville. Approximately 100 to 150 feet from where he left his brother, Charles Jones met the defendant, Henry Franklin Smith. Jones testified that the defendant Smith waved to him as he went by and that Smith's speed was between 50 and 60 miles per hour. When Charles Jones was approximately 300 to 350 feet beyond the entrance to the drive-in, he heard "the skidding of brakes applying on the road" behind him. Charles Jones turned and looked behind him and saw his 16-year-old brother, Joseph Robert Jones, lying on the west side of the road, partly on and partly off the pavement. There was no other traffic on the road at this time. Joseph Robert Jones was lying some 33 to 35 feet from the center of the driveway to the drive-in and the defendant Smith's car was approximately 25 to 30 feet beyond the point where Joseph Robert Jones was lying. The front portion of the left front fender on the defendant's car was bent and the mirror on the left hand side was broken off. Sometime later, Joseph Robert Jones's shoe was found lodged in the front of the defendant Smith's car between the grill and the radiator.

[1] In our opinion, the trial judge was correct in allowing the defendants' motions for nonsuit. Assuming, without admitting, that the plaintiff's evidence establishes sufficient inferences of negligence on the part of the defendant Smith to take this case to the jury, we feel that it can only be concluded that the plaintiff's minor son was negligent in attempting to cross the highway in front of the defendant's automobile and that this negligence by the plaintiff's minor son contributed to and was a proximate cause of his injuries.

G.S. 20-174(a) provides:

> "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway."

In *Price v. Miller,* 271 N.C. 690, 157 S.E. 2d 347, the deceased and one Foust were walking together toward the road. Foust saw a car coming and turned and walked down the shoulder of the road. He then heard a lick, turned, and saw the deceased and the car which struck him. The accident occurred at night. The road was straight and the weather was clear. The Court, after a thorough discussion of the law applicable to this situation, held that the trial judge properly allowed the defendant's motion for nonsuit; because the plaintiff, by his own evidence, had shown that he was contributorily negligent. The Court pointed out that a pedestrian has the duty to look out for his own safety. Further, the Court held that the operator of a motor vehicle on a public highway may act upon the assumption that a pedestrian will use due caution and reasonable care to protect himself.

> "We must conclude that plaintiff's intestate saw defendant's automobile approaching and decided to take a chance of getting across the road ahead of it, or in the alternative, that he not only failed to yield the right of way to defendant's automobile, but by complete inattention started across the highway without looking." *Price v. Miller, supra.*

However, in this case, unlike *Price v. Miller, supra,* the plaintiff has alleged that the defendant had the last clear chance to avoid the accident.

[2] In *Exum v. Boyles,* 272 N.C. 567, 158 S.E. 2d 845, the Supreme Court stated that for the doctrine of last clear chance to apply, "there must be proof that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and, thereafter, the defendant, having the means and the time to avoid the injury, negligently failed to do so."

In *Wade v. Sausage Co.,* 239 N.C. 524, 80 S.E. 2d 150, our Supreme Court set out four elements which must be established if a plaintiff is to recover under the doctrine of last clear chance. They are as follows:

> "(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 position 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."

[3, 4] We think the plaintiff has failed to establish sufficient facts to justify the application of the doctrine of last clear chance. Obviously, the plaintiff's son was in a position of peril when he was struck by the defendant Smith's car. However, there is no showing that by the exercise of reasonable care the defendant Smith did discover or could have discovered his peril in time to avoid the injury. The evidence shows that Charles Jones put his brother out of his truck on the west side of the highway so that he had to cross the highway in order to get to the drive-in where he worked. Charles Jones met the defendant Smith approximately 150 feet from where his brother had just alighted from his truck. Then he heard the sound of car brakes. The evidence showed that the truck driven by Charles Jones had tool boxes built up on the sides and that they extended to the top of the cab of the truck and from the cab to the rear. Based on the evidence presented at the trial below, what occurred after the defendant passed Charles Jones's truck is a matter of pure conjecture. The evidence fails to show that the defendant Smith could have discovered the peril in which Joseph Robert Jones had placed himself, or that he had the time and means to avoid the injury to Joseph Robert Jones after he discovered or should have discovered the boy's perilous position, and that he negligently failed to use this time to avoid the injury. Plaintiff's evidence does not disclose where the plaintiff's minor son was after he left the truck operated by his brother; what he was doing; how he crossed the road; whether he ever looked for traffic at all, whether he looked, saw defendant's car and decided he could make it across. The trial court correctly refused to submit the doctrine of last clear chance to the jury. In order for the evidence to be such as to justify a finding in favor of the party having the burden of proof, "the evidence must do more than raise a suspicion, conjecture, guess, possibility or chance; it must reasonably tend to prove the fact in issue, or reasonably conduce to its conclusion as a fairly logical and legitimate deduction." Stansbury, N. C. Evidence 2d, § 210, p. 539.

The judgment entered below is

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

BESSIE PRICE (WIDOW) v. TOMRICH CORPORATION AND WILLIAMS E. ARANT, JR., TRUSTEE FOR FIRST UNION BANK

No. 6814SC465

(Filed 15 January 1969)

1. Adverse Possession § 17— color of title — commissioner's deed

Commissioner's deed executed in 1952 in a judicial sale to plaintiff's predecessor in title, with description embracing the tract in controversy, *is held* to constitute color of title, and it is not necessary to rely upon the 1963 proviso to G.S. 1-38 providing that commissioners' deeds in judicial sales constitute color of title.

2. Adverse Possession § 17— color of title — where deed passes title to part of land

The fact that an instrument passes title to a part of the land in its description does not prevent it from being color of title to that part to which it does not convey good title but which is embraced within its description.

3. Adverse Possession § 25— color of title — sufficiency of evidence

Where the descriptions in plaintiff's and defendant's respective deeds embrace in part the same land, plaintiff's evidence is sufficient to establish *prima facie* case of seven years' adverse possession under color of title as to the controverted land, where evidence tends to show that (1) the land has been held by plaintiff and her predecessor in title since 1952 under known and visible boundaries conforming to the descriptions in plaintiff's deed and that (2) the land in question was hilly with small streams on it, that plaintiff's predecessor in title grew timber and built fish ponds on the property, and that plaintiff in recent years had received approximately $300 annually in fishing fees from fishermen using the ponds.

4. Adverse Possession § 4— lappage in descriptions of deeds

Where the descriptions in plaintiff's and defendant's respective deeds embrace in part the same land, and plaintiff is in possession of the lappage and defendant is not, title to the entire lappage is perfected in plaintiff if he establishes adverse possession of the lappage, or a part thereof, for seven years under color of title.

5. Adverse Possession § 1— defined

Adverse possession means actual possession with an intent to hold solely for the possessor to the exclusion of others and is denoted by the exercise of repeated acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible.

6. Adverse Possession § 25— sufficiency of evidence — acts of trespass v. acts of continuous use

Proof of intermittent acts of trespass is not sufficient to overrule a motion to nonsuit upon the issue of adverse possession, but evidence of continuous possession by using the land for the purposes for which it was ordinarily susceptible, even though such acts were seasonal or intermittent, is sufficient.

7. Trial § 21— nonsuit — consideration of evidence

On a motion to nonsuit, plaintiff's evidence is to be taken as true and must be considered in the light most favorable to her, giving her the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence.

APPEAL by plaintiff from *Godwin, S.J.*, at the 22 July 1968 Session of DURHAM Superior Court.

Plaintiff filed her complaint and request for restraining order on 25 May 1968, alleging that she was the owner of a tract of land containing 77.75 acres, more or less, in the area of Durham known as Bragtown; that during the month of May 1968, agents of the defendant corporation entered upon a portion of plaintiff's land, leveled it, uprooted trees, removed topsoil, and committed other acts of trespass; that they threatened and planned to cut a hole in the dam of a pond belonging to plaintiff, which would cause it to be drained. She alleged that such harm would be immeasurable and irreparable and prayed for temporary and permanent restraining orders and damages in the amount of $5500.00.

The defendant corporation answered 26 June 1968, denying any trespass on lands of plaintiff and alleging that the acts complained of were committed on land belonging to it.

On 23 July 1968, plaintiff, by leave of court, amended her complaint to allege that she and her predecessors in title had been in possession of the property in question for more than fifteen years, under known and visible boundaries, and had made such use of the property as was consistent with ownership and adverse to ownership or possession by any other party. Defendants filed answer, denying all allegations of the amendment.

At the close of plaintiff's evidence, the court allowed defendants' motion for involuntary nonsuit. Plaintiff excepted and appealed to this court.

Bryant, Lipton, Bryant & Battle by Victor S. Bryant for plaintiff appellant.

Powe, Porter & Alphin by E. K. Powe and Willis P. Whichard for defendant appellees.

BRITT, J.

The crucial question presented by this appeal is whether the evidence offered by plaintiff, when considered in the light most favorable to her, was sufficient to make out a *prima facie* case and

thus withstand defendants' motion for compulsory nonsuit. We think that it was.

The parties stipulated the following: All lands owned and claimed by both plaintiff and defendants in this action were owned by one Hawkins Chisenhall by virtue of a commissioner's report and final decree in a partition proceeding entered in September 1887. The 2.82 acres of land in controversy is designated as tract A on a plat prepared by one Love, R.L.S. Defendant corporation has record title to tracts A, B and C, and plaintiff has record title to tract H, as shown on said plat, through mesne conveyances from Hawkins Chisenhall. Charles W. White, Commissioner, executed and delivered to Dr. J. Y. Hinson a deed for tracts A and H, said deed bearing date of 5 December 1952 and recorded on 8 December 1952. Plaintiff is the sister and devisee of Dr. Hinson and succeeded to his interests in tracts A and H by virtue of his will probated 4 April 1963. Plaintiff claims ownership of tract A under color of title by adverse possession.

The plat aforesaid indicates that the lands claimed by plaintiff, a total of approximately 77.75 acres, are pear-shaped, tract A being triangular-shaped and fitting into the southwestern portion of tract H. The plat indicates that defendants' tracts B and C, containing approximately 25 acres, lie south of plaintiff's land and are somewhat rectangular in shape with tract A being an appendage extending off from the northeastern portion.

Charles W. White, as a witness for plaintiff, testified that after being appointed commissioner to sell the lands later conveyed by him to Dr. Hinson, he employed one Hunter Jones, a surveyor, to survey and plat the property purportedly owned by the decedent, David Chisenhall, whose land was being sold to make assets; that Surveyor Jones provided him with plats of the property and that a metes and bounds description made from the plat was used in the notice of sale and in the deed to Dr. Hinson; that the 2.82 acres in question were included in the plat and in the descriptions.

Plaintiff claims title under G.S. 1-38 which requires possession by the plaintiff and her predecessors, under known and visible lines and boundaries and under color of title, for seven years. We will discuss the three requirements in reverse order.

[1, 2] The deed from Charles W. White, Commissioner, to Dr. Hinson, dated 5 December 1952, recorded 8 December 1952, and with description embracing tracts A and H, clearly constituted color of title. *Perry v. Bassenger,* 219 N.C. 838, 15 S.E. 2d 365. The fact

that an instrument passes title to a part of the land embraced in its description does not prevent it from being color of title to that part to which it does not convey good title but which is embraced within its description. *Trust Co. v. Miller,* 243 N.C. 1, 89 S.E. 2d 765. It is not necessary to rely upon the proviso to G.S. 1-38, enacted in 1963, providing that commissioners' deeds in judicial sales constitute color of title.

[3] Plaintiff's evidence was sufficient to meet the test as to "known and visible boundaries." Prior to the commissioner's sale in 1952, lines were surveyed and marked and corners indicated according to established practice, and the commissioner's deed contained a metes and bounds description conforming thereto. Witnesses testified that they were able to "walk the lines" of the lands claimed by plaintiff from the markings as late as 1963, and a registered surveyor testified he had no difficulty in 1968 finding the lines and corners in the disputed area made by Surveyor Jones in 1952.

[4] Finally, we come to the requirement of possession for seven years, which possession must be adverse. It is obvious that a question of lappage is involved and in *Vance v. Guy,* 224 N.C. 607, 31 S.E. 2d 766, in an opinion by Stacy, C.J., we find that the following pertinent rules relating to lappage have been established by the decisions:

1. Where the title deeds of two rival claimants to land lap upon each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title. *Penny v. Battle,* 191 N.C. 220, 131 S.E. 627.

2. If one be seated on the lappage and the other not, the possession of the whole interference is in the former. *Shelly v. Grainger,* 204 N.C. 488, 168 S.E. 736; *Currie v. Gilchrist,* 147 N.C. 648, 61 S.E. 581.

3. If both have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other. *McLean v. Smith,* 106 N.C. 172, 11 S.E. 184; *Asbury v. Fair,* 111 N.C. 251, 16 S.E. 467.

We agree with plaintiff's contention that rule 2 applies to the instant case. In *Currie v. Gilchrist, supra,* it is said: "* * * [I]f the party claiming under the senior title is not in possession of any part of the lappage and his adversary has been in actual possession of a part under a deed which defines his boundaries and is color of

title, the law extends his possession to the whole of the lappage, and if he retains the possession for the time required by the statute, seven years, and it is adverse, it will bar the right of entry of the other party and defeat his recovery." That this is settled law is shown by *Lane v. Lane,* 255 N.C. 444, 121 S.E. 2d 893; *Trust Co. v. Miller, supra; Whiteheart v. Grubbs,* 232 N.C. 236, 60 S.E. 2d 101; *Vance v. Guy, supra;* and *Berry v. Coppersmith,* 212 N.C. 50, 193 S.E. 3. See also 1 Strong, N.C. Index 2d, Adverse Possession, § 18, p. 70.

[5, 6] "Adverse possession means actual possession, with an intent to hold solely for the possessor to the exclusion of others and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. (Numerous citations)." Denny, J. (later C.J.), in *Lindsay v. Carswell,* 240 N.C. 45, 81 S.E. 2d 168. Proof of intermittent acts of trespass is not sufficient to overrule a motion to nonsuit upon the issue of adverse possession, *Lindsay v. Carswell, supra,* but evidence of continuous possession by using the land for the purposes for which it was ordinarily susceptible, even though such acts were seasonal or intermittent, is sufficient. 1 Strong, N. C. Index 2d, Adverse Possession, § 25, p. 76, citing *Everett v. Sanderson,* 238 N.C. 564, 78 S.E. 2d 408, and other cases.

[7] It is well-established law in this jurisdiction that on a motion to nonsuit, plaintiff's evidence is to be taken as true and must be considered in the light most favorable to her, giving her the benefit of every fact and inference of fact pertaining to the issues, which may be reasonably deduced from the evidence. 7 Strong, N. C. Index 2d, Trial, § 21, pp. 294, 295.

[3] The testimony of Robert Dunn tended to show that very soon after Dr. Hinson purchased the land in December 1952 he employed Dunn to "bush and bog" or plow up a considerable portion of the land, including the portion where three fish ponds were later built. Other testimony established that the dam of the southernmost fish pond was partially on the 2.82 acres in question. Dunn testified that he broke up some of the land south of the lower fish pond and that Dr. Hinson planted pulpwood trees on that land.

Plaintiff's son, Walter G. Price, testified in substance as follows: In 1957 he lived in Georgia and visited Dr. Hinson, his uncle, on the farm in November of that year. The center fish pond (located immediately north of the southernmost pond referred to above) had

just been completed. He walked around the boundaries of the farm with Dr. Hinson, beginning at a gum tree at the southern end of the property and moving clockwise. He found it easy to follow the lines and the corners and to proceed from each corner marker to the other. He described the 2.82 acres in question as being very rolling, with small streams on it, and in 1957 it was used for growing timber; that timber was all the land was capable of growing because it was rolling and parts of it subject to overflow. He returned to the farm in the Summer of 1963 and again "walked the lines." The southernmost pond had been built and stocked with fish between 1957 and 1963. The disputed land below the southernmost fish pond contained pine and hardwood trees similar to that in 1957. His brother who lived on the farm had caused a forester to mark some of the trees with paint about waist high and at the base, preparatory to selling the trees. The farm road, partly on the disputed area, was used by plaintiff and others in connection with the farm. Some of the trees on the disputed area were sold by his brother between 1963 and 1965. The defendant corporation first claimed title to the disputed area in March or April of 1968.

Plaintiff testified that during recent years she had received approximately $300.00 each year as fees from people fishing in the ponds and that most of the fishing was done in the southernmost pond. She submitted other testimony to show indicia of possession of the 2.82 acres by her and Dr. Hinson.

Defendant corporation took title to its lands by two deeds dated 13 March 1968 and recorded on 19 April 1968. It is noteworthy that each deed contained a metes and bounds description of the entire lands claimed by defendants, but immediately after the description contained the following proviso: "No warranty of title is made as to that portion of the above-described tract which is claimed by J. Y. Hinson at Deed Book 208 at page 507, Durham County Registry. Reference is hereby made to Plat Book 24 at page 49 for a more particular description of the area not warranted."

Plaintiff's evidence was sufficient to make out a *prima facie* case, and the judgment of involuntary nonsuit entered by the superior court is

Reversed.

BROCK and PARKER, JJ., concur.

CECIL D. JERNIGAN, JR. v. ATLANTIC COAST LINE RAILROAD COMPANY

No. 686SC239

(Filed 15 January 1969)

1. Trial § 21— nonsuit — consideration of evidence

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

2. Negligence § 35— nonsuit for contributory negligence

Judgment of nonsuit is proper when plaintiff's evidence, taken in the light most favorable to him, shows contributory negligence on his part so clearly that no other conclusion can be reasonably drawn therefrom, and that this negligence was a proximate cause of the injury for which plaintiff seeks to recover.

3. Railroads § 5— crossing accident — negligence of railroad — contributory negligence of motorist

In an action to recover for injuries received when plaintiff motorist collided in the nighttime with a train engine standing on a railroad crossing, plaintiff's evidence tending to show that defendant's engine was unlighted, that no audible warning of the train's presence was given, that plaintiff was familiar with the custom of the railroad to place a flagman at this crossing to warn of the presence of a train on the crossing, but that there was no flagman at the crossing when the accident occurred, that plaintiff's view of the railroad tracks was unobstructed for a distance of 72 feet, that plaintiff first saw the engine when he was ten feet from it but was unable to stop in time to avoid striking it, that signs warned approaching motorists of the railroad crossing, and that plaintiff was familiar with the crossing through past experiences, while sufficient to raise inferences of negligence on the part of defendant railroad, *is held* to establish contributory negligence by plaintiff in failing to look and listen to determine the presence of the train at a crossing with which plaintiff was thoroughly familiar.

4. Railroads § 5— railroad crossing

A railroad crossing is itself notice of danger.

5. Railroads § 5— knowledge of crossing — duty of motorist

When a motorist has knowledge that a railroad crossing lies ahead, he must exercise due care and diligence to protect himself.

6. Railroads § 6— public crossing — duty of motorist to exercise due care

Failure of trainmen to give timely warning of the approach of a train to a public crossing does not relieve a traveler on the highway of his duty to exercise due care for his own safety.

7. Railroads § 6— public crossing — custom of having flagman at crossing

A motorist familiar with the custom of the railroad to have a flagman

at a grade crossing to warn of approaching trains has the right to place some reliance on the custom, but is not entitled to rely entirely thereon and omit the exercise of all care for his own safety.

8. Railroads § 5— knowledge of crossing — duty of motorist

A motorist is required to look and listen to ascertain whether a train is sitting in his lane of travel when he has knowledge of the existence of a railroad crossing.

9. Railroads § 5— illusion of an open crossing — duty of motorist

In an action for injuries received by a motorist who collided in the nighttime with a train engine standing on a crossing, conceding defendant's engine blocked only a portion of the crossing so that the view of lights on the opposite side of the crossing gave plaintiff the illusion of an open crossing, plaintiff was not thus relieved of the duty to exercise due care at the crossing.

APPEAL by plaintiff from *Copeland, J.*, at the February 1968 Civil Session, Superior Court of HALIFAX.

Plaintiff instituted this action on 7 October 1964 seeking damages for injuries received when his car collided with a train in Weldon, North Carolina. The accident in question occurred on West Third Street which ran generally east and west. The street had two lanes, one for eastbound traffic and one for westbound traffic.

There are three railroad tracks crossing West Third Street in the town of Weldon. These railroad tracks run generally in a north-south direction. When one is traveling east on West Third Street, there is a decline which begins approximately 100 yards west of the railroad crossing. The decline is steep so that one traveling in an easterly direction cannot see the railroad track until he crosses the crest of the hill and starts downward. After crossing the railroad tracks, going in an easterly direction, there is an incline. There is an overhead railroad trestle located 72 feet west of where the three railroad tracks cross West Third Street. This overhead trestle is supported by an abutment which is 14 to 15 feet wide, is approximately 18 inches thick, and is 16 feet tall. The street is clear between this overhead trestle and the point where the railroad tracks cross West Third Street.

The plaintiff alleged that the railroad company was negligent in allowing an unlighted or improperly lighted engine partially to block his lane of travel; that the defendant, for many years, had provided a flagman at this crossing, but failed to do so when this accident occurred; and, that the railroad company did not keep a proper lookout for the plaintiff and did not warn him of the presence of the engine by ringing the bell or blowing the whistle.

The defendant answered, denying negligence, and pleaded contributory negligence of the plaintiff as a proximate cause of his injury and as a bar to recovery.

At the close of the plaintiff's evidence, on motion of the defendant, the court entered judgment of involuntary nonsuit. The plaintiff appeals.

Allsbrook, Benton, Knott, Allsbrook & Cranford by Richard B. Allsbrook for plaintiff appellant.

Spruill, Trotter & Lane by Charles T. Lane for defendant appellee.

MORRIS, J.

[1] In considering a motion for judgment of nonsuit made by a defendant, all of the evidence favorable to the plaintiff must be taken as true and interpreted in the light most favorable to him. *Champion v. Waller,* 268 N.C. 426, 150 S.E. 2d 783; *Lienthall v. Glass,* 2 N.C. App. 65, 162 S.E. 2d 596.

[3] The evidence presented at the trial below would permit the jury to find the following to be the facts in this case:

On the night of 6 October 1961, the plaintiff and one other person had been working on a cottage located on the Roanoke River near Weldon, North Carolina. At approximately 1:00 a.m. on 7 October 1961, the plaintiff left the cottage to take his helper to his car. They traveled west on West Third Street. When they came to the railroad crossing previously described, a flagman stopped them. The train, at this time was "just sitting" on the track. Plaintiff and his helper waited approximately five minutes before the engine moved and the flagman waved them on. The plaintiff traveled approximately two miles on West Third Street (the same as Highway 158) toward Roanoke Rapids. After putting his helper out, he drove east on Highway 158, or West Third Street, back toward Weldon and the railroad crossing. He was traveling at approximately 35 miles per hour when he crossed the hill crest located approximately 100 yards west of the railroad crossing and started down the decline. He began reducing his speed. He could not see the railroad tracks before he crossed this hill crest. He slowed down further as he was under the overhead trestle located approximately 72 feet west of the railroad tracks. At this point the plaintiff, looking east, could see both sides of the street beyond the railroad tracks. He could see a stop light located on Washington Avenue, lights under a service

station located just east of the railroad tracks, and street lights located on West Third Street, east of the railroad crossing; however, none of these lights threw any light on the railroad tracks. As the plaintiff moved under the overhead trestle and toward the railroad tracks, he was traveling approximately 15 miles per hour. When he was approximately 10 feet from the third set of railroad tracks he first saw the train engine. It was projecting approximately five feet into his lane of travel and was not in motion. Plaintiff applied his brakes, but did not stop in time; his automobile struck the engine, and, as a result, the plaintiff was seriously injured. At the time of the accident, plaintiff's eyes were in excellent condition and the headlights on his car were in good working order. His headlights did not pick up the train until he was at the bottom of the hill and started across the railroad tracks; at this point the engine was directly in front of him. The plaintiff did not see any lights on the engine, nor did he hear a whistle or other warning before the collision. Also, the defendant did not have a flagman at the crossing.

Other evidence, offered by the plaintiff, tended to show that it was the practice of the railroad to have a flagman at the crossing whenever the train was there.

The engine was black with reflectorized strips running the full length of the engine. The plaintiff had lived in Weldon for approximately 10 years, was aware of the railroad crossing, and was aware that it was the practice of the railroad to use a flagman at this crossing. There is a round yellow sign, indicating a railroad crossing, approximately 500 feet west of where the accident occurred. There is another cross arm sign, indicating a railroad crossing ahead, just west of the overhead trestle.

[2, 3] While the evidence presented by the plaintiff raises sufficient inferences of negligence on the part of the defendant railroad for submission of the question to the jury, it has long been the rule in this State that judgment of nonsuit is proper when the plaintiff's evidence, taken in the light most favorable to him, shows negligence on his part, and that this negligence was a proximate cause, or one of the proximate causes, of the injury for which the plaintiff seeks to recover. The plaintiff's evidence must show contributory negligence on his part so clearly that no other conclusion can be reasonably drawn therefrom. *Price v. Railroad,* 274 N.C. 32, 161 S.E. 2d 90; *Ramey v. R. R.,* 262 N.C. 230, 136 S.E. 2d 638; *Herndon v. R. R.,* 234 N.C. 9, 65 S.E. 2d 320; *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137.

"The rule is firmly embedded in our adjective law to enter a

judgment of nonsuit on the theory of contributory negligence when plaintiff's own evidence, considered in the light most favorable to him, shows negligence on his part proximately contributing to his injury, so clearly that no other conclusion can be reasonably drawn therefrom. . . . The plaintiff thus proves himself out of court. . . . The very term 'contributory negligence' implies that it need not be the sole cause of the injury." *Ramey v. R. R., supra.*

[3] The evidence in this case, when taken in the light most favorable to the plaintiff, shows that the plaintiff could see the railroad tracks when he crossed the crest of the hill. His view of the tracks was completely unobstructed after he went under the overhead trestle, a distance of 72 feet from where the accident occurred. There were signs which gave warning that there was a railroad crossing ahead, and further, the plaintiff was familiar with this crossing through past experiences.

[4-6] A railroad crossing is itself notice of danger. When a person has knowledge that a railroad crossing lies ahead he must exercise due care and diligence to protect himself. *Bennett v. R. R.,* 233 N.C. 212, 63 S.E. 2d 181; *Price v. Railroad, supra.*

". . . a traveler has the right to expect timely warning, . . . but the failure to give such warning would not justify the traveler in relying upon such failure or in assuming that no train was approaching. It is still his duty to keep a proper lookout. . . . 'A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty.' " *Godwin v. R. R., supra.*

[7, 8] Speaking on the right of a person to rely on the custom of the railroad to use a flagman at a crossing, our Supreme Court in *Ramey v. R. R., supra,* said:

"Plaintiff had the right to place some reliance on the custom or usage of the defendant when one of its trains was approaching this grade crossing, where a bank to his right partially obscured his view of its tracks, to have a flagman there and its whistle blowing and bell ringing, and to stop the train at the grade crossing until the flagman waved it to proceed, with which custom and usage he was familiar. *Johnson v. R. R., supra* (255 N.C. 386, 121 S.E. 2d 580); *Oldham v. R. R.,* 210 N.C. 642, 188 S.E. 106; *Southern Ry. Co. v. Whetzel,* 159 Va.

796, 167 S.E. 427; 75 C.J.S., Railroads, § 939; 44 Am. Jur., Railroads, §§ 561 and 562. However, this rule does not mean that plaintiff could rely entirely on a proper performance on the part of defendant of its custom and usage there, and omit the exercise of all ordinary care on his part for his own safety, because it was his legal duty to take such precautions for his own safety as an ordinarily prudent man would take under the same or similar circumstances. *Johnson v. R. R., supra; Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370; *McCrimmon v. Powell*, 221 N.C. 216, 19 S.E. 2d 880; *Miller v. R. R.*, 220 N.C. 562, 18 S.E. 2d 232; *Godwin v. R. R., supra;* 75 C.J.S., Railroads, §§ 939 and 763; 44 Am. Jur., Railroads, § 480, p. 719."

In *Irby v. R. R.*, 246 N.C. 384, 98 S.E. 2d 349, our Supreme Court said:

"In the instant case plaintiff knew that he was approaching a railroad, and he knew he was entering a zone of danger. He was required before entering upon the track to look and listen to ascertain whether a train was approaching." (Quoted in *Price v. Railroad, supra.*)

We think that a party is also required to look and listen to ascertain whether a train is sitting in his lane of travel when he has knowledge of the existence of a railroad crossing. Or, as stated by Pless, J., in *Cecil v. R. R.*, 269 N.C. 541, 153 S.E. 2d 102, "With that knowledge, he must remember that it is always train time at a railroad crossing — and the train has the right of way. Motorists must recognize that the tracks constitute a deadly warning that a train may be coming and that they must protect themselves by diligently using their senses for self-preservation."

[9] Plaintiff argues that since the engine was only partially blocking his lane of traffic and he was able to see up West Third Street past the railroad crossing, this created an "illusion of an open crossing". Conceding only for the sake of argument that this is true, the creation of an "illusion of an open crossing" would tend to establish negligence on the part of the defendant railroad; however, it does not relieve the plaintiff of the obligation to exercise due care at a railroad crossing. In *Young v. R. R.*, 266 N.C. 458, 146 S.E. 2d 441, our Supreme Court, although deciding the case under Ohio Law, held, with approval, that the issue of negligence on the part of the defendant railroad should be submitted to the jury where it was shown that the defendant had created an "illusion of an open crossing". It is important to note that the plaintiff in the *Young* case was a passenger and not the driver. The Court was not deciding the

question of the driver's negligence. The Court, however, does state that if the driver were found to be negligent, his negligence would not be imputed to the plaintiff-passenger.

As stated in *Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370:

"It does not suffice to say that plaintiff stopped, looked, and listened. His looking and listening must be timely, *McCrimmon v. Powell, supra,* so that his precaution will be effective. *Godwin v. R. R., supra.* It was his duty to 'look attentively, up and down the track,' in time to save himself, if opportunity to do so was available to him. *Harrison v. R. R., supra* (194 N.C. 656, 140 S.E. 598); *Godwin v. R. R., supra. Here the conditions were such that by diligent use of his senses he could have avoided the collision. His failure to do so bars his right to recover. Godwin v. R. R., supra.*" (Emphasis added.)

[3] Plaintiff's own evidence, considered in the light most favorable to him, shows a failure by him to exercise that degree of care which the law requires when one is aware that he is approaching a railroad crossing. No other conclusion can be reasonably drawn therefrom.

The decision below is

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

GIRARD TRUST BANK v. F. E. EASTON
No. 688SC242

(Filed 15 January 1969)

1. Appeal and Error § 6— orders appealable — motion to strike

Notwithstanding Rule 4(b) of the Rules of Practice in the Court of Appeals, when a motion to strike an entire further answer or defense is granted, an immediate appeal is available since such motion is in substance a demurrer.

2. Appeal and Error § 6— orders appealable — motion to strike

Where a motion to strike allegations and prayer for relief relating to punitive damages is granted, the order is treated as a demurrer for failure to allege facts sufficient to constitute a cause of action, and an immediate appeal is available.

3. Appeal and Error § 2— matters reviewable — appeal from order striking entire cause of action

Where appeal is taken from an order striking an entire cause of action, the appeal brings up the entire case for review.

4. Pleadings § 42— striking of pleadings — irrelevant allegations

Allegations concerning conduct of a corporation not a party to the cause of action are held irrelevant and are properly stricken.

5. Pleadings § 42— striking of pleadings — evidential matters

Where defendant has denied material allegations of the complaint, narration in his further answer of evidential matters tending to sustain defendant's denial of the controverted facts is irrelevant and should be properly stricken.

6. Damages § 12; Pleadings § 42— striking of pleadings — punitive damages

Allegations in defendant's further answer which assert a cause of action for breach of contract, but which are insufficient to state a cause of action in tort, will not support an award of punitive damages, and allegations relating to the recovery of such damages are properly stricken on motion.

7. Pleadings § 42— striking of pleadings — repetitious allegations

It is proper to strike repetitious allegations from the pleadings. G.S. 1-135.

8. Damages § 9— pleading mitigation of damages

The doctrine of mitigation of damages does not constitute a cause of action and therefore may not be pleaded as such, although it may be pleaded as a further defense but not repetitiously.

APPEAL by defendant from *Fountain, J.*, 29 February 1968 Session of Superior Court of WAYNE County.

This civil action was instituted by the plaintiff for the recovery of balances allegedly due it from the defendant under the terms of two contracts entered into by the parties. On 26 April 1963 the parties entered into a "Dealer Floor Plan Agreement" for the purpose of enabling the defendant to finance the purchase of mobile homes to be resold on the retail market. Prior to this agreement, the parties had entered into a "Financing Agreement" whereby the plaintiff had agreed to purchase from the defendant certain installment sales contracts and conditional sales contracts which the defendant might receive on the sale of mobile homes. It was agreed that should it become necessary to repossess a mobile home described in one of these sales contracts, the defendant would repurchase such mobile home from the plaintiff. It is alleged that the defendant was in violation of the terms of these contracts and that the plaintiff

took possession of certain mobile homes and instituted this action for the recovery of an aggregate sum of $40,741.06, after the defendant refused to make payments as required by the "Dealer Floor Plan Agreement" and refused to repurchase several repossessed mobile homes from the plaintiff. The defendant filed answer denying the material allegations of the complaint, and in addition, filed what purports to be four further answers and included therein counterclaims for actual damages and punitive damages.

On motion of the plaintiff, the trial court struck portions of the first further answer, the entire second further answer, portions of the third further answer, none of the fourth further answer, and portions of the prayer for relief. The defendant excepted to the allowance of this motion to strike and appealed to the Court of Appeals, assigning error.

Dees, Dees, Smith & Powell by William L. Powell, Jr., for plaintiff appellee.

Braswell & Strickland by Roland C. Braswell and David M. Rouse for defendant appellant.

MALLARD, C.J.

[1-3] Ordinarily, Rule 4(b) of the Rules of Practice in the Court of Appeals of North Carolina precludes an appeal "from an order striking or denying a motion to strike allegations contained in pleadings." However, when a motion to strike an *entire* further answer or defense is granted, an immediate appeal is available since such motion is in substance a demurrer. *Insurance Co. v. Surety Co.*, 1 N.C. App. 9, 159 S.E. 2d 268. Likewise, where a motion to strike allegations and a prayer for relief relating to punitive damages is granted, the order is treated as a demurrer for failure to allege facts sufficient to constitute a cause of action, and an immediate appeal is available. *King v. Insurance Co.*, 273 N.C. 396, 159 S.E. 2d 891. In the case of *Sharpe v. Pugh*, 270 N.C. 598, 155 S.E. 2d 108, Justice Bobbitt said:

> "Even so, since plaintiff was entitled to appeal as a matter of right from the portion of the order which in effect sustained a demurrer to the alleged cause of action for personal injuries, that is, pain and suffering, the entire case is before us; . . ."

The exceptions taken by the defendant are properly before us, *Cecil v. R. R.*, 266 N.C. 728, 147 S.E. 2d 223.

[4, 5] In the first further answer defendant makes allegations

concerning conduct of New Mobile Homes, Inc., which is not a party to this cause of action. These are irrelevant and were properly stricken. In the first, second, and third further answers defendant, using several paragraphs to do so, alleges in substance that the plaintiff and not the defendant breached the contracts. These were properly stricken. The rule is stated in the case of *Chandler v. Mashburn,* 233 N.C. 277, 63 S.E. 2d 553, as follows:

> "The plea of denial controverts and raises an issue of fact between the parties as to each material allegation denied, and forces the plaintiff to prove them. That is all that is required of the defendant to admit of presentation of his defense. McIntosh N. C. P. & P. 461. In such case the defendant may show any facts which go to deny the existence of the controverted facts. *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412. Hence, averments narrating evidence which defendant contends sustains his denial of the controverted facts are irrelevant as pleading, and have no place in the answer.
>
> And upon motion of any party aggrieved, aptly made, the court may strike out irrelevant or redundant matter inserted in a pleading. G.S. 1-153. *Revis v. Asheville,* 207 N.C. 237, 176 S.E. 738."

[6] In the first, second, and third further answers appear allegations which in substance attempt to assert a cause of action for punitive damages. In the prayer for relief there appears a request that the defendant be allowed punitive damages.

These allegations are proper only if defendant is able to allege a cause of action for punitive damages for the plaintiff's alleged breach of contract. In *King v. Insurance Co., supra,* we find the following language:

> "With the exception of a breach of promise to marry, punitive damages are not given for breach of contract. (citations omitted) An apparent exception to this rule is found in cases where such damages have been allowed for a breach of duty to serve the public by a common carrier or other public utility. (citations omitted) In those instances, there is frequently a contractual relationship between the parties, but the award of punitive damages is upon the ground that the carrier or utility has violated a duty imposed upon it by law to serve those who apply. . . .
>
> . . .

> The allegations in the complaint that the breach of contract by the defendant was 'wilful', 'intentional,' in 'wanton disregard of the rights of the plaintiff' and 'calculated * * * to hamper, prevent and impair the plaintiff's legal position' . . . do not give rise to a cause of action sounding in tort and, therefore, do not constitute allegations of fact which if proved, would subject the defendant to liability for punitive damages.
>
> There was, therefore, no basis alleged in the complaint for an award of punitive damages. The striking of the allegations with reference to such award and the prayer therefor did not in any way impair the right of action alleged in the remaining portions of the complaint for the recovery of compensatory damages arising from the alleged breach of contract by the defendant."

We are of the opinion that the combined allegations in these further answers do not give rise to a cause of action sounding in tort and, therefore, do not constitute allegations of fact which, if proved, would subject plaintiff to liability for punitive damages. We hold that the trial judge was correct in ordering stricken all allegations relating to the award of punitive damages found in the first three further answers and the prayer for relief. In addition, the action of the trial judge was correct in striking the other indefinite and speculative allegations therein.

The defendant's second further answer also alleges in substance that the defendant was a third party beneficiary of contracts entered into by the plaintiff and two mobile home manufacturers, that the plaintiff has breached these contracts, and the defendant has been damaged. In this second further answer there is the second attempt to allege that the plaintiff has permitted the deterioration of the mobile homes that the plaintiff had taken from the sales lot of the defendant and that the defendant's credit position has been damaged by the acts of the plaintiff. These are in addition to the allegations that the acts of the plaintiff were wilful, intentional, malicious, and done with the intent of injuring the defendant and that the plaintiff has breached the contracts between the parties. It should be noted that the defendant's allegations as to mitigation of damages in the first further answer were not stricken.

[7] The defendant's answer must contain "a statement of any new matter constituting a defense or counterclaim, in *ordinary and concise language, without repetition.*" G.S. 1-135. (emphasis added) In the present case the defendant has failed to heed the words of the statute. Those portions of the second further answer which relate to allegations of a failure to minimize damages and breach of

contract are merely repetitions of allegations found elsewhere in the pleadings that were not stricken by Judge Fountain. Clearly, it was proper to strike these repetitious allegations from the defendant's pleading, G.S. 1-135, and those portions relating to punitive damages. *King v. Insurance Co., supra.*

[8] In his brief the defendant asserts that the allegations relative to the third party contract are proper because "they assert the defense that the plaintiff's claimed damages should be reduced because it failed to take reasonable steps to minimize its damages under the contract." With this contention of the defendant, as to minimizing damages, we agree. However, the doctrine of mitigation of damages does not constitute a cause of action and, therefore, may not be pleaded as such. *Scott v. Foppe,* 247 N.C. 67, 100 S.E. 2d 238. It may be pleaded as a further defense but not repetitiously. G.S. 1-135.

> "Ordinarily, the equitable doctrine of mitigation of damages is a defense to an action in which the plaintiff seeks to recover for damages allegedly caused by a breach of duty on the part of defendant and does not constitute a cause of action. . . . 'Mitigation of damages is what the expression imports, a reduction of their amount; not by proof of facts which are a bar to a part of the plaintiff's cause of action, or a justification, *nor of facts which constitute a cause of action in favor of the defendant;* but rather of facts which show that the plaintiff's conceded cause of action does not entitle him to so large an amount as the showing on his side would otherwise justify the jury in allowing him." *Scott v. Foppe, supra.*

The fourth further answer is in fact a motion by the defendant to require the plaintiff to furnish him with certain records. No part of this fourth further answer was stricken.

We note that Judge Fountain's order provided "that defendant shall have thirty days within which to file an amended Answer or otherwise plead." Defendant may now so amend or otherwise plead if he should desire.

The order allowing the motion to strike is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. CHARLES E. JOHNSON, ALIAS CHARLES E. JONES, AND HERMAN NATHANIEL McCOY

No. 687SC236

(Filed 15 January 1969)

1. Criminal Law § 75— admissibility of pre-Miranda confession at post-Miranda trial

In a trial which began in 1968 after the decision of *Miranda v. Arizona*, 384 U.S. 436, the court properly admitted incriminating statements made by defendants to police officers during an in-custody interrogation in 1963, notwithstanding the officers failed to advise defendants that they had a right to have an attorney present during the interrogation and that they had a right to an appointed counsel if they were indigent, where the police officers complied with constitutional standards applicable at the time the statements were made.

2. Constitutional Law § 30— speedy trial

The fundamental law of this State grants to every accused the right to a speedy trial.

3. Constitutional Law § 30— speedy trial

There is no statutory formula dictating the time within which a criminal trial must be had.

4. Constitutional Law § 30— speedy trial

Whether an accused has been granted or denied a speedy trial is to be determined in the light of the facts and circumstances of each particular case, and absent a statutory standard, what is a fair and reasonable time is within the discretion of the court.

5. Constitutional Law § 30— speedy trial — convicts and prisoners

The fact that the accused is in prison serving time for another offense does not mitigate against his right to a speedy trial.

6. Constitutional Law § 30— speedy trial — factors considered

The four interrelated factors to be considered in determining whether defendant has been denied his constitutional right to a speedy trial are: (1) the length of delay, (2) the reason for the delay, (3) prejudice to defendant, and (4) waiver by defendant.

7. Constitutional Law § 30— speedy trial — necessity for request and showing of prejudice

In this prosecution for an offense of armed robbery which occurred in October 1963, warrants for this offense were issued and read to defendants on 1 November 1963 while they were in jail awaiting trial on charges pending in two other counties, defendants entered pleas of guilty to the charges in those counties in November and December 1963 and began serving prison sentences, detainers were filed with the Department of Correction in October 1967 and defendants were so notified, indictments against defendants were returned in November 1967, counsel was appointed in January 1968, and the trial was had in March 1968. *Held:* Defendants

were not denied their rights to a speedy trial by the delay of four years and four months between the issuance of the warrants and the trial where defendants, having knowledge of the warrants, made no request to be brought to trial, there is no evidence that any prospective defense witness could not be located for the trial, and the indictment was not returned earlier because a third person was being sought as a suspect in the crime.

8. Constitutional Law § 30— waiver of speedy trial

An accused waives his right to a speedy trial unless he demands it.

9. Constitutional Law § 30— speedy trial — prejudice — possibility of concurrent sentence at earlier trial

In an armed robbery prosecution, a delay of some four years and four months between the issuance of the warrant and the trial did not prejudice defendants by reason of the possibility that the trial judge at an earlier trial might have allowed their sentences for this offense to run concurrently with sentences for other offenses to which defendants pled guilty shortly after the warrants in this case were issued, that being a matter within the sound discretion of the trial court.

APPEAL by defendants from *Parker, J.*, 25 March 1968 Session of Superior Court of NASH.

On 1 November 1963, warrants for the arrest of defendants for the alleged offense of armed robbery were issued by the Clerk of the Nash County Recorder's Court. Defendants were, at that time, in the Wilson County jail in connection with offenses committed in Wilson County on 23 October and 28 October and an offense committed in Edgecombe County on 31 October 1963. The offense for which the Nash County warrants were issued occurred on 25 October 1963. Defendants pled guilty to the Edgecombe County and Wilson County charges and were sentenced therefor at November 1963 and December 1963 Sessions of Superior Court and began serving the sentences. On 1 November 1963 the Sheriff of Nash County with two deputies talked with defendants in the Wilson County jail. At that time the warrants were read to defendants but not served on them. Nothing further was said or done about the Nash County charges until the Nash County Sheriff filed a detainer against the defendants on 29 September 1967. The Nash County orders and detainers and warrants were received by the Department of Correction on 2 October 1967 and copies sent to defendants. Indictments were sent to the grand jury at November Session 1967, and true bills were returned charging defendants with the offense of armed robbery on 25 October 1963. At 29 January 1968 Session of Nash County Superior Court, counsel was appointed for defendants. Appointed counsel moved for continuance in order to have time

to prepare for trial. The motion was granted, and defendants were tried at the March 1968 Session, the next session of court. Not guilty pleas were entered. The jury returned a verdict of guilty as charged in the bill of indictment. At trial, defendants moved to dismiss for that their right to a speedy trial was violated. After hearing evidence, the court entered an order finding facts and denying the motion. On appeal defendants assign as error the court's denial of the motion to dismiss and the court's admitting into evidence, over objection, the alleged confessions of defendants.

Attorney General T. W. Bruton by Deputy Attorney General Ralph Moody for the State.

Cleveland P. Cherry for defendant Charles E. Johnson, alias Charles E. Jones, appellant.

R. C. Boddie for defendant Herman Nathaniel McCoy appellant.

MORRIS, J.

[1] Defendants contend that the trial court erred in admitting, over their objection, evidence with respect to statements made by defendants to the Nash County officers when they talked with defendants in the Wilson County jail on 1 November 1963. At that time, defendants were not advised that they had a right to have an attorney present during the interrogation and that they had a right to an appointed attorney if they were indigent. This, defendants argue, violates the guidelines of *Miranda v. Arizona,* 384 U.S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, and that since this interrogation took place prior to *Miranda* and the trial began subsequent to *Miranda,* the statements are inadmissible. The North Carolina Supreme Court, in *State v. Jessie B. Lewis,* 274 N.C. 438, 164 S.E. 2d 177, in an opinion written by Justice Bobbitt, said:

> "In our view, Miranda should not and does not apply to confessions obtained prior to that decision, when offered at trials or retrials beginning thereafter, where law enforcement officers relied upon and complied with constitutional standards applicable at the time the confessions were made."

There is no contention that the law enforcement officers in any way failed to comply with constitutional standards applicable at that time. On the contrary, the evidence is plenary that they did. The court did not err in admitting the statements complained of.

Defendants further contend that the court committed error in

denying their motions to dismiss for that the constitutional guaranty of a speedy trial had been denied them.

[2] The fundamental law of this State grants to every accused the right to a speedy trial. In *State v. Lowry and State v. Mallory,* 263 N.C. 536, 542, 139 S.E. 2d 870, the Court quoted the following from *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891:

> "The right of a person formally accused of crime to a speedy and impartial trial has been guaranteed to Englishmen since Magna Carta, and the principle is embodied in the Sixth Amendment to the Federal Constitution, and in some form is contained in our State Constitution and in that of most, if not all, of our sister states, or if not, in statutory provisions. *S. v. Webb,* 155 N.C. 426, 70 S.E. 1064 . . .
>
> G.S. 15-10, entitled 'Speedy trial or discharge on commitment for felony,' requires simply that under certain circumstances 'the prisoner be discharged from custody and not that he go quit of further prosecution.' *State v. Webb, supra.*
>
> The Court said in *Beavers v. Haubert,* 198 U.S. 77, 49 L. Ed. 950, 954: 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.'
>
> The constitutional right to a speedy trial is designed to prohibit arbitrary and oppressive delays which might be caused by the fault of the prosecution. *Pollard v. United States,* 352 U.S. 354, 1 L. Ed. 2d 393; *State v. Hadley,* Mo., 249, S.W. 2d 857. The right to a speedy trial on the merits is not designed as a sword for defendant's escape, but a shield for his protection."

[3] There is no statutory formula dictating the time within which trial must be had. There are, however, two statutes, G.S. 15-10 and G.S. 15-10.2, neither of which is applicable here, relating to the time within which a trial must be had. G.S. 15-10 entitled "Speedy trial or discharge on commitment for felony" is for the protection of persons held without bail. G.S. 15-10.2 entitled, *inter alia,* "Mandatory disposition of detainers — request for final disposition of charges" requires the solicitor to try a prisoner who has a detainer lodged against him and who is serving a sentence in the State prison within eight months after the prisoner shall have requested a trial as provided therein. In this case the detainer was lodged against the defendants on 29 September 1967, the defendants

did not request a trial as provided in G.S. 15-10.2, and were tried at 25 March 1968 Session of Superior Court of Nash County.

[4, 5] Whether an accused has been granted or denied a speedy trial is to be determined in the light of the facts and circumstances of each particular case, and, absent a statutory standard, what is a fair and reasonable time is within the discretion of the court. *State v. Lowry, supra;* 22A C.J.S., Criminal Law, § 467(4). The fact that the accused is in prison serving time for another offense does not militate against his right to a speedy trial. *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309.

[6] In *State v. Hollars, supra,* Justice Sharp reiterated the four generally accepted interrelated factors to be considered together in reaching a determination of whether the denial of a speedy trial assumes due process proportions. They are the length of the delay, the reason for the delay, the prejudice to the defendant, and waiver by defendant.

Applying these factors to the facts of this case, we are constrained to say that there has been no denial of constitutional protections.

[7, 8] The time elapsing here from the time the warrant was *issued* to time of trial was 4 years and 4 months. At first blush this appears to be too long. However, we think there are other factors to be considered. From the record, the warrant was not served on the defendants, although it was read to each of them, and there can be no doubt but that they knew of the real probability of being required to answer to charges in Nash County. Neither of the defendants ever requested that he be brought to trial in Nash County. North Carolina stands with the majority of the states in holding that an accused waives his right to a speedy trial unless he demands it. *State v. Hollars, supra.* See also 57 Columbia Law Review, p. 846, where it is pointed out that both the State and the accused should desire a speedy trial. Both want to preserve the means of proof of the case. From the standpoint of the State, an old case is more vulnerable to cross-examination and less easily persuades the jury. The accused is anxious to escape the public suspicion created by the accusation and the mental strain of standing accused. The right to a speedy trial, however, is the personal right of the accused, and it is not designed as a sword for his escape, "but rather as a shield for his protection." 57 Col. L. Rev., *supra,* at page 853.

It appears abundantly clear that to hold that these defendants are entitled to dismissal of this charge for lack of a speedy trial

would be allowing the principle of their right to a speedy trial to be used as a sword for their escape.

[7, 9] On 1 November 1963, defendants confessed to the crime for which they were tried and convicted by a jury. They were afforded all the constitutional guaranties. There is not a scintilla of evidence of coercion or threat or abuse. There is no evidence in this record that any witness in their behalf could not be located for their trial. There is not even any evidence that they requested any witness to testify for them. Defendants suggest that they are prejudiced by reason of a *possibility* that the trial court might have allowed their sentence for this offense to run concurrently with sentences for other offenses to which they pled guilty. That is a matter in the sound discretion of the trial court.

[7] The Nash County Sheriff testified that he could have gotten an indictment against these defendants at December 1963 Session, but did not because he wanted to find, if possible, a third person who he thought was implicated in the crime. He was not able to find that person and presented the charge to the grand jury at November 1967 Session when a true bill was returned. Defendants were not tried at the next session of court because of a request for continuance, for good cause, by defendants' court-appointed counsel. They were tried at the March Session, which was the next session of court at which they could be tried.

We do not condone the practice of long delays between the time of commission of a crime and service of the warrant or obtaining an indictment. We recognize that under some circumstances delaying the indictment and the trial on one offense after another, until time is served on each consecutively can be a denial of speedy trial. No particular intellectual gymnastics are required to see that if such a procedure is intentionally designed to extend indefinitely the punishment of an accused and postpone his liberty, his constitutional rights may be violated. Neither do we condone the filing of a detainer prior to the service of a warrant or obtaining of a true bill in violation of G.S. 15-10.

We are here concerned only with the question of whether these defendants have been deprived of a constitutional guaranty. We find that under the circumstances of this case, they have not been.

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE OF NORTH CAROLINA v. JAMES CLEVELAND HARDEE

No. 685SC248

(Filed 15 January 1969)

1. Criminal Law § 113— instructions — statement of evidence

In the instructions to the jury, recapitulation of all the evidence is not required, but the trial judge is required to state the evidence to the extent necessary to explain the application of the law thereto. G.S. 1-180.

2. Homicide § 24— instruction as to cause of death — assumption that defendant fired fatal shot

In homicide prosecution, instruction which assumed that defendant fired the fatal shot is erroneous as an expression of opinion by the trial court, since defendant's admission that he shot at the deceased and his stipulation that the cause of death resulted from gunshot wounds of the chest do not constitute an admission by defendant that he fired the fatal shot.

3. Homicide § 28— instruction on self-defense — apparent necessity

An instruction on self-defense that defendant could use no more force than was reasonably necessary is erroneous, the correct rule being that defendant could use such force as was reasonably or apparently necessary.

4. Criminal Law §§ 88, 97— recross-examination

After a witness has been cross-examined and re-examined, it is in the discretion of the trial judge to permit or refuse a second cross-examination, and counsel cannot demand it as a right.

APPEAL by defendant from *Hubbard, J.*, 1(2) January 1968, Mixed Session of Superior Court of PENDER.

Defendant was charged in a bill of indictment with the murder of Warren L. Nedley on 20 December 1966. Upon calling the case for trial the solicitor for the State announced that he "would place the defendant on trial for second degree murder". Upon defendant's plea of not guilty, trial was by jury. The verdict was guilty of manslaughter. Upon the imposition of an active prison sentence defendant appealed assigning error.

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

Burney & Burney by John J. Burney, Jr., and Rountree & Clark by George Rountree, Jr., for defendant appellant.

MORRIS, J.

The evidence for the State in substance tends to show that defendant's daughter, Marlene Hardee Nedley, married the deceased,

Warren Lee Nedley, Jr., on the night of 19 December 1966. On the afternoon of the 19th defendant went with the couple to get their blood test. Defendant also went with them to the Register of Deeds office to secure the marriage license since his daughter was under 18. Defendant signed for his daughter to get the license. Defendant asked his daughter to wait until Christmas Eve to get married, but she and Nedley went to a justice of the peace about 9:00 p.m. that same date and were married. They returned to defendant's home about 11:00 p.m. and informed defendant and his wife that they were married, at which time defendant became angry and attempted to call the justice of the peace. The deceased and Marlene interfered with the telephone so that he could not make the call. Defendant got mad and went outside the house.

Marlene fixed a sandwich and split it with her husband. After a few minutes, Marlene told her husband to go outside because "I think Daddy's mad, and he might be cutting our tires." A short time after Nedley went out, Terry Lee Hardee, brother of Marlene, hollered and Marlene and her mother started out of the house. Before reaching the yard, Marlene heard two shots. She saw her father with a .22-caliber rifle, constantly shooting, and her husband running around the car and her daddy running around the car. She did not see a weapon in her husband's hands. She saw her husband fall, and he called for help. Marlene went to her husband, and with the help of her brother, tried to get him in the car. Unable to do so, she went for help and an ambulance came for Nedley. Marlene found a pistol belonging to her husband lying on the ground near him.

Defendant's evidence tends to be substantially in accord with the testimony of his daughter Marlene, except as to what occurred just prior to and at the time of the shooting in the yard. Defendant testified that Nedley came out of the house with him, after prohibiting him from making the telephone call; that Nedley grabbed him by the arm, and when defendant snatched away, Nedley struck him on the side of his head. Defendant heard a noise, and saw that Nedley had gone to his car and was shooting at defendant with a pistol. Defendant got his rifle out of his own car and shot the glass out of Nedley's car. Defendant kept calling out to the deceased, but deceased did not answer. Defendant's clothes had two bullet holes in them. Defendant's evidence tends to show he acted in self-defense in returning the fire of the deceased.

The trial judge stated in the charge:

"Now, ladies and gentlemen, I will not repeat the evidence in

this case. It is your duty to remember what was said from the witness stand. If my recollection or that of counsel differs from your recollection, you would disregard what I said the evidence was or what counsel said the evidence was and be guided solely by your own recollection of what was said from the witness stand."

[1] The judge did not repeat the evidence or any part of it in the charge. Recapitulation of all the evidence is not required, and the statute is complied with in this respect by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. 3 Strong, N. C. Index 2d, Criminal Law, § 113. *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14. In the case under consideration, the trial judge did not recapitulate any of the evidence and did not present to the jury, in the charge, the principal features of the *evidence* relied on by the defendant. The judge in the final mandate of the charge made application of the law to situations and circumstances without stating the evidence thereof. This does not comply with the provisions of G.S. 1-180, requiring a statement of the evidence to the extent necessary to explain the application of the law thereto. *State v. Floyd,* 241 N.C. 298, 84 S.E. 2d 915. In charging the jury, the stating of abstract principles of law is not sufficient. Apparently the failure to recapitulate the evidence to the extent necessary to enable him to explain the application of the law thereto was an oversight on the part of the learned trial judge; however, his failure to do so was error prejudicial to defendant.

Defendant also excepts to and assigns as error the following portion of the judge's charge:

"When you come to consider his plea of self-defense, you should ask yourselves these questions: First, at the time of the firing of the fatal shot that took the life of Warren L. Nedley, was Mr. Hardee at a place where he had a right to be? — and the court charges you that he was at home and was at a place where he had a right to be. Two, was he himself without fault in bringing on or entering into the encounter or difficulty with Warren L. Nedley? Three, was he, Mr. Hardee, unlawfully and feloniously assaulted by Warren L. Nedley, by Nedley shooting at him or threatening to shoot at him? Four, did he, Mr. Hardee, believe and have reasonable grounds to believe that he was about to suffer death or great bodily harm at the hands of Warren Nedley? Five, did he act with ordinary firmness and prudence, under the circumstances as they reasonably appeared to him and under the belief that it was necessary to kill Nedley

in order to save his own life or to protect himself from great bodily harm? Six, did he use no more force than was reasonably necessary to repel the assault which he contends Nedley was making upon him at the time the fatal shot was fired? If you are satisfied from all the evidence and circumstances in the case that the truth requires you to answer each of these questions 'Yes,' then it would be your duty to find the defendant not guilty."

[2, 3] We think the above instruction is erroneous in two respects. (1) In the first question stated the judge expressed an opinion when he assumed that the defendant fired the fatal shot. The defendant admitted shooting *at* the deceased, and the defendant stipulated at the trial "that the cause of the death of Warren L. Nelley, Jr., was the result of gunshot wounds of the chest", but since the defendant did not admit he fired the shots causing wounds which resulted in the death of the deceased, it was for the jury, and not the judge, to say whether the defendant fired the fatal shot. (2) It is also erroneous in that the judge failed to charge the jury correctly as to the amount of force which could be used. In the above instructions, the jury was told that the defendant could use no more force than was *reasonably necessary*. The law is that the defendant could use such force as was reasonably necessary or *apparently* necessary. In the case of *State v. Francis*, 252 N.C. 57, 112 S.E. 2d 756, the Supreme Court said:

"This Court said in *S. v. Pennell*, 231 N.C. 651, 58 S.E. 2d 341:

'Ordinarily, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling, or home, or place of business, or on his own premises, the law imposes upon him no duty to retreat before he can justify his fighting in self-defense, — *regardless of the character of the assault.*' (Emphasis added) (2) It is erroneous in that the court failed to charge the jury with respect to the use of such force as was necessary or *apparently necessary* to protect the defendant from death or great bodily harm. The plea of self-defense rests upon necessity, real or apparent. *S. v. Fowler*, 250 N.C. 595, 108 S.E. 2d 892; *S. v. Goode*, 249 N.C. 632, 107 S.E. 2d 70; *S. v. Rawley*, 237 N.C. 233, 74 S.E. 2d 620. Or, to put it another way, one may fight in self-defense and may use more force than is actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. The reasonableness of such belief or apprehension must be judged by the facts and circumstances as they appear to the

> party charged at the time of the assault. As pointed out by *Moore, J.*, in *S. v. Fowler, supra,* 'The law does not require the defendant to show that he was actually in danger of great bodily harm.' Neither does it limit the force to be used in self-defense to such force as may be *actually* necessary to save himself from death or great bodily harm. But the jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which the party charged acted. *S. v. Rawley, supra,* and cases cited therein."

In the original record on appeal as part of the instructions given to the jury by the judge there appears the following, to which the defendant excepts and which is assigned as error:

> "If you find the defendant, Mr. Hardee, guilty of murder in the second degree, you need not consider whether he is guilty of manslaughter. But if you find him not guilty of murder in the second degree, then it would be your duty to find him guilty of manslaughter, as charged in the bill of indictment."

This constitutes an expression of opinion by the judge which is prohibited by G.S. 1-180 and is obviously an error. We are bound by the record. However, in an addendum to the record there appears what purports to be Exhibit One, which appears to be a letter to defendant's counsel from a court reporter. This letter is dated 21 June 1968 and apparently attempts to correct the above instruction. The court reporter states that she made an error in transcribing when she turned two leaves of her shorthand notebook at one time. It is noted, however, that counsel for the defendant and the solicitor for the State stipulated that the original record as printed "constitutes the agreed record and statement of case on appeal." The difficulty we have with a record such as this is that there was no agreement or stipulation with respect to the addendum. Although the defendant does not argue this particular point in his brief, he does refer in his brief to the exception taken. What gives us concern is whether this Court should act on what the parties stipulated, or on a purported correction appearing in a letter as an addendum. In view of the disposition of this case decision on this point is not necessary and we do not decide it.

[4] Defendant strenuously argues and contends that the court committed error in rulings on the evidence on the cross-examination of the prosecuting witness, Marlene Nedley. The defendant took 44 exceptions to the rulings of the trial judge on the second cross-examination of the prosecuting witness. The defendant, after the first examination, fully cross-examined the prosecuting witness, and no

exception was taken to any ruling of the court. Then the State propounded questions on redirect examination. Thereafter the defendant proceeded to cross-examine the witness again, and that is when the defendant contends the court committed error. The court intimated to counsel for the defendant in the absence of the jury that the reason the evidence was not admitted was because none of the testimony sought to be elicited was touched on in the redirect examination. The rule is as follows: "After a witness has been cross-examined and re-examined, it is in the discretion of the trial judge to permit or refuse a second cross-examination, and counsel can not demand it as a right". Stansbury, N. C. Evidence 2d, § 36. In addition, more than half of these exceptions were taken in the absence of the jury. We do not rule on these exceptions, since, in our opinion, the defendant is entitled to a new trial for error in the charge, and these questions may not recur on another hearing.

New trial.

MALLARD, C.J., and CAMPBELL, J., concur.

TERRY ANN EDENS, MINOR, BY HER NEXT FRIEND, F. D. EDENS v. WILBUR R. ADAMS

AND

F. D. EDENS v. WILBUR R. ADAMS

No. 685SC440

(Filed 15 January 1969)

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

On motion for judgment of compulsory nonsuit, plaintiff's evidence is to be taken as true and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence.

2. Automobiles § 63— negligence in striking child — sufficiency of evidence

In an action for personal injuries sustained by minor plaintiff when she was struck in defendant's driveway by a trailer pulled by an automobile driven by defendant, motion for nonsuit is properly allowed where the evidence neither shows nor permits a reasonable inference that defendant knew at any time that the minor plaintiff was playing in close proximity to his automobile and trailer when he started off.

3. Negligence § 26— not presumed from injury

Negligence is not presumed from the mere fact that a minor plaintiff was injured.

APPEAL by plaintiff in each case from *Bundy, J.*, August 1968 Civil Session, NEW HANOVER County Superior Court.

These two cases were consolidated for trial. In the first case, Terry Ann Edens (the minor plaintiff) sought to recover damages for personal injuries caused by the alleged negligence of the defendant. In the second case, F. D. Edens sought to recover damages for hospital care, medical attention and medical bills incurred by his daughter, the minor plaintiff, due to the alleged negligence of the defendant.

At the conclusion of the plaintiffs' evidence, defendant's motion for judgment as of nonsuit was sustained, and the cases were dismissed. Both plaintiffs appealed.

Aaron Goldberg for plaintiff appellants.

Marshall & Williams by Lonnie B. Williams for defendant appellee in each case.

CAMPBELL, J.

The only question presented is whether the plaintiffs' evidence was sufficient to establish a *prima facie* case of negligence on the part of the defendant.

[1] "'On a motion for judgment of compulsory nonsuit, plaintiff's evidence is to be taken as true, and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence. Plaintiff's evidence must be considered in the light of his allegations to the extent the evidence is supported by the allegations. . . .'" *Gibbs v. Light Co.*, 268 N.C. 186, 150 S.E. 2d 207.

Applying this rule to the instant case, the plaintiffs alleged that on 13 April 1964 the minor plaintiff, who was about three and one-half years old, and her brother, who was four and one-half years old, were in the defendant's yard watching him mix suntan lotion and load it in a trailer which was attached to his automobile; while the minor plaintiff was standing near the driveway, the defendant entered his automobile, which was parked in his own driveway; he knew the minor plaintiff was there; he negligently failed and neglected to pay heed to his surroundings or to pay proper attention and to ascertain the whereabouts of the minor plaintiff before moving his automobile; he negligently failed to blow his horn in order to alert the minor plaintiff of his intention to drive along his own

driveway; he failed to keep and maintain a proper lookout and to keep his automobile under proper control; he "negligently drove his automobile along said driveway and ran into and against said minor plaintiff"; and she sustained serious and permanent injuries as a result of this negligence.

The minor plaintiff's four and one-half year old brother, the only eyewitness to the occurrence, testified that he went to the defendant's home and watched him fill some bottles with lotion in the garage, which was located in the backyard; he did not know whether or not the defendant saw the minor plaintiff playing in the backyard; pasteboard boxes containing the bottles were loaded by defendant in the trailer which was hooked to his automobile; the minor plaintiff and another little girl, the granddaughter of the defendant, were playing in the driveway less than a yard from the automobile; after the trailer was loaded, the defendant got in the automobile to leave; the minor plaintiff came over and got in front of her brother, who was standing by a barrel, which was about four feet from the driveway and to the rear of the automobile; and when the automobile started, the trailer knocked her down. The brother did not know whether the defendant saw him and his sister standing there, but he testified that the defendant did not blow his horn when he started. The brother testified: "She ran and got in front of me, and the trailer knocked her down." He further testified: "Well, he was in the car, and my sister ran over there and got in front of me and he started off."

Shortly after the occurrence the minor plaintiff's mother and grandmother talked to the defendant. He told them that he did not know what happened, " 'but he thought he might have [hit her] when he was passing by.' " " 'The wheel of my trailer might have hit her.' "

[2] Taken in the light most favorable to the plaintiffs, the evidence neither shows nor permits a reasonable inference that the defendant knew at any time that the minor plaintiff was playing in close proximity to his automobile and trailer at the time he started off. The plaintiffs' brief assumes that the defendant had such knowledge, but this assumption is based upon a question which defendant's counsel asked the brother on cross-examination. It is not based upon any evidence in the record. In fact, the record is to the contrary since it indicates that the infant plaintiff ran over in front of her brother, who was standing in a position of safety by the barrel, after the defendant had gotten in the automobile and was preparing to leave. There is no evidence as to how long she was in

this position or as to how long she remained there before she got in between the automobile and trailer and in close proximity to the wheel of the trailer.

> "Proof of an injury, without more, does not raise a presumption of negligence. . . . Negligence is the doing of an act which a reasonable man would not do under the same circumstances, or the failure to do an act which a reasonable man would not omit under similar circumstances. An act or omission does not constitute actionable negligence unless a reasonable man could have foreseen that injury to another would be likely to occur from such act or omission. . . . 'The law does not require omniscience and proof of negligence must rest on a more solid foundation than mere conjecture.'" *McDonald v. Heating Co.*, 268 N.C. 496, 151 S.E. 2d 27.

[3] Negligence is not presumed from the mere fact that the minor plaintiff was hurt. Direct evidence of negligence is not required but the same may be inferred from facts and attendant circumstances. But in a case such as this, the plaintiff must establish attendant facts and circumstances which reasonably warrant the inference that the injury was proximately caused by the actionable negligence of the defendant. Such inference cannot rest on conjecture or surmise. The inferences contemplated by the rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff. A cause of action must be something more than a guess. A resort to a choice of possibilities is guesswork, not decision. To carry the case to the jury, the plaintiffs must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts. *Boyd v. Harper*, 250 N.C. 334, 108 S.E. 2d 598.

The judgment of involuntary nonsuit is

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

RICHARD LEE FREEMAN v. HARDEE'S FOOD SYSTEMS, INC.

No. 688SC268

(Filed 15 January 1969)

1. **Trial § 21— motion to nonsuit — consideration of evidence**
On motion for judgment of compulsory nonsuit, plaintiff's evidence is to be taken as true and considered in the light most favorable to him.

2. **Master and Servant § 10— duration of employment contract**
An employment contract which specifies the compensation at a rate per year, month, week or day but which does not specify the duration of the contract is a contract for an indefinite period terminable at the will of either party.

3. **Master and Servant § 10— duration of employment — burden of proof**
The burden is upon the employee to establish the specific duration of an employment contract.

4. **Master and Servant § 10— duration of employment contract**
An employment contract fixed the rate of compensation on a weekly basis of $165 per week the first year and $180 per week the second year with proviso that all raises thereafter would be based upon merit and length of service. No specific duration for the employment was set out. *Held:* The contract was for a general, indefinite hiring, terminable at the will of either party.

APPEAL by plaintiff from *Fountain, J.,* 28 February 1968 Session, WAYNE County Superior Court.

Plaintiff instituted this action to recover damages for an alleged breach of an employment contract between the plaintiff and the defendant. At the close of all of the evidence, the trial court sustained a motion for judgment as of involuntary nonsuit. From this judgment, the plaintiff appealed.

Sasser, Duke and Brown by John A. Duke and Herbert B. Hulse for plaintiff appellant.

George K. Freeman, Jr., and Spruill, Trotter & Lane by DeWitt C. McCotter for defendant appellee.

CAMPBELL, J.

Another phase of this case is reported in *Freeman v. Food Systems,* 267 N.C. 56, 147 S.E. 2d 590. The question in the instant case is whether or not the employment contract was for a definite term. The plaintiff contends that it was for a definite term of two years, that the termination thereof before the expiration of six months was wrongful and that this wrongful termination entitled him to damages. While admitting that the contract was entered into, the defendant denies that it was for any definite duration, particularly for a period of two years.

[1] "'On a motion for judgment of compulsory nonsuit, plaintiff's evidence is to be taken as true, and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence. Plaintiff's evidence must be considered in the light of his allegations to the extent the evidence is supported by the allegations. . . .'" *Gibbs v. Light Co.*, 268 N.C. 186, 150 S.E. 2d 207.

Applying this rule to the evidence, we find that prior to February 1965 the plaintiff lived and worked in Goldsboro, North Carolina. He answered a blind advertisement, and pursuant thereto he began negotiations with the defendant for employment. He first communicated with Mr. Looney, the personnel manager for the defendant and later with Mr. Rawls. The plaintiff testified:

> "I told Mr. Rawls that if we would enter into a contract for two years by paying me $165.00 a week the first year and $180.00 a week the second year, I would go to work for them. As a result of that conversation he wrote me a letter confirming this conversation. . . . I can identify plaintiff's 'EXHIBIT No. 1.' It is a letter from Mr. Rawls confirming our two years' agreement as to our contract with Hardee's Food Systems, from Mr. Rawls to me. I received it about the 20th of February, 1965. It was signed by Mr. J. Leonard Rawls, Jr., the President. When I received the letter I telephoned Mr. Looney and told him I would accept his offer."

All of the preliminary negotiations leading up to the employment contract were finalized in the letter dated 19 February 1965. This letter, the plaintiff's Exhibit No. 1, was a definite offer of employment, and it was this offer which the plaintiff accepted. The letter reads as follows:

"HARDEE'S
FOOD SYSTEMS, INC.
P. O. Box 1619 Phone 446-5141
1901 Sunset Avenue, Rocky Mount, N. C.

February 19, 1965

Mr. Richard Lee Freeman
Box 410-B
Salem Acres
Route Six
Goldsboro, N. C.

Dear Lee:

Thank you for coming to Rocky Mount today to discuss the position of Treasurer with us. I certainly enjoyed talking with

you again. In order that there will be no misunderstanding, I wish to restate our offer to you. Your salary would be $165.00 per week for your first year of employment. At the beginning of your second year, your salary will be raised to $180.00 per week; thereafter, all raises would be based upon merit and length of service. Also at the end of your first year, we would reimburse you for the money you had spent in employment fees (some $700). In addition, we will pay your moving costs from Goldsboro to Rocky Mount. I certainly hope that you will accept our offer and join Hardee's. The Treasurer's position will give you quite a challenge and, we think, an exceptional future. We believe that both you and your wife will be assets to our company, and we hope that you will join us.

Tom Looney has been requested to call me as soon as he hears from you. All of us hope that your reply is favorable.

Very truly yours,
s/ J. L. Rawls, Jr.
J. Leonard Rawls, Jr.
President"

Both sides admit and the evidence fully establishes an employment contract was entered into and that the plaintiff moved from Goldsboro to Rocky Mount, North Carolina, and entered into the employment of the defendant in the position of treasurer on 22 March 1965. At the time the employment terminated on 18 August 1965, the defendant paid the plaintiff $2,060.

The determination of whether an employment contract is for a definite period of time or for an indefinite period terminable at the will of either party presents a question that is by no means free of doubt. The authorities, though very numerous, are sharply conflicting. One line of cases holds that where the duration of the contract is not specified in so many words, but where the compensation is specified at a rate per year, month or week, it imports an employment for the period designated. A second line of cases holds that where the duration is not definitely specified, the contract is for an indefinite period terminable at the will of either party. The cases are collected and the variance shown in an annotation in 11 A.L.R. 469, 100 A.L.R. 834 and 161 A.L.R. 706.

[2, 3] North Carolina is correctly classified with the second line of cases. An employment contract, such as the one in the instant case, where the compensation is specified at a rate per year, month, week or day, but where the duration of the contract is not specified,

is for an indefinite period. There is no presumption that it is for any particular period of time and the rate is fixed only for whatever time the employee might actually serve. The burden is upon the employee to establish a specific duration.

In *Edwards v. R. R.*, 121 N.C. 490, 28 S.E. 137, an employment contract was based upon the following letter:

> "'10 July, 1894.—W. J. Edwards, Esq., Raleigh, N. C. Dear Sir: I beg to advise that you have been appointed general storekeeper for the system, to take effect 15 July. Your salary will be eighteen hundred dollars a year. You will be in charge, etc. John H. Winder, Gen'l Manager.'"

The plaintiff there contended that he had a year-to-year contract and that he was entitled to a full year's pay. The Supreme Court held:

> "The contract before us is not specific as to the *term* of service, certainly not so expressed in the writing. The plaintiff does not so insist, but says a reasonable construction thereof leads to the conclusion that the parties intended a one-year term of service. We are not able to see that such was their intention. It seems reasonable that if they had so intended they would have expressed themselves in more definite and explicit terms on so important a feature of their agreement. . . . It does not seem unreasonable that the parties intended that the service should be performed for a price that should aggregate the gross sum annually, leaving the parties to sever their relations at will, for their own convenience."

In *Malever v. Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436, the employment contract was for "a regular permanent job", but the employee was discharged after one week. The Supreme Court held:

> "The general rule is, that 'permanent employment' means steady employment, a steady job, a position of some permanence, as contrasted with a temporary employment or a temporary job. Ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite general hiring, terminable at will. . . . Here, the plaintiff shows a promise of permanent employment, *simpliciter*, and no more."

In *Howell v. Credit Corp.*, 238 N.C. 442, 78 S.E. 2d 146, the Supreme Court held:

> "A mere agreement to give another permanent employment, in

and of itself, implies nothing more than a general or indefinite hiring terminable at the will of either party."

To like effect, see *Long v. Gilliam*, 244 N.C. 548, 94 S.E. 2d 585; and *Tuttle v. Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249.

[4] In the instant case the employment contract fixed the rate of compensation on a weekly basis of $165 per week the first year and $180 per week the second year. The contract then provided: ". . . (T)hereafter, all raises would be based upon merit and length of service." No specific duration for the employment was set out. Since the words used show a contemplated employment of a "permanent" nature, it was "an indefinite general hiring, terminable" at the will of either party. Therefore, the plaintiff has failed to carry the burden of establishing an employment contract for a definite term of two years.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. WALTER WEAVER
No. 6815SC457

(Filed 15 January 1969)

1. Criminal Law § 86— impeachment of defendant's credibility — prior offenses

When defendant voluntarily becomes a witness in his own behalf, he is subject to cross-examination and impeachment as any other witness, and it is proper for the solicitor to ask him questions concerning his prior criminal record for purpose of impeaching him, provided the questions are based on information and are asked in good faith. G.S. 8-54.

2. Criminal Law § 86— impeachment of defendant — conclusiveness of defendant's answers

When defendant denies impeaching questions as to his prior criminal record, his answers are conclusive in the sense that they cannot be rebutted by other evidence, but the solicitor is not precluded from rephrasing his questions to include such details as the docket number of the case, the name of the court, the date of trial, the offense charged, and the sentence imposed.

3. Criminal Law § 86— impeachment of defendant — prior conviction which was set aside

While it was improper for the solicitor to cross-examine defendant con-

cerning a conviction for felonious assault when this conviction had been subsequently set aside and on retrial defendant had been convicted only of simple assault — if the solicitor knew such was the case — defendant was hardly prejudiced when he had admitted convictions for a large number of different criminal offenses committed over a long period of years.

4. Criminal Law § 163— exceptions to charge — recapitulating the evidence

Objections to the charge in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction in order that an exception thereto will be considered on appeal.

APPEAL by defendant from *Beal, J.*, June 1968 Criminal Session of ALAMANCE Superior Court.

Defendant was tried on his pleas of not guilty to four bills of indictment charging him with forgery of four checks, each of which purported to bear the signature of J. A. Walker as drawer and were made payable to one Roy Groce. At the trial J. A. Walker testified for the State that he had not signed or authorized anyone else to sign his name to any of the four checks which purported to bear his signature. Roy Groce testified that the defendant had signed all of the checks in his presence and had given them to him to apply on salary which defendant had agreed to pay to Groce for services in selling liquor for defendant. Groce further testified that he was unable to read or write anything except his own name, that he did not know that J. A. Walker's name was on the checks, and that defendant had accompanied him when he went to the stores to cash two of the checks. Groce's testimony was corroborated by the testimony of a police officer of prior consistent statements; by his sister's testimony that Groce could not read or write and that defendant had accompanied Groce and his sister when some of the checks were cashed; by a school teacher's testimony that Groce was academically slow and received social promotions; and by testimony of a friend that Groce had told him that one of the checks was a salary check.

The defendant introduced into evidence the results of a handwriting analysis made by the SBI, which reported some similarities but many variations and differences between the writing on the checks and handwriting of the defendant. Defendant also testified and denied that he had signed the checks or given them to Groce.

The jury found defendant guilty as charged in each bill of indictment. Judgments were entered in two of the cases imposing active prison sentences and prayer for judgment was continued in the other two cases. Defendant appealed, assigning errors.

Attorney General T. W. Bruton and Deputy Attorney General Harry W. McGalliard for the State.

W. R. Dalton, Jr., for defendant appellant.

PARKER, J.

Appellant's first assignment of error, based on his exceptions Nos. 1 through 8, relates to the court's overruling his objections to certain questions asked him on cross-examination by the solicitor. The defendant had taken the stand and had testified in complete contradiction to the testimony given by the State's witnesses. For purposes of impeaching his credibility the solicitor cross-examined him as to his prior criminal record. Defendant admitted convictions for a large number of different criminal offenses committed over a long period of years. However, he denied convictions of certain other offenses, and the solicitor then rephrased the questions to include such details as the docket number of the case, the name of the court, the date of the trial, the offense charged, and the sentence imposed. Defendant's objections to these rephrased questions were overruled.

[1, 2] The defendant voluntarily became a witness in his own behalf and, therefore, was subject to cross-examination and impeachment as any other witness. G.S. 8-54; Stansbury, N. C. Evidence 2d, § 108. It was proper for the solicitor to ask him questions concerning his prior criminal record for purposes of impeaching him, provided the questions were based on information and were asked in good faith. *State v. Heard,* 262 N.C. 599, 138 S.E. 2d 243; 2 Strong, N. C. Index 2d, Criminal Law, § 86, p. 607. When defendant denied certain of the impeaching questions, his answers were conclusive in the sense that they could not be rebutted by other evidence, but this did not preclude the solicitor from pressing his cross-examination of the defendant by rephrasing his questions so as to make them more specific. The defendant was an evasive witness. The rephrased questions merely pinpointed with greater particularity the exact offenses which the solicitor was inquiring about and did not amount, as appellant contends, to an attempt to introduce in the guise of a question secondary evidence of the court records. With a criminal record as long as that which defendant freely admitted having it is little wonder that it was necessary to refresh his memory by giving specifics as to some of his convictions. It should be noted that as a result of four of the eight questions objected to the solicitor succeeded in getting from the defendant outright or implied admissions of guilt. There was no error in overruling defendant's objections to the form of the solicitor's questions.

[3] Appellant's second assignment of error, based on his exception No. 9, relates to the court's overruling his objection to the solicitor asking defendant concerning a conviction for felonious assault when this conviction had been subsequently set aside and on retrial the defendant had been convicted only of simple assault. See *State v. Weaver*, 264 N.C. 681, 142 S.E. 2d 633. While is was improper for the solicitor to ask concerning a conviction later set aside if he knew such was the case, it could hardly have been prejudicial to defendant in this case. The addition of one more conviction to the long list already before the jury could not have had any appreciable effect and could not have constituted any real prejudice to the defendant. As stated by Parker, C.J., speaking for our Supreme Court in *State v. Temple*, 269 N.C. 57, 66, 152 S.E. 2d 206:

> "It is thoroughly established in our decisions that the admission of evidence which is not prejudicial to a defendant does not entitle him to a new trial. To warrant a new trial it should be made to appear by defendant that the admission of the evidence complained of was material and prejudicial to defendant's rights and that a different result would have likely ensued if the evidence had been excluded. *S. v. King*, 225 N.C. 236, 34 S.E. 2d 3; 1 Strong's N. C. Index, Appeal and Error, §§ 40 and 41."

[4] Appellant's remaining assignments of error, Nos. 3 through 20, all relate to the manner in which the trial judge recapitulated or failed to recapitulate the evidence in his charge. There was no objection that the judge failed to comply with the provisions of G.S. 1-180. Rather, appellant's contention is that in the judge's charge there was an imbalance and unequal array of the evidence for the State as compared with the evidence favorable to the defendant. We have read the entire charge carefully and compared it with the transcript of the entire evidence which was submitted to the jury. While the judge may have summarized the import of the evidence in a manner different from that which defendant might have preferred, the charge considered as a whole did, in our opinion, fairly recapitulate the evidence. The defendant made no objection at the trial to the judge's manner of recapitulating the evidence and made no suggestion or request for any other or additional statements in the charge, although he was given an opportunity to do so. "The general rule is that objections to the charge in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction, in order that an exception thereto will be considered on appeal." 3 Strong, N. C. Index 2d, Criminal Law, § 163, pp. 119-120.

This was not a complicated case, though the evidence was in sharp conflict as to defendant's guilt. It was for the jury to decide and by their verdict they have resolved the conflicts in the evidence against the contentions of the defendant. At his trial and on this appeal the defendant's court-appointed counsel has ably and diligently represented him. The entire record discloses defendant has had a fair trial free from prejudicial error.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. GERALD WHITE

No. 687SC424

(Filed 15 January 1969)

1. Arrest and Bail § 6— resisting arrest — requisites of valid indictment or warrant

In order to charge a violation of G.S. 14-223, the warrant or indictment must identify the officer alleged to have been resisted and describe his official character with sufficient certainty to show that he is a public officer, must set forth the official duty the designated officer was discharging or attempting to discharge, and must point out, in a general way at least, the manner in which defendant is charged with having resisted or delayed or obstructed such public officer.

2. Arrest and Bail § 6— resisting arrest — sufficiency of warrant

Warrant charging that defendant did resist, delay and obstruct named Rocky Mount police officers in the making of a lawful arrest "by shoving said officers and refusing to go" is sufficient to charge a violation of G.S. 14-223.

3. Criminal Law § 18; Courts § 7— determination of whether defendant appealed from recorder's court to superior court

Where defendant was convicted in the recorder's court of the crime of resisting arrest and entered a plea of former jeopardy in the superior court on the ground that he had not appealed his recorder's court conviction, evidence that the words "Papers sent up" and "Appeal Bond $200" were written on the back of the original warrant is insufficient to support the court's finding that defendant appealed to the superior court, and the cause is remanded for a determination of whether or not defendant appealed from the recorder's court to the superior court.

APPEAL by defendant from *Morris, E.J.*, at the 13 May 1968 Special Criminal Session of NASH Superior Court.

The defendant was tried on a warrant charging substantially as

follows: That he "did resist, delay and obstruct public officers, Mullens, Carter, Simmons & Massey, Rocky Mount police officers in the discharge of their duty. G.S. 14-223, to wit: the making of a lawful arrest, by shoving said officers and refusing to go."

The evidence tended to show the following: Officers Mullens and Carter discovered a break-in at Friendly Package Store on the night of 10 February 1967 and found boot tracks in the snow leading out from the back door of the store. The officers followed the tracks which led directly to a home on Pearl Street. On being admitted into the house, they found the defendant, wearing boots with insertions in the soles identical to the tracks followed from the store. The defendant started cursing and asked what the officers were doing there. When advised that he was under arrest for breaking and entering, he announced he wasn't going anywhere and shoved the officers back when they attempted to lead him out. A struggle ensued in which four officers were needed to handcuff the defendant and overcome his resistance.

The defendant contended that he resisted only after two of the officers kicked in the back door of the house and said they didn't need a warrant when he asked to see it.

Defendant was first tried in the Rocky Mount Recorder's Court where he was found guilty and sentenced to ninety days in the Nash County Jail. The only evidence of an appeal having been taken consists of the words "Papers sent up" written on the original warrant and the words "Appeal Bond $200" at the top of the verdict and judgment. There are no minutes and no notation anywhere of a notice of appeal having been given in open court.

The State took a nol pros with leave in superior court on 30 March 1967, caused the case to be reinstated on 5 January 1968, and called it for trial on 16 May 1968. The defendant entered a plea of former jeopardy, contending that he had been convicted in recorder's court and had never appealed. The court overruled the plea, finding as a fact that the defendant had appealed.

Defendant was then tried upon the warrant, convicted by the jury, and from prison sentence imposed appealed to this court.

Attorney General T. Wade Bruton and Assistant Attorney General Millard R. Rich, Jr., for the State.

John E. Davenport and T. A. Burgess for defendant appellant.

BRITT, J.

Defendant filed in this court, as he did in the trial court, a motion to quash and for arrest of judgment, contending that the warrant does not state sufficient facts to allege the crime of resisting arrest.

[1] In charging a violation of G.S. 14-223, it is necessary that the warrant or indictment, in addition to other essentials, set forth the official duty the designated officer was discharging or attempting to discharge, and must point out, in a general way at least, the manner in which defendant is charged with having resisted or delayed or obstructed such public officer. It must also allege the identity of the officer alleged to have been resisted and describe his official character with sufficient certainty to show that he is a public officer. 1 Strong, N. C. Index 2d, Arrest and Bail, § 6, p. 278. *State v. Smith,* 262 N.C. 472, 137 S.E. 2d 819. The warrant in the instant case met the requirements.

[2] The Supreme Court of North Carolina has considered numerous cases on this question and in recent years has held in several cases that the warrant or bill was insufficient. In *State v. Dunston,* 256 N.C. 203, 123 S.E. 2d 480, the bill failed to state the official act the officer was discharging at the time. In *State v. Smith, supra,* the bill failed to name the officer. In *State v. Maness,* 264 N.C. 358, 141 S.E. 2d 470, cited in defendant's brief, the warrant failed to allege substantial facts. The deficiencies pointed out in those cases are provided in the instant case. Defendant's motion to quash and for arrest of judgment filed in this court is overruled.

[3] Defendant assigns as error the denial of his plea of former jeopardy, contending that he did not appeal from the judgment of the Rocky Mount Recorder's Court and that the superior court, therefore, lacked jurisdiction.

The State properly concedes that the superior court had no jurisdiction of this case except by appeal from the Rocky Mount Recorder's Court. Although the trial judge found that the defendant "noted an appeal" from the judgment of the recorder's court, it appears that this finding was made solely from the words "Papers sent up" and "Appeal Bond $200" written on the back of the original warrant. The State contends that these entries were sufficient to support the finding that defendant appealed to the superior court. We do not agree. While the inference is plausible, defendant should not be jeopardized upon what is, at the most, only a likelihood

We are confronted here with the unusual, a defendant contend-

ing that he did *not* appeal from one court to another, and we are unable to find a decision of our Supreme Court directly in point. The court has considered many cases in which the defendant was attempting to sustain his appeal, usually in the Supreme Court, and a review of those cases indicates that rules and statutes governing appeals have been strictly followed.

Example of cases in which appeals from the superior court to the Supreme Court were dismissed for lack of strict compliance with the rules include *State v. Banks,* 241 N.C. 572, 86 S.E. 2d 76; *State v. Morris,* 235 N.C. 393, 70 S.E. 2d 23; *State v. Clough,* 226 N.C. 384, 38 S.E. 2d 193; and *State v. Patterson,* 222 N.C. 179, 22 S.E. 2d 267.

In the case of *Spence v. Tapscott,* 92 N.C. 577, dealing with an appeal to the Supreme Court, it is said:

> "An appeal must be constituted and brought into this Court according to law. It is governed by rules of procedure, and their essential requirements must be observed. Otherwise regular authority cannot prevail. Ordinarily, it must appear in the record, with reasonable certainty, that an action or proceeding was instituted in or brought into court, from which an appeal lay; that proceedings were had, and a judgment or order given, from which an appeal lay, and that an appeal was taken from such judgment or order to this Court, in order to give it jurisdiction. This is essential to the establishment of the appellate relation between the court from whose judgment the appeal was taken and this Court. Procedure is essential to jurisdiction, as well as to the application of principle in courts of justice, and it cannot be dispensed with. It is dangerous to ignore or disregard it. * * *"

We perceive no reason why the State should be favored with a rule less stringent than that applicable to defendants. In the instant case, defendant's challenge to the jurisdiction of the superior court was timely, and he was entitled to have the question of jurisdiction properly determined.

The judgment appealed from and the verdict upon which it was predicated are vacated, and this cause is remanded to the superior court to the end that the judge will conduct a hearing to determine if defendant appealed from the recorder's court to the superior court. Should it be determined that defendant did appeal, he will be subject to retrial in the superior court; if it is determined that he did not appeal, an order should issue remanding the case to the District

Court of Nash County (as successor to the Rocky Mount Recorder's Court so far as this case is concerned) for issuance of commitment on the recorder's court judgment.

In view of the disposition of this appeal as aforesaid, it is not necessary for us to pass upon the other assignments of error asserted by the defendant.

Error and remanded.

BROCK and PARKER, JJ., concur.

ALFREDA S. HENSON v. AKERS MOTOR LINES, INC. AND ERVIN HENSON

No. 6828SC426

(Filed 15 January 1969)

1. Automobiles § 43— nonsuit for variance

Nonsuit for variance between pleading and proof is proper where plaintiff passenger alleges that defendant was negligent in slowing down to make a right turn without giving proper signal when the tractor-trailer owned by another defendant swerved and collided with defendant's car while the trailer was in the act of passing, and plaintiff's evidence shows that at the time of the collision defendant was making the right turn with his turn signal on.

2. Judgments § 40— nonsuit for variance — res judicata

Judgment of involuntary nonsuit for variance between allegation and proof does not preclude plaintiff from instituting a new action.

APPEAL by defendant Ervin Henson from *Martin (Harry), J.*, 23 April 1968 Session, Superior Court of BUNCOMBE.

Plaintiff seeks to recover for personal injuries allegedly sustained while a passenger in an automobile operated by her husband, defendant Ervin Henson, which automobile was in a collision with a tractor-trailer unit owned by defendant Akers Motor Lines, Inc. Defendant Henson interposed a demurrer to plaintiff's complaint which was overruled, and defendant Henson excepted. Upon trial, the court overruled defendant Henson's motion for nonsuit, and defendant Henson excepted. Upon trial, the jury could not reach agreement as to the negligence of defendant Akers, found defendant Henson negligent and that his negligence was a proximate cause of

plaintiff's injury and damages and awarded her $3500. The court withdrew a juror and declared a mistrial as to Akers and accepted the verdict as to Henson. Defendant Henson excepted and appealed. Facts necessary for a decision are set out in the opinion.

Robert S. Swain and S. Thomas Walton by S. Thomas Walton for plaintiff appellee.

Uzzell and Dumont by Harry Dumont for defendant Ervin Henson appellant.

MORRIS, J.

Plaintiff describes the occurrence in paragraph 8 of her complaint as follows:

> "That said time and place the defendant, Henson, was operating his automobile in the extreme right hand lane of said expressway, which was two lanes for vehicles proceeding in an easterly direction when the driver of the tractor-trailer unit owned by the defendant Akers Motor Lines, Inc., negligently operated said tractor-trailer unit while attempting to pass the automobile being driven by the defendant, Henson, so as to cause the right rear of said tractor-trailer unit to collide with the left rear of the automobile in which this Plaintiff was a passenger; that the defendant, Henson, was negligent at said time and place in that he did not give the required signal to turn from a direct line of travel for the minimum number of feet before attempting to do so and in slowing down his vehicle without giving the proper signal to do so and that the said negligence on the part of each of the defendants, jointly and severally, was to (sic) sole and proximate cause of the collision herein referred to and the injuries and damage to this plaintiff more fully set forth hereafter."

Also, the following specific acts of negligence on the part of the defendant Henson are set out in paragraph 9 of the complaint:

> "That the following acts and omissions on the part of the defendant Ervin Henson at said time and place constituted negligence on his part:
>
> (a) He operated said automobile without keeping a proper and careful lookout for the co-defendant Akers Motor Lines, Inc. and other users of the highway; under the circumstances and conditions then existing;

(b) He operated said automobile without keeping same under proper control;

(c) He operated said automobile at a speed and in such a manner so as to endanger the person of this plaintiff and in a careless, heedless and willful disregard of the rights and safety of this plaintiff;

(d) He operated said automobile at a speed that was greater than reasonable and prudent under the circumstances and conditions then existing inasmuch as it was night time and the surface of said highway was wet and slippery with rain;

(e) He failed to give a signal of his intention to turn from a direct line of travel continuously during the last 200 feet traveled before turning and slowed his vehicle down without proper signal therefor while approaching the Haywood Street exit off of said expressway."

It is obvious from these allegations that the plaintiff attempts to allege a collision occurring while the defendant Akers was attempting to overtake and pass the defendant Henson. Plaintiff says the driver of the tractor-trailer was negligent in causing the right rear of his truck to collide with the car in which the plaintiff was a passenger. She says the defendant Henson was negligent in that he slowed down to make a turn without signaling. She says that the negligence of both defendants was, jointly and severally, the proximate cause of her injuries.

The plaintiff's evidence, in substance, was the following: Cecil Burnett, a police officer with the City of Asheville, testified that when he arrived at the scene of the accident the defendant Henson told him he was leaving the exit lane and entering the expressway and ran into the side of the truck.

Plaintiff called the defendant Henson as a witness. He denied making this statement to the officer. Rather, he testified that he was driving in the exit lane intending to make a right hand turn; that he had his signal light on; and that as the truck came up beside him the driver cut to the left, causing the right rear of the truck to collide with the left rear of the plaintiff's car.

Margaret Ward, a witness for the plaintiff, testified that she saw the accident from a bridge over the highway. She stated that she saw the truck swerve, causing its rear end to hit the Henson car. She said she observed the signal light on the Henson car signaling a right turn.

Plaintiff testified that the defendant Henson came down onto

the expressway and that he continued in the exit lane (the extreme right hand lane) because he was going to make a right turn. She said that the signal light on defendant Henson's car was blinking for a right hand turn. Plaintiff said the truck came beside the car in which she was riding and whipped over in front of it, causing the right rear of the truck to strike the left rear of the car. She said Henson, at this time, was traveling approximately 25 miles per hour.

After the plaintiff closed his case, the driver of the tractor-trailer was called to testify on behalf of the defendant Akers. His testimony tended to show that the defendant Henson ran into the side of his truck. The defendant Henson offered no evidence.

As we view this testimony, it tells two stories. One, that the defendant Henson pulled his car into the side of the truck, or that the defendant Henson was making a right turn, with his turn signal on, when the tractor-trailer, owned by defendant Akers, swerved and collided with Henson's car. The evidence does not establish that the defendant Henson contributed to the cause of the accident by failing to signal his turn or slow down without a signal. The plaintiff has failed to offer any evidence to establish negligence on the part of the defendant Henson in the manner alleged in the complaint.

In *Hall v. Poteat,* 257 N.C. 458, 125 S.E. 2d 924, the North Carolina Supreme Court was faced with a situation very similar to the present one. There, the plaintiff alleged that the defendant pulled onto the highway suddenly and without signaling, causing the plaintiff to collide with the rear of the car being driven by the defendant. Before trial, the plaintiff amended his complaint to add that the defendant drove onto the highway without lights. The plaintiff testified that the car driven by the defendant was in the road "sitting still" when he first saw it; that he "had in mind" to pass the defendant but a truck was coming in the opposite direction. He applied his brakes hitting the back of the defendant's car. There was other evidence offered which showed that the defendant had traveled some distance before the plaintiff hit him. The Supreme Court stated:

> "Conceding plaintiff's testimony, when considered in the light most favorable to him, was sufficient to support a finding that the (first) collision was proximately caused by the negligence of defendant Jennings, it was not sufficient to support a finding that it was proximately caused by the negligence of the original defendants *as alleged in the complaint.* 'Plaintiff must prove his case in conformity with the facts he alleges to create liability.' *Bundy v. Belue,* 253 N.C. 31, 116 S.E. 2d 200. Con-

fronted by the material variance between plaintiff's allegations and proof, the court below properly entered judgment of involuntary nonsuit."

In *Taylor v. Garrett Co.*, 260 N.C. 672, 133 S.E. 2d 518, plaintiff alleged that just as he met the defendant going in the opposite direction, the rear portion of the defendant's truck swerved across the center line of the highway into the plaintiff's lane and collided with the plaintiff's car. At the trial, the plaintiff testified that as he entered a curve in the southbound lane, he saw an unlighted truck-trailer in the northbound lane; it was moving slowly. The defendant was behind, and very close to this truck-trailer; the left wheel of the defendant's truck was some two and one-half feet across the center line of the road; the plaintiff ran into the wheel of defendant's truck which caused his vehicle to turn over. The Court held the motion for nonsuit was properly allowed, saying:

"Plaintiff, if he is to recover, must do so by proving the allegations of his complaint. There he alleges a sudden swerving of defendant's truck into his line of travel, a sudden emergency. He offers no evidence to establish that fact, but does testify to other facts which, under the South Carolina statutes, might constitute negligence."

[1, 2] Following the authority of these cases, we feel constrained to hold that the motion for nonsuit made by the defendant Henson should have been allowed because of a material variance. This judgment of involuntary nonsuit does not preclude plaintiff from instituting a new action. *Hall v. Poteat, supra.*

For the reasons stated above, the judgment of the trial tribunal is reversed and judgment entered in accordance with this opinion.

Reversed.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE OF NORTH CAROLINA v. A. M. MANNING AND A. R. MANNING

No. 686SC404

(Filed 15 January 1969)

1. Trespass § 12— upon posted property for hunting, fishing or trapping — private pond

Whether a body of water is a "private pond" is not relevant to a

prosecution for trespass under G.S. 113-120.1, there being no requirement that a pond must be a "private pond" in order to post the notices and signs described in G.S. 113-120.2.

2. Trespass § 12— upon posted property for hunting, fishing or trapping

G.S. 113-120.1 prohibits hunting, fishing or trapping on properly posted lands or waters without the written consent of the owner or his agent, provided that in designated counties, including Halifax County, no arrest may be made for such violation without consent of the owner or his agent.

3. Trespass § 13— upon posted property for fishing — consent of owner — lessee in possession

In a prosecution in Halifax County under G.S. 113-120.1 for a trespass by fishing on properly posted lands and waters of a private club without the written consent of the owner or his agent, defendants' motion for nonsuit should be allowed where the State's evidence discloses that the private club is the lessee of the land under and around the lake upon which defendants were fishing, a lessee not being included within the term "owner" as used in the statute, G.S. 113-130, and there being no showing that defendants were fishing without the written consent of the actual owner, or that the owner consented to their arrest, or that the private club was the agent of the owner for these purposes.

APPEAL by defendants from *Mintz, J.*, 3 June 1968 Session, HALIFAX Superior Court.

The defendants were charged in identical warrants with the offense that on or about the 17th day of May, 1967, they did unlawfully, willfully and feloniously trespass and go on the land and waters of H & W Lake Club, Inc., upon which notices, signs, and posters prohibiting hunting, fishing or trapping have been placed, to hunt, fish or trap, without the written consent of the owner or its agent, in violation of Section 113-120.1 of the General Statutes of North Carolina and Chapter 1159 (Senate Bill 491) of the Session Laws of 1961 which declared Bellamy's Lake to be a private lake for purpose of enforcement of laws regarding trespass.

Defendants were found guilty in the Justice of the Peace Court and appealed to the Recorder's Court of Halifax County where they were found guilty. They then appealed to the Superior Court where they had trial *de novo* before a jury.

The evidence for the State tended to show the following: H & W Lake Club, Inc., was organized in about 1947 for the purpose of building (or rebuilding) a dam to create Bellamy's Lake. It is composed of approximately one hundred "members" who have the privilege of fishing in Bellamy's Lake. The club leases from the various owners all of the land inundated by the water of the lake, and all of the land bordering the lake with the exception of ap-

proximately fifty to one hundred feet where the water borders a public roadway. It has caused "no trespass" signs to be posted around and in the lake.

The club's president requested a constable to check persons fishing on the lake, and, if any were found fishing who were not "members" or guests of "members," to issue warrants against them for violating the trespass statute (G.S. 113-120.1).

On 17 May 1967 the constable found the two defendants fishing in Bellamy's Lake and caused the two warrants to be issued upon his oath before a justice of the peace. Neither of the defendants is a "member" of H & W Lake Club, and neither was a guest of a "member."

Both defendants were found guilty by the jury, and, from the verdict and the judgment, both defendants appealed to this Court.

T. W. Bruton, Attorney General, by (Mrs.) Christine Y. Denson, Staff Attorney, for the State.

Moore & Cook, by Stanley G. Cook, for the defendants.

BROCK, J.

This case has been considerably bothersome and confused. The State's evidence, and the conduct of the trial, concentrated upon the theory of establishing that Bellamy's Lake is a "private pond" both by virtue of descriptive testimony and by legislative declaration in Chapter 1159, Session Laws, 1961 (Senate Bill 491). Defendants' descriptive testimony tends to show that it does not come within the definition of a "Private pond" (G.S. 113-129); and defendants attack Chapter 1159, Session Laws, 1961, as being unconstitutional because it undertakes to grant an exclusive privilege which is not in consideration of public services (N. C. Const. Art. I, § 7.)

[1] G.S. 113-129 defines a "private pond"; but whether a pond is a "private pond" or not has no application to the trespass statute because there is no requirement that a pond must be a "private pond" in order to post the signs or posters described in G.S. 113-120.2. Therefore the argument as to whether Bellamy's Lake is or is not a "private pond" has no bearing upon a prosecution for trespass under G.S. 113-120.1. Also, we do not reach the question of the constitutionality of Chapter 1159, Session Laws, 1961, because it merely declares Bellamy's Lake to be a "private lake" and as we have said, this is not relevant to a prosecution for trespass under G.S. 113-120.1.

The statute under which these defendants are prosecuted reads as follows:

> "§ 113-120.1. Trespass for purposes of hunting, etc., without written consent a misdemeanor. — Any person who wilfully goes on the land, waters, ponds, or a legally established water fowl blind of another upon which notices, signs or posters, described in § 113-120.2, prohibiting hunting, fishing, or trapping, or upon which 'posted' notices have been placed, to hunt, fish or trap *without the written consent of the owner or his agent* shall be guilty of a misdemeanor and punished by a fine of not less than fifteen dollars ($15.00) nor more than fifty dollars ($50.00) or by confinement in jail for not more than thirty days, in the discretion of the court, provided, that if a violation of this section be committed at nighttime between the hours of sunset and sunrise, the person so offending shall be punished by a fine of not less than thirty dollars ($30.00) nor more than fifty dollars ($50.00) or by confinement in jail for not more than thirty days, in the discretion of the court. Provided, further, that *no arrests under authority of this section shall be made without the consent of the owner or owners of said land, or their duly authorized agents in the following counties: Halifax,* Onslow, Warren." (Emphasis added.)

[2] It seems clear that it is the hunting, fishing, or trapping on properly posted lands or waters without the *written consent of the owner or his agent* that is declared a misdemeanor by the statute. Also, insofar as Halifax County is concerned, no arrest is to be made for such violation *without the consent of the owner or his agent.*

Article 12 of Chap. 113 of the General Statutes provides definitions of various terms used in Chap. 113. Under Art. 12 we find in G.S. 113-130 a definition of "owner" as follows:

> ". . . as for real property, refers to persons having the present right of control, possession, and enjoyment, whether as life tenant, fee holder, beneficiary of a trust, or otherwise. *Provided, that this definition does not include lessees of property* except where the lease arrangement is a security device to facilitate what is in substance a sale of the property to the lessee." (Emphasis added.)

[3] In the case before us the H & W Lake Club is clearly a lessee of the land under and around Bellamy's Lake, and as such the Club does not fulfill the term *owner* as used in G.S. 113-120.1, *supra,* under which the defendants were prosecuted. There has been

no showing that the defendants were fishing without the written consent of the *owner*, there has been no showing that the *owner* consented to their arrest, and no showing that H & W Lake Club was the *agent of the owner* for these purposes.

It seems reasonably clear that the two defendants deliberately ignored the "no trespass" signs, and that they were unwelcomed intruders; nevertheless the State has the burden of producing evidence to substantiate its charges against the defendants. This it has failed to do.

The defendant's motions for judgment of nonsuit for failure of the State's evidence to make out a case against them should have been allowed and the charges dismissed.

Reversed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. JOHNNY REUBEN JONES

No. 6818SC448

(Filed 15 January 1969)

1. Criminal Law § 158— appeal and error — presumption as to matters omitted — the charge

Where the charge is not before the court on appeal, it is presumed that the trial court correctly and adequately charged the jury on the law and evidence in the case.

2. Criminal Law § 124— guilty verdict on one count

A verdict of guilty which refers to one of the counts in a bill of indictment, but not to all, amounts to an acquittal on the counts not referred to.

3. Larceny § 5— presumption arising from possession of recently stolen property

Evidence that defendant was in possession of stolen property shortly after the property was stolen raises a presumption of defendant's guilt of larceny of such property.

4. Larceny § 10— sentence

In prosecution upon indictment charging the larceny of property of a value in excess of $200 by breaking and entering a storehouse, trial court is authorized to impose sentence of three years imprisonment upon verdict that defendant was guilty as charged in the bill of indictment.

5. Larceny § 10— felonious larceny — punishment

Larceny of any property of another of any value after breaking and entering, and larceny of property of more than $200 in value, are felonies, each of which may be punishable by imprisonment for as much as ten years.

6. Criminal Law § 124— consistency of verdict

It is not required that the verdict be consistent.

7. Criminal Law § 124; Larceny § 9— return of inconsistent verdict

Defendant was charged in one count with felonious breaking and entering and in the second count with larceny of property of a value in excess of $200 by breaking and entering a storehouse. The jury's verdict was not guilty of the first count of felonious breaking and entering but was guilty of the second count as charged in the indictment. *Held:* Mere inconsistency will not invalidate the verdict.

APPEAL by defendant from *Crissman, J.*, 3 June 1968 Criminal Session of Superior Court of GUILFORD County, High Point Division.

Defendant on his plea of not guilty was tried by a jury on a bill of indictment charging him with the felonies of housebreaking, larceny, and receiving.

The jury returned a verdict of not guilty as to the first count of breaking and entering and guilty as charged on the second count in the bill of indictment. The second count charged the larceny, after breaking and entering, of one Craftman electric drill, one Black-Decker electric screwdriver, and one air nailing machine, the property of Wesley Lovett valued in excess of two hundred dollars.

From a judgment of imprisonment for a term of three years in the State Prison, defendant appeals, assigning error.

Attorney General T. W. Bruton and Staff Attorney Andrew A. Vanore, Jr., for the State.

Sammie Chess, Jr., for the defendant appellant.

MORRIS, J.

Defendant assigns as error and contends that the trial court committed error in denying defendant's motion for judgment as of nonsuit. When the evidence is considered in the light most favorable to the State, as we are required to do, *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741, we are of the opinion that there was ample evidence for submission of the case to the jury.

The State offered evidence which in substance tends to show that the defendant and two other persons unlawfully entered the place of business of the prosecuting witness in High Point, on the date alleged, and that property of the prosecuting witness was taken therefrom of the value of over two hundred dollars. The actual breaking was done by the other two persons. The property taken included tools, wrenches, and some money. The defendant, "shortly" after the larceny of the property, was in possession thereof and gave to the investigating officers some of the tools of the value of over two hundred dollars which had been stolen on that occasion. Defendant received some money that had been stolen from the place of business. The defendant was charged with the larceny of some of the property taken but was not charged with the larceny of any money.

The defendant offered evidence which in substance tends to show that at the time alleged he was drunk and took no part in the breaking, entering, or larceny. The property stolen on this occasion from Mr. Lovett's building was stolen by defendant's brother and another person, and they hid the tools, which the defendant later recovered and gave to the officers.

[1, 2] The conflict in the evidence was for the jury. The jury has held against the defendant. The charge of the court was not excepted to and is not before us. When there is no exception to the charge, it is presumed that the court correctly and adequately charged the jury on the law and evidence in the case. *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225; *Long v. Honeycutt,* 268 N.C. 33, 149 S.E. 2d 579. While there was no mention in the record as to what disposition was made of the count of receiving, the rule is that when a verdict of guilty refers to one of the counts in a bill of indictment, but not to all, that upon the acceptance of the verdict it amounts to an acquittal on the counts not referred to. 3 Strong, N. C. Index 2d, Criminal Law, § 124.

[3] Defendant contends that there was a variance between the indictment and proof in that the evidence shows that the defendant got some of the stolen money but that he was not charged with the larceny of the money. This contention is without merit. The evidence shows that the defendant was in possession of the property "shortly" after it was stolen. The doctrine of recent possession is applicable. *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578; *State v. White,* 196 N.C. 1, 144 S.E. 299.

[4] The defendant also contends that "the State would have to show that what the defendant received amounted to more than

$200.00 before the court could pronounce a sentence of 3 years which is more than allowed for a misdemeanor." This contention is also without merit. The jury found the defendant not guilty of the first count of breaking and entering, but on the second count the verdict was "guilty as charged in the bill of indictment." In the second count it is charged that on the date alleged the defendant, "after having unlawfully, wilfully and feloniously broken into and entered a certain storehouse, shop, warehouse, dwelling house, banking house, countinghouse and building occupied by one Wesley Lovett, trading and doing business as J & W Frame Works with intent to steal, take and carry away the merchandise chattels, money, valuable securities and other personal property located therein, one Craftman electric drill, valued at $60.00; a Black-Decker Electric screwdriver, valued at $50.00; one air nailing machine, valued at $200.00 of the total value of Three Hundred Ten and No/100 dollars, of the goods, chattels and moneys of the said Wesley Lovett, trading and doing business as J & W Frame Works then and there being found unlawfully, wilfully and feloniously did steal, take and carry away, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State."

[5] Larceny of any property of another of any value after breaking and entering in violation of G.S. 14-54 is a felony. The larceny of property of the value of more than two hundred dollars is also a felony. G.S. 14-72. The felony of larceny may be punishable by imprisonment for as much as ten years. *State v. Morgan,* 265 N.C. 597, 144 S.E. 2d 633.

[6, 7] There was an intimation but no specific contention in the brief that the verdicts on the first and second counts were inconsistent. However, the rule with respect to inconsistent verdicts on different counts in a bill of indictment is succinctly stated in 3 Strong, N. C. Index 2d, Criminal Law, § 124, as follows:

> "It is not required that the verdict be consistent; therefore, a verdict of guilty of a lesser degree of the crime when all the evidence points to the graver crime, although illogical and incongruous, or a verdict of guilty on one count and not guilty on the other, when the same act results in both offenses, will not be disturbed."

The Supreme Court in an opinion written by Justice Barnhill (Later C.J.) in the case of *State v. Davis,* 214 N.C. 787, 1 S.E. 2d 104, said: "In any event, a jury is not required to be consistent and mere inconsistency will not invalidate the verdict."

In *Grant v. United States,* 255 F. 2d 341 (6th Cir. 1958), it is said: "When at the same trial, a jury renders inconsistent verdicts of acquittal and conviction, the inconsistency is immaterial and the conviction will stand." Also in *Dunn v. United States,* 284 U.S. 390, 76 L. Ed. 356 (1931), Mr. Justice Holmes, speaking for the Court, said: "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment."

The judgment of the Superior Court is

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE OF NORTH CAROLINA v. DAVID WALLACE CHANCE

No. 6818SC449

(Filed 15 January 1969)

1. Crime Against Nature § 1— elements of the crime

The crime against nature is sexual intercourse contrary to the order of nature and includes acts with animals and acts between humans *per anum* and *per os.*

2. Crime Against Nature § 1— necessity for penetration

Proof of penetration of or by the sexual organ is essential to conviction of crime against nature.

3. Crime Against Nature § 1— G.S. 14-177; G.S. 14-202.1

G.S. 14-177 condemns crimes against nature whether committed against adults or children; G.S. 14-202.1 condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of G.S. 14-177.

4. Criminal Law § 115— submission of lesser degrees of the crime

There is no necessity for instructing the jury as to an included crime of lesser degree than that charged if the State's evidence tends to show the crime alleged in the bill of indictment was completed and there is no conflicting evidence relating to the elements of the crime charged.

5. Criminal Law § 3— attempt to commit crime

An attempt to commit a crime is an overt act in partial execution of the crime which falls short of actual commission but which goes beyond mere preparation to commit.

6. Crime Against Nature § 2— failure to submit question of attempt to commit the crime

In this prosecution for a crime against nature *per os* in violation of G.S. 14-177, the court did not err in failing to charge the jury that they could find defendant guilty of an attempt to commit a crime against nature where all of the State's evidence tended to show the act alleged in the bill of indictment was completed, and there was no evidence by the State or by defendant of an attempted act which fell short of the completed offense.

7. Crime Against Nature § 2— instructions — lesser degrees — taking indecent liberties with children

In this prosecution of a 26 year old male for a crime against nature committed against a 13 year old boy in violation of G.S. 14-177, where, in view of the evidence, it was unnecessary for the court to instruct the jury as to lesser included degrees of the crime charged, the question does not arise as to whether the crime of taking indecent liberties with children in violation of G.S. 14-202.1 is a lesser included offense of the crime against nature.

APPEAL by defendant from *Fountain, J.*, 25 March 1968 Criminal Session of Superior Court of GUILFORD County.

Defendant was tried on a proper bill of indictment in which it was alleged, among other things, that on 29 April 1967 the defendant "unlawfully, wilfully and feloniously did commit the abominable and detestable crime against nature with Bennie Max Hargett, Jr., a minor, age 13 years, by taking the private parts of the said Bennie Max Hargett, Jr., in his mouth, in violation of the General Statutes of North Carolina, Chapter 14, Section 177 . . ."

Upon arraignment, the defendant pleaded not guilty. Trial was by jury. Verdict was guilty as charged. Upon the coming in of the verdict, the defendant moved that the jury be polled. Upon polling the jury, each juror answered that the defendant was guilty as charged and that the juror still assented to the bringing in of such verdict.

From a judgment of imprisonment, the defendant appealed, assigning error.

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

Lawrence Egerton, Jr., James B. Rivenbark, and James R. Nance for defendant appellant.

MALLARD, C.J.

[1, 2] G.S. 14-177 reads, "If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court."

> "The crime against nature is sexual intercourse contrary to the order of nature. It includes acts with animals and acts between humans *per anum* and *per os*." *State v. Harward,* 264 N.C. 746, 142 S.E. 2d 691.
>
> "Proof of penetration of or by the sexual organ is essential to conviction." *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396.

Defendant sets out five assignments of error in the record but does not mention any of them in his brief. However, defendant in his brief does argue the substance of the first four. The defendant asserts, in substance, that these four assignments present the following two questions:

1. Did the trial court err by failing to charge that under this bill of indictment and the evidence in this case the defendant could be convicted of the crime of taking indecent liberties with children in violation of G.S. 14-202.1?

2. Did the trial court err in failing to charge the jury that under the evidence in this case the defendant could be convicted of attempting to commit the crime against nature?

The court instructed the jury that they could return one of two verdicts, guilty as charged in the bill of indictment of the crime against nature or not guilty.

[3] In *State v. Lance,* 244 N.C. 455, 94 S.E. 2d 335, the the Supreme Court said:

> "The two acts are complementary rather than repugnant or inconsistent. G.S. 14-177 condemns crimes against nature whether committed against adults or children. G.S. 14-202.1 condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age *which cannot be reached and punished under the provisions of G.S. 14-177.* G.S. 14-202.1, of course, condemns other acts against children than unnatural sexual acts. The two statutes can be reconciled, and both declared to be operative without repugnance." (emphasis added)

In the case before us the State offered evidence which, in substance, tended to show that on 29 April 1967 Bennie Max Hargett,

Jr., (Bennie) was a minor, 13 years of age. While he was in the Carolina Theatre in Greensboro that afternoon, the defendant, 26 years of age, came in and sat down beside him. Defendant began to fondle Bennie. Bennie asked defendant how much he would give him, and "started out at twenty-five dollars and worked down to five dollars." Defendant told Bennie to go upstairs to the men's rest room, which he did. The defendant followed and there in one of the stalls, the defendant committed the act described in the bill of indictment in the manner therein described. The defendant then gave Bennie one dollar and fifty cents. Shortly thereafter, Bennie called the police and related what had occurred. The defendant was arrested.

The defendant offered evidence which, in substance, tended to show that on the date in question he went to the Carolina Theatre in Greensboro. He also went to the rest room. That he did not fondle Bennie, that he did not commit the act described in the bill of indictment, and that he is not guilty of the crime charged.

[4] In *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545, Justice Bobbitt, speaking for the Court, said:

> "The distinction is this: The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contentions that the jury might accept the State's evidence in part and might reject it in part will not suffice."

[5-7] In the instant case the State's evidence tended to show that the act alleged in the bill of indictment was completed. There is no evidence either by the State or by the defendant of an attempted act which fell short of the completed offense. An attempt to commit a crime is an overt act in partial execution of the crime which falls short of actual commission but which goes beyond mere preparation to commit. *State v. Parker*, 224 N.C. 524, 31 S.E. 2d 531. The State's evidence showed the completed offense prohibited by G.S. 14-177. What occurred in the theatre before going to the rest room was but a component of the single act of the crime against nature *per os* which the jury found was consummated. There is no conflicting evidence relating to the elements of the crime charged. If the State's evidence is not believed and the crime against nature was not com-

mitted, there is no evidence of the commission of any other crime or an attempt to commit any crime. In view of the evidence in this case, the question does not arise as to whether G.S. 14-202.1 is a lesser included offense of the crime against nature. We are of the opinion that under the evidence in this case the court correctly limited the verdicts of the jury to guilty as charged or not guilty.

No error.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. RAYMOND RIER WILLIAMS

No. 689SC464

(Filed 15 January 1969)

1. Criminal Law § 106— motion for nonsuit — sufficiency of evidence

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.

2. Homicide § 21— manslaughter — culpable negligence — intoxication, speeding, intentional failure to stop at stop sign

In this manslaughter prosecution, motion for nonsuit is properly denied where the State's evidence tends to show that while intoxicated and driving at an excessive speed, defendant intentionally failed to stop at a stop sign and struck the automobile of decedent, causing his death, the evidence being sufficient to show culpable negligence on the part of defendant.

3. Homicide § 27— involuntary manslaughter — instructions

In this manslaughter prosecution, any error in the definition of manslaughter given in the initial part of the charge was cured later in the charge by the court's instruction that a violation of G.S. 20-158 is not negligence *per se*.

4. Criminal Law § 170— remarks of solicitor in jury argument invited by remarks of defense counsel

Assignment of error to remarks made by the solicitor in his argument to the jury to which defendant objected is overruled where the record discloses the remarks were invited by remarks of defense counsel in addressing the jury, the control of arguments of the solicitor and of counsel being left largely to the discretion of the trial judge.

APPEAL by defendant from *Carr, J.*, at the 15 July 1968 Session of GRANVILLE Superior Court.

By indictment proper in form, defendant was charged with manslaughter in the death of Joe N. Bullock, which charge grew out of an intersection collision in the town of Creedmoor between an automobile driven by defendant and one driven by the decedent.

At trial, the State's evidence tended to show the following:

On 31 August 1967 at about 9:30 p.m., defendant was driving west on Brassfield Road (Church Street) and decedent was driving south on N. C. Highway No. 50 (Main Street). Defendant failed to stop in observance of a stop sign erected on Brassfield Road, drove across the eastern lane of Main Street and struck the left side of the Bullock car. Immediately before the collision, defendant was observed speeding as he passed a house located some 110-120 feet east of the intersection. Debris at the scene indicated that the collision occurred at the point where the westbound lane of Brassfield Road intersected the southbound lane of Main Street. There were skid marks leading to the Bullock car, but no skid marks connected with defendant's car except those made by it in spinning around after the collision. Defendant's car came to rest with its rear end in a ditch at the southwest corner of the intersection, the front of the car facing east. The Bullock car was located behind the defendant's car. The first persons to arrive at the scene following the collision found the defendant sitting sidewise in the seat of his car, slumped over, with his feet hanging out the door and his chin in his hands.

At least four witnesses, including the Creedmoor Chief of Police, a woman and a medical doctor, who went to the scene immediately after the collision, testified that the defendant was under the influence of intoxicating beverage. Several witnesses testified that defendant was drunk to the extent that he was using vulgar and profane language and had to be strapped to a stretcher.

Defendant was also charged with failing to stop at a stop sign and pled guilty to the charge in the Creedmoor Court. He testified in his own behalf, admitted drinking one beer before leaving his home in Franklinton and stated that he slowed to 5 or 10 mph before entering the intersection after looking left and right and observing no approaching vehicle.

Defendant also offered medical testimony tending to show that the death of Mr. Bullock was the result of a pre-existing heart condition combined with the injuries received in the collision. Other medical testimony was to the effect that injuries received in the collision were the major cause of death.

Defendant's motions for nonsuit were overruled, and from judgment on the jury verdict of guilty, defendant appealed.

Attorney General T. Wade Bruton by Assistant Attorney General William W. Melvin and Staff Attorney T. Buie Costen for the State.

Hubert H. Senter for defendant appellant.

BRITT, J.

The first question presented by this appeal is whether the evidence was sufficient to overcome the defendant's motions for nonsuit.

[1] "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. * * * 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." 2 Strong, N. C. Index 2d, Criminal Law, § 106, p. 654.

[2] The defendant contends that the State failed to present evidence of culpable negligence resulting in the accident and death. Clearly, there was evidence which, if believed, justified the jury finding that the defendant was driving under the influence of intoxicating liquor at the time of the collision. This, standing alone, was found insufficient in *State v. Tingen,* 247 N.C. 384, 100 S.E. 2d 874, but in that case, Higgins, J., noted the absence of any causal connection with the injury, and there was no evidence whatever of speed or reckless driving. In this case, however, the defendant admitted violating G.S. 20-158; there was evidence of excessive speed only 120 feet from the intersection and of an absence of skid marks from defendant's car, and defendant's own testimony permits the inference that he knew the status of right-of-way at the intersection and that his violation of 20-158 was intentional. The case of *State v. Sealy,* 253 N.C. 802, 117 S.E. 2d 793, where there was no evidence of intent or recklessness, is also distinguishable.

The evidence was ample to meet the requirements for culpable

negligence set forth in *State v. Cope,* 204 N.C. 28, 167 S.E. 456, and that such culpable negligence resulted in the death of Mr. Bullock. The motions for nonsuit were properly overruled.

[3] Defendant assigns as error a definition of involuntary manslaughter given by the trial judge in the initial part of his charge to the jury. If there was any defect in the challenged statement, it was cured later in the charge when the judge declared that a violation of G.S. 20-158 is not negligence *per se.*

In his brief, defendant brings forward and argues other assignments of error relating to the judge's charge to the jury, but a careful review of the charge as a whole impels us to conclude that it contains no error prejudicial to the defendant.

[4] Defendant assigns as error certain remarks made by the solicitor in his argument to the jury to which defendant objected. The record discloses that the remarks of the solicitor apparently were invited by remarks of defendant's counsel in addressing the jury. In such instances, the control of arguments of solicitor and of counsel to the jury must be left largely to the discretion of the trial judge. *State v. Seipel,* 252 N.C. 335, 113 S.E. 2d 432. The assignment of error is overruled.

We have carefully considered the other assignments of error asserted by the defendant, but finding them without merit, they are overruled. The defendant was provided with a fair trial in which we find

No error.

BROCK and PARKER, JJ., concur.

IN THE MATTER OF THE CUSTODY OF WILBUR F. KING, III, AN INFANT, WILBUR F. KING, JR. v. MARILYNN LEE KING

No. 688SC443

(Filed 15 January 1969)

1. Divorce and Alimony § 22; Habeas Corpus § 3— proceedings for custody of child

Chapter 1153, Session Laws of 1967, which brings all of the statutes relating to child custody and support together into one Act, is effective from and after 1 October 1967. G.S. 50-13.1 et seq.

2. Divorce and Alimony § 22; Habeas Corpus § 3— determination of child custody in divorce action begun after 1 October 1967

Where no final judgment has been entered in husband's action for absolute divorce instituted after 1 October 1967, any action or proceeding for custody of the minor child of the parties should be joined with the pending divorce action or be by motion in the cause in such action, and a petition by the wife to have the matter of custody determined in a separate habeas corpus proceeding is subject to dismissal. G.S. 50-13.5(f).

APPEAL by respondent, Wilbur F. King, Jr., from *Parker, J.*, September 1968 Session of WAYNE Superior Court.

Wilbur F. King, Jr., and Marilynn Lee King were married in 1965. One child was born of this marriage, Wilbur F. King, III, born 26 March 1966. Wilbur F. King, Jr., instituted an action for absolute divorce against Marilynn Lee King on 17 September 1968 on the grounds of one year's separation. Summons therein was personally served on Marilynn Lee King on 20 September 1968. In his complaint the plaintiff alleged the marriage of the parties, the birth of their child, the separation of the parties on 29 January 1967 and that they had lived separate and apart since that date. Plaintiff also alleged on information and belief that his wife contemplated remarrying upon a divorce being granted to the parties and that in the event of her remarriage she planned to take their child out of the State, if custody of the infant child should be awarded to her. The plaintiff prayed that he be granted an absolute divorce from the defendant and that he be awarded custody of their child.

While this action was pending and after service of summons therein, Marilynn Lee King on 24 September 1968 verified a petition in which she alleged the institution of the divorce action against her and service of process therein; that when she and her husband had separated on 29 January 1967 they had mutually agreed that she would have custody of their child, subject to reasonable visitation rights on the part of her husband; that she was employed as a school teacher and resided with her parents at Dunn, N. C., and had always provided a good home for her child; that it would be for the best interest of the child if custody be granted to her; that she denied any intention or plan of remarrying or moving from the State of North Carolina; and that her husband had forcibly deprived her of custody of their child and the facts relative thereto. Petitioner prayed for an order directing her husband to bring their child before the court to determine its custody and that custody be granted to her. On presentation of this petition, Judge Joseph W. Parker on 25 September 1968 issued a *writ* of *habeas corpus* directing the husband, Wilbur F. King, Jr., to bring the infant child be-

fore him at the courthouse of Wayne County at Goldsboro, N. C., at 10:00 a.m. on 30 September 1968, together with a return of the writ, then and there to receive, abide by and conform to such orders as might be made in the premises. This writ, together with a copy of the petition and notice of the hearing, were served on the husband by the Sheriff of Lenoir County on 25 September 1968. In response thereto Wilbur F. King, Jr., appeared before Judge Parker in the Superior Court of Wayne County on 30 September 1968 and through counsel moved that the *habeas corpus* proceedings be dismissed because of the prior institution of the pending divorce action and the provisions of G.S. 50-13.5(f). This motion was overruled. The court then proceeded to hear the matter upon the petition of the wife and upon the return of the *writ* of *habeas corpus,* and after hearing evidence offered by both petitioner and respondent, the court entered order dated 30 September 1968 awarding custody to the petitioner mother and retaining the cause for further orders of the court. To the entry of this order the respondent, Wilbur F. King, Jr., objected, excepted and appealed, assigning as errors the denial of his motion to dismiss and the entry of the order appealed from.

William F. Simpson for petitioner appellee.

Aycock, LaRoque, Allen, Cheek & Hines, by C. B. Aycock, for respondent appellant.

PARKER, J.

[1] This case is controlled by the provisions of Chapter 1153, Session Laws of 1967, entitled "An Act To Rewrite The Statutes Relating To Custody And Support Of Minor Children," which is effective from and after 1 October 1967. G.S. 50-13.1 *et seq.* "By enactment of this Chapter the Legislature has sought to eliminate the conflicting and inconsistent statutes, which have caused pitfalls for litigants, and to bring all of the statutes relating to child custody and support together into one act." *In Re Holt,* 1 N.C. App. 108, 160 S.E. 2d 90.

[2] G.S. 50-13.5(f) provides in part that "(i)f an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, *any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action.*" (Emphasis added.) In this case an action

for absolute divorce had been instituted by the husband against the wife in the Superior Court of Lenoir County. Service of summons in this divorce action had been made on the wife and no final judgment had been entered therein. Therefore, under the express language of G.S. 50-13.5(f) any action or proceeding for custody of the minor child of the parties should have been joined with the pending divorce action or be by motion in the cause in such action. The purpose of the quoted statutory provision is clear.

> "In divorce actions, the marital rights and obligations of both husband and wife, as well as the custody and support of the children of the marriage, are before the court in a *single* action. In a *habeas corpus* proceeding the judge has jurisdiction of only one facet of the marital dispute, the custody and support of the children." *In Re Custody of Sauls,* 270 N.C. 180, 186, 154 S.E. 2d 327.

Justice to all parties is best served when one judge is able to see the controversy whole. The statute so provides.

In the present case petitioner attempted to have the matter of custody determined in a separate *habeas corpus* proceeding. In view of the then pending divorce action, the custody proceeding should either have been joined with such action or have been by motion in the cause therein. Because of petitioner's failure to observe the statutory procedure, respondent's motion to dismiss the petition should have been allowed.

The record before us discloses that when the order appealed from, dated 30 September 1968, was entered by the judge presiding at the session of Superior Court of Wayne County, no papers in connection with the *habeas corpus* proceeding had been then filed, but that the papers were subsequently filed in the office of the Clerk of Superior Court of Lenoir County on 14 October 1968.

This cause is accordingly remanded to the Superior Court of Lenoir County, which is directed to enter an order dismissing the *habeas corpus* proceeding.

Reversed.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. EDWARD THEODORE RAY

No. 6814SC406

(Filed 15 January 1969)

1. Criminal Law § 15— motion for change of venire

In prosecutions for kidnapping and robbery, assignments of error relating to trial court's failure to sustain defendant's motion for change of the venire and his motion for the call of a special venire from a contiguous county *are held* without merit.

2. Grand Jury § 3; Jury § 7— challenge to racial composition of grand and petit juries

In prosecutions for kidnapping and robbery, assignments of error relating to (1) trial court's failure to sustain defendant's motion to quash the bills of indictment on ground that Negroes were systematically excluded from service upon the grand jury solely by reason of their race and (2) trial court's failure to sustain defendant's challenge to the array of petit jurors for the same reason *are held* without merit.

3. Criminal Law § 84— admission of seized article

In prosecutions for kidnapping and robbery, defendant's contention that trial court erred in failing to exclude a shirt belonging to defendant on the ground that the shirt was illegally seized *is held* without merit.

4. Criminal Law § 42— articles connected with crime — identification

In prosecutions for robbery and kidnapping, trial court did not err in allowing State's witness to identify a carton of cigarettes and a sales slip as articles being in defendant's possession on the date of the offense, the State attempting to show that the prosecuting witness had purchased the article earlier in the day, and the defendant's contention that the State "flaunted" the exhibit before the jury is not supported by the record.

APPEAL by defendant from *Bailey, J.*, 11 October 1967 Regular Criminal Session, Superior Court of DURHAM.

Defendant was tried on separate bills of indictment charging kidnapping and robbery. The cases were consolidated for trial. Defendant pleaded not guilty, and, from a verdict of guilty as charged in each bill of indictment and judgments entered thereon, defendant appeals.

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

C. C. Malone, Jr., for defendant appellant.

MORRIS, J.

This is a companion case to *State v. Edward Theodore Ray*, 274 N.C. 556, 164 S.E. 2d 457. In that case defendant appealed

from a verdict of guilty as charged to the capital offense of rape with recommendation that punishment be imprisonment in the State's Prison for life. Defendant was tried on that charge at the April 1967 Session of Durham Superior Court. That charge and the convictions from which he now appeals arose from the same occurrence. As was noted in Chief Justice Parker's opinion in *S. v. Ray, supra,* defendant was represented by his court-appointed attorneys, C. C. Malone, Jr., and R. Roy Mitchell, Jr. From both convictions he was permitted to appeal *in forma pauperis.* For each appeal, the County of Durham was ordered to furnish his counsel a transcript of the trial, and the County of Durham was ordered to pay the cost of mimeographing the appeal and the brief of his counsel. In this Court, as in the Supreme Court, a writ of *certiorari* was allowed, upon petition of defendant's counsel, C. C. Malone, Jr., giving him additional time within which to prepare and docket his case on appeal. On 29 July 1968, this Court entered an order granting additional time and directing that case on appeal be docketed in this Court by 10:00 a.m., Tuesday, 3 September 1968. The case on appeal was not docketed until 5 September 1968. Under the rules of practice in this Court, the delay beyond the time granted subjects this appeal to dismissal. Nevertheless, we have carefully examined all defendant's assignments of error and find no prejudicial error in his trial.

[1, 2] Assignments of error Nos. 1 and 2 relate to the court's failure to sustain defendant's motion for a change of the venire and his motion for the call of a special venire from a contiguous county. Assignment of error No. 3 is addressed to the court's failure to sustain defendant's motion to quash the bills of indictment upon the ground that Negroes were systematically excluded from service upon the grand jury solely by reason of their race and in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of these United States and Article I, Section 17, of the Constitution of North Carolina. Assignment of error No. 5 is addressed to the court's failure to sustain defendant's challenge to the array of petit jurors for the same reason.

These questions were before the Court in *S. v. Ray, supra.* We find no substantial difference in the evidence presented in this case in support of defendant's position. The arguments advanced here in defendant's brief are identical to the arguments advanced in the Supreme Court. We think the opinion of Parker, C.J., in *S. v. Ray, supra,* holding these arguments to be without merit is decisive of these questions and we so hold.

[3] Defendant further contends that the trial tribunal committed prejudicial error in allowing State's Exhibit #9 to be introduced into evidence. State's Exhibit #9 was a dark blue shirt belonging to defendant which defendant contends was illegally obtained by an officer with other articles of clothing belonging to the defendant. The reasons advanced by defendant to sustain his contention are the same as those advanced by him in his appeal to the Supreme Court with respect to the same exhibit, in that case State's Exhibit #18. As to this assignment of error, *S. v. Ray, supra,* is controlling and assignment of error No. 7 is overruled.

[4] Defendant's remaining assignment of error is addressed to the trial court's failure to sustain defendant's objection to testimony regarding State's Exhibit #6 and the identification of this exhibit. Defendant, in his brief, states that the "State exposed and flaunted this exhibit before the jury without offering to introduce same into evidence." The record before us is devoid of any evidence or indication that the State "flaunted" this exhibit before the jury. There is no exception taken to any comment of the solicitor to the jury. This particular exhibit, cigarettes and sales slip, was identified by the prosecuting witness as being "in all respects similar to those purchased (by her) at Eckerd's on the night in question." The assistant manager of Eckerd's testified that on the night in question cigarettes were being sold at a reduced price; that this brand of cigarettes was on sale for $1.99 per carton; that the sales slip, part of Exhibit #6, was a sales slip for merchandise bought at Eckerd's; that it was dated 7 December 1966, the date this offense occurred; that the number on the sales slip indicated that the merchandise was sold at the tobacco counter; that the rest of State's Exhibit #6 — cigarettes and paper bag — were in all respects similar to the cigarettes being sold and paper bag in which cigarettes were placed at Eckerd's on Broad Street. State's Exhibit #6 was identified by Mrs. Mary Ann Gibson. She testified that defendant lived at her house, with the permission of her husband; that he paid no rent and contributed nothing to the expense of the home; that he slept on a sofa in the living room and she, her husband and two children occupied the bedroom; that defendant left her home the evening of 7 December and returned about 9:30; that she opened the door for him and he had a paper bag; that she saw the bag later in the week and it contained cigarettes; that she gave the bag containing the cigarettes to the officer the day after defendant left her home. Over defendant's objection, she identified State's Exhibit #6. Defendant's exception to the court's overruling his objection is the basis for defendant's assignment of error No. 6. According to the record, at the

close of the State's evidence, State's Exhibit #6, with other exhibits, was received in evidence. The record does not indicate that any objection was made by defendant to the introduction thereof.

State v. Eagle, 233 N.C. 218, 63 S.E. 2d 170, is cited by defendant as authority for his position. In that case, the defendant objected to the solicitor's argument and particularly to the solicitor's stating to the jury that he was willing for a whiskey bottle *which had not been identified nor introduced into evidence during the trial* then to be shown to the jury and that he had sent for it to be brought to the courtroom. We do not think that case is applicable here.

In allowing the witness to identify the exhibit, the trial court did not commit prejudicial error.

In the trial below, we find

No error.

MALLARD, C.J., and CAMPBELL, J., concur.

JOYCE SOMERSET v. BILLY GENE SOMERSET
No. 6826SC377

(Filed 15 January 1969)

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

Assignments of error in support of which no argument is advanced and no authority is cited are deemed abandoned.

2. Divorce and Alimony § 8— abandonment — adequate provocation

In an action for divorce from bed and board under G.S. 50-7, the court's instructions upon adequate provocation, when read in context, *are held* to adequately explain the law applicable to the case.

3. Divorce and Alimony § 8— constructive abandonment

The doctrine of "constructive abandonment" has long been recognized in this State.

4. Divorce and Alimony § 8— constructive abandonment

If a husband, by continued and persistent cruelty or neglect, forces his wife to leave his home, he may himself be guilty of abandonment.

5. Divorce and Alimony § 8— constructive abandonment — court order that defendant move out of the home

In this action by the wife for divorce from bed and board under G.S.

50-7(1) and (4), plaintiff's evidence tending to show that defendant's continued cruelty caused her to invoke the aid of the Domestic Relations Court, and that after finding the facts against defendant the judge of Domestic Relations Court ordered defendant to move out of and stay away from the home, *is held* sufficient to be submitted to the jury on the issue of defendant's constructive abandonment of plaintiff, it being for the jury to determine whether defendant's conduct justified plaintiff in seeking the aid of the courts and constituted constructive abandonment of plaintiff.

APPEAL by defendant from *Martin, Robert M., J.*, 11 March 1968 Schedule D Session, MECKLENBURG Superior Court.

This is an action for alimony, custody and support. Summons was issued and complaint was filed 17 February 1967, therefore the 1967 amendments to G.S. Chap. 50, which were specified to become effective 1 October 1967 do not apply to this case. Session Laws 1967, c. 1152, s. 9. The *pendente lite* proceedings are properly omitted from the Record on Appeal because they have no bearing upon the assignments of error relating to the trial on the merits before a jury.

The wife's complaint contains allegations in support of two grounds for divorce from bed and board under G.S. 50-7; (1) that defendant offered such indignities to her person as to render her condition intolerable and life burdensome, and (2) that the defendant abandoned his family. G.S. 50-7(4) and (1). The defendant by his answer denies all material allegations of the complaint, and pleads a recrimination to each ground alleged.

The jury answered the issues in favor of the plaintiff, and Judge Martin entered a judgment requiring the defendant to pay alimony to plaintiff, awarding custody of the one minor child to plaintiff, and requiring defendant to make support payments for the child. Defendant appealed.

A. A. Bailey, by Nelson M. Casstevens, Jr., for plaintiff appellee.

James J. Caldwell for defendant appellant.

BROCK, J.

It would add nothing to the understanding of the questions raised by this appeal to recount here the charges and countercharges hurled by the parties in their pleadings and their evidence. The jury adopted the plaintiff's view and rejected the defendant's.

[1, 2] Defendant's first argument is that the trial judge failed to properly instruct upon adequate provocation. Under this argument

in defendant's brief he lists assignments of error Nos. 5, 6, 7, 8, 9, 10, 11, 15 and 16. Some of these seem to relate to other matters, and are deemed abandoned because no argument is advanced and no authority is cited in support thereof. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Defendant's exceptions and assignments of error to the charge are in the nature of broadside exceptions which are not permissible. However, we have carefully reviewed the charge and hold that when read in context it adequately explains the law applicable to the case.

[1] Defendant's second argument is that the trial judge erred in refusing to nonsuit the cause of action based upon abandonment; and in failing to charge adequately upon defendant's contention that the separation was involuntary. Under this argument defendant lists assignments of error Nos. 2, 5, 6, 8, 10, 11, 15 and 16. Again some of these seem to relate to other matters, and are deemed abandoned for failure to advance any argument or citation of authority in support thereof. Rule 28, *supra.*

[5] Defendant's argument for nonsuit of the cause of action based on abandonment stems from an order of the Domestic Relations Court of Mecklenburg County. On 7 December 1966 defendant was tried in the Domestic Relations Court upon a warrant issued at the instance of the plaintiff. As a result of this trial the judge of the Domestic Relations Court ordered defendant to move out of his and plaintiff's home; and pursuant to this order defendant was compelled to move out of his home. He argues therefore that he did not abandon plaintiff because he had no choice but to move.

[3, 4] The doctrine of "constructive abandonment" has long been recognized in North Carolina. In *Blanchard v. Blanchard,* 226 N.C. 152, 36 S.E. 2d 919, the court said: "It is unnecessary for a husband to depart from his home and leave his wife in order to abandon her. By cruel treatment or failure to provide for her support, he may compel her to leave him. This, under our decisions, would constitute abandonment by the husband." Also, if a husband, by continued and persistent cruelty or neglect, forces his wife to leave his home, he may himself be guilty of abandonment. 1 Lee, N. C. Family Law, § 80, p. 302.

[5] In the case *sub judice* the plaintiff's evidence, when considered in the light most favorable to her, tends to show that the defendant's continued cruelty caused her to invoke the aid of the Domestic Relations Court, and after finding the facts against the defendant the judge concluded it was necessary to order the defendant to stay away from the home.

If plaintiff's evidence had shown that defendant's conduct was such that *plaintiff* had to leave the home to seek safety, there would be no question but that plaintiff had made out a case for the jury. We perceive no reason why plaintiff's seeking the aid of the Domestic Relations Court should detract from her cause of action. It was for the jury to determine whether defendant's conduct prior to the order of the Domestic Relations Court would justify plaintiff in seeking the aid of the Courts and thereby constitute a constructive abandonment by him. Defendant cannot hide behind the order which his own improper conduct brought about.

Judge Martin submitted the case to the jury under instructions upon the law applicable to constructive abandonment, and explained the defendant's contention that his moving from the home was involuntary. The cases of *Weld v. Weld,* 27 Minn. 330, 7 N.W. 267, and *Keely v. Keely,* 216 N.Y.S. 2d 301, cited by the defendant are not controlling.

We have considered defendant's remaining assignments of error and find them to be without merit. The defendant has had a fair trial, free from prejudicial error. The jury had an opportunity to consider all of his contentions, and they have answered the issues against him.

No error.

BRITT and PARKER, JJ., concur.

LLOYD M. WIGGINS v. PYRAMID LIFE INSURANCE COMPANY
No. 681SC431

(Filed 15 January 1969)

1. Courts § 7— appeal from a district court — where docketed

Where trial of a civil action was had in a district court on 19 June 1967 but judgment was not signed until 31 October 1967 and notice of appeal was given on that date, the appeal should be docketed in the Court of Appeals and not in the superior court, the superior court having no jurisdiction to hear and determine appeals from the district court where notice of appeal was given on or after 1 October 1967. G.S. 7A-35(a) and (c).

2. Appeal and Error § 1; Courts § 2— jurisdiction

Jurisdiction cannot be conferred by consent where it does not otherwise exist.

3. Appeal and Error § 1— jurisdiction of Court of Appeals

If the court from which the appeal is taken had no jurisdiction, the Court of Appeals cannot acquire jurisdiction by the appeal, the jurisdiction of the Court of Appeals being derivative.

4. Appeal and Error § 5— defect of jurisdiction

The Court of Appeals will take notice *ex mero motu* of a defect of jurisdiction.

APPEAL by plaintiff from *Cowper, J.*, 13 May 1968 Session, GATES Superior Court.

Complaint in this case was filed 27 February 1967 in the District Court Division, Gates County. It appears from the record on appeal that the case was tried before Judge William S. Privott, District Judge, sitting without a jury, on 19 June 1967. However, judgment was signed under the date of 31 October 1967, and shows a filing date of 3 November 1967. The judgment of the District Court was in favor of the plaintiff, and under date of 31 October 1967 Judge Privott signed appeal entries which contained a statement that defendant "gives notice of appeal to the Supreme Court of North Carolina or other appellate court having jurisdiction over an appeal from said District Court." The appeal entries show a filing date of 3 November 1967.

Certain stipulations were entered into between the parties under the date of 29 December 1967 which contained the following: "It is further stipulated that this appeal herein (sic) is to be before the Superior Court initially, in the opinion of counsel for plaintiff and defendant, and there has been a timely assembly of the record." The appeal was thereafter docketed in the Superior Court and was heard by Judge Cowper at the 13 May 1968 Session. Judge Cowper ruled that the District Court erred in failing to allow defendant's motion for nonsuit, and thereupon dismissed the action. From Judge Cowper's judgment the plaintiff gave notice of appeal to this Court, and thereafter docketed the record on appeal in this Court.

John H. Hall for plaintiff appellant.

Cansler & Lockhart for defendant appellee.

BROCK, J.

It seems to us that counsel interpreted the last paragraph of the judgment of the District Court as setting the date of the judgment, *nunc pro tunc*, on 19 June 1967. The said last paragraph reads as follows: "This judgment signed out of term and out of the county

and within the district, by consent, this 31st day of October, 1967, all as of the date of the trial of said action, to wit: June 19, 1967." This judgment was filed 3 November 1967, and the notice of appeal was filed 3 November 1967.

It may be that, for some purpose, the judgment is effective as of the date of 19 June 1967; but it is quite clear that notice of appeal could not be given until the judgment was signed on 31 October 1967. Therefore the date of notice of appeal comes on or after 1 October 1967.

G.S. 7A-35(a) provides:

> "Civil cases tried in the district court in which notice of appeal to the superior court has been given on or before September 30, 1967, and which have not been finally determined in the superior court on that date, shall be disposed of as provided by rule of the Supreme Court, and the jurisdiction of the superior court over civil appeals from the district court continues to the extent necessary for this purpose."

G.S. 7A-35(c) provides:

> "On and after October 1, 1967, all causes appealed to the appellate division from the Utilities Commission, the Industrial Commission, the district court in civil cases, or the superior court, other than criminal cases which impose a sentence of death or life imprisonment, shall be filed with the clerk of the Court of Appeals."

[1] These statutes make the date of notice of appeal controlling, not the date of the trial or the judgment. Under the statute the Superior Court has no jurisdiction to hear and determine an appeal from the District Court where the notice of appeal has been given on or after 1 October 1967; and it follows that the Superior Court of Gates County had no jurisdiction to hear and determine the appeal in this case. Unfortunately, the stipulation as to the understanding of counsel notwithstanding, defendant has chosen an improper forum in which to docket its appeal from the District Court.

[2, 3] Jurisdiction cannot be conferred by consent where it does not otherwise exist, 1 McIntosh, N. C. Practice 2d, § 6, and the jurisdiction of the Court of Appeals is derivative; therefore, if the court from which the appeal is taken had no jurisdiction, the Court of Appeals cannot acquire jurisdiction by appeal. 1 Strong, N. C. Index 2d, Appeal and Error, § 1, p. 103.

[4] Neither party has raised the question of jurisdiction before

this Court; nevertheless we will take notice *ex mero motu* of defects in the record. 1 Strong, N. C. Index 2d, Appeal and Error, § 5, p. 110.

Ex mero motu this appeal is dismissed for lack of jurisdiction.

Appeal dismissed.

BRITT and PARKER, JJ., concur.

ROBERT E. HARRIS EVANGELISTIC ASSOCIATION, INC. v. BOARD OF TAX SUPERVISION FOR BUNCOMBE COUNTY; EDWARD H. McELRATH, CHAIRMAN AND TAX SUPERVISOR; JOE G. ADAMS, MEMBER, AND SAM L. IRVIN, MEMBER

No. 6828SC414

(Filed 15 January 1969)

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

Where the record on appeal was docketed in the Court of Appeals 125 days after the date of the judgment appealed from, and the trial court did not extend the time for docketing the record on appeal, the appeal is dismissed by the Court of Appeals *ex mero motu* for failure to docket within the time prescribed by Rule 5.

APPEAL by defendant from *McLean, J.*, May 1968 Civil Session of BUNCOMBE Superior Court.

Plaintiff, a nonprofit religious and charitable organization incorporated under the laws of North Carolina, filed its complaint on 21 July 1967 seeking a determination that its real property located in Biltmore Ward, Buncombe County, North Carolina, on which it conducts a nursing home, be adjudged tax exempt for *ad valorem* tax purposes and that the defendant Board of Tax Supervision for Buncombe County be restrained from listing said property as taxable property upon the tax records of Buncombe County for the year 1967 and years following. Plaintiff alleged that in 1966, upon plaintiff's application and following receipt by the Board of an advisory opinion from the Attorney General of North Carolina, the defendant Board had granted plaintiff's property tax exempt status, but that on 7 June 1967 plaintiff had received a notice from defendant Board, without any prior notice or hearing, that plaintiff's property had been placed on the tax records for 1967 as taxable property.

Defendant demurred on the grounds that the court lacked jurisdiction in that plaintiff had not followed the remedy set forth in Chapter 105 of the General Statutes. The demurrer was overruled.

Defendant then filed answer and the parties stipulated that the action might be tried by the judge without a jury. After hearing, the trial court entered judgment making findings of fact and concluding as a matter of law that plaintiff is a nonprofit eleemosynary religious association; that plaintiff's land has located thereon a rest home or nursing home used entirely for charitable purposes; that plaintiff's nursing home is not conducted for profit nor is a profit realized from the operation of said home; and that the assessment and imposition of real property tax against the plaintiff's land was illegal and invalid. In accord with these conclusions the court entered judgment declaring plaintiff's land tax exempt for purposes of assessment and collection of Buncombe County *ad valorem* taxes and restraining the defendant Board from listing said property on the tax scrolls of said county as taxable property for 1967 and future periods. From this judgment defendant gave notice of appeal, assigning errors.

Gudger & Erwin, by James P. Erwin, Jr., for plaintiff appellee.

Peter L. Roda for defendant appellant.

PARKER, J.

The judgment here appealed from was entered 17 May 1968. The record on appeal was docketed in this Court on 19 September 1968, 125 days after the date of the judgment appealed from. Rule 5 of the Rules of Practice of this Court provides that if the record on appeal is not docketed within ninety days after the date of the judgment appealed from the case may be dismissed under Rule 17; provided the trial tribunal may, for good cause, extend the time not exceeding sixty days. In the record before us there is no order extending the time for docketing the record on appeal. Accordingly, the appeal in this case should be and is dismissed, *ex mero motu,* for failure to docket within the time fixed by the Rules. Rule 48 of the Rules of Practice of this Court; *Carter v. Board of Alcoholic Control,* 274 N.C. 484, 164 S.E. 2d 1; *Kelly v. Washington,* 3 N.C. App. 362, 164 S.E. 2d 634 (filed 31 December 1968); *Williams v. Williams,* 1 N.C. App. 446, 161 S.E. 2d 757.

Nevertheless, since this case involved a matter concerning the public tax revenues, we have carefully reviewed the entire record and the briefs of the parties and defendant has shown no prejudicial error.

Appeal dismissed.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. SIDNEY BRUCE HOGSED

No. 6829SC454

(Filed 15 January 1969)

Criminal Law § 166— appellant's brief

Failure of defendant's brief to comply with Rule 28 of the Rules of Practice in the Court of Appeals in that the brief does not contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record, and the authorities relied on, classified under each assignment, subjects the appeal to dismissal. Rule 48 of the Rules of Practice in the Court of Appeals.

APPEAL by defendant from *Martin, (Harry C.), J.,* July 1968 Session of Superior Court of TRANSYLVANIA County.

Defendant was tried upon a bill of indictment charging him with the misdemeanor of operating a motor vehicle on the public highways while under the influence of intoxicating liquors. Upon his plea of not guilty, trial was by jury. The jury returned a verdict of guilty as charged.

From a judgment imposing a one-hundred-dollar fine and requiring the defendant to pay the cost and surrender his driver's license, the defendant appeals, assigning error.

Attorney General T. W. Bruton, Assistant Attorney General William W. Melvin, and Staff Attorney T. Buie Costen for the State.

Hamlin, Potts & Hudson by Jack H. Potts for the defendant.

MORRIS, J.

The brief of the defendant appellant does not comply with the provisions of Rule 28 of the Rules of Practice in the Court of Appeals in that it does not contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record, and the authorities relied on, classified under each assignment. Rule 48 of the Rules of Practice in the Court of Appeals reads: "If these rules are not complied with, the appeal may be dismissed." This case is, therefore, subject to dismissal for failure to comply with the rules. The Attorney General has made a motion to dismiss on the grounds of this failure to comply with the rules. *State v. Floyd,* 241 N.C. 79, 84 S.E. 2d 299; *Shepard v. Oil & Fuel Co.,* 242 N.C. 762, 89 S.E. 2d 464.

However, instead of dismissing it, we have examined the exceptions and assignments of error in the record and find no prejudicial

error. The issue was primarily one of fact, and the jury's verdict was against the defendant.

No error.

MALLARD, C.J., and CAMPBELL, J., concur.

RAY B. HERLOCKER, TRADING AS ASHEBORO PAVING COMPANY v. GUY H. ANDREWS, ORIGINAL DEFENDANT, AND DEAN F. RING, ADDITIONAL DEFENDANT

No. 6819SC429

(Filed January 15 1969)

1. Appeal and Error § 41— evidence submitted under Rule 19(d)(2) — failure to affix summary of evidence to brief

Where appellant submits the evidence in the record on appeal under Rule 19(d)(2) of the Rules of Practice in the Court of Appeals but fails to affix an appendix to the brief setting forth in succinct language the testimony he relies upon to support his assignments of error, appellee's motion to dismiss the appeal is allowed.

2. Appeal and Error § 41— purpose of Rule 19(d)(2)

The primary purposes of Rule 19(d)(2) are (1) to relieve counsel of the necessity of narrating all of the testimony and (2) to save litigants the expense of mimeographing all of the evidence as a part of the record on appeal.

APPEAL by defendant Guy H. Andrews from *Seay, J.*, 5 February 1968 Session, RANDOLPH Superior Court.

Plaintiff instituted this action to recover the balance due on a contract with defendant for the paving of a parking lot.

From a verdict in favor of plaintiff, and judgment entered thereon, defendant appealed assigning error.

Moser & Moser, by D. Wescott Moser, for plaintiff appellee.

Hoyle, Boone, Dees & Johnson, by J. Sam Johnson, Jr., for defendant appellant.

BROCK, J.

As authorized by Rule 19(d)(2), as an alternative to narrating the testimony, defendant appellant filed the complete stenographic

transcript of the evidence in the trial tribunal. This transcript of evidence consists of one hundred and seven pages of testimony.

[1] Defendant's first seventeen assignments of error relate to the examination or cross-examination of witnesses. As a part of the alternative of the privilege of filing the stenographic transcript of the evidence, Rule 19(d)(2) also provides ". . . *the appellant in an appendix to his brief shall set forth* in succinct language with respect to those witnesses whose testimony is deemed pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof." Rule 19(d)(2), Rules of Practice in the Court of Appeals of North Carolina. (emphasis added). Defendant appellant has failed to furnish us with an appendix to his brief. Prior to argument of the case on appeal, plaintiff duly filed a motion to dismiss for failure of defendant to comply with this rule.

[2] Rule 19(d)(2) was adopted as an alternate to the formerly existing Rule to accomplish two primary purposes: (1) to relieve counsel of the necessity of narrating all of the testimony, and (2) to save litigants the expense of mimeographing all of the evidence as a part of the Record on Appeal. Only one copy of the stenographic transcript is required to be filed. Therefore, in order for the three members of the panel to understand appellant's assignments of error, it is necessary that appellant provide us with an appendix to his brief. *Bryant v. Snyder,* 3 N.C. App. 65 (filed 13 November 1968).

[1] Plaintiff appellee's motion to dismiss is allowed. Rule 48, Rules of Practice, *supra.*

Appeal Dismissed.

BRITT and PARKER, JJ., concur.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION, 1969

WILLIAM R. PORTH, INDIVIDUALLY AND AS ADMINISTRATOR, C. T. A. OF JERRY HILDA PORTH v. ROBERT EDWARD PORTH, MARGARET CHURCH PORTH, PEGGY SUE PORTH, CAROLYN BORCHARDT, DOROTHY BORCHARDT, GERALDINE BORCHARDT, MICHAEL BORCHARDT, FREDA SANDBERG, VELMA BUCKINGHAM MAKI, VIRGINIA KRESS, RUTH BORCHARDT FINCH, LUCY COOPER, DACA MARIE JOHNSON, KAY GILLIAM, SHERI MEHLEN, DOROTHEA BORCHARDT, WILLIAM BORCHARDT, ARTHUR BORCHARDT, JAMES J. BOOKER, SAMUEL M. WHITT AND WIFE, BLANCHE COLLINS WHITT, WILLIAM V. DOSS, J. C. TUCKER, SR., AND NORMAN TUCKER, D/B/A J. C. TUCKER & SONS, PRUDENTIAL INSURANCE COMPANY OF AMERICA, FIRST UNION NATIONAL BANK, AND LAWYERS TITLE INSURANCE CORPORATION, ANY AND ALL UNKNOWN HEIRS OF JERRY HILDA PORTH AND ANY AND ALL OTHER PERSONS, BORN OR UNBORN WHO NOW HAVE OR MAY HAVE AT ANY TIME IN THE FUTURE ANY RIGHT, TITLE OR INTEREST IN THE PROPERTIES OF THE DECEDENT, JERRY HILDA PORTH, AND ROBERT E. PORTH

No. 68SC157

(Filed 5 February 1969)

1. Descent and Distribution § 6— wrongful acts barring property rights — construction of statute

G.S. Ch. 31A, entitled "Acts Barring Property Rights," must be conconstrued in the light of the long established policy of this State that no man shall be permitted to take advantage of his own wrong or to acquire property as the result of his crime.

2. Husband and Wife § 15— incidents of tenancy by entirety

Where husband and wife own real property as tenants by the entirety, the husband is solely entitled, to the exclusion of the wife, to the possession, income and usufruct of such property during their joint lives.

3. Descent and Distribution § 6; Constitutional Law § 23— acts barring property rights — forfeiture of vested rights

In providing that where husband is the slayer of his wife he shall hold all of the entirety property during his life subject to pass upon his death to the estate of the wife, G.S. 31A-5(2) recognizes husband's right to the lifetime possession and use of entirety property and thereby avoids the possibility that the statute might be considered unconstitutional as working a forfeiture of a vested property right for crime.

4. Descent and Distribution § 6— acts barring property rights — murder of wife by husband — restraint upon alienation

The provision of G.S. 31A-5(2) that the husband-slayer of his wife shall "hold" all of the entirety property during his life subject to pass upon his death to the estate of the wife, *held* not to bar the alienation of the entire title to the property by joint conveyance of the slayer-husband and the heirs of the decedent, the word "hold" being used in the same sense as when used in the habendum clause of a deed.

5. Deeds § 12— construction of "hold" in habendum clause

The word "hold" as used in the habendum clause of a deed is never construed to place a restraint on alienation.

6. Deeds § 12— restraint upon alienation

It is the established policy of our law to prevent undue restraint upon or suspension of the right of alienation.

7. Descent and Distribution § 6— G.S. 31A-5 — "estate" defined

The word "estate" as used in G.S. 31A-5 means those persons, other than the slayer, who succeed to the rights of the decedent either by testate or intestate succession, as the case may be.

8. Descent and Distribution § 6; Estates § 3— murder of wife by husband — time of vesting of wife's estate

In statute providing that husband-slayer of his wife shall hold all of the entirety property during his life subject to pass upon his death to the estate of his wife, the words "pass upon his death" refer exclusively to possession and enjoyment of the property and not to vesting in interest, and the persons entitled to succeed to wife's estate are to be determined as of the actual date of her death and not as of the subsequent date when the husband's life estate terminates upon his death. G.S. 31A-5(2).

9. Descent and Distribution § 6— determination of wife's estate

In view of statutory presumption that, for purposes of distributing the estate of decedent, the husband-slayer of his wife shall be deemed to have died immediately prior to the death of the decedent, G.S. 31A-4, the words "the estate of the wife" as used in G.S. 31A-5(2) mean the estate of the murdered wife as the same comes into existence at the instant of her death.

10. Wills § 44— determination of time of class

Generally, where there is a bequest to one for life and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator and not those who answer that description at the death of the first taker.

11. Descent and Distribution § 6— murder of wife by husband — joint bank account

Where, at the time of wife's murder by her husband, there existed a joint bank account subject to a survivorship contract between the decedent and her husband, the proper disposition of the account should direct that the slayer-husband have only the income during his lifetime from his one-half share of the account, subject to the rights of his creditors, and that at his death the principal should pass to the estate of his deceased wife. G.S. 31A-6(a).

12. Executors and Administrators § 5— motion for removal of administrator

Motion in declaratory judgment action to remove plaintiff as administrator of his mother's estate on the ground that plaintiff is no longer a resident of this State is a collateral attack and is properly denied; such question must be presented by direct proceedings before the clerk of Superior Court who, as probate judge, has exclusive original jurisdiction to hear and decide a motion to remove an administrator for cause. G.S. 28-32.

APPEALS by defendant Philip E. Lucas, Guardian *ad litem,* and by defendant James J. Booker, from *Johnston, J.,* 27 November 1967 Session of FORSYTH Superior Court.

This is a civil action brought under G.S., Chap. 1, Art. 26, by the Administrator c. t. a. of the estate of Jerry Hilda Porth for a declaratory judgment to determine the rights of the parties in certain properties of the decedent and in certain matters in connection with settlement of her estate. The material facts relevant to the questions presented by these appeals were established by stipulations of the parties and by findings of the trial court and are not in dispute.

Jerry Hilda Porth, a resident of Forsyth County, N. C., died 13 August 1965. In September 1965 her husband, Robert Edward Porth, was charged with her murder. On 25 February 1966 he was convicted of first-degree murder of his wife and on 3 February 1967 the conviction was affirmed by the North Carolina Supreme Court.

In addition to her husband, the decedent was survived by her son, William R. Porth, who was her only child, and by her mother, her sister, and two brothers. The son, William R. Porth, is married to Margaret Church Porth, and after the death of his mother two children were born to the son and his wife: a daughter, Peggy Sue Porth, born 4 August 1966, and a son, born in September 1967. The

decedent left a holographic will which disposed of certain specified items of personal property but which contained no residuary clause and made no disposition of any interest in real property.

At the time of her death, Jerry Hilda Porth held an interest as tenant by the entirety with her husband in two pieces of real property in Forsyth County. One of these, known as the Briarcliff Road property, had been conveyed to Robert E. Porth and wife, Jerry Porth, by deed dated 17 July 1956, and at the time of decedent's death was subject to a mortgage. The other tract, known as the Shallowford Hills property, had been conveyed to Robert E. Porth and wife, Jerry Porth, by three deeds, each dated 9 March 1959, and at the time of decedent's death was subject to a materialmen's lien in favor of J. C. Tucker & Sons, who were in process of constructing a dwelling thereon pursuant to a contract made with decedent and her husband.

Subsequent to decedent's death and after her husband had been charged with her murder but before his conviction, her husband, Robert E. Porth, and her son, William R. Porth, and his wife, joined in execution of a deed dated 27 January 1966 conveying the Briarcliff Road property to Samuel M. Whitt and wife, and William V. Doss, for a sales price of $29,500.00. In this transaction the grantors were represented by Attorney James J. Booker, who at the time was also representing Robert E. Porth in the murder case then pending against him. The net proceeds of the sale remaining after provision was made for the mortgage and certain expenses incident to the sale was divided into two equal portions. Out of one portion the sum of $8,000.00 was paid to James J. Booker and applied on his attorney's fee for representing the husband in the murder case and the remainder of that portion was applied toward expenses of that case and other miscellaneous expenses of the husband. Out of the other portion the sum of $3,000.00 was placed in an escrow bank account pursuant to an agreement between James J. Booker and Lawyers Title of North Carolina, Inc., and the balance was paid to the decedent's estate or is held by plaintiff pending further orders of the court. Plaintiff's complaint requested a determination by the court as to the validity of the sale by decedent's surviving husband and son of the Briarcliff Road property and instructions as to plaintiff's duties and responsibilities as to such property or the proceeds of such sale.

Following decedent's death and on 9 February 1966, J. C. Tucker & Sons, contractors, filed in the office of the Clerk of Superior Court of Forsyth County a notice of lien against the Shallowford Hills

property in the amount of $4,672.29 with interest, being the balance claimed to be due from the decedent and her husband on their contract for construction of the residential building on said property. On 5 August 1966 said contractors filed suit in the Superior Court of Forsyth County against Robert E. Porth, William R. Porth as Administrator c. t. a. of the Estate of Jerry Hilda Porth, and against William R. Porth and his wife as individuals, asking for judgment for the amount claimed and that the Shallowford Hills property be sold to satisfy such judgment and lien. Plaintiff's complaint in the present action for a declaratory judgment requested a determination by the court as to the persons entitled to the Shallowford Hills property, as to whether such property or the proceeds from a sale thereof is subject to payment of debts and costs of administration of the Estate of the decedent, and as to the duties and responsibilities of the plaintiff administrator in regard to said property or the proceeds of the sale thereon during the lifetime of the husband.

At the time of her death decedent and her husband had a joint checking account in Wachovia Bank & Trust Company. In connection with this account there was in existence at the time of her death a survivorship contract signed by decedent and her husband. Plaintiff requested instructions of the court as to what disposition should be made of this checking account.

Plaintiff's complaint also alleged facts and requested a determination by the court regarding certain other properties in which the decedent held an interest at the time of her death and regarding certain policies of insurance on her life, but since no question relative to any of these is presented on appeal, no further reference to any of these matters is required.

The defendants in this action are the husband, daughter-in-law, grandchildren, mother, sister, brothers, legatees and other persons interested in decedent's estate or in properties in which she held an interest at the time of her death, including the purchasers of the Briarcliff Road property and the attorney who had represented the husband and son in connection with the sale of such property and who had also represented the husband in connection with the murder case. On motion of the plaintiff, a guardian *ad litem* was appointed to represent two of the defendants who are minors and to represent all unknown heirs of the decedent, *in esse* or *in posse,* and any and all other persons not now in being or who are under any disability who may become interested in the properties which are the subject of this action.

Answers were filed by or on behalf of several of the defendants,

but reference is made only to those pleadings which raise questions presented on these appeals. The answer filed by the purchasers of the Briarcliff Road property alleged that all persons having any interest in such property had joined in the conveyance to them for a valuable consideration, and these defendants prayed that this action be dismissed as to them. The guardian *ad litem* filed answer in which he took the position that the sale of the Briarcliff Road property was not valid under G.S. 31A-5 and that title to said property should be restored in order that it might hereafter pass to the estate of the decedent at the time of the death of her surviving husband. The guardian *ad litem* similarly contended as to the Shallowford Hills property that under G.S. 31A-5 title should be held by the husband for his life, to pass upon his death to the estate of his deceased wife, subject to determination of the validity of the materialmen's lien being asserted by J. C. Tucker & Sons.

James J. Booker also filed answer and filed a motion that William R. Porth, plaintiff herein, be removed as administrator c. t. a. of the estate of his mother on the ground that he was no longer a resident of North Carolina. James J. Booker also filed motion that the attorneys for the administrator c. t. a. be required to withdraw from the case because of an alleged conflict of interest. Both of these motions were denied.

The trial judge, after hearing evidence and receiving stipulations of the parties, entered judgment making findings of fact substantially as above set forth, and concluding as a matter of law that both the Briarcliff Road and the Shallowford Hills properties had been held by the decedent and her husband as tenants by the entirety and that title to said properties was at the date of decedent's death on 13 August 1965, and at all times thereafter, subject to the provisions of Chapter 31A of the General Statutes of North Carolina. As to the Briarcliff Road property the court adjudged that title vested in the estate of Jerry Hilda Porth at the time of her death and that the person or persons constituting her heirs as of that date were the persons entitled to said property, subject to the right of the defendant, her husband, Robert E. Porth, to hold all of said property during his lifetime; that the sale and conveyance by Robert E. Porth and by William R. Porth, the latter being the only heir at law of Jerry Hilda Porth, was lawful and binding on the parties to this action and vested a fee simple title in the grantees, Samuel M. Whitt and wife, and William V. Doss; that the net proceeds from the sale of said property should be paid to the administrator of the estate of Jerry Hilda Porth, to be distributed to William R. Porth, individually, as the only heir of Jerry Hilda Porth, subject to the

value of the life interest of Robert E. Porth in such net proceeds, which life interest should be computed pursuant to the tables set forth in the North Carolina General Statutes and paid to the said Robert E. Porth; and that the portion of such proceeds as is payable to William R. Porth shall be subject to North Carolina inheritance taxes, debts, and costs of administration of the estate of Jerry Hilda Porth. As to the Shallowford Hills property, the court concluded that the materialmen's lien of J. C. Tucker & Sons was a valid lien; that subject to such lien title vested in the estate of Jerry Hilda Porth, and the person or persons constituting her heirs as of the date of her death are entitled to said property subject to the right of the defendant Robert E. Porth to hold all of said property during his lifetime; that upon sale of said property under the materialmen's lien any surplus proceeds should be paid to the estate of Jerry Hilda Porth to be distributed to William R. Porth, individually, as the only heir of Jerry Hilda Porth, subject to the value of the life interest of Robert E. Porth. As to the joint checking account in Wachovia Bank & Trust Company in the name of Mr. and Mrs. Robert E. Porth, the court concluded that one-half of the balance should be paid to the defendant, Robert E. Porth, subject to his liability for funeral bills and other debts of the decedent constituting necessaries for which he is liable as husband of the decedent, and the remaining one-half should be paid to the administrator c. t. a. to be held as an asset of the estate of Jerry Hilda Porth pursuant to the provisions of G.S. 31A-6.

From judgment in accord with these conclusions, the guardian *ad litem* and the defendant, James J. Booker, appealed, assigning errors.

Womble, Carlyle, Sandridge & Rice, by Charles F. Vance, Jr., and John L. W. Garrou, for plaintiff appellee.

McKeithan & Graves, by J. H. McKeithan, for defendant appellees, Samuel M. Whitt and wife, Blanche Collins Whitt and William V. Doss.

W. Dunlop White, Jr., for defendant appellee, Lawyers Title of North Carolina, Inc.

James J. Booker for himself as defendant appellant.

Jenkins & Lucas, by R. Kenneth Babb, for defendant appellant Philip E. Lucas, Guardian Ad Litem.

PARKER, J.

APPEAL OF THE GUARDIAN AD LITEM: The appeal of the guardian *ad litem* brings forward three assignments of error: (1) That the trial court erred in holding valid the conveyance of the Briarcliff Road property by the surviving husband and son of the decedent and in directing distribution of the net proceeds of such sale in the manner set forth in the judgment; (2) that the court erred in determining that title to the Shallowford Hills property vested in the heirs of the decedent as of the date of her death and in directing distribution of any surplus proceeds from a sale of such property in accordance with that determination; and (3) that the court erred in the manner in which it directed distribution of the balance in the joint checking account in the name of decedent and her husband. Determination of the questions presented requires an interpretation of the provisions of Chapter 31A of the General Statutes, which is entitled "Acts Barring Property Rights," and which was enacted by Chapter 210 of the Session Laws of 1961 and became effective 1 October 1961.

[1] The North Carolina Supreme Court has long recognized as a basic principle of law and equity that no man shall be permitted to take advantage of his own wrong or to acquire property as the result of his crime. *In Re Estate of Perry,* 256 N.C. 65, 123 S.E. 2d 99; *Garner v. Phillips,* 229 N.C. 160, 47 S.E. 2d 845; *Parker v. Potter,* 200 N.C. 348, 157 S.E. 68; *Bryant v. Bryant,* 193 N.C. 372, 137 S.E. 188. The statute we are now called on to interpret must be construed in the light of this long established public policy. G.S. 31A-15 expressly provides that "(t)his chapter (G.S., Chap. 31A) shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong." The particular section of the statute with which we are first concerned and which is controlling on the questions presented by the guardian *ad litem's* first two assignments of error, is G.S. 31A-5, which provides as follows:

> "Where the slayer and decedent hold property as tenants by the entirety:
>
> "(1) If the wife is the slayer, one half of the property shall pass upon the death of the husband to his estate, and the other one half shall be held by the wife during her life, subject to pass upon her death to the estate of the husband; and
>
> "(2) If the husband is the slayer, he shall hold all of the property during his life subject to pass upon his death to the estate of the wife."

[2, 3] It is firmly established in North Carolina that where husband and wife own real property as tenants by the entirety, the husband is solely entitled, to the exclusion of the wife, to the possession, income, and usufruct of such property during their joint lives. *Nesbitt v. Fairview Farms, Inc.*, 239 N.C. 481, 80 S.E. 2d 472; *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566; *West v. Railroad*, 140 N.C. 620, 53 S.E. 477. G.S. 31A-5 recognizes this distinction in the rights held by the husband as compared with the rights held by the wife in entirety property by providing that the slayer-husband shall hold *all* of the property during his life subject to pass upon his death to the estate of the wife, whereas the slayer-wife is to hold only *one-half* of the property during her lifetime subject to pass upon her death to the estate of the husband, while the other one-half of the property in such case shall pass upon the death of the husband to his estate. In preserving the slayer-husband's right to hold all of the property during his life, G.S. 31A-5(2) recognizes his right to the lifetime possession, income, and usufruct, of the property, and thereby avoids the possibility that the statute might be considered unconstitutional as working a forfeiture of a vested property right for crime. See, Bolich, *Acts Barring Property Rights*, 40 N.C.L. Rev. 175, at 201-205.

[4] In the case presently before us, appellant guardian *ad litem* contends in connection with his first assignment of error that the language of the statute providing that if the husband be the slayer, "he shall hold all of the property during his life," is mandatory, and therefore that the slayer-husband in this case had no lawful right or power to join in a conveyance of the Briarcliff Road property. We do not so interpret the statute. The quoted language was employed by the Legislature, not for the purpose of barring any alienation of the property until after the slayer-husband's death, but in order to recognize and preserve the husband's lifetime rights in the property and thereby avoid the constitutional problem referred to above. The Legislature clearly intended that even the slayer-husband should not forfeit what was always recognized as his — the right to possession and income from the property for his lifetime.

[4-6] We do not believe that the statute, correctly interpreted, bars the alienation of the entire title to the property by joint conveyance of the slayer-husband and the heirs of the decedent. To so interpret the statute would run contrary to the established policy of our law, which is to prevent undue restraint upon or suspension of the right of alienation. See, *Mercer v. Mercer*, 230 N.C. 101, 52 S.E. 2d 229. We do not presume that the Legislature intended to do

something that is against the long established public policy of this State, and the language of the statute does not require such a construction. The words "shall hold," as used in the statute, were not intended to effect a complete restraint on alienation during the husband's lifetime. On the contrary, the word "hold", as used in the statute, is used in the same sense as when used in the habendum clause of a deed. Certainly the word "hold" as used in the habendum clause of a deed is never construed to place a restraint on alienation, and the very words used in this statute, "hold all of the property during his life subject to pass upon his death to the estate of the wife," if used in a deed, would not prevent the husband from selling his life interest in the property. Our law has long recognized that the slayer-husband cannot convey more than his own interest in the entirety property and that certainly no conveyance of his can work a detriment to the rights of the estate of his deceased wife. For that reason it was held in *Bryant v. Bryant, supra,* that the slayer-husband "holds the interest of his deceased wife in the property as a trustee for her heirs at law; that he should be perpetually enjoined from conveying the property in fee; that the plaintiffs should be adjudged the sole owners, upon the appellant's death, of the entire property as the heirs of their deceased mother. . . ." That case arose when the slayer-husband attempted to sell the *fee* title to lands previously held by him and his wife by the entireties. This the court prevented him from doing, but made no suggestion that the husband could not join with his wife's heirs in order to convey good title to the property.

[7] We must next determine the meaning of the word "estate" as it is used in G.S. 31A-5. The legal significance of this word must be ascertained from the context in which it appears. *Reid v. Neal,* 182 N.C. 192, 108 S.E. 769. From examination of the entire statute and giving consideration to the purposes for which it was enacted, we believe it is clear and we so hold that the word "estate" as used in G.S. 31A-5 means those persons, other than the slayer, who succeed to the rights of the decedent either by testate or intestate succession, as the case may be. To accomplish the purpose of G.S. 31A-5 and consistent with the clear language of G.S. 31A-4, the slayer cannot be included in this class. In cases in which the decedent has made testamentary disposition of the real property involved, this interpretation gives effect to the decedent's will. If there is no will, or if, as in the case before us, the decedent left a will but made no disposition therein of the real property involved, the decedent's "estate" consists of those persons who become entitled to succeed to the de-

cedent's property under our intestate succession laws. In either event under G.S. 31A-4 the slayer is not included.

[8] Finally we must determine as of what date the roll must be called in order to ascertain the persons entitled as constituting the "estate" of the deceased wife under G.S. 31A-5(2). The guardian *ad litem* contends that the language of the statute that the slayer-husband hold the property during his life "subject to pass upon his death to the estate of the wife," postpones the roll call until the death of the husband. We do not agree.

Our decisions have long recognized the legal distinction between vesting in interest and vesting in possession and enjoyment. For example, in *Rives v. Frizzle,* 43 N.C. 237, Ruffin, C.J., construing a bequest to testator's wife for life and after her death to his lawful heirs, said:

> "'(A)fter,' or 'upon,' the death of the wife, or the like expressions, do not make a contingency, but merely denote the commencement of the remainder, in point of enjoyment. . . . The limitation here is not to such persons 'as may be my heirs at the death of my wife;' but it is to 'my lawful heirs,' simpliciter, and imports, therefore, those who were the heirs at the testator's death, who took in right then, though they were not to take in possession, until the previous benefit, intended for their mother, should terminate by her death."

[8, 9] We hold that the words "pass upon his death" refer exclusively to possession and enjoyment of the property and not to vesting in interest. In effect, the slayer-husband holds a life estate in the property with a vested remainder in the estate of his deceased wife, and the persons entitled to succeed to her estate are to be determined as of the actual date of her death, not as of the subsequent date when the husband's life estate terminates upon his death. This interpretation is further supported by the express language of G.S., Chap. 31A, as well as by reference to the purposes to be achieved by the statute. G.S. 31A-4 provides in part that, for purposes of distributing the estate of the decedent, "(t)he slayer *shall be deemed to have died immediately prior to the death of the decedent. . . .*" In view of this express statutory presumption, it is clear that the words "the estate of the wife" as the same are used in G.S. 31A-5(2) mean the estate of the murdered wife as the same comes into existence at the instant of her death, and the title to the entireties property at that moment passes to those persons who would be entitled to succeed to her interest in such property as of the moment of her death if she had in fact survived her husband, subject only to his

recognized right to "hold" the property during his lifetime. In the case before us, the murdered wife died on 13 August 1965. According to G.S.31A-4, for purposes of distributing her estate, her slayer-husband is deemed to have died immediately prior to that date. The statute makes no attempt artificially to alter the date of the death of the decedent, but provides instead that the acual date of death of the slayer is to be disregarded. Therefore, if the language of the statute is followed, the estate of the decedent is determined at the date of her actual death, and the law calls the roll of the class immediately as of that time; those who can then answer, take.

The correctness of the interpretation of the words "estate of the wife" in G.S. 31A-5(2) as meaning the estate as it came into existence at the moment of her actual death, is further strengthened by an examination of subparagraph (1) of G.S. 31A-5, which deals with the situation when the wife is the slayer. In such case the statute provides that "one half of the property shall pass upon the death of the husband to his estate, and the other one half shall be held by the wife, subject to pass upon her death to the estate of the husband." It is not reasonable to suppose that the Legislature in G.S. 31A-5(1) intended the word "estate" to have one meaning as to one-half of the property and another meaning as to the other one-half. Rather, it is more reasonable to suppose that the word "estate" as twice used in the same sentence was intended to have the same meaning, and that it refers to the estate of the deceased as such estate comes into existence at the moment of actual death.

[10] The interpretation which we have here given to G.S. 31A-5(1) and (2) is consistent with the rules of construction applied by our Supreme Court when considering instruments creating future instruments. *Rives v. Frizzle, supra.* As pointed out by Chief Justice Stacy in *Trust Co. v. Lindsay,* 210 N.C. 652, 654, 188 S.E. 94, 95, quoting from Lord Campbell: "Generally speaking, where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take *are the persons who answer that description at the death of the testator,* and not those who answer that description *at the death of the first taker.*" (Emphasis added.)

What we have said above disposes of appellant guardian *ad litem's* first two assignments of error, as to both of which we find the trial court's judgment to be correct.

[11] The question presented by appellant guardian *ad litem's* third assignment of error, directed to that portion of the judgment deal-

ing with the joint bank account as to which decedent and her husband had entered into a survivorship contract, is governed by G.S. 31A-6(a), which provides as follows:

> "Where the slayer and the decedent hold property with right of survivorship as joint tenants, joint owners, joint obligees or otherwise, the decedent's share thereof shall pass immediately upon the death of the decedent to his estate, and the slayer's share shall be held by the slayer during his lifetime and at his death shall pass to the estate of the decedent. During his lifetime, the slayer shall have the right to the income from his share of the property subject to the rights of creditors of the slayer."

The trial court's judgment was in error insofar as it directed payment of one-half of the checking account to the slayer-husband. The judgment should have directed that the slayer-husband have only the income during his lifetime from his one-half share of the account, subject to the rights of his creditors, and that at his death the principal should pass to the estate of his deceased wife. Plaintiff appellee's brief concedes this is so, and the judgment should be modified accordingly.

APPEAL OF JAMES J. BOOKER: The appeal by defendant, James J. Booker, presents three assignments of error: (1) That the trial court erred in directing that the $3,000.00 held in the escrow account be paid to the estate of the decedent; (2) that the court erred in overruling appellant's motion to remove the plaintiff as administrator c. t. a. of his mother's estate; and (3) that the court erred in overruling appellant's motion to remove plaintiff's counsel from the case. There is no merit in any of these assignments of error.

The $3,000.00 escrow account was set aside from a portion of the proceeds of sale of the Briarcliff Road property solely to protect the title insurance company against creditors and tax claims against decedent's estate; the title insurance company has filed answer disclaiming any interest in the escrow account and appellant James J. Booker has no interest therein except as trustee. There was no error in directing that this fund be paid to the decedent's estate to be distributed in the same manner as the remaining proceeds from the sale of the Briarcliff Road property.

[12] Appellant Booker's motion to remove plaintiff as administrator of his mother's estate on the grounds that plaintiff is no longer a resident of this State is a collateral attack which cannot be made in this action. Such a question must be presented by direct proceed-

ings before the Clerk of Superior Court, who, as probate judge, has exclusive original jurisdiction to hear and decide a motion to remove an administrator for cause. G.S. 28-32; *McMichael v. Procter,* 243 N.C. 479, 91 S.E. 2d 231. Appellant's motion made before the judge in this declaratory judgment action was properly denied.

There was also no error in overruling appellant Booker's motion that counsel for plaintiff be removed on grounds of a conflict in interest. Appellant contends there is a conflict in that counsel representing plaintiff in this case is also representing plaintiff, as an individual, and his father in a separate suit brought against them by the appellant Booker for the purpose of collecting additional attorney's fees allegedly due by reason of Booker's representation of the father in the murder case. We find no relationship between the issues which might arise in that case and those in the present declaratory judgment action, and appellant's motion was properly overruled.

On the appeal of the guardian *ad litem,* the judgment of the trial court is modified so as to direct that the husband be entitled only to the income during his lifetime from one-half of the joint bank account, subject to the rights of his creditors. With that change the judgment is

Modified and affirmed.

On the appeal of the defendant, James J. Booker, we find

No error.

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

SIGMOND A. BEAR, ADMINISTRATOR C. T. A. OF THE ESTATE OF MOSES BEAR v. SIGMOND A. BEAR AND WIFE, CATHERINE BEAR; JANET BEAR DURHAM AND HUSBAND, EMMETT DURHAM; MIRIAM MOSS AND HUSBAND, SIDNEY MOSS, AND SALLY STEPHENSON AND HUSBAND, GLENN STEPHENSON

No. 685SC441

(Filed 5 February 1969)

1. Wills § 66— antilapse statute — residuary devise or bequest

G.S. 31-42(a) applies to prevent the lapse of a residuary devise or bequest as well as to prevent the lapse of a specific devise or bequest.

2. Wills § 66— antilapse statute — when applicable

G.S. 31-42(a) prevents the lapse of a devise or bequest, whether it be

specific or residuary, where the devisee or legatee who would have taken had he survived the testator predeceases the testator survived by issue who survive the testator and who would have been heirs of the testator had there been no will.

3. Wills § 66— antilapse statute — lapsed residuary devise or bequest

A lapsed residuary devise or legacy continues as a part of the residue and passes to the other residuary devisees or legatees, or, if there are none, passes as if testator died intestate with respect thereto. G.S. 31-42(c)(2).

4. Wills § 66— antilapse statute — lapsed residuary devise or bequest

Provision of G.S. 31-42(c)(2) that a lapsed residuary devise or bequest continues as a part of the residue and passes to "the other residuary devisees or legatees, if any" applies only where there are other residuary devisees or legatees named in the will who survive the testator, and does not operate to pass the lapsed portion of the residuary devise or bequest to surviving issue who were substituted under G.S. 31-42(a) for other deceased residuary devisees or legatees.

APPEAL by respondents from *Bundy, J.*, 14 October 1968 Civil Session, Superior Court of NEW HANOVER.

This is an action for a declaratory judgment brought to construe the will of Moses Bear. The matter was heard on the facts admitted in the petition, answers, and stipulations by the administrator c. t. a. and all respondents. The respondents are all of the heirs of Moses Bear and are all persons who have, or may have a claim of any interest in the estate of Moses Bear, real or personal. Moses Bear died on 15 January 1968 leaving a last will and testament which was dated 22 September 1917. He was declared an incompetent in the Superior Court of New Hanover County on 11 June 1919 and remained an incompetent until his death. His nephew, Sigmond A. Bear, qualified as administrator c. t. a., and the gross value of the estate was estimated by him to be $448,000. The will of Moses Bear has been duly admitted to probate.

Moses Bear was the son of Samuel Bear, Sr., who had eight children; namely, Isaac Bear, Sigmond Bear, Julius Bear, Miriam (Mamie) Bear Blumenthal, Bertha Bear Rothschild, Moses Bear, Julia Bear, and Emanuel Bear. Isaac, Julia, and Julius Bear were deceased at the time Moses Bear's will was written, and the two sisters and two brothers named in the will predeceased Moses Bear. Emanuel I. Bear, a brother named in the will, left children surviving; namely, Sigmond A. Bear and Janet Bear Durham, respondents herein, who are the nephew and niece of Moses Bear. Bertha Bear Rothschild, named in the will, left lineal descendants surviving her; namely, Miriam Moss and Sally Stephenson, her grand-

daughters, and the grandnieces of Moses Bear, also respondents herein.

The will of Moses Bear contained five items. The First Item contained directions to the named executors with respect to debts, funeral expenses, and costs of administration. The Second Item is a bequest to Mamie Blumenthal of the sum of $5,000 in cash. There is no controversy as to this Item, it being agreed by all parties that this bequest lapsed and fell into the residuary estate. The Third Item of the will contained a specific bequest of $2,500 in cash to Bertha Rothschild. There is no controversy as to this Item, all parties agreeing that this legacy passes to respondents Miriam Moss and Sally Stephenson, granddaughters of Bertha Rothschild.

Item Fourth of the will is as follows: "All the rest and residue of my property and estate, of every nature and kind, both real, personal and mixed, and wheresoever the same may be at the time of my death, I give, devise and bequeath unto my brothers Sigmond Bear and Emanuel I. Bear, share and share alike, absolutely and in fee simple."

Item Fifth appointed his brothers as executors of the will and revoked all other wills previously made by testator.

The trial court entered a judgment containing "findings of fact" and conclusions of law. The "findings of fact" were not findings of fact by the court but constituted a statement of the facts admitted, stipulated, or agreed upon. The "findings of fact" and conclusions of law pertinent to this appeal are as follows:

"5. That, with respect to Item Fourth of the said Will, Emanuel I. Bear and Sigmond Bear, the persons named as legatees and devisees therein, were deceased at the time of the death of Moses Bear. That General Statutes of North Carolina 31-42(a) is applicable to a devise or legacy under a residuary clause, and that by reason thereof the respondents Sigmond A. Bear and Janet Bear Durham, the only living children of Emanuel I. Bear, a brother of Moses Bear, are substituted for their father Emanuel I. Bear, who predeceased the testator, and each is therefore entitled to one-fourth of the residuary estate of the said Moses Bear.

6. That, with respect to the bequest to Sigmond Bear under Item Fourth of said Will, the said bequest lapsed, he having predeceased the testator, Moses Bear, without leaving issue surviving.

7. That the lapsed bequest to Sigmond Bear, the brother of

Moses Bear, is not saved by the provisions of General Statutes of North Carolina 31-42(c), there being no other residuary devisees or legatees, and under the terms of that subsection, the same passes as if the testator had died intestate with respect thereto; that the distribution of said intestate, one-half share of the residuary estate of Moses Bear, is one-third to Sigmond A. Bear; one-third to Janet Bear Durham, one-sixth to Miriam Moss, and one-sixth to Sally Stephenson; as a result of which the respondents Bear and Durham each take an additional one-sixth each of the whole residue, and the respondents Moss and Stephenson take one-twelfth each of the whole residue.

8. That, by reason of the foregoing construction, the entire residuary estate of the late Moses Bear, including both real and personal property, passes to the respondents in the following proportions, to wit:

A. Sigmond A. Bear, 5/12ths undivided interest;

B. Janet Bear Durham, 5/12ths undivided interest;

C. Miriam Moss, 1/12th undivided interest;

D. Sally Stephenson, 1/12th undivided interest."

Respondents Sigmond A. Bear and wife, Catherine Bear, and Janet Bear Durham and husband, Emmett Durham, excepted to findings and conclusions Nos. 6, 7 and 8. Respondents Miriam Moss and husband, Sidney Moss, and Sally Stephenson and her husband, Glenn Stephenson, excepted to findings and conclusions Nos. 5 and 8.

Hogue, Hill and Rowe by C. D. Hogue, Jr., for respondent appellants (and appellees) Sigmond A. Bear and wife, Catherine Bear, and Janet Bear Durham and husband, Emmett Durham.

Marshall and Williams by Lonnie B. Williams for respondent appellants (and appellees) Miriam Moss and husband, Sidney Moss, and Sally Stephenson and husband, Glenn Stephenson.

MORRIS, J.

At the outset, exceptions of all respondents to the "findings of fact" are without merit and are overruled because the facts stated by the court as "findings of fact" are only recapitulation of facts admitted, stipulated or agreed upon, and the exceptions will be considered only as exceptions to the conclusions of law.

Appellants Bear and Durham contend that they should take the entire residue of the estate, relying both on the effect of North Car-

olina General Statute 31-42 and what they contend is a reasonable construction of the will. Appellants Moss and Stephenson contend that as to the entire residue Moses Bear died intestate and that, as nephew and niece of testator, respondents Bear and Durham are entitled to one-third each of the residue; and respondents Moss and Stephenson, as grandnieces of testator, are entitled to one-sixth each of the residue.

A determination of the question requires the construction of G.S. 31-42. This statute is entitled "Failure of devises and legacies by lapse or otherwise." The sections pertinent to this appeal are (a) and (c). They are here set out verbatim:

"(a) Devolution of Devise or Legacy to Person Predeceasing Testator. — Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a devisee or legatee who would have taken individually had he survived the testator, and he dies survived by issue before the testator, whether he dies before or after the making of the will, such devise or legacy shall pass by substitution to such issue of the devisee or legatee as survive the testator in all cases where such issue of the deceased devisee or legatee would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will."

"(c) Devolution of Void, Revoked, Renounced or Lapsed Devises or Legacies. — If subsections (a) and (b) above are not applicable and if a contrary intent is not indicated by the will:

(1) Where a devise or legacy of any interest in property is void, is revoked, is renounced, or lapses or which for any other reason fails to take effect, such a devise or legacy shall pass

a. Under the residuary clause of the will applicable to real property in case of such devise, or applicable to personal property in case of such legacy, or

b. As if the testator had died intestate with respect thereto when there is no such applicable residuary clause; and

(2) Where a residuary devise or legacy is void, revoked, renounced, lapsed or for any other reason fails to take effect with respect to any devisee or legatee named in the residuary clause itself or a member of a class described therein, then such devise or legacy shall continue as a part of the residue and shall pass to the other residuary devisees or legatees if any; or, if none, shall pass as if the testator had died intestate with respect thereto."

This statute as above set forth is applicable to wills of persons dying on or after 1 July 1965. It does not appear that the statute has been interpreted, nor that the question before us has been heretofore presented.

Appellants Bear and Durham contend that under the provisions of G.S. 31-42(a) they are substituted in the residuary clause to receive the share of Emanuel I. Bear who predeceased testator. They further contend that, having been thus substituted, they become "the other residuary devisees or legatees" who take where a residuary devise lapses under subsection (c) (2) of the statute.

Appellants Moss and Stephenson contend that section (a) is inapplicable to a lapse occurring in the residuary clause and respondents Bear and Durham are not substituted for their father with respect to the one-half of the residue devised and bequeathed to him and further that section (c) of the statute clearly provides that a lapsed residuary devise or bequest goes "to the other residuary devisees or legatees if any"; that there are no other residuary devisees or legatees surviving testator and as to the bequest to Sigmond Bear, the testator died intestate.

Section (a) of G.S. 31-42 provides that, absent a contrary intent expressed by the will, where "a devise or legacy of any interest in property is given to a devisee or legatee who would have taken individually had he survived the testator, and he dies survived by issue before the testator, whether he dies before or after the making of the will, such devise or legacy shall pass by substitution to such issue of the devisee or legatee as survive the testator . . ." Respondents Bear and Durham earnestly contend that the phrase "devise or legacy of any interest in property" includes the residuary.

On the other hand, respondents Moss and Stephenson just as earnestly contend that section (a) has no application to the residuary because it must be construed as a part of the entire statute. When this is done, they contend, it is apparent that section (c) becomes applicable, by its specific provisions, when section (a) is *not* applicable, and that subsection (1) of section (c) provides that "Where a devise or legacy of any interest in property" fails by reason of renunciation, revocation, lapse or any other reason, "such a devise or legacy shall pass under the residuary clause of the will" or by intestacy if there be no residuary clause. They argue that if section (a) applied to the residuary, section (c) would not provide that such a lapsed devise or legacy would pass under the residuary clause. Additionally they contend that subsection (2) of section (c) specifically provides for lapsed residuary devises and legacies.

[1] As we view the plain wording of the statute in the light of rules of statutory construction, we reach the conclusion that section (a) thereof does apply to residuary devises or bequests.

"When courts are called upon to interpret legislative intent, the words selected by the Legislature should be given their generally accepted meaning unless it is manifest that such definition will do violence to legislative intent." *Bleacheries Co. v. Johnson, Comr. of Revenue,* 266 N.C. 692, 694, 147 S.E. 2d 177. Provisions of a statute are not to be interpreted out of context but must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505; Strong, N. C. Index 2d, Statutes § 5, p. 72.

[2, 3] It appears to us that section (a) of the statute is designed and intended to prevent the lapse of a devise or bequest, whether it be specific or residuary, in a situation where the devisee or legatee who would have taken had he survived the testator predeceases testator survived by issue who survive the testator and who would have been heirs of testator had there been no will. If this situation does not exist, then the devise or legacy lapses and passes under the provisions of subsection (c) (1) under the residuary or by intestacy, if there be no residuary. If lapse of a residuary devise or legacy cannot be prevented by application of section (a), then under subsection (c) (2) it continues a part of the residue and passes to the other residuary legatees or devisees, if any. If none, it passes as if testator had died intestate with respect thereto.

That this construction manifests the intent of the legislature is further evidenced by the clear language of the statute itself. Subsection (c) (2) is applicable, with respect to residuary devises or legacies, only where section (a) is not applicable. It would follow, it seems to us, that if the legislature had intended to exclude residuary devises and legacies from the operation of section (a), it would have specifically limited the section to specific legacies and devises, omitted subsection (2) from the provisions of section (c), and treated residuary devises and legacies in a separate provision of the statute unrelated to any other section.

We do not think that the legislature intended that the issue of a devisee or legatee meeting the conditions of section (a) could be substituted for that devisee or legatee as to a specific devise or bequest and not allowed to be similarly substituted if the same devisee or legatee were named as one of the residuary devisees or legatees.

We, therefore, hold that respondents Janet Bear Durham and Sigmond A. Bear are substituted for their father, Emanuel I. Bear, with respect to Item Fourth of the will of Moses Bear and are entitled to one-half of the residue of the estate. Assignment of error No. 1 of respondents Moss and Stephenson is overruled.

By their assignment of error No. 1, respondents Bear and Durham further contend that having been substituted for their father by reason of the applicability of section (a) of G.S. 31-42, they also take the share of Sigmond Bear in the residue to the exclusion of respondents Moss and Stephenson. To reach this determination they take the position that by reason of such substitution, they become "the other residuary devisees or legatees" referred to in subsection (2) of section (c).

G.S. 31-42(c)(2) provides that where a residuary devise or bequest lapses or becomes otherwise ineffective, "then such devise or legacy shall continue as a part of the residue and shall pass to *the other residuary devisees or legatees if any;* or, if none, shall pass as if the testator had died intestate with respect thereto." (Emphasis added.)

[4] Respondents Bear and Durham contend that this amendment changes the law and that they, by substitution, are the other residuary devisees or legatees. We do not agree. Prior to the 1965 amendment, in a situation where testator gave the residue of his estate to A, B, and C and A predeceased testator leaving no issue entitled to the property under the anti-lapse statute, A's share would pass to the heirs of testator as intestate property. *Wooten v. Hobbs,* 170 N.C. 211, 86 S.E. 811; *Entwistle v. Covington,* 250 N.C. 315, 108 S.E. 2d 603; Wiggins, *Wills and Administration of Estates in North Carolina,* § 149; 39 N.C.L. Rev. 313. After the 1965 amendment, the application thereof would result in A's share continuing as a part of the residue for division among the other residuary legatees and devisees. As we view G.S. 31-42(c)(2), the subsection is applicable only where there are other residuary devisees or legatees *named in the will who survive the testator.* Residuary devisee is defined as "The person *named in a will,* who is to take all the real property remaining over and above the other devises." (Emphasis added.) Black's Law Dictionary, 4th Ed., 539. Residuary legatee is defined as "The person *to whom a testator bequeaths* the residue of his personal estate, after the payment of such other legacies as are specifically mentioned in the will." (Emphasis added.) Black's Law Dictionary, 4th Ed., 1044. It seems obvious to us that the statute by use of the words "the other residuary devisees or legatees, if any"

refers to those residuary devisees or legatees *named* in the will and not to "such issue of the devisee or legatee as survive testator" who may have been substituted under G.S. 31-42(a). We, therefore, hold that the residuary devise and bequest of one-half the residuum to Sigmond Bear lapsed and passes as intestate property, and respondents Bear and Durham's assignment of error is overruled.

The construction placed upon the will of Moses Bear by the trial court resulted in the entire residuary estate, including both real and personal property, passing to the respondents in the following proportions: Sigmond A. Bear, 5/12 undivided interest; Janet Bear Durham, 5/12 undivided interest; Miriam Moss, 1/12 undivided interest; Sally Stephenson, 1/12 undivided interest. In the judgment of the trial court, we find no error.

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

LOUISE CANNADY BROWN v. ANNIE LAURIE GREEN, ADMINISTRATRIX OF THE ESTATE OF WILLIE LOU CANNADY

No. 68SC198

(Filed 5 February 1969)

1. Evidence § 11— dead man's statute — testimony by plaintiff

In an action against defendant administratrix to recover money allegedly loaned by plaintiff to defendant's intestate, testimony by plaintiff that she and deceased went to an attorney's office and a bank on a certain date, when viewed with other evidence that the attorney's discussion with plaintiff and deceased concerned a deed of trust for $15,000 to be executed by deceased and that deceased deposited $15,000 in the bank on that date, *is held* violative of G.S. 8-51 since it related to a personal transaction with deceased tending to establish plaintiff's claim against the personal representative of deceased.

2. Evidence § 11— dead man's statute — acts of plaintiff — testimony based on independent knowledge

In an action to recover for a loan allegedly made by plaintiff to defendant's intestate, the court properly overruled defendant's objection to a question asked plaintiff as to whether she withdrew money from her bank account on a certain date, plaintiff not being precluded by G.S. 8-51 from testifying as to her own acts based upon independent knowledge not derived from any personal transaction or communication with deceased.

3. Trial § 15— necessity for motion to strike testimony

Where a question asked a witness is competent, exception to his answer which is incompetent in part should be taken by motion to strike the part that is objectionable.

4. Appeal and Error § 30; Trial § 15— unresponsive testimony — motion to strike

Question of whether the unresponsive part of a witness' answer to a competent question was incompetent under G.S. 8-51 is not presented by an objection and exception to the question where no motion was made to strike the unresponsive testimony.

5. Evidence § 11; Appeal and Error § 48— dead man's statute — error in admission of evidence cured by later testimony

Error in the admission over defendant's objection of testimony which is incompetent under G.S. 8-51 was cured when plaintiff was thereafter permitted to give the same testimony without objection.

6. Evidence § 13— attorney and client — confidential communications

In an action to recover for a loan allegedly made by plaintiff to defendant's intestate, the court did not err in requiring an attorney to testify as to his preparation of a deed of trust for plaintiff and defendant's intestate where the evidence showed he was acting as attorney for both plaintiff and deceased and that communications between the attorney and the plaintiff and deceased were not regarded as confidential, only confidential communications being privileged, and communications to an attorney acting for two persons in a business transaction ordinarily not being privileged *inter se*.

7. Wills § 60— renunciation of interest in an estate

Written instrument purporting to be a "family agreement" is not a proper renunciation of an interest in an estate as provided in G.S. 29-10 where there is no evidence that it was delivered to anyone or that it was approved by the clerk and resident judge of the superior court.

8. Evidence § 34— admission against interest

In an action against defendant administratrix to recover money allegedly loaned by plaintiff to defendant's intestate, a purported "family agreement" signed by all of the heirs at law of deceased except plaintiff acknowledging that money provided to deceased by plaintiff was a loan and not a gift is not competent as an admission against interest where defendant signed the writing as an individual and not as administratrix, those who signed the writing not being parties to the action.

9. Appeal and Error § 30— admission of entire writing incompetent in part — general objection — motion to strike — restriction of purpose

Where a portion of a paper writing admitted into evidence was competent for the limited purpose of corroborating two witnesses for plaintiff, admission of the entire writing is not error where defendant objected generally to its introduction but did not move to strike the incompetent portion or request that its purpose be restricted.

10. Trial § 40— submission of counterclaim — nonsuit of counterclaim

The trial court erred in submitting issues to the jury with respect to defendant's counterclaim after having allowed plaintiff's motion for nonsuit as to the counterclaim at the close of the evidence.

APPEAL by defendant from *Hobgood, J.*, December 1967 Civil Session of VANCE Superior Court.

Plaintiff instituted this action to recover of the defendant the sum of $13,500.00 alleging that plaintiff had loaned to defendant's intestate sums of money upon which there was a balance due of $13,500.00 plus interest. Defendant denied the loan, the indebtedness, and alleged a counterclaim against the plaintiff claiming that plaintiff was indebted to the estate in the sum of $8,597.30.

Upon trial, the following issues were submitted to and answered by the jury as indicated:

"1. Is the defendant, as Administratrix of the Estate of Willie Lou Cannady, indebted to the plaintiff?

"ANSWER: Yes.

"2. If so, in what amount?

"ANSWER: $11,000

"3. Is the plaintiff indebted to the defendant Administratrix?

"ANSWER: No.

"4. If so, in what amount?

"ANSWER: ....."

Upon the entry of judgment on the verdict, the defendant appeals, assigning error.

Vaughan S. Winborne for plaintiff appellee.

Sterling G. Gilliam, and Banzet & Banzet, by Frank Banzet for defendant appellant.

PARKER, J.

Defendant appellant contends that the trial court committed error in admitting testimony of the plaintiff concerning transactions and communications between the plaintiff and defendant's intestate in violation of G.S. 8-51 which reads in part as follows:

"Upon the trial of an action, or the hearing upon the merits

of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. . . ."

In *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542, the following rule relating to G.S. 8-51 is stated:

"This statute does not render the testimony of a witness incompetent in any case unless these four questions require an affirmative answer:

"1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title?

"2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest?

"3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic?

"4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic?

"Even in instances where these four things concur, the testimony of the witness is nevertheless admissible under an exception specified in the statute itself if the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, is examined in his own behalf, or

the testimony of the deceased person or lunatic is given in evidence concerning the same transaction or communication.

"Somewhat similar analyses of the statute appear in the following authorities: *Bunn v. Todd,* 107 N.C. 266, 11 S.E. 1043; Stansbury on the North Carolina Law of Evidence, section 66.

"A personal transaction or communication within the purview of the statute is anything done or said between the witness and the deceased person or lunatic tending to establish the claim being asserted against the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through or under the deceased person or lunatic. *Davis v. Pearson,* 220 N.C. 163, 16 S.E. 2d 655, *Boyd v. Williams,* 207 N.C. 30, 175 S.E. 832."

In the case under consideration, it is undisputed that the plaintiff was a witness testifying in her own behalf as well as a party to the action and interested in the event. It is also undisputed that the defendant was the personal representative of the deceased, Willie Lou Cannady. It is in evidence that the plaintiff was one of nine living children of the deceased at the time of her death on 1 October 1964.

[1] Plaintiff was permitted to testify over objection that on 19 March 1963 plaintiff and her mother went to an attorney's office and to the Citizens Bank. The attorney later testified over objection and exception that "the gist of the conversation" he had with the plaintiff and her mother on this occasion was concerning a deed of trust to be executed by the deceased for $15,000.00. However, the instrument was never executed. An official of the Citizens Bank & Trust Company in Henderson testified that on the date of 19 March 1963 Willie Lou Cannady opened an account with the bank in the amount of $15,000.00. When the actions and conduct on 19 March 1963 of the plaintiff and deceased, as testified to by plaintiff, are thus viewed together with other evidence relating to the $15,000.00 deposit and evidence as to where the money came from, it is obvious that the testimony of the plaintiff with respect to the trip to the bank and to the lawyer's office on that date concerned a personal transaction between plaintiff and deceased tending to establish the claim herein being asserted against the personal representative of the deceased. Such is prohibited by G.S. 8-51, and its admission over objection was prejudicial error.

[2] The following question was asked plaintiff and answer given after defendant's objection to the question was overruled:

"Q On April 27, 1964, did you withdraw any deposit from that account?

"A Yes, I withdrew $4,500.00 and sent my mother a Treasurer's check in the sum of $4,500.00, with this letter attached."

In this case what the plaintiff did with respect to withdrawing money from her bank account was competent. That is all that the foregoing question referred to. The trial court correctly overruled the objection to the *question.*

"The statute does not preclude an interested party from testifying as to his own acts or the acts and conduct of the decedent when the witness is testifying as to facts based upon independent knowledge not derived from any personal transaction or communication with the deceased." 3 Strong, N. C. Index 2d, Evidence, Section 11, p. 610.

[3, 4] The answer of the witness was in part responsive to the question and in part was not responsive. That part of the answer relating to sending her mother a treasurer's check for $4,500.00 was not responsive. However, defendant did not move to strike the answer or any part thereof. "The rule is that where a question asked a witness is competent, exception to his answer, when incompetent in part, should be taken by motion to strike out the part that is objectionable." *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196; Stansbury, N. C. Evidence 2d, Section 27. See also, *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599. The question as to whether the unresponsive part of the answer was incompetent under G.S. 8-51 in the absence of a motion to strike is not presented on this record by the objection and exception to the *question.*

[5] Plaintiff, as a witness for herself, was also asked, "What comprised the $15,000.00?" She replied: "I brought approximately $9,000 and some money down here with me, had the $6,045 cash from Oxford Bank, and my mother paid me $2,500." Defendant's motion to strike was overruled, and the defendant excepted. For the plaintiff to testify over objection that the deceased paid her $2,500.00 under the circumstances and evidence in this case is testimony concerning a personal transaction between them which tended to establish the alleged claim of plaintiff. However, this error was cured when the plaintiff was thereafter permitted to testify, without objection, concerning "the $2,500.00 that my mother was paying me." The rule is that when incompetent evidence is admitted over objection, the admission of such evidence is cured where the same evidence, or

evidence of substantially the same import, is thereafter admitted without objection. 1 Strong, N. C. Index 2d, Appeal and Error, Section 48, pp. 196, 197; *State v. Brown,* 1 N.C. App. 145, 160 S.E. 2d 508.

[6] Defendant also asserts that the trial court committed error in allowing, over objection, Sterling G. Gilliam, an attorney at law, to testify. The evidence tended to show that in preparing a deed of trust for the plaintiff and defendant's intestate on 19 March 1963, he was acting as attorney for both of them and that the communications between the lawyer and the plaintiff and deceased were not regarded as confidential. In the case of *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785, the Supreme Court said:

> "It is an established rule of the common law that confidential communications made to an attorney in his professional capacity by his client are privileged, and the attorney cannot be compelled to testify to them unless his client consents. *Guy v. Bank,* 206 N.C. 322, 173 S.E. 600; *McNeill v. Thomas,* 203 N.C. 219, 165 S.E. 712; *Hughes v. Boone,* 102 N.C. 137 (159); *Jones v. Marble Co.,* 137 N.C. 237; 58 A.J. 214.
>
> "But the mere fact the evidence relates to communications between attorney and client alone does not require its exclusion. Only confidential communications are protected. If it appears by extraneous evidence or from the nature of a transaction or communication that they were not regarded as confidential, 58 A.J. 274, or that they were made for the purpose of being conveyed by the attorney to others, they are stripped of the idea of a confidential disclosure and are not privileged. *Michael v. Foil,* 100 N.C. 178; *Allen v. Shiffman,* 172 N.C. 578, 90 S.E. 577; *Hughes v. Boone, supra; Rosseau v. Bleau,* 30 N.E. 52; 58 A.J. 274; ibid., 215.
>
> "Therefore, as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged *inter sese. Carey v. Carey,* 108 N.C. 267; *Michael v. Foil, supra; Allen v. Shiffman, supra; Blaylock v. Satterfield,* 219 N.C. 771, 14 S.E. 2d 817; 58 A.J. 277; Anno. 141 A.L.R. 562."

Applying the foregoing rule to the facts in this case, it was not error to require Mr. Gilliam to testify.

Defendant assigns as error the admission into evidence, over objection, of a paper writing, plaintiff's exhibit #15, purporting to be a "family agreement." This instrument was not signed by Annie

Laurie Green as administratrix; however, it was signed by Annie Laurie Green as an individual. It appears to have been signed by all of the children and heirs at law of Willie Lou Cannady except the plaintiff, Louise Cannady Brown. Included among the signers was Jacqueline M. Cannady, a minor 19 years of age, and her guardian, Joseph H. Green. This instrument was not sworn to by anyone. It was, however, acknowledged by the parties before a notary public.

The instrument states in substance that those signing it know that the sum of $13,500.00 was placed at the disposal of the deceased Willie Lou Cannady by Louise Cannady Brown as a loan and not as a gift, and that in their opinion "the sum of $13,500.00 rightfully belongs to the said Louise Cannady Brown." Also attached to the instrument are statements in writing signed by seven of those signing it that they "rescind" their consent or "renounce" the signature or would like to "withdraw our names" from the instrument.

[7] There is no evidence that the instrument was ever delivered to anyone. There is also no evidence that it was ever approved by the clerk of the Superior Court and the Resident Judge of the Superior Court. It is, therefore, not a proper renunciation of an interest in an estate as provided in G.S. 29-10.

Defendant contends that Exhibit #15 is an invalid contract because the plaintiff Louise Cannady Brown did not sign it and because it was never delivered. Defendant does not cite any authority or argument asserting the incompetence of this evidence other than authority tending to show that the instrument did not constitute a valid agreement. Plaintiff contends that the exception to this instrument was not properly made. Plaintiff further contends that the exhibit is not a contract, nor an offer to compromise, but is an admission against interest.

[8] We are of the opinion and so hold that the exception to the exhibit was properly taken and that the instrument is neither a contract nor an offer to compromise. In Stansbury, N. C. Evidence 2d, Section 167, it is stated, "Anything that *a party to the action* has said, if relevant to the issues and not subject to some specific exclusionary rule, is admissible against him as an admission." (Emphasis added.) Those who originally signed this exhibit are not parties in this case. The administratrix of the estate of Willie Lou Cannady is the defendant. Although Annie Laurie Green signed it as an individual, she did not sign it in her capacity as administratrix; therefore, it was not an admission or a declaration against interest by the administratrix of the estate of Willie Lou Cannady.

[9] Two of the signers of this exhibit #15 testified for the plaintiff. The testimony of these two, Elizabeth Cannady Bowman and Jacqueline M. Cannady, was of such a nature and content that parts of this exhibit #15 were competent for the limited purpose of corroborating each one of them. Stansbury, N. C. Evidence 2d, Sections 50-52. Also, we are of the opinion that the parts of this instrument relating to those who signed but did not testify is incompetent and upon proper objection should be stricken. However, an objection is waived if not made at the proper time. *Lambros v. Zrakas,* 234 N.C. 287, 66 S.E. 2d 895; *State v. Williams,* 1 N.C. App. 127, 160 S.E. 2d 121; *Eaton v. Klopman Mills, Inc.,* 2 N.C. App. 363, 163 S.E. 2d 17. In this case the objection, which was overruled, was a general one made to the introduction of the entire exhibit. In McCormick on Evidence, Hornbook Series, Section 52, it is stated:

> "If the offer consists of several statements or items tendered as a unit, e.g., a deposition, a letter, a conversation, a transcript of testimony or the like, and it is objected to as a whole, and parts are subject to the objection made and parts are not, the judge will not be put in error for overruling the objection."

In Stansbury, N. C. Evidence 2d, Section 27, the rule is stated:

> "Where evidence competent for some purposes, but not for all, is admitted generally, counsel must ask, at the time of admission, that its purpose shall be restricted.
>
> "The opponent must specify his ground of objection and the part of the offer to which it is applicable. As in other cases, if objection is made to the question and properly overruled and the answer contains improper matter, there should be a motion to strike out."

In *Nance v. Telegraph,* 177 N.C. 313, 98 S.E. 838, the Court said:

> "Defendant objected to this testimony, but it will be observed that at least some of it was clearly admissible, and the objection must fail, for where a part of testimony is competent, although the other part of it may not be, and exception is taken to all of it, it will not be sustained. Defendant should have separated the 'good from the bad,' and objected only to the latter, as the objection must be valid as to the whole of the testimony. We will not set off the bad for him and consider only that much of it, upon the supposition that his objection was aimed solely at the incompetent part. He must do that for himself. This is the firmly established rule."

In the case before us the defendant objected and excepted to the introduction of plaintiff's exhibit #15, part of which was admissible. In our opinion, upon proper objection and request, the defendant was entitled to have the contents of exhibit #15 limited and restricted. However, there was no such request made and in the absence thereof, the admission was not error. *State v. Corl,* 250 N.C. 252, 108 S.E. 2d 608; *Doub v. Hauser,* 256 N.C. 331, 123 S.E. 2d 821.

[10] Defendant also asserts that the trial court committed error in allowing plaintiff's motion for judgment as of nonsuit as to defendant's counterclaim at the close of the evidence and then submitting issues to the jury with respect to the counterclaim. Since this case goes back for a new trial, we do not deem it necessary to discuss all of the contentions of the parties with respect to this assignment of error. We are bound by the record, and the record reveals that the motion for nonsuit as to defendant's counterclaim was allowed. The record also shows that the court submitted issues to the jury with respect to the cause of action asserted in the counterclaim. While this is confusing and appears to be error, we do not decide the question as to whether this error was prejudicial to the defendant appellant.

There are other exceptions of the defendant, some of which may have merit, but since they probably will not occur on a new trial we do not deem it necessary to discuss them.

New trial.

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

W. JOE TEMPLE AND CARLTON L. TEMPLE v. CLARINE T. CARTER

No. 681SC360

(Filed 5 February 1969)

1. Estates §§ 3, 5— timber on life estate

The general rule is that standing timber growing on land is considered a part of the inheritance, and a life tenant is not allowed to cut and sell the timber merely for his own profit.

2. Estates § 5— life estate — cutting timber — repair of buildings — action for waste

A life tenant is not liable for waste in the cutting and sale of timber if done with a present view of making necessary repairs to buildings al-

ready on the premises, the proceeds are honestly expended for that purpose and no substantial injury results to the inheritance.

3. Estates §§ 3, 5— life estate — cutting timber — land used for tree farming — action for waste

When, prior to the creation of a life estate, the land in which estate is created was used for tree farming from which salable timber was periodically cut and sold, the life tenant may continue the cultivation and sale of the trees for his own profit, such product not being part of the inheritance but part of the annual fruits of the land.

4. Estates § 5— life estate — action for waste — cutting timber — tree farming

In an action by remaindermen to restrain a life tenant from removing timber from the land, where defendant alleged she had a right to cut and sell the timber on the ground that the land had been used for tree farming by the testator who created the life estate, issues should have been submitted to the jury as to whether the land is a tree farm and whether it had been a tree farm prior to testator's death.

5. Trial § 40— issues submitted

While the form and number of issues ordinarily rest in the sound discretion of the trial judge, the judge is required to submit such issues as are necessary to settle the material controversies raised by the pleadings and to support the judgment.

6. Estates § 5— life estate — action for waste — cutting timber — repairs to buildings — tree farming

In an action by remaindermen to restrain a life tenant from removing trees from the land, defendant has not shown justification for cutting timber beyond the amount needed for making repairs to a dwelling on the land where it does not appear that testator who created the life estate conducted a tree farming operation on the property, defendant's evidence showing only that from time to time testator would cut timber in order to procure lumber for repairs to outbuildings, to build a house for one of his children, to sell a little and to use for firewood.

APPEAL by plaintiff from *Cowper, J.*, and a jury, May 1968 Session PASQUOTANK Superior Court.

W. Joe Temple and Carlton L. Temple (plaintiffs) instituted this civil action on 21 September 1966 against their sister, Clarine T. Carter, (defendant) to restrain her from cutting and removing timber from a seven acre portion of a thirty-three acre tract of land.

Plaintiffs and defendant were the children of W. E. Temple who died testate on 31 May 1966. In his will the father devised to the defendant "the use and enjoyment" of three tracts of land "during the term of her natural life", and at her death the three tracts were devised to the plaintiffs "in fee simple". One of the three tracts contained thirty-three acres, seven acres of which consisted of pine

trees with an age of sixty to eighty years. A few hardwood trees were intermingled with the pines. On or about 20 September 1966 the defendant began to cut and remove the timber on this seven acre portion, and at the time of the commencement of this action, approximately 10,000 log feet had been cut. The plaintiff procured a temporary restraining order, which stopped further cutting. The proceeds from the sale of the trees already cut, which amounted to $562.12, were deposited in the office of the clerk of the superior court pending the outcome of this action.

The defendant filed an answer alleging that the homeplace in which she had lived most of her life with her father was located on the thirty-three acre tract; the house was in a bad state of repair; it needed a new roof, new floors and porches, and other repairs, and it was necessary to cut the timber in order to procure proceeds with which to make the needed repairs. It was further alleged that the seven acres involved were suitable only for the cultivation and growing of timber; the father had used this land for purposes of tree farming and had not cultivated it for any other purposes; she proposed to use it in the same manner; the trees, all of which were mature, had been marked for cutting by the North Carolina Forest Service; she intended to cut and remove only those trees which had been so marked and which would be subject to deterioration if allowed to remain standing; and such removal would benefit the tree farm.

The defendant introduced evidence tending to show that the house was heated by woodstoves; a new modern hot water heating system should be installed if there was to be further occupancy and reasonable comfort; and structural repairs, such as flooring, roof and plumbing, were needed. She also introduced evidence tending to show how the father, during his lifetime, had used the seven acre portion; he had periodically cut trees which needed to be cut in order to permit other trees to grow; she proposed to cut all trees which the North Carolina Forest Service had marked and recommended for cutting; ten to fifteen trees per acre were left unmarked; the unmarked trees were to remain standing and to serve as seed trees; and merchantable timber would be reproduced after at least fifty years if properly managed or after sixty to seventy years if improperly managed.

The plaintiffs offered no evidence and it was stipulated that the burden of proof on all issues should be upon the defendant. The court submitted four issues to the jury which were answered as follows:

"(1) Is the dwelling house occupied by the defendant in need of repairs?

ANSWER: Yes

(2) If so, in what amount?

ANSWER: $3784.00

(3) Is the defendant guilty of waste in cutting timber?

ANSWER: No

(4) If not, is the defendant entitled to cut the timber marked for cutting?

ANSWER: Yes"

The plaintiffs, among other things, objected and took exceptions to the issues submitted to the jury and this is one of their assignments of error.

Forrest V. Dunstan, Russell E. Twiford, O. C. Abbott, John S. Kisiday for plaintiff appellants.

Leroy, Wells, Shaw & Hornthal by Dewey W. Wells for defendant appellee.

CAMPBELL, J.

[1, 2] We are confronted at the outset with the respective rights of a life tenant and the remaindermen to standing timber growing on land.

". . . (T)he general rule is that standing timber growing on land is considered a part of the inheritance, and that a tenant is never allowed to cut and sell timber merely for his own profit, but there is clear intimation that the tenant for life is not liable for waste in the cutting and sale of timber if done with a present view of making needed repairs, and the proceeds are honestly expended for that purpose and no substantial injury to the inheritance has been caused. . . ." *Fleming v. Sexton,* 172 N.C. 250, 90 S.E. 247. To like effect, see *Thomas v. Thomas,* 166 N.C. 627, 82 S.E. 1032.

Dean Mordecai in his valuable treatise on North Carolina real estate law stated:

"The liability of a life tenant for waste has been very greatly modified in modern times until it has come to be established that such a tenant may, as a general rule, do what is required

for the proper enjoyment of his estate to the extent that his acts and management are sanctioned by good husbandry in the locality in which the land is situate, having regard, also, to its condition, which do not cause a substantial injury to the inheritance. He may clear land for the proper enjoyment of his estate, and where he may clear he may sell the timber for his own benefit. It may be that the cutting and selling of the timber for the present purpose of making necessary repairs to buildings already on the premises can, at times, be sustained. But the cutting of timber for sale except as above indicated is doubtless waste — which waste would not be purged by a subsequent application of the proceeds to repair. To justify a sale of timber for needed repairs, it must appear that it was done with the present view of making needed repairs, that the proceeds were honestly expended for such purpose, that no substantial injury was done to the inheritance, and that what was done was 'most for the benefit of all concerned.' " 1 Mordecai's Law Lectures 2d, Ch. XIII, p. 504.

[3] In the instant case the defendant attempted to justify the sale of timber on the basis of needed repairs. She also sought to justify the cutting of timber beyond the amount needed for repairs on the theory that since her father had conducted a tree farm operation, she was justified in continuing such operation. This theory may be considered as another exception to the general rule which forbids the cutting of timber by a life tenant.

"This exception has been established principally by modern authorities in favor of the owners of timber estates — that is, estates which are cultivated merely for the produce of salable timber and in which the timber is cut periodically. The reason for the distinction is that since cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land; in these cases, the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and therefore goes to the tenant for life." 33 Am. Jur., Life Estates, Remainders, Etc., § 323, p. 825.

"When, prior to the creation of an estate for life, the land in which such estate is created has been used . . . by cutting and selling timber located thereon, then the owner of such estate for life is privileged to continue the use so begun, although such

continuance causes the market value of the interest limited after the estate for life to be diminished." Restatement, Property, § 144, p. 476.

"The rule that a life tenant impeachable for waste may not cut timber for commercial purposes is subject to an exception in favor of the life tenant of a timber estate which is cultivated merely for the production of salable timber and from which the timber is cut periodically." 51 A.L.R. 2d, § 10, p. 1380.

"But there has grown up an exception to this rule originating in England, and adopted in some states in this Country, and apparently disapproved by none who have had occasion to treat it. The exception applies to estates which were cultivated by the settlor and this custom has continued after his death, to produce salable timber where the timber is cut periodically. The reason assigned is that protecting and cutting timber periodically and pursuing a system of reforestation is a mode of cultivation, and such product is not then a part of the inheritance but part of the so-called annual fruits of the land; and in such cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor; and the timber so cultivated and cut periodically is looked upon as annual profits of the estate when reforestation is pursued. . . ." *First Nat. Bank of Mobile v. Wefel,* 252 Ala. 212, 40 So. 2d 434.

Compare *Lee & Bradshaw v. Rogers,* 151 Ga. 838, 108 S.E. 371, and *Poole v. Union Trust Co.,* 191 Mich. 162, 157 N.W. 430.

In North Carolina the continuation by the life tenant of a commercial use of timber is recognized. *Carr v. Carr,* 20 N.C. 317.

[4, 5] The right of the defendant to apply this exception in the instant case was not determined by the issues submitted to the jury. The controversy presented by the pleadings was whether this particular seven acre portion was a tree farm and whether it had been a tree farm prior to the death of the father, which the life tenant would have a right to continue to cultivate. This raised an issue of fact.

"Issues arise upon the pleadings only. An issue of fact arises on the pleadings whenever a material fact is maintained by one party and controverted by the other. Ordinarily the form and number of issues in a civil action are left to the sound discretion of the judge. '. . . it is the duty of the Judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies aris-

ing in the pleadings, and . . . in the absence of such issues, or admissions of record equivalent thereto, sufficient to reasonably justify, directly or by clear implication, the judgment rendered therein, this Court will remand the case for a new trial.' " (citations omitted) *Rubber Co. v. Distributors,* 253 N.C. 459, 117 S.E. 2d 479.

[6] The evidence in the instant case, when considered in the light most favorable to the defendant, fails to show that this life tenant comes within the exception to the general rule since the evidence does not reveal that the father conducted a tree farming operation on this seven acre portion. The evidence shows that from time to time the father would cut timber in order to procure lumber for repairs to outbuildings, to build a house for one of his children, to sell a little and to cut for firewood purposes. The evidence does not show that the father periodically cut trees in the sense of cultivating a timber crop. The evidence further shows that it would take a minimum of fifty years to reproduce similar timber under favorable forestry practices and from sixty to seventy years if good forestry practices were not followed. Under this evidence it is not proper to say that the remaindermen would not be adversely affected by the cutting of the marked trees or that no substantial injury to the inheritance would be caused. Therefore, the defendant should have been restricted to cutting only so much of the timber or to using only so much of the proceeds deposited in the office of the clerk of the superior court as was needed to make the necessary repairs to the dwelling.

New trial.

MALLARD, C.J., and MORRIS, J., concur.

MARGARET W. (O.) NEWBERN, THOMAS WILSON SANDERS, HAROLD CARTWRIGHT, DANIEL CARTWRIGHT AND KIZZIE LEE v. SEATON E. BARNES AND WIFE, ALICE SNELL BARNES; DOMINICO S. MAIRORANA AND WIFE, RONOME B. MAIRORANA

No. 681SC402

(Filed 5 February 1969)

1. Appeal and Error § 28— assignment of error to conclusion of law

An assignment of error to a conclusion of law presents for review the question of whether the facts found, or admitted, support the conclusion.

2. Wills § 43.5— devise to class or individuals

Persons named specifically in a will, by name or other personal and particular designation, take as individuals and not as a class, unless a contrary intention appears elsewhere in the will.

3. Wills § 43.5— devise to class or individuals

A devise of part of testator's homeplace to two named grandchildren with proviso that if they or either of them die without lawful bodily heirs then the portion given them to go to testator's family, *is held* a devise to each grandchild individually, and not as a class, of a one-half undivided fee simple title in the designated homeplace, the title of each being defeasible upon her dying without issue.

4. Wills § 36— estates devised — fee simple defeasible

An estate which may last forever, but which may end upon the happening of a specified event, is a fee simple defeasible.

5. Wills § 36— estates devised — fee simple defeasible

A devise to a named devisee with a proviso that if the devisee should die without issue the property should go to another, transmits a defeasible fee to the first taker, and upon the death of such devisee without issue, the person or persons named to take upon the happening of the contingency take the fee.

6. Wills § 66— lapsed devise

Under a will devising one-half of testator's homeplace to named grandchildren with proviso that if they or either of them die without lawful bodily heirs the portion given them to go to testator's family, the devise to one grandchild who predeceased the testator without issue surviving becomes a lapsed devise upon testator's death, and where testator leaves surviving him four children and the remaining grandchild, each inherit by intestate succession one-fifth of the one-half undivided interest in the portion of the homeplace described in the devise which lapsed.

7. Taxation § 41— foreclosure proceedings — sufficiency of notice

Tax foreclosure proceedings, wherein service of summons was by publication upon a named person, *are held* adequate to convey to defendants' predecessors in title a fee simple absolute title to that person's one-tenth undivided interest in certain realty and a defeasible fee simple title to that person's one-half interest in the realty; but the foreclosure proceedings *are held* inadequate to affect title to certain interests (1) held by persons not named in the service of summons or (2) acquired after completion of the foreclosure proceedings.

8. Taxation § 41— foreclosure proceedings — parties

Plaintiffs and their predecessors in title were not necessary parties to the foreclosure of a devisee's defeasible fee interest in property where at the time of the foreclosure the happening of the event to defeat devisee's interest had not occurred and there existed a possibility that title could have ripened into fee simple absolute.

9. Adverse Possession § 23— sufficiency of pleadings

The fact that defendants did not specially plead title by adverse pos-

session does not prevent them from defending their title by a simple denial of plaintiff's allegations of ownership and right to possession and by the introduction of evidence of adverse possession for twenty years or of possession under color of title for seven years.

10. Adverse Possession § 25— sufficiency of evidence

Evidence in this action to determine ownership and possession of certain realty held sufficient to require findings upon the question of adverse possession by defendants for twenty years or under color of a commissioner's deed for seven years.

APPEAL by defendants from judgment of *Cowper, J.*, signed 7 May 1968 after trial at the 22 January 1968 Session, CURRITUCK Superior Court.

This controversy concerns the northern one-half of the Jesse Sanderson homeplace. The homeplace had been divided upon the ground by a line running generally east and west, and the southern half of the Sanderson homeplace is not involved in this action. By Item 3 of his will, Jesse Sanderson provided as follows:

> "The other half of my home tract which is the northern half, I give and bequeath to my two grandchildren, Mary Sanderson and Sarah Sanderson, the children of my deceased son Nathan Sanderson but with this provise (sic), that if they or either of them die without and (sic) heir lawfully begotten by their bodies then said portion given to them shall go back to my Sanderson family."

Jesse Sanderson died in 1908, and his will was duly admitted to probate. The granddaughter, Sarah, had predeceased testator, dying in 1905 without issue surviving. The granddaughter, Mary, married one Alpine and survived until 1962, at which time she died without issue.

In 1935 Currituck County instituted tax foreclosure proceedings against the land owned by Mary Sanderson Alpine, and, by commissioner's deed dated 7 October 1938, the property described in the complaint was conveyed to defendants' predecessors in title. In the tax foreclosure proceeding service of summons by publication was ordered upon proper affidavits. The published notice was directed to "Mary Alpine and all other persons who have or claim an interest in the lands hereinafter described." This notice was duly published in *The Advance,* Elizabeth City, North Carolina.

In 1945 Jenny Sanderson, a daughter of Jesse Sanderson, died intestate without issue. In 1963 Nathan Cartwright, a grandson of Jesse Sanderson, executed a quitclaim deed conveying all of his in-

terest in the subject property to four of the plaintiffs (Newbern, Sanders, Daniel Cartwright, and Harold Cartwright).

Plaintiffs, heirs at law of Jesse Sanderson, bring this action to recover possession of the property from defendants and to remove as a cloud on their title, defendants' claim of title to the property of Mary Sanderson Alpine, which title is claimed by defendants by virtue of the tax foreclosure sale, and by adverse possession.

The trial court concluded that the devise to Mary and Sarah by Item 3 of the will was a devise of a defeasible fee to the two as a class; that Mary, as survivor of the class, succeeded to the interests of Sarah in 1905; that the service of summons by publication in the tax foreclosure proceeding was ineffective as notice to these plaintiffs and their predecessors, and that they were not duly before the court in that proceeding; and are not bound thereby; that defendants and their predecessors in title purchased only a defeasible fee which was defeated by the death of Mary Sanderson Alpine in 1962 without heirs of her body; that, upon the death of Mary Sanderson Alpine, the property reverted to the Sanderson heirs and that plaintiffs are the owners in fee of the land in controversy. Judge Cowper then decreed that plaintiffs are entitled to immediate possession of the lands in controversy.

Defendants appeal, assigning error.

Frank B. Aycock, Jr., and Gerald F. White, for plaintiff appellees.

Hall & Hall, by John H. Hall, for defendant appellants.

BROCK, J.

Defendants assign as error finding of fact number 4, all of the conclusions of law, and the entry of the judgment. Although labeled as a finding of fact, finding number 4 is a conclusion of law which in effect is the same as conclusion of law number 1; therefore, we consider assignment of error number 1 as though made to conclusion of law number 1.

[1] An assignment of error to a conclusion of law presents for review the question of whether the facts found, or admitted, support the conclusion. *Brown v. Board of Education,* 269 N.C. 667, 153 S.E. 2d 335.

By conclusion of law number 1 the trial judge decreed that the following provision of the will of Jesse Sanderson was a devise to a class, and that upon the death of Sarah the entire tract vested in Mary subject to defeasance:

"The other half of my home tract which is the northern half, I give and bequeath to my two grandchildren, Mary Sanderson and Sarah Sanderson, the children of my deceased son Nathan Sanderson but with this provise (sic), that if they or either of them die without and (sic) heir lawfully begotten by their bodies then said portion given to them shall go back to my Sanderson family."

[2] We hold conclusion of law number 1 to be error. Persons named specifically in a will, by name or other personal and particular designation, will take as individuals, and not as a class. *Wooten v. Hobbs,* 170 N.C. 211, 86 S.E. 811; *Mebane v. Womack,* 55 N.C. 293. Persons named specifically in a will as legatees do not take as a class, but individually, and, therefore, where a fund is bequeathed to be divided between four persons, if one or more of them die before the testator, their shares lapse to the next of kin, and the survivors take only the sums indicated by the original bequest. *Todd v. Trott,* 64 N.C. 280. The later cases show that the initial presumption that a gift to persons named in the language of gift is made to them as individuals and not as a class, notwithstanding they are also designated in general terms as by relationship and in fact constitute a natural class, generally applies to a gift by will to the children of the testator or trustor, named and also designated as such children in the language of gift. Annot., 61 A.L.R. 2d 212, 269 (1958). In the absence of a contrary intention appearing elsewhere in the will, or the surrounding circumstances, a devise to persons named in the will is a devise to them as individuals rather than a class. Annot., 61 A.L.R. 2d 212, 258 (1958).

[3] There is nothing in the will of Jesse Sanderson, or in the circumstances, which indicates an intent to devise to Mary and Sarah as a class. It seems to us that the use of the words "if they *or either of them* die without . . ." gives strong support to an intention to devise to Mary and Sarah *individually* rather than as a class. We hold that by Item 3 of his will Jesse Sanderson devised to Mary and Sarah Sanderson each, as individuals and not as a class, a one-half undivided fee simple title in the northern half of the Sanderson homeplace, the title of each being defeasible upon her dying without issue.

[4, 5] The devises to Mary and Sarah were each a devise of a defeasible fee in a one-half undivided interest to that portion of the homeplace. An estate which may last forever, but which may end upon the happening of a specified event, is a fee simple defeasible. *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205; 7 Strong, N. C. Index

2d, Wills, § 36, p. 629. A devise to a named devisee with a proviso that if the devisee should die without issue the property should go to another, transmits a defeasible fee to the first taker, and upon the death of such devisee without issue, the person or persons named to take upon the happening of the contingency take the fee. *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662; 7 Strong, N. C. Index 2d, Wills, *supra.*

[6] By reason of the death of Sarah Sanderson in 1905 without issue, the devise to her became a lapsed devise upon the death of Jesse Sanderson in 1908, and as to that portion of his estate he died intestate. Jesse Sanderson left surviving him four children (Thomas, Elizabeth, Jenny, and Ella), and Mary Sanderson, the sole surviving child of Nathan, a deceased son of Jesse. Therefore upon Jesse Sanderson's death his four children and his granddaughter Mary each inherited from him a one-fifth of the one-half undivided interest in the portion of the homeplace which was described in the devise which lapsed by reason of the death of Sarah. This amounted to an inheritance by each of a one-tenth undivided interest in the whole of the portion of the homeplace which is in controversy.

[7, 8] At the time of the tax foreclosure proceedings in 1935, 1936, 1937 and 1938 Mary Sanderson Alpine, under the will of Jesse Sanderson, was the owner of a defeasible fee in a one-half undivided interest in the portion of the homeplace in controversy, and, as an heir at law of Jesse Sanderson, was the owner of the fee simple absolute title to a one-tenth undivided interest in the portion of the homeplace in controversy. As to these interests of Mary Sanderson Alpine the tax foreclosure proceedings were adequate to convey title to defendants' predecessors in title. Therefore, by virtue of the tax foreclosure proceedings, and mesne conveyances, defendants held a fee simple absolute title to a one-tenth undivided interest, and a defeasible fee simple title to a one-half interest, in the portion of the homeplace in controversy. The plaintiffs and their predecessors in title were not necessary parties to a foreclosure of these interests because at the time of the foreclosure the happening of the event to defeat Mary's defeasible fee simple title to the one-half had not occurred, and it was possible that her title could have ripened into a fee simple absolute by the event of bearing a child. However, the foreclosure proceeding was not notice to plaintiffs and their predecessors in title to the one-tenth interest each which Thomas, Elizabeth, Jenny, and Ella took by way of inheritance from Jesse Sanderson; and, therefore, the proceeding did not affect the title to four-tenths undivided interest in the portion of the homeplace which is in controversy.

Jesse Sanderson's daughter Jenny died in 1945 without lineal descendants, and her one-tenth interest descended by intestate succession one-fortieth each to her brother Thomas, to her sisters Elizabeth and Ella, and to her deceased brother's child Mary Sanderson Alpine. This one-fortieth, having been acquired by Mary Sanderson Alpine after completion of the tax foreclosure proceedings, obviously was not affected thereby.

When Mary Sanderson Alpine died in 1962 without issue the one-half interest in the portion of the homeplace purchased by defendants' predecessors in title in the tax foreclosure proceeding was defeated and it reverted to the heirs at law of Jesse Sanderson, who are represented in this lawsuit by plaintiffs. However, the death of Mary Sanderson Alpine without issue did not affect defendants' title to a one-tenth undivided interest, which was also purchased by defendants' predecessors in title.

Nevertheless, defendants contend, and offered evidence tending to show that they, and their predecessors in title, have been in open, notorious and adverse possession since 1939 or 1940 of the entire property described in the complaint. They contend that by reason of adverse possession for more than twenty years, and by reason of adverse possession under color of the commissioner's deed for more than seven years, that title has vested in them in fee simple to the one-half undivided interest originally devised to Sarah Sanderson, and which, because it became a lapsed devise, descended to plaintiffs' lineal ancestors by intestate succession in 1908. Defendants do not contend, and properly so, that they and their predecessors in title held the one-half interest of Mary Sanderson Alpine by adverse possession; they concede that their title to this one-half interest was a defeasible fee, and that it was defeated upon the death, without issue, of Mary Sanderson Alpine in 1962.

[9] Plaintiffs' complaint is composed of two paragraphs: (1) They allege generally that they are the owners and entitled to possession of the tract of land described, and (2) they allege defendants claim an interest adverse to them. Defendants' answer is composed of two paragraphs: (1) They generally deny plaintiffs' allegation of ownership and right to possession, and (2) admit that they claim an interest in the tract of land described. Defendants did not specially plead title by adverse possession. However, this does not prevent them from defending their title. "In possessory actions which involve the title to land, it is not necessary to plead the statute specially, but objection may be taken under a general denial, since the statute in such cases confers a title, and does not simply bar the

remedy." McIntosh, N. C. Practice 2d, § 371. "In actions to recover land, wherein plaintiff alleges title and right to the possession, it is generally sufficient for the defendant to make a simple denial and introduce evidence of his possession for twenty years, or, of his possession under color for seven years, in support of his denial." *Whitaker v. Jenkins,* 138 N.C. 476, 51 S.E. 104.

[10] Because of the trial judge's conclusion that the devise to Mary and Sarah Sanderson was a class devise, and that, because of the death of Sarah, Mary Sanderson (Alpine) was the holder of a fee simple defeasible title in the whole of the tract in controversy, it was not necessary for him to make findings with respect to adverse possession by defendants and their predecessors in title; and he made none. However, in view of our holding that the devise was to them individually and not as a class, findings upon the question of adverse possession are necessary. Because of the error in the conclusion by the trial judge there must be a new trial.

We have not overlooked defendants' contention that the court erred in denying their motions for nonsuit. Without specifically ruling upon the question we note that even under defendants' alternate contentions (that either they are owners of a one-half undivided interest by reason of adverse possession; or at least that they are owners of a one-tenth undivided interest by reason of the tax foreclosure proceedings) this controversy must be litigated, and we perceive no prejudice to defendants in denying their motions for nonsuit. Also, under the rationale of G.S. 41-10 we do not feel that justice would be served by the entry of a nonsuit which would leave the entire title to the property handicapped by suspicion.

Defendants further contend that in the event they do not have title to a one-half undivided interest, they are the owners of the one-fortieth interest inherited by Mary Sanderson Alpine from her aunt Jenny Sanderson who died intestate in 1945. Defendants have no claim to this interest (except as it is included in their claim of adverse possession of the one-half) because it was inherited by Mary Sanderson Alpine after the tax foreclosure sale, and because this action was instituted within twenty years of 1945. There is no separate color of title for this interest.

The judgment appealed from is reversed and a new trial ordered.

New trial.

BRITT and PARKER, JJ., concur.

MAGGIE A. BOWEN v. DANNY CLIFTON GARDNER, APPEARING HEREIN BY HIS GUARDIAN AD LITEM, MILDRED D. GARDNER, AND JAMES GARDNER

No. 68SC185

(Filed 5 February 1969)

1. Trial § 21— nonsuit — consideration of evidence

On motion for judgment as of nonsuit at the close of plaintiff's evidence, the court is required to consider the evidence in the light most favorable to plaintiff.

2. Automobiles § 62— negligence — nonsuit — striking pedestrian — unmarked crosswalk

Plaintiff pedestrian's evidence tending to show that she was struck by a motorcycle operated by the minor defendant as she was crossing a city street at night within the boundaries of an unmarked crosswalk at an intersection and that defendant first saw the plaintiff when he was 20 feet away from her, *is held* sufficient to withstand defendant's motion for judgment as of nonsuit.

3. Automobiles § 40— "unmarked crosswalk" defined

The term "unmarked crosswalk at an intersection," as used in G.S. 20-173(a) and G.S. 20-174(a), means that area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection.

4. Automobiles § 40— pedestrian — unmarked crosswalk

Evidence considered in the light most favorable to plaintiff *is held* to show that at the time of the collision complained of plaintiff was within the lateral boundaries of a "sidewalk" projected across the intersection of two city streets.

5. Automobiles § 40— pedestrian in unmarked crosswalk

It is the duty of a motorist to yield the right of way to a pedestrian in an unmarked crosswalk at an intersection. G.S. 20-173(a).

6. Automobiles § 40— pedestrian's duty at unmarked crosswalk

Even though plaintiff was crossing an intersection within the lateral boundaries of an unmarked crosswalk and therefore had the right of way, plaintiff was under the duty, in the exercise of reasonable care for her own safety, to keep a timely lookout for approaching vehicular traffic and to see what she should and could have seen if she had looked before starting across and during the crossing of the street.

7. Automobiles § 83— contributory negligence — nonsuit — striking pedestrian in unmarked crosswalk

Even though plaintiff pedestrian had the right of way when crossing a heavily traveled city street intersection at night within the boundaries of an unmarked crosswalk, plaintiff's evidence discloses her contributory negligence as a matter of law where she testified that she looked and kept looking as she was crossing but did not see or hear the motorcycle that struck her, and there was evidence that the motorcycle with its

lights burning had been coming toward her on a straight street for three or four hundred feet.

APPEAL by plaintiff from *Parker, J.*, April 1968 Session of WILSON Superior Court.

This is a civil action brought by the plaintiff to recover damages for bodily injuries received when she was hit by a motorcycle being driven by the minor defendant as she was attempting to cross Downing Street in Wilson, North Carolina, on foot. The plaintiff alleged that the defendant was negligent in that he (1) failed to keep a proper lookout, (2) operated the motorcycle at a highly dangerous and excessive rate of speed, (3) failed to yield the right of way to the plaintiff who was crossing Downing Street at the intersection of Downing and Jordan Streets, (4) failed in the operation of his motorcycle to turn out or take such other action as was necessary to avoid colliding with the plaintiff after he saw or should have seen that she was attempting to cross Downing Street, (5) failed to use due caution and circumspection and operated his motorcycle recklessly, carelessly and heedlessly and in disregard of the rights and safety of others using the street and more particularly the plaintiff crossing Downing Street, and (6) operated the motorcycle in the nighttime without a proper headlight. She further alleged that these negligent acts and omissions were the proximate cause of the collision and of her injuries resulting therefrom.

The defendant denied the plaintiff's allegations of negligence and further answered that the plaintiff was contributorily negligent in that she (1) failed to keep a proper lookout for vehicles lawfully and properly using the city street she was attempting to cross, (2) "failed to cross the street between intersections at a safe and proper place," (3) failed to yield the right of way to the defendant as was her duty, thereby violating G.S. 20-174(a).

The plaintiff replied that if she was found to be contributorily negligent, the defendant had the last clear chance to avoid the collision and resulting injuries to her and negligently failed to avail himself of it in that he (1) saw or by the exercise of due care should have seen that the plaintiff was attempting to cross the street, (2) knew or by the exercise of due care should have known the plaintiff was unaware of her peril in time to avoid the danger, (3) could have sounded a warning to the plaintiff, slowed or stopped the motorcycle, or turned it toward his left rather than to his right so that the collision could have been avoided, and (4) failed to use ordinary care and to exercise all of the means at his command to avoid the col-

lision. The plaintiff further alleged that these acts or omissions of the defendant were the proximate cause of the collision and the resulting injuries to the plaintiff.

Upon trial the plaintiff introduced evidence tending to show that she was 72 years old; that at about 7:30 p.m., after talking with several ladies at a car which was parked on the south side of Jordan Street near the southeast corner of its intersection with Downing Street, she left the car and started to cross Downing Street to visit a neighbor who lived in a house located on the southwest corner of the intersection of Downing Street and Jordan Street facing Downing Street. Downing Street, which is 31 or 32 feet wide, runs generally north and south and Jordan Street runs generally east and west. Before attempting to cross, she looked in both directions along Downing Street. While she was crossing, she continued to look from time to time in both directions. She could see over a block north on Downing Street from the intersection but neither saw nor heard any approaching traffic. She then began to cross Downing Street as quickly as she could. The evidence offered by plaintiff is not clear, however, as to whether she was walking or running or whether she headed straight across Downing Street toward the southwest corner of the intersection or at an angle across the street toward the front door of the neighbor's house where she was going to visit. She at no time saw nor heard the defendant and did not remember being hit by the motorcycle or anything else until she awoke in the recovery room of the hospital. She was wearing a black all-weather coat, but the intersection was well-lighted. There was evidence that there was no paved sidewalk on the south side of and running parallel to Jordan Street on either side of its intersection with Downing Street.

The defendant, Donny Clifton Gardner, testified on an adverse examination, which plaintiff introduced into evidence, that he lived with his father and mother in Wilson, that on the date in question he was traveling on a motorcycle owned by him, but the registration certificate thereof was in the name of his father, the defendant James Gardner. He was going south on Downing Street at a speed of about 30 miles per hour. He could see 100 feet ahead of the motorcycle as he was traveling with the aid of the headlight on the motorcycle. The headlight was on low beam. He first saw the plaintiff when he was 20 feet away from her. At this time she was running across Downing Street toward his right and was at the center of Downing Street at a point approximately 50 feet south of the centerline of Jordan Street. He did not blow his horn or give any warning but applied his brakes and turned to his right toward the west side of

Downing Street in the direction in which she was running in an effort to avoid hitting the plaintiff. The plaintiff at no time turned to look at him but continued running across the street. He collided with her at a point approximately 60 feet south of the centerline of Jordan Street and 7 or 8 feet east of the west curb of Downing Street.

Upon the close of the plaintiff's evidence, the defendants' motion for nonsuit was granted, and the plaintiff appeals from the judgment rendered thereon.

Gardner, Connor & Lee by Cyrus F. Lee for plaintiff appellant.

Boyce, Lake & Burns by Eugene Boyce for defendant appellees.

PARKER, J.

At the outset, it should be noted that the minor defendant testified that he spells his first name *Donny*. However, in the record and the briefs, including his own brief, the defendant's first name is spelled *Danny;* therefore, he will be referred to in this opinion as *Danny*.

Appellant assigns as error the ruling of the trial court in granting the defendants' motion for judgment as of nonsuit at the close of plaintiff's evidence.

This motion poses the following questions:

1. Does the plaintiff's evidence show negligence as alleged on the part of defendants, proximately causing injury to plaintiff; and if so

2. Does the plaintiff's own evidence establish her contributory negligence as alleged as a matter of law?

[1, 2] We are of the opinion and so hold that the plaintiff's evidence is sufficient to permit a jury to find actionable negligence on the part of the defendant Danny, proximately resulting in personal injuries to the plaintiff. We are required to consider plaintiff's evidence in the light most favorable to plaintiff on motion for judgment of nonsuit. *Anderson v. Carter,* 272 N.C. 426, 158 S.E. 2d 607. Plaintiff's evidence tends to show that the defendant Danny, who was operating the motorcycle owned by him and registered in the name of his father, the defendant James Gardner, did not see the plaintiff until he was within twenty feet of her. On the evidence in this case, the failure to do so was a failure to keep a proper lookout as alleged. The evidence further tends to show that the defendant Danny failed

to yield the right of way to the plaintiff, a pedestrian, who was crossing Downing Street in an unmarked crosswalk at an intersection.

[3, 4] We come now to consider the second question. There were neither traffic signals nor marked crosswalks at the intersection of Jordan and Downing Streets. Downing Street runs generally north and south. Jordan Street runs generally east and west. There are paved sidewalks running north and south and parallel to Downing Street. There is an unpaved grass strip which one of the witnesses described as "what you would call a sidewalk" running east and west and parallel to Jordan Street and on the south side thereof where Jordan Street intersects with the east margin of Downing Street. The evidence reveals that the plaintiff was walking westward on the south side of Jordan Street on this area that is called the sidewalk before entering Downing Street at or near the intersection of Jordan Street with Downing Street. In *Anderson v. Carter, supra,* Justice Lake said, "We construe the term 'unmarked crosswalk at an intersection,' as used in G.S. 20-173(a) and G.S. 20-174(a), to mean that area within an intersection which also lies within the *lateral boundaries of a* sidewalk projected across the intersection."

[4, 5] Although there is evidence otherwise, taking the evidence in the light most favorable to the plaintiff, at the time of the collision the plaintiff was in the lateral boundaries of what is called a sidewalk projected across the intersection of Downing Street as it is intersected by Jordan Street. Under the provisions of G.S. 20-173(a), it was the duty of the defendant to yield the right of way to plaintiff, a pedestrian, in an unmarked crosswalk, at an intersection.

[6] Even though the evidence in the light most favorable to the plaintiff tended to show that plaintiff was crossing Downing Street in an unmarked crosswalk at an intersection of Jordan and Downing Streets, and therefore had the right of way, plaintiff was under the duty to exercise due care for her own safety. This duty required her to keep a proper lookout for vehicular traffic using the street and to exercise that degree of care for her own safety that a reasonably prudent person would under the same or similar circumstances. It was her duty, even though she had the right of way, in the exercise of reasonable care for her own safety to keep a timely lookout for approaching vehicular traffic on the street and to see what she should have and could have seen if she had looked before she started across

and during the crossing of Downing Street. In the case of *Rosser v. Smith,* 260 N.C. 647, 653, 133 S.E. 2d 499, the Supreme Court said:

> "It was the duty of defendant both at common law and under the express provisions of G.S. 20-174(e) to 'exercise due care to avoid colliding' with Mrs. Rosser on the highway. *Landini v. Steelman,* 243 N.C. 146, 90 S.E. 2d 377. Even if we concede that plaintiff's evidence, and defendant's evidence favorable to him, would permit a jury to find that defendant failed to exercise due care to avoid striking Mrs. Rosser after she saw her, it is manifest that plaintiff's own evidence so clearly shows negligence on the part of his intestate, which proximately contributed to her injuries and death, that no other conclusion can be reasonably drawn therefrom.
>
> "The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided. *Holland v. Malpass,* 255 N.C. 395, 121 S.E. 2d 576; *Alford v. Washington,* 244 N.C. 132, 92 S.E. 2d 788; 65 C.J.S., Negligence, sec. 116, p. 706. It was the duty of Mrs. Rosser to look before she started across the highway. *Goodson v. Williams,* 237 N.C. 291, 296, 74 S.E. 2d 762, 766. It was also her duty in the exercise of reasonable care for her own safety to keep a timely lookout for approaching motor traffic on the highway to see what she should have seen and could have seen if she had looked before she started across the highway. *Garmon v. Thomas,* 241 N.C. 412, 416, 85 S.E. 2d 589, 592."

Plaintiff's evidence tends to show that she was going across Downing Street as "quick as I could, because it was a very busy street." The evidence is not clear as to whether she was walking or running. Plaintiff's evidence also tends to show that the speed limit there was 35 miles per hour, that the defendant's motorcycle was being operated at a speed of about 30 miles per hour after it had stopped at a service station about three or four hundred feet north of the intersection of Jordan and Downing Streets where the collision occurred. The street was straight, level, visibility was good, and the roadway was dry.

In the case of *Warren v. Lewis,* 273 N.C. 457, 160 S.E. 2d 305, it is stated:

> "Justice Lake, in *Douglas v. W. C. Mallison & Son,* 265 N.C. 362, 144 S.E. 2d 138, has accurately and concisely stated the rule governing nonsuit on the ground of plaintiff's contributory negligence. 'A judgment of nonsuit on the ground of con-

tributory negligence may be entered only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, so clearly establishes the defense that no other reasonable inference or conclusion can be drawn therefrom. *Cowan v. Transfer Co.*, 262 N.C. 550, 138 S.E. 2d 228; *Waters v. Harris*, 250 N.C. 701, 110 S.E. 2d 283; Strong, N. C. Index, Negligence, § 26. For such a ruling to be proper, it is also necessary that the answer has alleged the negligent act or omission on the part of the plaintiff which is so shown by the evidence. *Maynor v. Pressley*, 256 N.C. 483, 124 S.E. 2d 162; *Rodgers v. Thompson*, 256 N.C. 265, 123 S.E. 2d 785; *Messick v. Turnage*, 240 N.C. 625, 83 S.E. 2d 654; *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326; G.S. 1-139.' "

[7] In this case the plaintiff had the right of way and had the right to assume that the defendant in the operation of his motorcycle would keep a proper lookout and yield the right of way. However, the plaintiff negligently failed to see the defendant's approaching motorcycle and thus failed to see a danger which was or should have been obvious to her. She testified she looked and kept looking as she was crossing but did not see or hear the motorcycle that struck her. Although it was there with its light burning and had been coming toward her on a straight street for three or four hundred feet, she was, in her rush to cross the street, totally unaware of its approach on a street on which she testified she knew traffic was always heavy.

Plaintiff argues that the doctrine of last clear chance is applicable. Under the facts in this case, we do not agree.

We are of the opinion and so hold that the evidence clearly shows that the plaintiff was contributorily negligent as a matter of law in failing to see what she ought to have seen and in failing to use that degree of care for her own safety in crossing this busy street that an ordinarily prudent person would have used under the same or similar circumstances and that her failure to do so was one of the proximate causes of her injuries. The cases cited by plaintiff are factually distinguishable. *Warren v. Lewis, supra; Price v. Miller*, 271 N.C. 690, 157 S.E. 2d 347; *Blake v. Mallard*, 262 N.C. 62, 136 S.E. 2d 214; *Garmon v. Thomas*, 241 N.C. 412, 85 S.E. 2d 589; *Rosser v. Smith, supra.*

We are of the opinion that the judgment of nonsuit was properly entered.

Affirmed.

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

JAMES PERCY DAVIS, IRVIN NICHOLAS DAVIS AND WIFE, MARY E. PITTMAN DAVIS; DOROTHY DAVIS STEGLAFF (DIVORCED); AVERY WINSTON DAVIS AND WIFE, IVA THORNHILL DAVIS; SADIE VIOLA DAVIS McCLENNY AND HUSBAND, SAMUEL F. McCLENNY; CORA CHRISTINE DAVIS MATSIL AND HUSBAND, MAX MATSIL; FLORENCE DAVIS; THOMAS ERNEST DAVIS AND WIFE, MYDE ATKINSON DAVIS v. REXFORD DAVIS AND RONNIE DAVIS, MINORS, WITHOUT GENERAL OR TESTAMENTARY GUARDIAN IN THIS STATE; WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF ELIZABETH BARNES MILLER, DECEASED, AND THE PRIMITIVE BAPTIST CHURCH OF ORLANDO, FLORIDA; MYRTLE DAVIS AND DOROTHY DAVIS

No. 688SC321

(Filed 5 February 1969)

1. Wills § 69— conveyance by ascertained contingent remainderman

An ascertained remainderman whose interest will take effect only upon the happening of an event uncertain may convey whatever interest he has prior to the occurrence of the uncertain event.

2. Wills § 69— conveyance by ascertained contingent remainderman

Where testator devised property to his daughter for life with remainder to her children or grandchildren, and if she should die leaving no child or issue of such, then to two named contingent remaindermen, a conveyance prior to the death of the life tenant without issue by one contingent remainderman of all his interest in the property is valid and is binding upon the heirs of such contingent remainderman.

APPEAL by plaintiffs from *Fountain, J.*, May-June 1968 Session, Superior Court of WAYNE.

The facts in this case are uncontroverted. John A. Burns of Wayne County died on 24 September 1916 leaving a will which has been duly probated and recorded. Under this will the property in question was disposed of as follows:

> "[T]hat part of my home tract in Wayne County bounded on the North by the Juniper Swamp, on the East by the lands of Simon and Larry Aycock, on the South by the Pocosin Branch, on the West by a straight line running with the Big Ditch along the cross fence between Hickory field and long field" . . . "to Lizzie Barnes for life and at her death to her children or grandchildren under the same conditions and with the same limitations as fixed for the offspring of Lloyd Barnes in paragraph second hereof, and if she should die leaving no child or issue of such, then to my two daughters, Christian Davis and Melissa Aycock . . ."

On 17 January 1952, Christian Davis, holder of a remainder under the above devise, conveyed by deed all her right, title, and in-

terest in the land in question to Elizabeth Barnes Miller, the life tenant in the above devise (Elizabeth Barnes Miller and Lizzie Barnes are one and the same). The validity of the conveyance is not questioned. Christian Davis died on 3 March 1954.

Lizzie Barnes Miller died on 24 May 1967. By a document purporting to be her will, she devised the property in question to the Primitive Baptist Church in Orlando, Florida.

Plaintiffs in this action are the heirs of Christian Davis. Rexford Davis and Ronnie Davis, minor heirs of Christian Davis, are made defendants. Plaintiffs bring this suit in the form of an action for a declaratory judgment and seek to have the following questions answered:

"Question 1: What was the intention of John A. Barnes Testator, gathered from the four corners of his Will, regarding the ultimate disposition of the property hereinabove described?

Question 2: What was the effect, if any, of the deed from Christian Davis to Elizabeth Barnes Miller dated the 17th day of January, 1952, and recorded in Book 380 at page 129 of the Wayne County Registry?

Question 3: Whether or not the heirs of Christian Davis have any interest in the afore-described land?"

These questions were answered by the judge below as follows:

"Answer to Question No. 1: The intention of John A. Barnes, as gathered from the four corners of his will regarding the ultimate disposition of the property referred to in the Complaint was to give to his daughter, Elizabeth Lizzie Barnes Miller, a life estate and if she should die leaving no issue surviving, then to this two (2) daughters, Christian Davis and Melissa Aycock.

Answer to Question No. 2: The effect of the deed from Christian Davis to Elizabeth Barnes Miller, dated the 17th day of January, 1952, and recorded in Book 380 at page 129 of the Wayne County Registry, was to convey to said Elizabeth Barnes Miller a one-half (½) undivided interest in said land in fee simple, subject to the life estate of Elizabeth Barnes Miller.

Answer to Question 3: The heirs of Christian Davis have no interest in said land and this holding is not inconsistent with the will of John A. Barnes."

Plaintiffs excepted to each of these answers, and assigned as error the finding of the court below that Elizabeth Barnes Miller

owned a one-half interest in the property in question following the conveyance of Christian Davis, as being contrary to law.

Sasser, Duke and Brown by J. Thomas Brown, Jr., for plaintiff appellants.

Braswell and Strickland by David M. Rouse for Rexford Davis and Ronnie Davis, minor defendants who join appellants.

Taylor, Allen, Warren and Kerr by W. R. Taylor for defendant appellees.

MORRIS, J.

[2] The will of John A. Barnes is clear and unambiguous. There is a devise to Lizzie Barnes for life, remainder to her children or grandchildren; and, if she should die leaving no child or issue of such, then to Christian Davis and Melissa Aycock. There is no controversy as to the type of remainder held by Christian Davis and Melissa Aycock; it is agreed that they held a contingent remainder. However, the appellants argue that Christian Davis, prior to the death of Elizabeth Barnes Miller without issue, had no transmissible interest in the property, and her deed was in fact a nullity and did not pass any interest to Elizabeth Barnes Miller. Therefore, the devise to the Primitive Baptist Church of Orlando, Florida, had no effect.

[1] As we view the matter, the validity of the plaintiffs' claim to the property hinges upon this question — may an ascertained remainderman, whose interest will take effect only upon the happening of an event uncertain, convey whatever interest he has prior to the occurrence of this uncertain event? If this question is answered in the affirmative, then the heirs of Christian Davis, the plaintiffs and minor defendants, have no interest in this property because of the deed executed on 17 January 1952.

In *Fortescue v. Satterthwaite,* 23 N.C. 566, T devised property to N, S, and J. It was provided that if N, S, or J should die without issue, then his property was to go to the survivors. J first died, then N died without issue, leaving S as the survivor. Prior to the death of N, S, who is the plaintiff, and her husband had conveyed the interest of S in the property to N, the defendant. Speaking on the right of the defendant to introduce this bill of sale into evidence, the Court says:

> "It is true, as stated in the argument, that a possibility cannot be transferred at law. But by a *possibility* we mean such an in-

> terest, or the chance of succession, which an heir apparent has in his ancestor's estate; which a next of kin has of coming in for a part of his kinsman's estate; which a relation has of having a legacy left him, etc. Such interests as these, we conceive, are the true technical *possibilities* of the common law. 2 P. Wil., 181; *Whitfield v. Faucet,* 1 Ves., 381; Atherley on Mar. Sett., 57. But executory devises are not considered as mere *possibilities,* but as *certain interests* and *estates. Gurnel v. Wood,* Willes, 211; *Jones v. Roe,* 3 Term, 93. In the last case the judges seem to have considered it as settled that contingent interests, such as executory devises to persons who were certain, were assignable. They may be assigned (says Atherley, p. 55) both in real and personal estate, and by any mode of conveyance by which they might be transferred had they been vested remainders."

In *Bodenhamer v. Welch,* 89 N.C. 78, the testator devised property to his wife for life and after her death, to his children then living. One of the testator's sons who survived the testator's wife had filed a petition in bankruptcy, and his interest had been assigned to the defendant. The question before the Court was the validity of this assignment. Speaking of the son's interest, the Court said:

> "His interest was contingent, depending upon his surviving his mother. It was not as contended, a mere possibility, but an *estate* in the land, *an executory devise,* or rather a contingent remainder, which is a *certain* interest. A possibility is defined to be 'an uncertain thing' which may happen, or a contingent interest in real or personal estate. Possibilities are divided into, first, a possibility coupled with an interest: this may of course be sold, assigned, transmitted or devised: such a possibility occurs in executory devises and in contingent, springing or executory uses; and secondly, a bare possibility of hope of succession: this is the case of an heir apparent during the life of his ancestor: it is evident he has no right he can assign, devise or release. 2 Bouvier Law Dict., 253.
>
> That executory devises, contingent remainders and other possibilities coupled with an interest may be assigned, is maintained in *Jones v. Roe,* 3 D. & E., 88; *Higden v. Williamson,* 3 P. Wms., 132; 2 Story, 630; *Comegys v. Vasse,* 1 Pet., 193, 7 Texas, 25; *Fortescue v. Satterthwite,* 23 N.C., 566; and 3 Pars. Cont., 475; Burrill Assign., 72; Shep. Touch., 239."

In *Watson v. Smith,* 110 N.C. 6, 14 S.E. 640, the devise very closely resembled that involved in the present case. The Court said the question presented was ". . . whether the interests of such de-

visees are assignable by deed, either in law or equity. . . . What interests did these last named persons [the same as Christian Davis and Melissa Aycock in the present case] take under the will?" The Court first lent itself to the question of what type of remainder was involved and concluded that this was a contingent remainder. Then the Court held that the interest may be assigned in equity.

> "Taking the limitation to be either a contingent remainder or an executory devise, we are of opinion that the interest of George Watson and others [the same as the interest of Christian Davis and Melissa Aycock] was at least 'a possibility coupled with an interest' . . . and its assignment for a valuable consideration and free from fraud or imposition, while void in law, will be upheld in equity. . . . In *Bodenhamer v. Welch,* 89 N.C., 78, it is held that such an interest may be assigned (we suppose an equitable assignment is meant), and we are of the same opinion; *but even if this were not so, it is clear that the assignment in question, if treated as an executory contract, may be specifically enforced against the assignors and their heirs, should the life tenant die without issue* . . .
>
> The plaintiff, the life tenant, has by the assignment acquired an equitable right to the interest of the said remainderman. He is a single gentleman, about 80 years of age, and the defendant is willing to take the risk of his marrying and leaving issue, *provided the assignment of the remaindermen is effectual to bind them and their heirs. We have seen that such is its effect* . . ." (Emphasis added.)

In *Kornegay v. Miller,* 137 N.C. 659, 50 S.E. 315, testator devised land to A & J in trust. If either died without issue, his share was to pass to the survivor, and if both died without issue, then the income was to go to the testator's wife. The Court held that the contingent interest of the testator's wife could be conveyed by her deed. The Court held that the assignment may be specifically enforced against the assignors and their heirs. Although not necessary to the holding of the case (that a contingent remainderman may convey his interest to the detriment of his heirs), the Court goes on to say that the assignee holds a present interest ". . . not existent at law, but thoroughly recognized in equity; and to that title equity stands ready to give full effect the instant the property comes into being . . . instantly upon the acquisition of the thing, the assignor holds it in trust for the assignee, *whose title requires no act on his part to perfect it.* The assignee, therefore, has an equitable title *from the time of the assignment.*"

In *Hobgood v. Hobgood,* 169 N.C. 485, 86 S.E. 189, our Supreme Court again held that a contingent interest could be conveyed stating, ". . . our decisions on the subject being to the effect that when the holders of a contingent estate are specified and known, they may assign and convey it, and, in the absence of fraud or imposition, when such a deed is made, it will conclude all who must claim under the grantors, even though the conveyance is without warranty or any valuable consideration moving between the parties."

Malloy v. Acheson, 179 N.C. 90, 101 S.E. 606, and *Seawell v. Cheshire,* 241 N.C. 629, 86 S.E. 2d 256, are other cases in which our Supreme Court has held that a contingent remainder may be assigned where the ultimate taker is ascertained.

[2] In the present case, Christian Davis was to take only upon the death of the life tenant without issue. The remainder to Christian Davis was contingent not because of the uncertainty of the person who was to take, but because of the uncertainty of the event. The cases cited above establish that an assignment by such a remainderman is valid and is binding upon the heirs of the assignor. This being true, the conveyance by Christian Davis to Elizabeth Barnes Miller cut off any interest the heirs of Christian Davis may have had in the property in question. The judgment below is

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE HIGHWAY COMMISSION v. LINDSEY STOKES AND WIFE, MARY WILLIE STOKES; W. O. McGIBONY, TRUSTEE; AND THE FEDERAL LAND BANK OF COLUMBIA

No. 6917SC34

(Filed 5 February 1969)

1. Eminent Domain § 7— highway condemnation — statutory notice to landowner — jurisdiction

The fact that landowners were not given statutory ten days' notice by the Highway Commission in its action for the appropriation of a portion of defendants' property does not deprive the trial court of jurisdiction to hear the matter, where the case had been pending in the court for several months and had been calendared for trial, and where the landowners had received notice of the calendar and had caused to be issued subpœna *duces tecum* for production of documents at the trial. G.S. 136-108.

2. Notice § 1— motions during session of court

Parties are fixed with notice of all motions or orders made during the session of court in causes pending therein, and the statutory provisions for notice of motions are not applicable in such instances.

3. Trial § 1— calendar — duty of trial court

The calendar is under the control of the court, which has the right not only to determine whether it is necessary to make a calendar but to make such orders as are necessary for the dispatch of business as to the disposition of causes placed on the calendar and not reached on the day for which they are set. Rule 22, Rules of Practice in the Superior Court.

4. Trial § 1— calendar — resetting case for trial

Trial court did not exceed its authority in resetting case for trial during the session in which it was calendared where it appears that counsel did not appear for the purpose of discussing the calendar although given every opportunity of doing so.

5. Eminent Domain § 7— highway condemnation — waiver of jury trial

Where counsel for landowners failed to appear in highway condemnation proceeding which was calendared for trial, the right to a jury trial was waived. G.S. 1-184.

APPEAL by defendants Lindsey Stokes and wife, Mary Willie Stokes, from *Beal, S.J.*, 22 July 1968 Civil Session of Superior Court of ROCKINGHAM.

On 29 July 1966, plaintiff instituted action under Article 9, Chapter 136, General Statutes of North Carolina, for the appropriation of a portion of the property of defendants in the construction of its Project 8.1592502. Exhibit A, attached to the complaint, listed under liens and encumbrances "Existing easements of right of way — State Highway Commission." Defendants Stokes filed answer on 19 January 1967. In their answer defendants Stokes admitted the taking of a portion of their lands but averred that "the amount of land so taken is in excess of that for which deposit was made as by law required." They further denied that the plaintiff "has heretofore acquired or presently owns easements of right of way in the lands of defendants Stokes." By way of affirmative defense, they alleged that on or about 20 September 1949, defendants relying on representations of plaintiff's agent, signed a right-of-way agreement in blank; that the blank paperwriting was falsely and fraudulently made and altered while in the hands of plaintiff, and they asked that the paperwriting of 1949 be rescinded and declared void.

Plat was filed by plaintiff on 17 April 1967. The case was calendared for trial by the Rockingham Bar Association for the two

weeks session beginning 22 July 1968, and was set for trial on 23 July. Copy of the calendar was received by counsel for defendants Stokes on 11 July 1968. On 15 July 1968 counsel for defendants Stokes had a subpœna *duces tecum* issued to the Chairman of the Highway Commission for his personal appearance, or in lieu thereof, the production of certain plans or maps on file with the Commission and the production of the original of the 1949 right-of-way agreement under which plaintiff claimed a previously existing right of way, to be used in the trial of the case on 23 July 1968 or when the case was called for trial.

On 22 July, at the call of the calendar, counsel for plaintiff was present, but counsel for defendants were not. The court instructed counsel for plaintiff to telephone counsel for defendants and request their attendance at court on the afternoon of 22 July to discuss the calendar. Again counsel for defendants did not appear. The court reset the case for trial on Monday, 29 July 1968. On 25 July, counsel for defendants Stokes filed with the clerk a paperwriting entitled "Special Appearance" in which they contended that the court was without power to proceed in the action "to hear and determine any and all issues raised by the pleadings, other than the issue of damages" for that the 10 days' notice provided by G.S. 136-108 had not been given and further that if the court should proceed to determine the matter under G.S. 136-108, the court had no jurisdiction to hear and determine the issue of fraud raised in the pleadings.

At the call of the calendar on 29 July 1968 counsel for plaintiff was present but counsel for defendants Stokes were not. The court again directed plaintiff's counsel to contact counsel for defendants and advise them that the court would proceed to try the case. Counsel for defendants advised that no counsel for defendants would be present. Whereupon the court called the case for trial and proceeded to hear evidence to determine all issues other than the issue of damages. On 1 August 1968, the court signed an order making findings of fact and conclusions of law and determined all issues other than the issue of damages. From the entry of this order defendants Stokes appealed.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Trial Attorney Robert G. Webb for the State Highway Commission, plaintiff appellee.

Ross E. Strange and Harry R. Stanley for defendant appellants Stokes.

MORRIS, J.

The order determining issues signed by the court contained 28 findings of fact. The findings of fact included a chronological history of the occurrences set out above including the fact that no request for continuance was made by counsel for defendants, that there was no evidence of any physical disability which would prevent counsel's attendance, nor was any other excuse offered. The court also found that "on September 20, 1949, the defendants Lindsey Stokes and Mary W. Stokes executed a right of way agreement to the North Carolina State Highway Commission (State Highway and Public Works Commission) conveying to it an easement in perpetuity across the entire western margin of their property as shown on the right of way agreement consisting of a width of 152 feet and running from the southern margin of the defendants' property to the northern margin of the defendants' property." The court found as a fact that the area taken is that certain area designated as New Right of Way on the plat filed. On the facts found the court made the following conclusions of law:

"1. That the plaintiff, State Highway Commission, is an agency of the State of North Carolina, with the power of eminent domain and that acting pursuant to the authority granted them by statute, did acquire an interest as set forth above in the defendants' property and that it was necessary for the plaintiff to appropriate this property for the construction of Project 8.1592502, Rockingham County.

2. That all parties who have or claim an interest in the property rights affected by this appropriation are properly before the Court;

3. That the date of taking is July 29, 1966; that this matter was properly calendared for trial by the Rockingham County Bar Association; that the access on the service road across the entire western margin of defendants' property which leads to the primary or main travelled lanes of U. S. Highway #29 a distance of 350 to 400 feet from the southern margin of defendants' property is reasonable access and the defendants are not entitled to compensation for any control of access to the main travelled lanes of U. S. Highway #29 in front of their property; that the right of way agreement dated September 20, 1949, introduced into evidence as plaintiff's Exhibit No. 3 is a valid conveyance of the property described in the plat hereinabove referred to, consisting of 1.96 acres and designed (sic) as old right of way on said plat.

4. That there is no evidence to sustain the allegations of fraud alleged in the Answer of the defendant and the cause of action alleged therein is hereby dismissed.

5. That the only issue remaining to be decided is 'What sum, if any, are the defendants entitled to recover of the plaintiff, State Highway Commission, for the appropriation of a portion of their property for highway purposes?' "

Defendants did not except to any finding of fact or conclusion of law, but excepted to the entry of the order. They assign as error the court's resetting the case "for hearing to determine the issues under General Statutes 136-108, with less than 10 days' notice" and further contend the court was without "jurisdiction to determine the issue of fraud in this case without trial by jury."

Counsel for appellants candidly concede that they are unable to present any authority with respect to their contention that they are entitled to have a jury trial on the issue of fraud, but they earnestly contend that had they appeared for trial, they would have waived this right.

G.S. 136-108 provides: "After the filing of the plat, the judge, upon motion and ten (10) days' notice by either the Highway Commission or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken."

[1, 2] Appellants contend that this statute requires notice of ten days before the court can hear the matter to determine issues and that because this notice was not given, the court was without jurisdiction to hear the matter. This contention is without merit. This case had been pending in the court for several months, had been calendared for trial, and appellants had received notice of its having been calendared for trial and had caused to be issued subpœna *duces tecum* for the production of documents at the trial. They did not appear for the call of the calendar nor in response to the request of the court that they appear to discuss the calendar. This was a regular session of court. The Supreme Court and this Court have said repeatedly that parties are fixed with notice of all motions or orders made during the session of court in causes pending therein, and the statutory provisions for notice of motions are not applicable in such instances. *Harris v. Board of Education,* 217 N.C. 281, 7 S.E. 2d 538 (and cases cited therein); *Angle v. Black,* 1 N.C. App. 36, 159 S.E. 2d 254.

[3, 4] The record before us clearly reveals that the trial court gave counsel for appellants every opportunity to be present to discuss the calendar; and when they did not appear for that purpose, the court, on its own motion, reset the case for trial on Monday, 29 July 1968. The calendar is under the control of the court, and the court has the right, not only to determine whether it is necessary to make a calendar, but to make such orders as are necessary for the dispatch of business as to the disposition of causes placed on the calendar and not reached on the day for which they are set. Rule 22, Rules of Practice in the Superior Courts of North Carolina, Vol. 4A, N.C. General Statutes, App. I. In resetting the case for trial the court certainly did not exceed its authority, and it appears abundantly clear from the record that the court was acting in consideration of appellants' counsel.

[5] When counsel for appellant failed to appear on 29 July 1968, at the second call of the case, the right to a jury trial was waived. G.S. 1-184. Appellants could have appeared, requested a jury trial, and protected by exception any rights they deemed denied. They chose not to appear and we think they have waived any right to jury trial they might have had.

Under our view of the case, the question of whether G.S. 136-108 deprives appellants of a jury trial on the issue of fraud is not reached, and we, therefore, do not discuss it.

The only issue remaining for determination is the issue of damages as set out in the trial court's fifth conclusion of law.

In the proceedings and order of the trial court we find

No error.

CAMPBELL and BROCK, JJ., concur.

CHARLES W. BRAY, JR., A MINOR, BY HIS NEXT FRIEND, WILLIAM F. WARD v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., A CORPORATION, AND NORWOOD F. BENDER

AND

CHARLES W. BRAY v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., A CORPORATION, AND NORWOOD F. BENDER

No. 683SC363

(Filed 5 February 1969)

1. Negligence § 57— invitee's injury on store premises — sufficiency of evidence

In an action for personal injuries received by five-year-old plaintiff while in corporate defendant's grocery store, defendants' motions for nonsuit were properly allowed where plaintiff's evidence shows only that plaintiff was injured when a wheel on the grocery cart in which he was riding jammed and the cart overturned, and that the store manager did not know when the carts were last inspected, there being no evidence of the condition of the cart or what, if anything, caused the wheel to jam, and there being no showing that failure to inspect was a proximate cause of the injury.

2. Negligence § 53— duty of store owner to invitee

While a store proprietor is not an insurer of the safety of a minor who is on the premises, the proprietor has the duty to exercise ordinary care to keep premises furnished for the use of invitee customers in a reasonably safe condition, including the duty to make reasonable inspections.

3. Negligence § 26— injury — presumptions

Negligence is not presumed from the mere fact that the minor plaintiff was injured.

4. Negligence § 26— burden of proof

While negligence need not be established by direct evidence but may be inferred from facts and attendant circumstances, plaintiff must establish attendant facts and circumstances which reasonably warrant the inference that the injury complained of was proximately caused by the actionable negligence of defendant.

5. Negligence § 53—degree of care — invitee — licensee

The degree of care owed to an invitee is higher than that owed to a licensee.

APPEAL by plaintiffs from *Peel, J.,* 30 April 1968 Civil Session, Superior Court of CRAVEN.

These two cases were consolidated for trial. In the first action the minor plaintiff seeks to recover for personal injuries suffered while in the corporate defendant's store on 6 August 1965. The second action is brought by the minor plaintiff's father, and he seeks to recover for medical expenses incurred on behalf of the

minor plaintiff for the treatment of these injuries. Plaintiffs allege that the grocery cart in which the minor plaintiff was riding at the time of the accident was in an unsafe condition, and that the defendants knew, or should have known, that the cart was in an unsafe condition.

At the close of the plaintiffs' evidence the court allowed defendants' motions for nonsuit and plaintiffs appealed.

Ward and Ward by Kennedy Ward for plaintiff appellants.

Barden, Stith, McCotter and Suggs by L. A. Stith for defendant appellees.

MORRIS, J.

The evidence, taken in the light most favorable to the plaintiffs, tells the following story:

On 6 August 1965 between the hours of 7:00 p.m. and 8:00 p.m., the minor plaintiff, Charles Bray, Jr., Randy Jarman, and the minor plaintiff's mother, Margaret Bray, entered the A. & P. store located at 1105 Park Drive, New Bern, North Carolina. At the time of this accident, Randy Jarman was 8 years of age and Charles Bray, Jr., the minor plaintiff, was 5 years of age. As the parties entered the grocery store, Mrs. Bray told the young boys to get a grocery cart and follow her. Charles Bray, Jr., climbed into a seat on the grocery cart which was designed so that young children customarily rode in the seat. Mrs. Bray entered the aisle behind the check-out counter and the boys followed her with Charles Bray, Jr., riding in the cart and Randy Jarman pushing. Mrs. Bray was walking faster than the young boys. She entered an aisle between two grocery counters, picked up one or two items, and then turned to look for the boys. They were in another aisle when they heard Mrs. Bray call them. Randy Jarman began pushing the cart toward Mrs. Bray with the minor plaintiff riding therein. Randy Jarman stated at the trial, "And I was on the other aisle and when I went to turn the corner that was when the cart turned over." He said that the cart turned over because the right wheel jammed. He then stated that the cart turned over while it was going straight ahead. Charles Bray, Jr., minor plaintiff, suffered a broken leg as a result of the cart's turning over. Randy Jarman stated that before this occurrence, the cart had been functioning properly.

Norwood F. Bender, individual defendant and manager of the A. & P. store in which this incident occurred, was called as an ad-

verse witness. He testified that the carts were periodically checked; that the employees were instructed to inspect them when they were pushed back into the line where they were placed for further use by customers; and that he did not know when the carts were last inspected prior to this accident. He further stated that an outside firm was employed by the A. & P. Company to inspect the carts approximately every six months; that he examined the carts regularly, but he did not examine each individual cart.

[1] We think the trial judge properly refused to submit the question of defendants' negligence to the jury. There was no evidence introduced showing the condition of this cart; what type of mechanical difficulty was involved, if any; or, what, if anything, caused the wheel to jam. Assuming only for the sake of discussion that the plaintiffs' evidence was sufficient to show a failure to inspect by the defendants, we do not think that there was a showing that the failure to inspect was a proximate cause of the minor plaintiff's injuries.

In *Colclough v. A. & P. Tea Co.*, 2 N.C. App. 504, 163 S.E. 2d 418, plaintiff offered evidence which tended to prove that a string, wrapped around the inside of the wheel on the shopping cart she was pushing, caused the wheel to jam, injuring the plaintiff. This Court in an opinion by Parker, J., held that the trial court properly allowed the defendant's motion for nonsuit. It was held that it was a matter of speculation as to how the string became wrapped around the wheel. In the present case we have no evidence at all showing why the wheel jammed. If the issue of negligence had been submitted to the jury, there was no evidence from which they could have made even a rational guess as to the answer.

[2-4] The defendants were not insurers of the minor plaintiff's safety while he was on the premises of the corporate defendant although they were under a duty to exercise ordinary care to keep such premises, furnished for the use of invitee customers, in a reasonably safe condition, and this includes the duty to make reasonable inspections. *Routh v. Hudson Belk Co.*, 263 N.C. 112, 139 S.E. 2d 1; *Colclough v. A. & P., supra.* However, the plaintiff in the present case has failed to show that there was a defect in the wheel which the defendants knew about, or should have discovered by a timely and proper inspection. There is no evidence showing that there was a defect. The possibilities are numerous: there may have been a defect in the wheel; some object may have become wrapped around the wheel while it was being pushed by the young boys; the wheel may have hit an object which had been dropped on the floor; and many

others. But, there is no evidence whatsoever on this point and the matter, if submitted to the jury, could only have been decided by conjecture.

> "Negligence is not presumed from the mere fact that the minor plaintiff was hurt. Direct evidence of negligence is not required but the same may be inferred from facts and attendant circumstances. But in a case such as this, the plaintiff must establish attendant facts and circumstances which reasonably warrant the inferences that the injury was proximately caused by the actionable negligence of the defendant. Such inference cannot rest on conjecture or surmise. The inferences contemplated by the rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff. A cause of action must be something more than a guess. A resort to a choice of possibilities is guesswork, not decision. To carry the case to the jury, the plaintiffs must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts. *Boyd v. Harper*, 250 N.C. 334, 108 S.E. 2d 598." *Edens v. Adams*, 3 N.C. App. 431, 165 S.E. 2d 68.

Also, see *Goldman v. Kossove*, 253 N.C. 370, 117 S.E. 2d 35, for a holding in accord with the decision we have reached here.

[5] Assuming, as the parties have in their briefs, that the minor plaintiff occupied the status of an invitee while on the corporate defendant's premises, the defendants owed him the duty reasonably to inspect the premises. The degree of care owed to an invitee is higher than that owed to a licensee. However, this case is not meant to be determinative of the question of whether the minor plaintiff was an invitee or a licensee. This question was not raised by the parties, and we find it unnecessary to consider it under the facts presented here.

The plaintiffs have failed to show that there were any acts of negligence committed by the defendants which proximately caused the injuries sustained by the minor plaintiff. The judgment below is

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

LINCOLN CONSTRUCTION COMPANY v. THE PROPERTY CONTROL AND CONSTRUCTION DIVISION OF THE DEPARTMENT OF ADMINISTRATION OF THE STATE OF NORTH CAROLINA

No. 681SC405

(Filed 5 February 1969)

1. State § 4— actions against the State

The State may not be sued unless by statute it has consented to be sued or has otherwise waived its immunity from suit.

2. State § 4— contract action against State agency

The Property Control and Construction Division of the Department of Administration is an agency of the State which is not subject to suit on contract or for breach thereof unless and except in the manner expressly authorized by statute.

3. State § 4; Statutes § 5— statute waiving sovereign immunity — construction

Statutes permitting a State agency to be sued are in derogation of the sovereign right of immunity and must be strictly construed.

4. State § 4— actions against State agency — contracts for public buildings — G.S. 143-135.3

G.S. 143-135.3 authorizes suit against State agencies in the superior court only upon contracts for the construction of buildings and appurtenances thereto which have been awarded under the provisions of G.S. Ch. 143, Art. 8, and does not apply to contracts for grading and paving unless such grading and paving is an appurtenance to a public building.

5. State § 4— actions against State agencies — airport grading and paving contract — G.S. 143-135.3

G.S. 143-135.3 does not authorize a suit in the superior court against a State agency to recover upon a contract relating to the grading and paving of an airport and calling for construction of a runway, taxiway, apron, turnaround and access road, these not being "appurtenances" to any building.

APPEAL by defendant from *Cowper, J.*, 8 January 1968 Civil Session of DARE Superior Court.

This is a civil action instituted in the Superior Court of Dare County in which plaintiff, a corporation engaged in the earth moving and paving business, seeks to recover $36,366.77 from the defendant as additional compensation allegedly due under the terms of a contract between the parties relating to the grading and paving of an airport at Kill Devil Hill in Dare County. Defendant is an agency of the State of North Carolina. In its complaint the plaintiff alleged the execution of the contract, dated 20 August 1963, a copy of which was attached as an exhibit to the complaint; completion of

the work to be performed thereunder by plaintiff on 12 December 1963; and acceptance of said work by the defendant. Plaintiff's claim for additional compensation was based in part on representations which plaintiff alleged were made by defendant to plaintiff in the invitation to bid and in the contract between the parties as to the amount of unclassified excavation and the amount of borrow material plaintiff might be required to move under the contract, which representations plaintiff alleged had been breached by defendant resulting in additional costs to the plaintiff. Plaintiff also alleged that it had been required to do additional work because of failures in the soil-cement base which plaintiff alleged were caused by the defendant's directing a lower percentage of cement in the mix than as specified in the contract. Plaintiff also claimed certain additional compensation in the form of interest which plaintiff alleged was due it because of alleged failures of defendant to make payments to the plaintiff as called for under the contract. In its complaint plaintiff also alleged that it had submitted to the Director of the North Carolina Department of Administration a written and verified claim setting forth the facts on which its claim was based, and that on 22 February 1966 said Director had in writing denied plaintiff's claim for additional compensation. This action was commenced on 21 April 1966. Plaintiff's complaint alleges that this action is instituted under and pursuant to the provisions of G.S. 143-135.3.

Defendant demurred to the plaintiff's complaint, which demurrer was overruled by Judge Chester Morris. Defendant then filed answer, admitting execution of the contract but denying any misrepresentations or delays in payment, and a further answer and counterclaim in which defendant alleged that as a result of plaintiff's poor workmanship, improper equipment, and improper mixing of the soil-cement, defendant had paid plaintiff $9,060.00 in excess of the amount which would have been paid had the project been properly constructed, and that defendant had by mistake paid plaintiff an additional $4,900.00 for borrow material used in the base course, whereas defendant alleged it was obligated under the contract to pay plaintiff only for borrow material used in the subgrade. Plaintiff filed reply, denying material allegations of defendant's further answer and counterclaim.

The case was heard by Judge Cowper without a jury under the provisions of G.S. 143-135.3. The court entered judgment making findings of fact and adjudging that plaintiff recover $28,280.20 from the defendant and that defendant recover nothing of plaintiff by reason of the counterclaim. From the entry of this judgment defendant appealed, assigning errors.

Pittman, Staton & Betts, by William W. Staton; and Stevens, Burgwin, McGhee & Ryals, by Granville Ryals for plaintiff appellee.

Attorney General T. W. Bruton, Assistant Attorney General Parks H. Icenhour, and Staff Attorney William B. Ray for defendant appellant.

PARKER, J.

Appellant's first assignment of error is directed to the court's order overruling defendant's demurrer to plaintiff's complaint. Defendant's demurrer challenged the jurisdiction of the superior court to adjudicate the matters alleged in the complaint.

[1-3] It is settled as a general rule that the State may not be sued unless by statute it has consented to be sued or has otherwise waived its immunity from suit. *Teer Co. v. Highway Commission,* 265 N.C. 1, 143 S.E. 2d 247; *Ferrell v. Highway Commission,* 252 N.C. 830, 115 S.E. 2d 34. The defendant in this case is an agency of the State. It is not subject to suit on contract or for breach thereof unless and except in the manner expressly authorized by statute. Moreover, statutes permitting suit, being in derrogation of the sovereign right of immunity, are to be strictly construed. *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703. The question presented by this appeal must be decided in the light of the foregoing well-recognized principles.

Plaintiff's cause of action is founded on contract. Plaintiff contends that it is authorized to maintain this suit by G.S. 143-135.3. This statute was originally enacted as Chapter 1022 of the 1965 Session Laws which was entitled "An Act To Provide For The Equitable And Expeditious Settlement Of Controversies Arising Between Boards Of Governing Bodies Of The State Government Or Of A State Institution, And The Awardees Of Building Construction Contracts Which Are Subject To Article 8 Of Chapter 143 Of The General Statutes." The statute first became effective upon its ratification on 14 June 1965. It was reenacted with slight modifications, none of which are material to a decision of this appeal, by Chapter 860 of the Session Laws of 1967, which Act rewrote Article 8 of Chapter 143 of the General Statutes. G.S. 143-135.3 does authorize the filing of an action in the superior court in certain cases and subject to conditions precedent as specified in the statute. This appeal presents, therefore, the question whether plaintiff's action is authorized by G.S. 143-135.3

For present purposes the pertinent portions of this statute are as follows:

"Upon completion of *any contract for construction or repair work awarded* by any State board to any contractor, *under the provisions of this article,* should the contractor fail to receive such settlement as he claims to be entitled to under terms of his contract, he may, within 60 days from the time of receiving written notice as to the disposition to be made of his claim, submit to the Director of the Department of Administration a written and verified claim for such amount as he deems himself entitled to under the terms of said contract, setting forth the facts upon which said claim is based. . . .

"As to such portion of the claim which may be denied by the Director of the Department of Administration, the contractor may, within six months from receipt of the decision, institute a civil action for such sum as he claims to be entitled to under said contract by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County or in the superior court of any county wherein the work under said contract was performed . . .

* * * * *

" 'A contract for construction or repair work,' as used in this section, is defined as any contract *for the construction of buildings and appurtenances thereto,* including, but not by way of limitation, utilities, plumbing, heating, electrical, air conditioning, elevator, excavation, grading, paving, roofing, masonry work, tile work and painting, and repair work." (Emphasis added.)

[4] It is apparent, therefore, that the statute by virtue of its express language is applicable only to contracts for the *construction of buildings and appurtenances thereto which have been awarded under the provisions of Article 8* of Chapter 143 of the General Statutes. Article 8 relates to contracts for public *buildings.*

[4, 5] By express statutory definition G.S. 143-135.3 does not apply to contracts for grading and paving unless such grading and paving is an appurtenance to a public building. The contract under which plaintiff sues in this case relates to the grading and paving of an airport and called for construction of a 3000 foot runway, a taxiway, apron and turnaround, and an access road. These were not "appurtenances" to any building, and plaintiff's contract does not fall within the statutory definition provided in G.S. 143-135.3.

In view of our opinion that G.S. 143-135.3 is in any event by virtue of the statutory definition contained therein not applicable

to the type of contract here sued upon, we have not found it necessary to decide whether the statute is retroactively applicable to any contracts made and performed prior to its enactment. Since plaintiff's suit is not authorized by G.S. 143-135.3 and since we find no other statute by which the State's sovereign immunity has been waived in this case, defendant's demurrer to plaintiff's complaint should have been sustained.

The order which overruled the demurrer is

Reversed.

BROCK and BRITT, JJ., concur.

HERMAN JAMES CRAWFORD v. HINTON G. HUDSON, JR., GUARDIAN AD LITEM FOR WILLIAM JAMES HAYDEN

No. 6921SC35

(Filed 5 February 1969)

1. Parent and Child § 5— action for funeral expenses and loss of services of unemancipated child

In an action for funeral expenses and loss of services of plaintiff's deceased minor child, failure of the complaint to allege that the child was "unemancipated" is not fatal.

2. Parent and Child § 5— liability for funeral expenses of child

The father of an unemancipated minor child is liable for the reasonable funeral expenses of the child.

3. Death § 7— damages — funeral expenses

Funeral expenses do not constitute an element of damages in a wrongful death action.

4. Death § 7— damages — burial expenses

A cause of action does not exist for the recovery of burial expenses in an action for wrongful death separate and apart from the right to recover for the wrongful death, the statute providing for the payment of burial expenses out of the amount recovered in such action. G.S. 28-173.

5. Parent and Child § 5— action for funeral expenses and loss of services of unemancipated child

The father of an unemancipated minor child whose death results from the negligent act of a third party has a cause of action against the third party for the reasonable and necessary funeral expenses and loss of services during the minority of the deceased child which is separate and

apart from the cause of action by the personal representative for the wrongful death of the child.

APPEAL by plaintiff from *McConnell, J.*, 30 September 1968, Civil Session, FORSYTH County Superior Court.

Herman James Crawford (plaintiff) instituted this civil action in his individual capacity as father of his deceased son, Herman Colman Crawford, Jr., to recover for funeral and burial expenses, grave plot, tombstone, and loss of services during the remaining period of minority.

In his complaint the plaintiff alleged that deceased was living in the plaintiff's household at the time of his death; deceased was riding as a passenger in an automobile being operated by William James Hayden (defendant); the vehicle, which was being operated in a negligent and unlawful manner, overturned; and deceased died as a result of injuries received in the accident. It was further alleged that: "Plaintiff has expended the reasonable and necessary sum of $1,261.82 for the funeral expenses and burial of his deceased son, $125.00 for the grave plot, and $175.00 for a suitable tombstone, for a total of $1,561.82. In addition, the plaintiff has suffered the loss of services of his minor son during the remaining period of his minority in the amount of $2,500.00."

The defendant filed a demurrer to the complaint asserting that the complaint failed to state a cause of action because the plaintiff had previously instituted an action as administrator of his son's estate seeking to recover for his wrongful death. It was further asserted that: ". . . the plaintiff has in law no cause of action for funeral expenses, grave plot, tombstone, or for loss of services of his minor son — other than such rights as he may have in the wrongful death action which he has instituted."

From the order of the trial court sustaining the demurrer and dismissing the action, the plaintiff appealed.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and Jimmy H. Barnhill for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr., J. Robert Elster and James H. Kelly for defendant appellee.

CAMPBELL, J.

[1] At the outset we note the complaint does not state that the plaintiff is the surviving father of his deceased "unemancipated"

minor son. While it would be preferable to use the word "unemancipated", failure to do so is not fatal. Therefore, the demurrer should not have been sustained and the action dismissed, if the plaintiff has otherwise stated a cause of action.

[5] The question, therefore, presented for decision is: "Can the father of an unemancipated minor child whose death results from the negligent act of a third party recover from such third party the reasonable and necessary funeral expenses and loss of services during minority of the deceased child?" We think the answer to this question is "yes".

[2] The father of an unemancipated minor child is liable for the reasonable funeral expenses of such child. *Hunycutt v. Thompson,* 159 N.C. 29, 74 S.E. 628; 3 Lee, North Carolina Family Law, § 231, p. 67.

[3, 4] Funeral expenses do not constitute an element of damages to be taken into consideration in a wrongful death action. *Burton v. Croghan,* 265 N.C. 392, 144 S.E. 2d 147. A cause of action does not exist for the recovery of burial expenses in an action for wrongful death separate and apart from the right to recover for the wrongful death. The statute provides for the payment of burial expenses out of the amount recovered in such action. G.S. 28-173. *Davenport v. Patrick,* 227 N.C. 686, 44 S.E. 2d 203.

[5] Here, however, we do not have an action for wrongful death. This is an action brought by the person primarily responsible for the funeral expenses and the person entitled to the services during minority. This is an independent and separate cause of action. In *Hoke v. Greyhound Corp.,* 226 N.C. 332, 38 S.E. 2d 105, the Supreme Court carefully reviewed the history of the wrongful death statute modeled after Lord Campbell's Act and concluded that the North Carolina Court has uniformly held that the wrongful death statute conferred a new right of action which did not exist before the statute and which at the death of an injured person accrued to the personal representative of the decedent for the benefit of a specific class of beneficiaries. The Supreme Court went on to say that on the other hand the right of an injured person to sue for personal injuries of any kind is entirely separate and distinct from the right of the personal representative to sue under authority of the wrongful death statute. Any damage sustained by such person during his lifetime is personal to that person and, if proximately caused by the wrongful act of another, could be recovered by him. If this right of action survived his death, the recovery would be an asset of his estate to be admin-

istered as any other personal property owned and possessed by decedent at the time of his death. The Supreme Court stated:

> "Moreover, while both the right of action for the recovery of consequential damages sustained between date of injury and date of death, and the right of action to recover damages resulting from such death have as basis the same wrongful act, there is no overlapping of amounts recoverable. But such consequential damages as flow from the wrongful act would be recoverable — by the personal representative — those sustained by the injured party during his lifetime, for benefit of his estate, and those resulting from his death, for benefit of his next of kin — determinable upon separate issues." *Hoke v. Greyhound Corp., supra.*

Thus, the Supreme Court recognized two different causes of action stemming from the same wrongful act. In that case, both were recoverable by the same party plaintiff, namely, the personal representative; nevertheless, the personal representative would hold the recovery in two classifications determined upon separate issues.

In the instant case, we are recognizing two different causes of action stemming from the same wrongful act. Instead of the same party bringing both causes and holding the recovery in two classifications determined upon separate issues, we have one cause being presented here, and the recovery would be held by the father in his individual capacity because of a liability incurred by him due to the wrongdoing of the defendant.

While the wrongful death statute, G.S. 28-173, provides that "(t)he amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars ($500.00) incident to the injury resulting in death", there is no provision that the recovery must be applied to burial expenses. In a case of an unemancipated minor child the father, who is primarily liable for the burial expenses of such child, would not be able to recover such expenses from the wrongful death funds. This being true, it would not be equitable or just for a wrongdoer to place this burden and expense upon an innocent father.

In the case of *In Re Peacock,* 261 N.C. 749, 136 S.E. 2d 91, the Supreme Court specifically recognized two separate causes of action growing out of the same wrongful act of the tortfeasor and two separate recovery funds. "The wrongful death fund" resulted from the

wrongful death cause of action and "the general estate fund" resulted from the personal injury cause of action. It was held that the treatment for injuries during the interval between injury and death, over and beyond the $500 provided for in G.S. 28-173, was to be paid to the doctors and hospital from this general estate fund. The Supreme Court thus recognized the right of creditors (the doctors and hospital) to recover more than the wrongful death statute authorized (*i.e.*, more than the $500) by recovering from the funds of the other cause of action.

Just as in the *Peacock* case, *supra,* we think "the ends of justice and equity require" a finding that the plaintiff in this case has stated a valid cause of action in his complaint.

Reversed.

BROCK and MORRIS, JJ., concur.

ROAMIN BOWLER DORMAN, JR., TRUSTEE UNDER WILL OF R. B. DORMAN, DECEASED v. WAYAH VALLEY RANCH, INC.

No. 6830SC243

(Filed 5 February 1969)

1. Easements § 3— easement by implication upon severance of title

Where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed and which are reasonably necessary for use of that part.

2. Easements § 3— creation of easement by implication upon severance of title — essentials

The essentials to the creation of an easement by implication upon severance of title are: (1) a separation of the title; (2) before the separation took place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained.

3. Pleadings § 19— demurrer

The complaint is to be construed liberally on demurrer.

4. Pleadings § 19— demurrer

A demurrer admits for the purpose of testing the sufficiency of the pleadings the truth of factual averments well stated and relevant inferences of fact reasonably deducible therefrom.

5. Easements § 6— action to establish easement by implication — pleadings

In action wherein plaintiff seeks injunction to require defendant to remove obstructions placed by defendant in a roadway leading to plaintiff's land and to recover monetary damages, the complaint *is held* to allege sufficient facts to show the three essentials for creation of an easement by implication in the roadway upon severance of title.

6. Easements § 3— easement appurtenant to granted lands — conveyances

An easement in a roadway which is appurtenant to granted land passes by each conveyance to subsequent grantees thereof.

APPEAL by plaintiff from *Bryson, J.*, April 1968 Session of MACON Superior Court.

This is a civil action in which plaintiff seeks an injunction to require defendant to remove obstructions placed by defendant in a roadway leading to plaintiff's land and to recover monetary damages. Plaintiff's amended complaint alleged:

Plaintiff is owner of a certain described tract of land in Macon County North Carolina, which lies some distance from the Wayah public road. Defendant is owner of a tract of land lying between plaintiff's land and said Wayah public road. Prior to 2 July 1937 both tracts of land were parts of a larger single tract then owned by John and Annie Slagle. On 2 July 1937 John and Annie Slagle conveyed the land now owned by plaintiff to Herman and Willa Menzel by warranty deed with habendum reading: "To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging to the said Herman Menzel and wife Willa H. Menzel, and their heirs and assigns, to their only use and behoof forever." On 22 January 1940 Herman and Willa Menzel conveyed said tract by warranty deed with habendum clause, including all privileges and appurtenances thereunto belonging, to R. B. Dorman. R. B. Dorman died leaving a will dated 19 July 1954 which has been admitted to probate in Macon County under the terms of which said land, together with all privileges and appurtenances appertaining thereto, was devised to the plaintiff as trustee.

John Slagle died prior to 18 February 1938 leaving a will by which he devised all his real estate in Macon County, including the land now belonging to defendant, to Annie Slagle. On 7 November 1945 Annie Slagle conveyed the land now belonging to defendant to T. H. and E. M. McNish, and on 24 November 1953 T. H. and E. M. McNish conveyed said property to the defendant.

Paragraph 12 of the amended complaint is as follows:

"12. That for many years prior to July 2, 1937, there was a dwelling house located upon the lands of the plaintiff as described in Paragraph 3 above, and ingress and egress to said dwelling and the land described in Paragraph 3 was by a road leading from said property over the property now owned by the defendant and to the Wayah public road, which road was the only means of access to said property, and which road was used for a great many years prior to July 2, 1937, by the occupants of said dwelling house; and that the metes and bounds description of the center line of the road leading from the property now owned by the plaintiff across the lands of the defendant to the Wayah public road is set forth as follows:" There then follows a metes and bounds description of such center line.

Plaintiff's amended complaint further alleges that after Herman and Willa Menzel secured title to the property presently owned by plaintiff on 2 July 1937, they used said road until the date they conveyed the same to R. B. Dorman on 22 January 1940; that R. B. Dorman, after securing title to said property, occupied the old house on the property for some time, and later secured the services of T. H. and E. M. McNish, who at that time owned the land now owned by defendant, to construct a new house on the property now owned by plaintiff, which new house was constructed by the McNishes, and all building material was hauled in over the road leading from property now owned by plaintiff to the Wayah public road; that the said R. B. Dorman occupied said dwelling as a summer home from that date until his death and used said roadway to gain access to his property, placed tile under said road, and kept the same in good condition. Plaintiff alleged that during the year 1961 the defendant obstructed the road leading to plaintiff's property, and has refused to allow plaintiff to use said roadway by automobile or other vehicles, and the only access the plaintiff has had to his property is by walking into the same. In paragraph 17 of the amended complaint plaintiff alleged that the land of the plaintiff does not abut upon any public road, and the road leading from Wayah public road over the land of the defendant is the only way the plaintiff can gain access to his property, and said road is necessary to the beneficial enjoyment of the land owned by the plaintiff.

Defendant demurred to the amended complaint. The demurrer was sustained, and plaintiff appealed.

Jones, Jones & Key, by R. S. Jones, Jr., and J. H. Stockton, for plaintiff appellant.

Marcellus Buchanan for defendant appellee.

PARKER, J.

[1, 2] It is a well-recognized general rule of law that where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed and which are reasonably necessary for use of that part. *Barwick v. Rouse,* 245 N.C. 391, 95 S.E. 2d 869; *Spruill v. Nixon,* 238 N.C. 523, 78 S.E. 2d 323; *Ferrell v. Trust Co.,* 221 N.C. 432, 20 S.E. 2d 329; *Carmon v. Dick,* 170 N.C. 305, 87 S.E. 224. "Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude is in use at the time of severance and is necessary for the reasonable enjoyment of the other part, on a severance of the ownership a grant of the right to continue such use arises by implication of law." 25 Am. Jur. 2d, Easements and Licenses, § 27, p. 440. See, Annot., 34 A.L.R. 233; 100 A.L.R. 1321; 164 A.L.R. 1001. In *Barwick v. Rouse, supra,* Winbourne, C.J., stated the three essentials to the creation of an easement by implication upon severance of title to be as follows: "(1) A separation of the title; (2) before the separation took place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained."

[3-5] When the complaint in the present case is construed liberally, as we are required to do on demurrer, G.S. 1-151; 6 Strong, N. C. Index 2d, Pleadings, § 19, p. 328, plaintiff's amended complaint does allege sufficient facts to show the existence in this case of the three essentials required for creation of an easement in the roadway over defendant's land. (1) Plaintiff has alleged that prior to 2 July 1937 the Slagles were owners of a large single tract which embraced the land now owned by plaintiff and the land now owned by defendant, and has alleged separation of title on 2 July 1937 by conveyance from the Slagles to plaintiff's predecessor in title of the tract of land now owned by plaintiff. (2) Plaintiff has alleged that for many years prior to 2 July 1937 there was a dwelling located on the tract now owned by him and the roadway in question over the property now owned by defendant was the only means of access to the property now owned by plaintiff. A demurrer admits for the purpose of testing the sufficiency of the pleading the truth of factual averments well stated and relevant inferences of fact reasonably deducible therefrom. 6 Strong, N. C. Index 2d, Pleadings, § 19, p. 331. It can be reasonably inferred from the facts alleged by plaintiff that at the time separation of title occurred on 2 July 1937 and for many

years prior thereto the use of the roadway in question, which was the only means of access to the dwelling house, had been so long continued and was so obvious or manifest as to show it was meant to be permanent. (3) Plaintiff has alleged that his land does not abut any public road and that the roadway leading from the Wayah public road over the land of the defendant is the only way plaintiff can gain access to his property and is necessary to the beneficial enjoyment of his property.

[5, 6] Plaintiff has, therefore, alleged sufficient facts to show the three essentials for creation of an easement by implication in the roadway in question upon the severance of title which occurred on 2 July 1937 when the Slagles conveyed the tract now owned by plaintiff, being the dominant tenement with the easement in the roadway appurtenant thereto, to plaintiff's predecessor in title. Plaintiff also alleged facts sufficient to show that by a mesne conveyance and a devise he obtained title as trustee to such dominant tenement. The easement in the roadway, being appurtenant to the granted land, passed by each conveyance to subsequent grantees thereof. 25 Am. Jur. 2d, Easements and Licenses, § 95, p. 501.

Plaintiff has stated a good cause of action. Accordingly, the judgment appealed from is

Reversed.

BROCK and BRITT, JJ., concur.

J. F. DUKE v. SARAH K. TANKARD, ADMINISTRATRIX OF THE ESTATE OF MRS. J. M. TANKARD, AND JOHN M. TANKARD, JR.

No. 682SC374

(Filed 5 February 1969)

1. Negligence § 35— nonsuit for contributory negligence

Motion for nonsuit on the ground of contributory negligence will be granted only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom.

2. Negligence § 35— nonsuit for contributory negligence

Nonsuit on the ground of contributory negligence should be denied if diverse inferences upon the question are permissible from plaintiff's proof.

3. Automobiles § 13— outrunning headlights

Where a motorist is traveling within the maximum speed limits prescribed by G.S. 20-141(b), his failure to stop his vehicle within the radius of his lights or the range of his vision is not contributory negligence *per se*, but is only evidence to be considered with other circumstances in the case.

4. Animals § 3— collision with animal roaming at large — negligence — contributory negligence

In an action for personal injuries and property damage sustained when plaintiff's automobile collided with defendant's cow, plaintiff's evidence *is held* not to disclose contributory negligence as a matter of law where it tends to show that plaintiff was driving in the nighttime within the speed limit with his lights on high beam when defendant's cow suddenly appeared in his lane of travel at a point 10-12 feet in front of plaintiff, and that although he applied his brakes, plaintiff struck the cow with considerable force.

APPEAL by defendants from *Cohoon, J.*, at the May 1968 Civil Session of BEAUFORT Superior Court.

This is a civil action instituted by plaintiff in which he attempts to recover for personal injuries and property damage sustained by him on 4 November 1964 when the automobile owned and operated by plaintiff collided with a cow belonging to defendants and which was running at large.

Defendants filed answer and counterclaim, pleading contributory negligence on the part of plaintiff and asking for damages for the loss of their cow. Plaintiff replied, pleading contributory negligence to the counterclaim.

At trial, issues of negligence, contributory negligence and damages were submitted on plaintiff's claim, and similar issues were submitted on defendants' counterclaim. The jury answered the issues in favor of plaintiff, and from judgment entered thereon, defendants appealed.

LeRoy Scott for plaintiff appellee.

Rodman & Rodman by Edward N. Rodman for defendant appellants.

BRITT, J.

In their brief, defendants concede that plaintiff's evidence of negligence on the part of defendants was sufficient to carry the case to the jury on the first issue. They contend, however, that plaintiff's evidence, taken in the light most favorable to him, established con-

tributory negligence as a matter of law and that the trial judge erred in overruling defendants' motion for judgment as of nonsuit interposed at the conclusion of plaintiff's evidence and renewed at the conclusion of all the evidence.

[1] It is a well-established principle of law in this jurisdiction that a motion for judgment of nonsuit on the ground of contributory negligence will be granted only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom. *Bass v. McLamb,* 268 N.C. 395, 150 S.E. 2d 856; *Johnson v. Thompson,* 250 N.C. 665, 110 S.E. 2d 306; *Williams v. Hall,* 1 N.C. App. 508, 162 S.E. 2d 84.

[2] Nonsuit on the ground of contributory negligence should be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes the defense that no other reasonable inference or conclusion can be drawn therefrom. *Galloway v. Hartman,* 271 N.C. 372, 156 S.E. 2d 727; *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283. Further, nonsuit on the ground of contributory negligence should be denied if diverse inferences upon the question are permissible from plaintiff's proof. *Galloway v. Hartman, supra; Wooten v. Russell,* 255 N.C. 699, 122 S.E. 2d 603; *Williams v. Hall, supra.*

The evidence in the instant case disclosed that the collision complained of occurred in the nighttime. Prior to 1953, the Supreme Court of North Carolina, in numerous cases, held that the plaintiff was guilty of contributory negligence as a matter of law for "outrunning his headlights" at the time of the collision. In *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251, Stacy, C.J., clearly laid down the rule and listed numerous decisions of the court in which the rule had been applied as well as those in which the rule was not applied.

[3] However, the General Assembly passed an act, Chapter 1145 of 1953 Session Laws, amending G.S. 20-141(e) by adding thereto the proviso "that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits described by G.S. 20-141(b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence *per se* or contributory negligence *per se* in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator."

In *Burchette v. Distributing Co.,* 243 N.C. 120, 90 S.E. 2d 232,

in an opinion by Winborne, J. (later C.J.), our Supreme Court interpreted the 1953 proviso as follows:

> "* * * [I]f the driver of a motor vehicle who is operating it within the maximum speed limits prescribed by G.S. 20-141(b) fails to stop such vehicle within the radius of the lights of the vehicle or within the range of his vision, the courts may no longer hold such failure to be negligence *per se,* or contributory negligence *per se,* as the case may be, that is, negligence or contributory negligence, in and of itself, but the facts relating thereto may be considered by the jury, with other facts in such action in determining whether the operator be guilty of negligence, or contributory negligence, as the case may be. * * *"

The interpretation declared by our Supreme Court in *Burchette v. Distributing Co., supra,* was quoted with approval in *Bass v. McLamb, supra,* in an opinion by Branch, J.

[4] Plaintiff's evidence tended to show the following: On 4 November 1964 in the nighttime at about 6:30 p.m., he was driving his 1961 Dodge in an easterly direction on Highway 264 in Beaufort County between Washington and Yeatsville. He was traveling 50-55 mph in open country where the posted speed limit was 60 mph. The weather was clear, visibility good, the road was dry, and there was no fog. His lights were burning good, on high beam. As he came out of a long curve to the right, defendants' cow suddenly appeared in plaintiff's lane of travel, crossing the highway from plaintiff's right to left. The cow was only 10-12 feet in front of plaintiff when he first saw him, and although he applied his brakes, he struck the cow with considerable force.

We hold that plaintiff's evidence did not show that plaintiff was contributorily negligent as a matter of law and the trial judge properly overruled defendants' motions for nonsuit.

No error.

BROCK and PARKER, JJ., concur.

CHARLEY W. TINDLE v. BOBBIE DAVIS DENNY

No. 6921SC58

(Filed 5 February 1969)

1. Trial § 21— nonsuit — consideration of evidence

On motion to nonsuit, plaintiff's evidence is to be taken as true and all the evidence considered in the light most favorable to plaintiff, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence.

2. Trial § 21— nonsuit — consideration of evidence

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury and not for the court and do not justify a nonsuit.

3. Trial § 18— nonsuit — function of the court

On motion to nonsuit, the function of the court is to determine only whether the facts and circumstances in evidence, considered in the light most favorable to plaintiff, tend to make out and sustain the cause of action alleged in the complaint.

4. Trial § 18— function of the jury

It is the function of the jury alone to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony, and determine what the evidence proves or fails to prove.

5. Trial § 18— weight and credibility of evidence

In weighing the credibility of the testimony, the jury has the right to believe any part or none of it.

6. Automobiles § 92— motorcycles — duty to passenger — negligence — nonsuit

Plaintiff's evidence tending to show that he was riding as a passenger on the "buddy seat" of defendant's motorcycle and that defendant suddenly started the motorcycle forward from a stopped position at a traffic signal in such a manner that it jumped forward, throwing plaintiff backwards and off the motorcycle and causing the injuries complained of, *held* sufficient to be submitted to the jury on the issue of defendant's negligence.

7. Negligence § 1— negligence defined

The common law standard of care required of any person is that degree of care for another's safety which a reasonably prudent man, under like circumstances, would exercise; the standard of care is constant under this rule, but the degree of care varies with the circumstances.

8. Negligence § 1— degree of care

A reasonably prudent man increases his watchfulness as the possibility of danger mounts; therefore, the degree of care required of one whose breach of duty is very likely to result in serious harm is greater than when the effect of such breach is not nearly so great.

9. Negligence § 28— questions of law and of fact

The standard of care is a part of the law of the case for the court to explain and apply; the degree of care required, under the particular circumstances, to measure up to the standard is for the jury to decide.

10. Automobiles § 39.5— motorcycles

Although it is not negligence *per se* for a motorcyclist to carry a passenger on a seat provided for that purpose, it would seem that a greater degree of care would be required in the operation of the motorcycle than if there were no passenger.

11. Negligence § 35— nonsuit for contributory negligence

A judgment of nonsuit on the ground of contributory negligence may be entered only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, so clearly establishes the defense that no other reasonable inference or conclusion can be drawn therefrom.

12. Automobiles § 94— motorcycles — contributory negligence of passenger

Whether plaintiff-passenger, who was thrown from the "buddy seat" of defendant's motorcycle as it suddenly took off from a stopped position at a traffic signal, was guilty of contributory negligence in looking down at his feet while stopped instead of watching for change in light, *held* an issue for the jury.

APPEAL by plaintiff from *McConnell, J.*, 16 September 1968 Schedule B Session, FORSYTH Superior Court.

This is a civil action to recover damages for personal injury alleged to have proximately resulted from the negligent operation of a motorcycle by defendant.

From judgment of involuntary nonsuit entered at the close of all the evidence, plaintiff appealed.

Wilson & Morrow, by John F. Morrow, for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by J. Robert Elster, for defendant appellee.

BROCK, J.

[1-5] On motion to nonsuit, the plaintiff's evidence is to be taken as true, and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence. The defendant's evidence which tends to impeach or contradict the plaintiff's evidence is not to be considered, but defendant's evidence may be considered to the extent that it is not in conflict with plaintiff's evidence and tends to make clear or

explain plaintiff's evidence. Discrepancies and contradictions, even in plaintiff's evidence, are for the jury and not for the court; and therefore, discrepancies and contradictions in the plaintiff's evidence do not justify a nonsuit. The function of the court is to determine only whether the facts and circumstances in evidence, considered in the light most favorable to the plaintiff, tend to make out and sustain the cause of action alleged in the complaint. And it is the function of the jury alone to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony, and determine what the evidence proves or fails to prove. In weighing the credibility of the testimony, the jury has the right to believe any part or none of it. *Brinkley v. Insurance Co.*, 271 N.C. 301, 156 S.E. 2d 225.

[6] Testing plaintiff's evidence in the light of these principles, it discloses the following facts and circumstances. Plaintiff is a thirty-year-old male person who lived in Winston-Salem at the time of the injuries complained of. He had known defendant four or five years. On 24 January 1967 plaintiff encountered defendant at a restaurant in Winston-Salem, and asked defendant to take him for a ride on defendant's motorcycle. Plaintiff sat on the back portion of the seat, on what is generally known as the "buddy seat," which has a little rail around the back for the passenger to hold onto while riding. Plaintiff had ridden on a motorcycle before, but not in the last twelve years or more.

Defendant drove his motorcycle away from the restaurant with plaintiff riding as a passenger on the "buddy seat," and drove for a mile or more before the accident in question. While riding this mile or more they had to stop for at least one traffic signal, and plaintiff experienced no difficulty in holding on as defendant started from the stopped position. At the intersection of Vargrave Street and Waughtown Street defendant stopped for a red traffic light. Plaintiff was seated on the "buddy seat" holding to the rail around the seat with both hands. When the light turned green, defendant "taken (sic) off, it jumped, and it throwed (sic)" plaintiff backwards off the motorcycle causing the injuries complained of.

Webster's Third New International Dictionary (1968) defines *take off* as "to start off or away, often suddenly." Therefore, plaintiff's evidence tends to show that defendant suddenly started his motorcycle forward from a stopped position in such a manner that it jumped forward, throwing the plaintiff backwards and off the motorcycle causing the injuries for which plaintiff seeks to recover damages. We must, therefore, examine the standard of care owed by

defendant to plaintiff to determine whether the evidence in this case presents a question for the jury.

[7-9] The common law standard of care required of any person is that degree of care for another's safety which a reasonably prudent man, under like circumstances, would exercise. 6 Strong, N. C. Index 2d, Negligence, § 1, p. 3. The standard of care is constant under the above rule, but the degree of care varies with the circumstances. A reasonably prudent man increases his watchfulness as the possibility of danger mounts; therefore, the degree of care required of one whose breach of duty is very likely to result in serious harm is greater than when the effect of such breach is not nearly so great. Thus, the degree — that is the quantity — of care necessary to measure up to the standard is as variable as the attendant circumstances. That degree of care which a man of ordinary prudence would exercise under the circumstances may mean nothing more than care not to willfully or wantonly injure, or it may mean "the utmost degree of care," "the highest degree of care," or "the greatest degree of care." The *standard of care* is a part of the law of the case for the court to explain and apply. The *degree of care* required, under the particular circumstances, to measure up to the standard is for the jury to decide. *Pinyan v. Settle,* 263 N.C. 578, 139 S.E. 2d 863; *Rea v. Simowitz,* 225 N.C. 575, 35 S.E. 2d 871.

[6, 10] Although it is not negligence *per se* for a motorcyclist to carry a passenger on a seat provided for that purpose, it would seem that while carrying such a passenger a greater degree of care would be required in the operation of the motorcycle than if there were no passenger. 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 559, p. 114. It is for the jury to determine whether, under the circumstances, the defendant exercised the care of a man of ordinary prudence in the manner in which he started his motorcycle from a stopped position, and whether defendant's conduct was a proximate cause of plaintiff's becoming dislodged from the "buddy seat."

[11, 12] Defendant contends that plaintiff was guilty of contributory negligence as a matter of law in looking down at his feet while stopped instead of watching for the traffic signal to turn green, and that the judgment of nonsuit should be sustained on this ground. A judgment of nonsuit on the ground of contributory negligence may be entered only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, so clearly establishes the defense that no other reasonable inference or conclusion can be drawn therefrom. *Warren v. Lewis,* 273 N.C. 457, 160 S.E. 2d 305.

Plaintiff testified: "We stopped, and I was looking down at my

feet to make sure I had my feet back out of his way, and the light turned green and I didn't see it." This may require submission of an issue of contributory negligence, but it is for the jury to determine whether plaintiff's conduct was, or was not, the conduct of a reasonably prudent man under the circumstances, and whether it was also a proximate cause of his becoming dislodged from the "buddy seat."

It seems that his honor may have become overly impressed by the contradictions in plaintiff's evidence, and by the import of defendant's evidence. These were matters to be resolved by the jury.

It follows that we disagree with the trial judge's ruling, and that the judgment of nonsuit is

Reversed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. FRANK HAZEN CLINTON

No. 6818SC451

(Filed 5 February 1969)

1. Criminal Law § 176— review of failure to grant nonsuit

An assignment of error to failure of trial court to grant defendant's motion for nonsuit presents the issue of whether there is any competent evidence to support the allegations of the crime charged, considering the evidence in the light most favorable to the State and giving it the benefit of every reasonable inference fairly deducible therefrom.

2. Burglary and Unlawful Breakings § 5— sufficiency of evidence

Issue of defendant's guilt of felonious breaking and entering is properly submitted to the jury.

3. Burglary and Unlawful Breakings § 2— what constitutes dwelling house

A room in a rooming house is included in the meaning of the term "dwelling house" as used in statute prohibiting felonious breaking and entering. G.S. 14-54.

4. Criminal Law § 71— shorthand statement of fact

In a prosecution for felonious breaking and entering, testimony by the prosecuting witness' landlady that defendant was in witness' car "locked up and ready to go" is admissible as a shorthand statement of the facts.

5. Burglary and Unlawful Breakings § 7— instructions as to lesser degree of crime

Where the evidence pointed only to breaking and entering with intent to commit larceny, trial court did not err in failing to submit to the jury an issue of non-felonious breaking and entering.

6. Criminal Law § 115— instructions as to lesser degree of crime

The court is not required to submit to the jury a lesser included offense when there is no evidence from which the jury could find that such included crime of lesser degree was committed.

APPEAL by defendant from *Crissman, J.*, at the 24 June 1968 Session of Superior Court of GUILFORD, Greensboro Division.

By indictment proper in form, defendant was charged with burglary in the first degree of the dwelling of Luby Smith on 28 May 1965, and larceny of a set of car keys. The indictment was dated 27 May 1968.

When the case came on for trial, the solicitor announced in open court that he would not seek a conviction for first-degree burglary, but would seek a conviction of the felony of breaking and entering under G.S. 14-54 or such lesser offense as the jury might find.

The evidence offered by the State tended to show: The prosecuting witness lived in a rooming house on Walker Avenue in the city of Greensboro. On the night in question he had gone to bed early and was awakened between 11:00 and midnight by the steps of someone entering his room. When he awoke, he saw the defendant who asked if he could borrow some money. When told that he could not, the defendant left. Shortly thereafter, he came back and asked if he could borrow the car of the prosecuting witness, and when told that the prosecuting witness didn't loan his car, the defendant left again. Mr. Smith, who had been paid for his work that day, then got up and took his wallet from his pants pocket and placed it under his pillow. Each time the defendant had come in, he had done so without knocking or making his presence known. There were two doors to Smith's room, one from the hall which he kept locked, and one from the bathroom which was closed. The bathroom could also be entered from an adjoining room, the door to which was left open for tenants whose rooms did not adjoin the bath. Before entering, Mr. Smith parked his car on the street near the front of the rooming house, locking the ignition and doors. He was awakened about 5:00 or 5:30 when Mrs. Welborn, the landlady, came to his room and told him that the defendant was in the car, locked up and ready to go. Mr. Smith could not find his pants in which had been his car keys, but hastened downstairs and confronted the defendant, who

slipped out the other side of the car and ran away. The evidence was that the car had been locked and that the defendant was seen sitting in it with the motor running. Smith later found his pants in the bathroom, with the pockets turned inside out. The keys were never found.

The defendant offered no evidence but moved for judgment as in case of nonsuit. This motion was overruled and the case was submitted to the jury. From judgment on the verdict of guilty of felonious breaking and entering, the defendant appealed.

Attorney General T. Wade Bruton by Assistant Attorney General George A. Goodwyn for the State.

Alston, Alexander, Pell & Pell by E. L. Alston, Jr., for defendant appellant.

MORRIS, J.

[1, 2] The defendant first assigns as error the failure of the court to grant his motion for nonsuit. This presents the issue of whether there is any competent evidence to support the allegations of the crime charged, considering the evidence in the light most favorable to the State, and giving it the benefit of every reasonable inference fairly deducible therefrom. 2 Strong, N. C. Index 2d, Criminal Law, § 106, p. 654. Judged by this criterion, the assignment of error is overruled.

The evidence was that the keys had been in the pocket of a pair of pants, that the pants had been moved, and that the pockets had been emptied. Since the doors were closed, it is a reasonable inference that someone broke and entered the room of the prosecuting witness and had obtained the keys. The evidence was that the defendant was seen in the car of the prosecuting witness, and the motor was running. The car had been left locked. The jury could reasonably infer that the defendant had obtained the keys in order to unlock the car and start the motor. In addition, the defendant had twice entered the room of the prosecuting witness, without knocking, and at a time when the prosecuting witness had retired for the night. Moreover, the defendant fled when confronted by the prosecuting witness. Though this evidence is circumstantial, the test, on motion for nonsuit, is the same as for substantive evidence. *State v. Tillman,* 269 N.C. 276, 152 S.E. 2d 159.

The conclusion that there is sufficient identification of the defendant as the perpetrator of the crime is supported by the cases of

State v. Mullinax, 263 N.C. 512, 139 S.E. 2d 639; *State v. Knight,* 261 N.C. 17, 134 S.E. 2d 101; and *State v. Peters,* 253 N.C. 331, 116 S.E. 2d 787. See also *State v. Bailiff,* 2 N.C. App. 608, 163 S.E. 2d 398. (Larceny).

[3] The defendant contends that a room in a rooming house is not included in the meaning of the term "dwelling house". The cases do not support this contention. "Every permanent building in which the owner or renter and his family, or any member thereof, usually and habitually dwell and sleep is deemed a dwelling in which this crime may be committed." *State v. Jake,* 60 N.C. 471 (a burglary case). *State v. Langford,* 12 N.C. 253, indicates that a dwelling house is the place wherein a man reposes. This is approved in *State v. Jenkins,* 50 N.C. 430. It is undisputed that the room in the case at hand was used for sleeping; thus, it appears to meet the test of a "dwelling house".

[4] Defendant contends that certain inadmissible evidence was allowed by the trial court. Luby Edgar Smith was permitted to testify that Mrs. Welborn had told him the defendant was in his car "fixing to drive off". Mrs. Welborn was permitted to testify that defendant was in the car "locked up and ready to go". The record before us does not show that an objection was made to the questions which produced these answers. Following the answers of the witnesses, the defendant moved to strike in each instance, but he did not specify the reason for these motions. The evidence was properly admitted. Smith's testimony was corroborative of Mrs. Welborn whose testimony was proper as a "shorthand statement of the facts", Stansbury, N. C. Evidence 2d, § 125; Strong's N. C. Index 2d, Evidence, § 42; therefore, the motions to strike, made in a general manner, were properly overruled.

Defendant contends that the lower court did not adequately explain the proper weight to be given circumstantial evidence. It would appear that this point was adequately covered. The judge clearly set out the elements of the offense charged and in terms easily understood by a jury. Therefore, the exception on this point seems to be without merit.

[5, 6] Finally, defendant objected to the failure of the court to submit an issue of non-felonious breaking and entering. The evidence pointed only to breaking and entering with intent to commit larceny. The court is not required to submit to the jury a lesser included offense when there is no evidence from which the jury could find that such included crime of lesser degree was committed. *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545; *State v. LeGrande,* 1

N.C. App. 25, 159 S.E. 2d 265; *State v. Martin*, 2 N.C. App. 148, 162 S.E. 2d 667.

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

IN THE MATTER OF: THE CUSTODY OF LINDA GAIL BURCHETTE AND PHYLLIS ANN BURCHETTE

No. 6921SC1

(Filed 5 February 1969)

1. Appeal and Error § 39— appeal not aptly docketed

Appeal is subject to dismissal for failure to docket the record on appeal within the time allowed by Rule 5. Court of Appeals Rule No. 48.

2. Appeal and Error § 44— failure to file brief

Appellant's assignments of error are deemed abandoned where appellant files no brief. Court of Appeals Rule No. 48.

3. Appeal and Error § 44— stenographic transcript — failure to file appendix to brief

Where appellant filed with the Court of Appeals the stenographic transcript of the hearing but filed no brief, the appeal is subject to dismissal for failure to comply with Rule 19(d)(2) with respect to an appendix to the brief. Court of Appeals Rule No. 48.

4. Habeas Corpus § 4; Infants §§ 1, 9— review of habeas corpus hearing for custody of child

Because the courts have the duty to give children subject to their jurisdiction such oversight and control as will be conducive to the welfare of the children and to the best interests of the State, the Court of Appeals reviewed the entire habeas corpus hearing and determined that the order appealed from leaving custody of two minor children in their foster parents and refusing to award custody to their natural mother serves the best interests of the children and the State.

APPEAL by Vera Burchette Van Hoy (the mother of Linda Gail and Phyllis Ann) from *Johnston, J.*, 12 February 1968 Schedule B Session, FORSYTH Superior Court.

On 4 January 1957, the custody of the two abovenamed children was assumed by the Forsyth County Welfare Department because their mother, the appellant, was sentenced to prison on 4 January 1957; and because at that time the whereabouts of the father, Ira

C. Burchette, was unknown. On 7 January 1957 the Forsyth County welfare Department located the father who, on 11 January 1957, signed an agreement for the placement of the children by the Welfare Department. The children were thereupon placed in foster homes where they have resided until the present. Linda Gail Burchette is fifteen years of age, and Phyllis Ann Burchette is twelve years of age, both having lived the last eleven years of their lives with their foster parents, Mr. and Mrs. J. S. Thomason.

The mother, Vera Burchette Van Hoy, was released prison in May, 1957. She and the father, Ira C. Burchette, were divorced in 1959, and thereafter she married James Van Hoy, with whom she is now living in Richmond, Virginia.

On 13 September 1963, Ira C. Burchette, the father, filed an application in Forsyth County Superior Court for the issuance of a writ of *habeas corpus* to obtain custody of the children. By order dated 11 October 1963, the two children were to remain in the home of Mr. and Mrs. J. S. Thomason.

On 8 November 1967, Vera Burchette Van Hoy, the mother, filed a petition in Forsyth County Superior Court for the issuance of a writ of *habeas corpus* to obtain custody of the children. After hearing upon return to the writ Judge Johnston entered an order dated 19 February 1968 in which he found the following:

> "That Linda Gail Burchette is fifteen years of age and Phyllis Ann Burchette is twelve years of age, and that these children were placed in the care of the Forsyth County Welfare Department on January 11, 1957, upon voluntary agreement signed by Ira C. Burchette, father of the children; and that during the month of January, 1957, the children were placed in the home of Mr. and Mrs. J. S. Thomason and that the children have remained in the home of Mr. and Mrs. Thomason since January, 1957; that the children indicated under oath and in open court that they have seen their mother no more than three or four occasions, and have never had an opportunity to acquaint themselves with their natural mother; that neither the mother nor father have contributed anything to the support of these children and that they have never received presents, cards, acknowledgment of birthdays from the natural parents; that the foster parents of these children are of excellent character and the home life of these children has been happy, stable, and cheerful; that the said children have become attached to the foster parents and consider them as their own parents in that Phyllis Ann, age 12, has lived eleven

of the twelve years, and Linda Gail Burchette, age 15, has lived eleven of the fifteen years with the foster parents, attending the same school and same friends as long as they can remember; that upon examination of the minor children by the court and by counsel, the girls indicated their desire to continue to live in the home of their foster parents, and indicated fear and apprehension as to moving to the home of the petitioner; that both Linda Gail and Phyllis Ann Burchette are doing well in their school work and that two older sisters who are now residing with the petitioner have discontinued their education, and further that the home of the petitioner and her husband is a home of limited means, in that Mr. Van Hoy is physically disabled; and that it is for the best interest of said minor children that they remain in the home and custody of Mr. and Mrs. J. S. Thomason."

Judge Johnston thereafter ordered "that Linda Gail Burchette and Phyllis Ann Burchette shall remain wards of this court for their own protection, and that custody of the two minor children be awarded Mr. and Mrs. J. S. Thomason."

Vera Burchette Van Hoy, the mother, appealed.

Craige, Brawley, Horton & Graham, by Cowles Liipfert, for Vera Burchette Van Hoy, appellant.

The Legal Aid Society of Forsyth County, by Hosea V. Price, for Linda Gail Burchette and Phyllis Ann Burchette.

BROCK, J.

[1] The order appealed from is dated 19 February 1968, and the record on appeal should have been docketed in this Court on or before 19 May 1968. Rule 5, Rules of Practice in the Court of Appeals of North Carolina. However, in accordance with Rule 5, appellant, on 17 May 1968, obtained an order from the trial tribunal extending the time to 3 June 1968 within which the record on appeal might be docketed. Nevertheless, appellant did not docket the record on appeal in this Court until 31 July 1968, and for failure to docket on time this appeal is subject to dismissal. Rule 48, Rules of Practice, *supra.*

[2, 3] In addition to failure to docket on time, appellant has filed no brief and therefore the assignments of error are deemed to be abandoned. Rule 28, Rules of Practice, *supra.* Pursuant to Rule 19(d)(2), appellant filed in this Court the stenographic transcript

of the hearing, but by failure to file a brief appellant has failed to comply with Rule 19(d)(2) with respect to an appendix to her brief and the appeal is further subject to dismissal. Rule 48, Rules of Practice, *supra.*

[4] However, because the duty is constant upon the courts to give to children subject to their jurisdiction such oversight and control as will be conducive to the welfare of the child and to the best interests of the State, G.S. 110-21; *In Re Morris,* 225 N.C. 48, 33 S.E. 2d 243, we have reviewed the entire history of these children and the entire proceeding before Judge Johnston. In our opinion the order appealed from serves the best interests of the two minor children and serves the best interests of the State.

Appeal dismissed.

CAMPBELL and MORRIS, JJ., concur.

WALL FUNERAL HOME, INC., ORIGINAL PLAINTIFF AND CONTINENTAL INSURANCE COMPANY, ADDITIONAL PLAINTIFF v. W. L. STAFFORD, JR., GUARDIAN AD LITEM FOR JIMMIE LEE HOLMES AND BERTHA SMITH, ORIGINAL DEFENDANTS AND JOHN DOE, ADDITIONAL DEFENDANT

No. 6921SC31

(Filed 5 February 1969)

1. Pleadings § 11— cross actions — pleading unknown defendant by fictitious name

G.S. 1-166, which allows a plaintiff ignorant of a defendant's name to designate such defendant by any name and to amend his pleadings later when the true name is discovered, does not expressly authorize a defendant to set up a cross action against an unknown additional defendant.

2. Limitation of Actions § 7— purpose of G.S. 1-166

Purpose of statute allowing plaintiff to designate a defendant by a fictitious name is to provide plaintiff a means to toll the statute of limitations when he does not yet know the proper designation of the defendant. G.S. 1-166.

3. Pleadings § 11— cross action — pleading unknown defendant by fictitious name

Even if G.S. 1-166 were construed to allow a defendant to set up a cross action against an unknown joint tort-feasor by use of a fictitious name, order of trial court striking defendant's cross action against "John

Doe" should be affirmed where defendant fails to show he has been prejudiced.

4. Appeal and Error § 46— burden of appellant to show prejudice

The burden is on appellant not only to show error but that the alleged error was prejudicial and amounted to the denial of some substantial right.

APPEAL by original defendant from *McConnell, J.*, 29 July 1968 Civil Session of FORSYTH Superior Court.

This is a civil action commenced 20 December 1967 to recover for property damages arising out of an accident on Interstate 40 in the City of Winston-Salem.

Plaintiff's complaint alleged that the original defendant, Jimmie Lee Holmes, was negligent in driving a car across the center median, where it collided with the plaintiff's ambulance.

The original defendant alleged in his answer that his car was struck by a hit-and-run motorist, whose identity is unknown, causing defendant to lose control, cross the median, and collide with the plaintiff's ambulance, so that the accident was not the result of the original defendant's negligence, but was unavoidable. The original defendant also alleged a cross action against the unidentified hit-and-run motorist, referred to as "John Doe," for contribution as a joint tort-feasor.

Summons was issued by the Clerk of Superior Court of Forsyth County on 14 June 1968, directing the Sheriff of Forsyth County to serve the additional defendant, John Doe. The summons was returned unserved.

Plaintiff's motion to strike the entire cross action was allowed, and the original defendant appealed.

Hudson, Petree, Stockton, Stockton & Robinson, by J. Robert Elster and John M. Harrington, for original plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by Jimmy H. Barnhill, for original defendant appellants.

PARKER, J.

[1] Appellant's sole assignment of error is addressed to the court's allowing plaintiff's motion to strike his cross action. Appellant, an original defendant in this tort action, has attempted to set up a cross action for contribution under G.S. 1-240. (Since this action was commenced prior to 1 January 1968, G.S. 1B-8 is not applicable; see

§§ 3½ and 4, Ch. 847 of the 1967 Session Laws.) By this means he seeks to bring in as an additional defendant a person alleged by him to be a joint tort-feasor but whose identity he does not yet know, designating such person as "John Doe." Appellant relies on G.S. 1-166, which provides that when the *plaintiff* is ignorant of the name of a defendant, he may designate such defendant by any name and later amend his pleadings to insert the true name when it is discovered. However, G.S. 1-166 does not, at least by express language, apply to authorize a *defendant* to cross-plead against an unknown additional defendant, and G.S. 1-240, which is applicable to this case, contains no provision permitting a cross action for contribution against an additional defendant designated only by a fictitious name. With regard to seeking contribution prior to judgment, G.S. 1-240 provides that the original defendant "may, upon motion, have the other joint tort-feasors made parties defendant," and there is no reason to suppose that the Legislature intended in such cases that the additional parties defendant might be fictitious or anything other than real defendants.

[2] The obvious purpose of G.S. 1-166 is to provide a plaintiff a means to toll the statute of limitations when he does not yet know the proper designation of the defendant. No comparable necessity exists when a defendant desires to pursue a cross action for contribution against an unknown joint tort-feasor under G.S. 1-240, since the statute does not begin to run on the claim for contribution until judgment has been recovered against the first tort-feasor. *Godfrey v. Power Co.*, 223 N.C. 647, 27 S.E. 2d 736. (See, G.S. 1B-3(c) for the time within which an action to enforce contribution must be commenced in cases controlled by G.S., Chap. 1B.)

[3] While neither the express language nor the purpose of G.S. 1-166 would seem to make it applicable to the situation here presented, even if we stretch the language of that statute sufficiently to make it apply to this case, nevertheless, the order here appealed from should be affirmed. Appellant has failed to show he has been in any way prejudiced. In any event he could not have recovered contribution from "John Doe" until he learned John's true identity and served process upon him in person; nor was he entitled to delay trial of the action while he continued to search for the real "John Doe"; and even after entry of the order striking his cross action, if prior to trial he should be so fortunate as to find the real "John Doe," he may at that time still move to have him made an additional party defendant.

[4] The burden is on appellant not only to show error, but that

the alleged error was prejudicial and amounted to the denial of some substantial right. 1 Strong, N. C. Index 2d, Appeal and Error, § 46, p. 190.

Affirmed.

MALLARD, C.J., and BRITT, J., concur.

SHIRLEY B. SULLIVAN (HINES) v. MARTHA JOHNSON

No. 688SC444

(Filed 5 February 1969)

1. Constitutional Law § 24; Jury § 1; Trial § 56— necessity for jury trial in civil action

In an action to remove a cloud on title, the lower court possessed no authority to make findings of fact as to the controverted issues where the record does not show the hearing of evidence, the waiver of trial by jury, or an agreement as to the facts. N. C. Constitution, Art. I, § 19.

2. Pleadings § 37— issues of fact for jury

An issue of fact is raised for determination of the jury whenever a material fact, which is one constituting a part of plaintiff's cause of action or defendant's defense, is alleged by one party and denied by the other. G.S. 1-198.

3. Pleadings § 10; Trial § 56— necessity for reply — jury trial

Allegations of new matter in defendant's answer not relating to a counterclaim are deemed denied without a reply, G.S. 1-159, and in this case *are held* to present issues of fact which are required to be submitted to the jury in absence of waiver of jury trial.

4. Pleadings § 41— motion to strike

It is error for the court to fail to rule upon a motion to strike made in apt time, such motion being made as a matter of right. G.S. 1-153.

APPEAL by plaintiff from *Parker, (Joseph W.) J.*, at the 9 September 1968 Session of LENOIR Superior Court.

Plaintiff filed complaint 27 May 1968 alleging that on 26 April 1965 she was owner of a parcel of land in the City of Kinston; that on 13 November 1962 her husband, Alfred H. Sullivan, had purportedly executed a note and deed of trust on the property to the defendant; that at the time these were executed plaintiff was the wife of Sullivan and had not joined in the execution of the note and deed

of trust. Plaintiff alleged that no consideration was given for this note and deed of trust and that it was still held by the defendant. Plaintiff prayed that the note and deed of trust, being a cloud on her title, be canceled.

Defendant answered 7 June 1968 pleading a recorded separation agreement executed 20 June 1962 between plaintiff and her husband by which plaintiff had agreed to convey her interest in the property to her husband; that plaintiff did convey the property to her husband by deed on 8 June 1962; that in November 1964 Alfred H. Sullivan instituted divorce proceedings against the plaintiff; that a consent order was entered in the divorce proceedings as a result of which Alfred H. Sullivan conveyed the property to the plaintiff subject to a prior deed of trust to the Savings & Loan Association and to the deed of trust held by the defendant, this latter deed of trust not being assumed by the plaintiff. Upon foreclosure of the prior deed of trust, defendant became the last and highest bidder. The defendant alleged that the excess of the bid after payment of the first lien and costs of sale was being held by the clerk of court. Finally, defendant alleged that plaintiff was estopped to deny the validity of the deed of trust held by the defendant, and prayed that the action be dismissed.

On 18 June 1968, plaintiff filed a motion to strike certain portions of defendant's answer on the grounds that these portions were conclusions of law or allegations of evidentiary matter, and not allegations of ultimate facts.

When the matter came before the court, the court entered judgment making findings of fact and conclusions of law and dismissing the plaintiff's action. Plaintiff appealed, assigning errors in the findings of fact and in the failure to rule upon the motion to strike.

Turner & Harrison, by Fred W. Harrison for plaintiff appellant.

George B. Greene and James A. Hodges for defendant appellee.

PARKER, J.

[1] The first question presented by this appeal is whether the lower court possessed the authority to make findings of fact, where the record does not show the hearing of evidence, the waiver of a trial by jury, or an agreement as to the facts. The case of *Horton v. Horton,* 211 N.C. 390, 190 S.E. 216, seems particularly in point. In that case, the court stated:

"The record does not disclose what admissions, if any, were

made at the hearing in the court below, and there being no waiver of jury trial or agreement as to facts nor evidence offered, the court was without power to decide a controverted issue of fact raised by the pleadings. Doubtless the effort to end an unseemly controversy between members of the same family led the learned judge into error."

See also, *In Re Wallace,* 267 N.C. 204, 147 S.E. 2d 922; *Sparks v. Sparks,* 232 N.C. 492, 61 S.E. 2d 356; Const., Art. I, § 19; 5 Strong, N. C. Index 2d, Jury, § 1, p. 117; 7 Strong, N. C. Index 2d, Trial, § 56, p. 375; 1 McIntosh, N. C. Practice 2d, § 1371.

[2, 3] "An issue of fact is raised for the determination of the jury whenever a material fact, which is one constituting a part of plaintiff's cause of action or defendant's defense, is alleged by one party and denied by the other." 6 Strong, N. C. Index 2d, Pleadings, § 37, p. 373. *In Re Wallace, supra;* G.S. 1-198. Since new matter in the answer, not relating to a counterclaim, is deemed denied without a reply, 1 McIntosh, N. C. Practice 2d, § 1264; *Gamble v. Stutts,* 262 N.C. 276, 136 S.E. 2d 688; G.S. 1-159, it is clear that there were issues of fact in the case at hand which were required to be submitted to the jury, in the absence of waiver.

[4] Plaintiff's assignment of error to the failure of the court to rule upon her motion to strike is also well taken. It is well settled that a motion to strike, made in apt time, is made as a matter of right. G.S. 1-153; *Trust Co. v. Pollard,* 256 N.C. 77, 123 S.E. 2d 104; *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412; *Parrish v. R. R.,* 221 N.C. 292, 20 S.E. 2d 299. The plaintiff in this case, having filed his motion in apt time, was entitled to be heard thereon. The right to make a motion to strike would be an empty one unless it included the right to have the motion ruled upon.

Since the trial court failed to rule upon plaintiff's motion to strike and since in any event the court had no authority to make findings of fact on controverted issues, a jury trial not having been waived, the judgment appealed from is set aside and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. TIMOTHY I. HIATT
No. 6921SC107

(Filed 5 February 1969)

1. Criminal Law § 91— continuance as of right under G.S. 1-180.1 — comment by judge on verdict

In a prosecution for driving while under the influence of intoxicants, defendant was not entitled as of right under G.S. 1-180.1 to have his case continued for the session by the fact that on the preceding day the trial judge, in the presence of all jurors, discharged from further service a jury which had returned a verdict of not guilty in a driving under the influence case where the judge made no comment concerning the verdict returned by the discharged jury.

2. Criminal Law § 101— discharge of jury

A trial judge has the discretionary power to discharge a jury from further service.

3. Criminal Law §§ 91, 101— discharge of jury in presence of other jurors

G.S. 1-180.1 does not require the trial judge to exercise his prerogative of discharging a jury from further service in the absence of other jurors summoned for the session.

APPEAL by defendant from *Armstrong, J.*, 23 September 1968 Three-Week Criminal Session, FORSYTH Superior Court.

The defendant was charged in the Municipal Court of the City of Winston-Salem under a warrant alleging that on or about 23 July 1967 he did unlawfully and wilfully drive a vehicle upon U.S. 52 while under the influence of intoxicating liquor. From a conviction in the municipal court, he appealed to the superior court.

Defendant was found guilty by a jury in superior court and from judgment imposed on the verdict, he appealed to this Court.

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

Wilson & Morrow by John F. Morrow for defendant appellant.

BRITT, J.

Defendant's sole assignment of error is to the refusal of the trial judge to grant defendant's motion for a continuance of his case for the session.

[1] From the record before us, we glean that when defendant's case was called for trial on 10 October 1968, the trial judge, in chambers and in the absence of prospective jurors, denied defendant's

motion that his case be continued for the session for the reason that on the preceding day the trial judge, in the presence of all jurors, discharged from further service a jury which had returned a verdict of not guilty in a driving under the influence case. The record further indicates that when the jury was discharged, the judge made no comment concerning the verdict.

Defendant contends that he was entitled to have his case continued by reason of G.S. 1-180.1 which provides as follows:

> "§ 1-180.1. *Judge not to comment on verdict.* — The presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any term of court, upon any verdict rendered at such term of court; and if any presiding judge shall make any comment as herein prohibited, or shall praise or criticise [sic] any jury on account of its verdict, whether such comment, praise or criticism be made inadvertently or intentionally, such praise, criticism or comment by the judge shall constitute valid grounds as a matter of right, for the continuance for the term of any action remaining to be tried during that week at such term of court, upon motion of any party to any such action, plaintiff or defendant, or upon motion of the solicitor for the State. The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment."

The assignment of error is without merit and is overruled.

[2, 3] It is well-established law in this jurisdiction that a trial judge in his discretion has the power to discharge a jury from service. *State v. Pugh,* 183 N.C. 800, 111 S.E. 849. In his brief, defendant's counsel concedes this to be the law and further concedes that the record in this case does not show that the trial judge made any comments other than the minimum comments necessary to discharge the jury. But, defendant contends that when the trial judge exercises his power to discharge a jury from further service, he must do so in the absence of all other jurors summoned for the session.

We do not construe the statute to impose this requirement upon the trial judge. The statute is quite plain in what it prohibits, and no portion of it requires the trial judge to exercise his prerogative in the absence of other jurors.

No error.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. CHARLES FOUNTAIN GRANT

No. 688SC256

(Filed 5 February 1969)

1. Automobiles § 129— prosecution for driving while intoxicated — instructions

In a prosecution for driving while under the influence of intoxicating liquor in which the State and defendant stipulated that if a witness were present in court he would testify that he administered a blood alcohol test to defendant and that the test showed that the defendant had a content of point twenty-two (.22%) alcohol in his bloodstream, a statement by the court in its charge that "it has been stipulated by his counsel that the result of that test was point two-two (.22) percent," while not in the exact words of the stipulation, is not prejudicial error since the substance is the same.

2. Automobiles § 130; Criminal Law § 138— driving while intoxicated — punishment — active prison sentence

Defendant sentenced to an active prison term of 6 months upon his conviction of driving while under the influence of intoxicants is not entitled to have the sentence set aside on the ground that an active sentence for that crime is contrary to prevailing custom, the determination of what sentence within the statutory maximum shall be imposed being the duty of the trial judge, and the sentence imposed upon defendant being within the maximum authorized by G.S. 20-179.

APPEAL by defendant from *Fountain, J.*, 11 March 1968 Session of Superior Court of LENOIR County.

After conviction and imposition of sentence in recorder's court on a charge of operating an automobile on the public highways while under the influence of intoxicating liquor, the defendant appealed to the Superior Court of Lenoir County.

Upon trial in superior court, the jury returned a verdict of guilty as charged. From a judgment imposing a six-months prison sentence, the defendant appealed, assigning error.

Attorney General T. W. Bruton, Assistant Attorney General William W. Melvin, and Staff Attorney T. Buie Costen for the State.

Turner & Harrison by Fred W. Harrison for defendant appellant.

MALLARD, C.J.

[1] Defendant contends the trial court committed error in the charge in stating a stipulation entered into by the State and the defendant. On page fourteen of the record the stipulation is set out as follows:

"At this point it is stipulated that if Mr. Lutz were present in Court he would stipulate that he had administered a blood alcohol test on the defendant and that the test showed that the defendant had a content of point twenty-two (.22%) alcohol in his blood stream."

The entire portion of the charge of the court excepted to reads, "However, it has been stipulated by his counsel that the result of that test was point two-two (.22) percent."

The stipulation as stated by Judge Fountain was not in the exact words of the stipulation in the record, but when read in context, the substance is substantially the same. The defendant's contention that the judge committed prejudicial error in stating the stipulation is without merit.

[2] The only other assignment of error brought forward by the defendant in his brief is that the court committed error in entering the judgment. The defendant contends that an active prison sentence, although authorized by G.S. 20-179, is contrary to custom, and therefore he is entitled to a new trial or at least that the case ought to be remanded and another sentence imposed "in accordance with prevailing custom." This contention is without merit. The determination of what sentence, within the limits fixed by the Legislature, shall be imposed in a case is the duty of the trial judge. The statute with respect to the imposition of sentences in North Carolina upon a conviction, or plea of guilty, of the crime of operating an automobile on the public highways while under the influence of intoxicating liquor is G.S. 20-179. Under this statute a maximum sentence of two years may be imposed, and therefore a sentence of six months in prison is not excessive. *State v. Lee,* 247 N.C. 230, 100 S.E. 2d 372; *State v. Morris,* 2 N.C. App. 262, 163 S.E. 2d 108; *State v. Morris,* No. 414, Fall Session 1968, N. C. Supreme Court, Filed 21 January 1969.

In the trial and sentence there is

No error.

CAMPBELL and MORRIS, JJ., concur.

SHELOMA RICHARDSON, ADMINISTRATRIX OF THE ESTATE OF CLAYTON C. RICHARDSON, JR. v. GEORGE DEWEY SHERMER

No. 6917SC7

(Filed 5 February 1969)

1. Appeal and Error § 44— failure to file brief

Appellant by failing to file a brief is deemed to have abandoned his objections and exceptions. Rules of Practice in the Court of Appeals Nos. 28 and 48.

2. Appeal and Error § 36— motion to dismiss appeal — noncompliance with Rules

Appellee's motion to dismiss the appeal for failure of appellant to serve statement of case on appeal before docketing, and for failure to comply with Rules of Practice Nos. 5, 16, 18, 19 and 28, is allowed where record fails to show compliance with the Rules or waiver of the Rules, and the Court of Appeals has not been requested to allow any amendments.

APPEAL by defendant from *Gambill, J.*, 9 September 1968 Session of Superior Court of SURRY County.

R. Lewis Alexander and Perry Henson, shown as plaintiff appellee's attorney on the record. (No brief filed.)

Franklin Smith, shown as defendant appellant's attorney on the record. (No brief filed.)

MALLARD, C.J.

What purports to be a record on appeal in this case was filed in the office of the Clerk of the Court of Appeals on 8 November 1968. No other record on appeal has been filed herein.

The record, by what properly should have been an addendum thereto, shows that the statement of the case on appeal had not been served on the appellee when the purported case on appeal was docketed in this Court.

This purported record reveals that the judgment appealed from was entered 12 September 1968, and no extension of time has been granted in which to docket an appeal herein as provided in Rule 5 of the Rules of Practice in the Court of Appeals.

[1] On appeals from the Seventeenth District, when the record on appeal was docketed by 10:00 a.m. on 31 December 1968, appellant's brief was required to be filed by noon of 7 January 1969. This case was properly on the calendar of this Court for hearing on 28 January 1969. No briefs have been filed. Appellant by failing to file

a brief is deemed to have abandoned his objections and exceptions. *Bost v. Bank,* 1 N.C. App. 470, 162 S.E. 2d 158; Rules of Practice in the Court of Appeals of North Carolina, #28 and #48.

[2] Plaintiff appellee on 13 January 1969 filed a proper motion to dismiss the appeal for failure to comply with Rule 5, Rule 16, Rule 18, Rule 19, and Rule 28 of the Rules of Practice in the Court of Appeals, and for failure to serve statement of case on appeal before docketing. On 22 January 1969 defendant appellant filed an answer to the motion. The motion and the answer thereto have been considered. Compliance with the Rules does not appear in the record, a waiver of the Rules does not appear therein, compliance with the Rules has not been dispensed with by a writing signed by the appellee or her counsel, and this Court has not been requested to and therefore does not allow any amendments. See Rule 16. The motion to dismiss the appeal is allowed.

Appeal Dismissed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. RAYMOND BIGGS
No. 6917SC101

(Filed 5 February 1969)

Burglary and Unlawful Breakings § 7; Criminal Law § 115— submission of non-felonious breaking or entering

In a prosecution for the felony of breaking and entering a store building with the felonious intent to steal property therefrom, failure of the court to submit the issue of defendant's guilt of non-felonious breaking or entering is prejudicial error where the evidence tends to show that no personal property was taken from the building and the only evidence of defendant's alleged felonious intent to steal is circumstantial.

APPEAL by defendant from *Beal, S.J.,* October 1968 Session of Superior Court of ROCKINGHAM County.

Defendant was tired on a bill of indictment charging him and another with the felony of breaking and entering the store of Lowes Mayodan Associate Store, Inc., (Lowes) on 11 January 1968 with the felonious intent to steal therefrom property belonging to Lowes, in violation of G.S. 14-54.

The defendant offered no evidence.

The jury returned a verdict of guilty. From a judgment of imprisonment, the defendant appeals, assigning error.

Attorney General Robert Morgan and Staff Attorney (Mrs.) Christine Y. Denson for the State.

Gwyn, Gwyn & Morgan by Melzer A. Morgan, Jr., for the defendant appellant.

MALLARD, C.J.

The State's evidence was circumstantial. It tended to show that the defendant, together with another man, broke a window in the store building of Lowes in which personal property owned by Lowes was situated on 11 January 1968 and entered the building. The evidence further tended to show that no personal property was taken and that none of the personal property of Lowes was missing therefrom. The defendant was apprehended that same night about three-fourths of a mile from Lowes.

Defendant assigns as error the fact that the trial court failed to instruct and submit to the jury the issue of defendant's guilt of non-felonious breaking or entering, which is a lesser degree of the crime charged.

There was ample evidence to submit the question of the guilt or innocence of the defendant on the felony charge of breaking or entering as well as the lesser included offense of non-felonious breaking or entering, which is a misdemeanor.

We are of the opinion and so hold that the court's failure to submit for jury consideration and decision the lesser included offense of the misdemeanor of breaking or entering was prejudicial error. Decision in this case is controlled by *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27. The other cases cited by the State are factually distinguishable.

Defendant has other assignments of error, but since the case goes back for a new trial, we do not deem it necessary to discuss them.

New trial.

BRITT and PARKER, JJ., concur.

RUSSELL G. SIMMONS v. LEON EDWARDS

No. 682SC317

(Filed 5 February 1969)

Appeal and Error §§ 39, 44— failure to aptly docket appeal and file brief

Appeal is dismissed for failure to file a brief within the time required by Rule 28 and for failure to docket the appeal within the time prescribed by Rule 5.

APPEAL by plaintiff from *Cohoon, J.*, April 1968 Session Superior Court of TYRRELL.

This is a civil action to recover damages for personal injuries sustained as the result of an automobile collision.

At the close of plaintiff's evidence, defendant moved for a judgment as of nonsuit. The motion was allowed, and plaintiff appeals.

Jones, Jones and Jones by L. Bennett Gram, Jr., for plaintiff appellant.

Bailey and Bailey by Carl L. Bailey, Jr., for defendant appellee.

MORRIS, J.

Appellant has failed to comply with Rule 28 of the Rules of Practice in the Court of Appeals of North Carolina by his failure to file his brief within the time required. Defendant, in apt time, before the brief was filed, and in accordance with Rule 28, moved to dismiss the appeal. On the day after appellant filed his brief, he filed a petition for extension of time for filing brief to and including the day the brief was actually filed. In addition to noncompliance with Rule 28, appellant also failed to comply with Rule 5 in that he did not docket his appeal in this Court within the time prescribed. For failure to comply with the Rules of Practice in this Court, the appeal is dismissed. Despite these circumstances, we have examined the record and the evidence presented and we find no error in the ruling of the trial tribunal.

Appeal dismissed.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE v. ELIJAH CAMPBELL
No. 6917SC104

(Filed 5 February 1969)

APPEAL by defendant from *Beal, S.J.*, 14 October 1968, Criminal Session, ROCKINGHAM Superior Court.

The defendant was charged in a valid bill of indictment with the felony of prison escape. The defendant voluntarily and understandingly waived the appointment of an attorney to represent him and appeared without an attorney.

The defendant freely, voluntarily, and understandingly entered a plea of guilty.

This all occurred in open court 16 October 1968, and the defendant was sentenced to a term of one year in the Rockingham County common jail to be assigned to the North Carolina Department of Correction. On 18 October 1968 the defendant wrote to the clerk of court in Rockingham County giving notice of appeal.

An attorney was appointed to perfect the appeal and to represent the defendant on the appeal.

Attorney General Robert Morgan and Deputy Attorney General Harry W. McGalliard for the State.

Benjamin R. Wrenn, Court-Appointed Attorney, for defendant appellant.

CAMPBELL, J.

This is another typical case where the system breaks down. The defendant, without expense to himself, has called upon the taxpayers to furnish him with an attorney to present this matter to this Court. This attorney has reviewed the proceedings and, after such review, has filed a brief in which he frankly states that he finds no errors. The Attorney General has reviewed the record on appeal and agrees with the defense counsel that no prejudicial error has been made to appear.

We, likewise, have reviewed the record on appeal, and we conclude that no error has been made to appear. Compare with *State v. Fowler*, 3 N.C. App. 232, 164 S.E. 2d 387.

Affirmed.

BROCK and MORRIS, JJ., concur.

APPENDIX:
AMENDMENTS TO RULES

ANALYTICAL INDEX

WORD AND PHRASE INDEX

AMEND SUPPLEMENTARY RULES OF THE SUPREME COURT OF NORTH CAROLINA, 1 N.C. App. 657, AS FOLLOWS:

Delete Rule 3, including amendments thereto adopted April 30, 1968, and insert the following in lieu thereof:

"Rule 3. Appeals as of Right from the Court of Appeals to the Supreme Court.

When an appeal as a matter of right is taken to the Supreme Court from a decision of the Court of Appeals as provided in G.S. 7A-30, the appealing party shall:

(a) within 15 days from the date of the certificate of the clerk of the Court of Appeals to the trial tribunal, give written notice of appeal to the clerk of the Court of Appeals, to the clerk of the Supreme Court, and to the opposing parties;

(b) when the appeal is based on involvement of a substantial constitutional question, specify in the notice of appeal the article and section of the Constitution allegedly involved and state with particularity how appellant's rights thereunder have been violated; affirmatively state that the constitutional question involved was timely raised (in the trial court if it could have been or in the Court of Appeals if not) and either not passed upon or passed upon erroneously;

(c) file supplemental briefs as required by Rule 7, Supplementary Rules of the Supreme Court (271 N.C. 747).

All appeals under G.S. 7A-30 shall be docketed in the Supreme Court within ten (10) days after giving the required notice of appeal.

The Supreme Court shall calendar the cause for hearing at any time it may deem appropriate after the expiration of twenty-eight (28) days from the date on which the cause was docketed in the Supreme Court.

The appellant's brief must be filed within ten (10) days after the appeal is docketed, and the appellee's brief must be filed within twenty (20) days after the appeal is docketed."

Amend Rule 8 of the Supplementary Rules by Substituting the word "ten" for the word "fourteen" in the second sentence, and by substituting the words "twenty days" for the words "twenty-one days" in the third sentence.

Amend Supplementary Rule 8 by adding a new paragraph at the end thereof reading as follows:

"The cause shall be deemed docketed as of the date certiorari is granted or an order certifying transfer to the Supreme Court is entered pursuant to Supplementary Rule 13."

Amend Supplementary Rule 6 by adding a new paragraph to read as follows:

"The cause shall be deemed docketed in the Supreme Court as of the date the Supreme Court in writing orders the transfer of said cause to the Supreme Court pursuant to Supplementary Rule 13."

Adopted by the Court in conference on 11 December 1968.

HUSKINS, 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.

ADVERSE POSSESSION

§ 1. In General

Adverse possession defined. *Price v. Tomrich Corp.*, 402.

§ 4. Adverse Possession of Lappage in Description of Deed of Opposing Party

Where descriptions in plaintiff's and defendant's deeds embrace in part the same land, and plaintiff is in possession of the lappage and defendant is not, title to entire lappage is perfected in plaintiff when he establishes adverse possession of a part of the lappage for seven years under color of title. *Price v. Tomrich Corp.*, 402.

§ 17. What Constitutes Color of Title

Commissioner's deed constitutes color of title. *Price v. Tomrich Corp.*, 402.

§ 23. Burden of Proof and Pleadings

Adverse possession need not be specially pleaded by name. *Newbern v. Barnes*, 521.

§ 25. Sufficiency of Evidence, Nonsuit and Directed Verdict

Evidence is sufficient to establish seven years adverse possession by plaintiff under color of title as to lappage. *Price v. Tomrich Corp.*, 402.

Proof of intermittent acts of trespass is not sufficient to overrule a motion to nonsuit upon the issue of adverse possession. *Ibid.*

Evidence in this action to determine ownership and possession of certain realty held sufficient to require findings upon the question of adverse possession by defendants for twenty years or under color of a commissioner's deed for seven years. *Newbern v. Barnes*, 521.

ANIMALS

§ 3. Injury or Damage Caused by Animal Roaming at Large

Plaintiff's evidence held not to disclose contributory negligence as matter of law in striking defendant's cow. *Duke v. Tankard*, 563.

APPEAL AND ERROR

§ 1. Jurisdiction in General

Court of Appeals acquires no jurisdiction by appeal from lower court which had no jurisdiction. *Wiggins v. Ins. Co.*, 476.

§ 2. Review of Decision of Lower Court and Matters Necessary to Determination of Appeal

If trial court reaches correct result, its judgment should not be disturbed

APPEAL AND ERROR—Continued

on appeal even though some of its reasons therefor are incorrect. *Reese v. Carson*, 99.

Where appeal is taken from an order striking an entire cause of action, the appeal brings up the entire case for review. *Bank v. Easton*, 414.

§ 5. Matters Cognizable Ex Mero Motu

Court of Appeals will take notice ex mero motu of defect in jurisdiction. *Wiggins v. Ins. Co.*, 476.

§ 6. Judgments and Orders Appealable

Appeal from interlocutory injunction preventing aldermen from granting cablevision franchise is not premature. *Cablevision v. Winston-Salem*, 252.

Appeal from compulsory reference is not premature. *Development Co. v. Phillips*, 295.

An immediate appeal lies from an order granting a motion to strike which has the effect of granting a demurrer. *McAdams v. Blue*, 169.

A Superior Court judge can neither allow nor refuse an appeal. *Development Co. v. Phillips*, 295.

When a motion to strike an entire answer is granted, an immediate appeal is available. *Bank v. Easton*, 414.

§ 16. Jurisdiction and Powers of Lower Court After Appeal

Once appeal has been taken and trial judge has fixed the time within which to serve the case on appeal, the trial court is thereafter *functus officio* and is without authority to enter subsequent order enlarging the time to serve case on appeal. *Roberts v. Stewart*, 120.

A superior court judge can neither allow nor refuse an appeal. *Development Co. v. Phillips*, 295.

§ 25. Parties Entitled to Object and Take Exception

Party may not except to ruling in his favor. *In re McCraw Children*, 390.

§ 26. Exceptions and Assignments of Error to Judgment

Exceptions to the entry of judgment present question of whether facts found support the conclusions of law. *Howell v. Alexander*, 371.

§ 28. Objections, Exceptions and Assignments of Error to the Findings of Fact

Review of assignment of error to conclusion of law. *Newbern v. Barnes*, 521.

§ 31. Exceptions and Assignments of Error to the Charge.

Party must object to court's statement of the evidence at the trial to present the question on appeal. *Holloway v. Medlin*, 89.

§ 32. Objections, Exceptions and Assignment of Error to the Issues

Appellant may not challenge the issues submitted for the first time on appeal. *Holloway v. Medlin*, 89.

§ 36. Making Out and Service of Case on Appeal

Where trial court was without authority to extend the time for service of case on appeal, the Court of Appeals reviewed only the record proper since trial court was *functus officio*. *Roberts v. Stewart*, 120.

Motion to dismiss is allowed for appellant's failure to serve statement of case on appeal in apt time. *Richardson v. Shermer*, 588.

APPEAL AND ERROR—Continued

§ 39. Time of Docketing

Record on appeal must be docketed with Court of Appeals within 90 days after date of judgment, but this period may be extended not exceeding 60 days for good cause. *Roberts v. Stewart*, 120.

Appeal is dismissed for failure to docket the appeal within the time prescribed by Rule 5. *Kelly v. Washington*, 362; *Evangelistic Assoc. v. Bd. of Tax Supervision*, 479; *Simmons v. Edwards*, 591; *In re Custody of Burchette*, 575.

§ 41. Form and Requisites of Transcript

Where appellant files a stenographic transcript of the evidence, failure to affix an appendix to his brief summarizing the testimony he relies on to support his assignments of error requires dismissal of appeal. *Bryant v. Snyder*, 65; *Herlocker v. Andrews*, 482; *In re Custody of Burchette*, 575.

§ 44. Time for Filing Briefs and Effect of Failure to File

Assignments of error deemed abandoned where appellant files no brief. *In re Custody of Burchette*, 575.

Appeal is dismissed for failure to file brief within time required by Rule 28. *Simmons v. Edwards*, 591.

§ 45. Form and Contents of Brief, and Effect of Failure to Discuss Exceptions and Assignments of Error Therein

Official volumes of the N. C. Reports should be cited in the brief. *Development Co. v. Phillips*, 295.

Assignments of error not supported by argument or authority are deemed abandoned. *Somerset v. Somerset*, 473.

§ 46. Presumptions and Burden of Showing Error

Appellant has the burden to show prejudicial error. *Funeral Home v. Stafford*, 578.

§ 48. Harmless and Prejudicial Error in Admission of Evidence

Error in admission of incompetent testimony is cured when testimony of same import is thereafter admitted without objection. *Brown v. Green*, 506.

Question of whether unresponsive testimony was incompetent is not presented by objections and exceptions to the question where no motion is made to strike the unresponsive testimony. *Ibid.*

Admission of entire writing incompetent in part is not error where defendant objects generally to its introduction but does not move to strike the incompetent portion. *Ibid.*

§ 50. Harmless and Prejudicial Error in Instructions

Trial court's failure to define negligence per se in one part of the charge is not error where it subsequently defines the term in another part. *Woodward v. Shook*, 129.

§ 57. Findings or Judgments on Findings

Findings supported by competent evidence are conclusive on appeal. *In re McCraw Children*, 390.

§ 58. Injunctions and Other Equity Proceedings

In reviewing interlocutory injunctions, Court of Appeals may weigh the evidence and find facts for itself. *Cablevision v. Winston-Salem*, 252.

ARREST AND BAIL

§ 3. Right of Officer to Arrest Without Warrant

Arrest without warrant is lawful where officer has reasonable grounds to believe defendant had committed a felony. *S. v. Furr*, 300.

§ 6. Resisting Arrest.

Requisites of valid indictment or warrant for resisting arrest. *S. v. White*, 443.

Warrant charging that defendant did resist, delay and obstruct named Rocky Mount police officers in the making of a lawful arrest "by shoving said officers and refusing to go" is sufficient to charge a violation of G.S. 14-223. *Ibid.*

ASSAULT AND BATTERY

§ 5. Assault With a Deadly Weapon

Both assault with a deadly weapon with intent to kill and an assault with a deadly weapon are general misdemeanors. G.S. 14-33. *S. v. Burris*, 35.

§ 11. Indictment and Warrant

Indictment charging assault "causing serious bodily injury" is sufficient to charge aggravated assault. *S. v. Jeffries*, 218.

§ 14. Sufficiency of Evidence

Evidence of assault causing serious bodily injury held sufficient for jury. *S. v. Jeffries*, 218.

§ 15. Instructions Generally

In prosecution for aggravated assault, defendant may not be convicted of assault with a deadly weapon. *S. v. Jeffries*, 218.

§ 16. Necessity of Submitting Question of Guilt of Lesser Degree

In prosecution for aggravated assault, court erred in failing to submit the issue of defendant's guilt of simple assault. *S. v. Jeffries*, 218.

§ 17. Verdict and Punishment

Jury's original verdict of assault with a deadly weapon with intent to kill is sensible and responsive in light of the indictment and instructions, and action of the trial court in failing to accept the verdict is erroneous. *S. v. Burris*, 35.

AUTOMOBILES

§ 3. Driving Without License or After Revocation or Suspension

Fatal variance occurs where indictment charges defendant with operating a motor vehicle while license is revoked on one date and the evidence shows the alleged offense occurred on another date. *S. v. White*, 31.

§ 13. Lights

Failure to stop vehicle within radius of its lights is not negligence per se. *Duke v. Tankard*, 563.

§ 39.5. Motorcycles

Motorcyclist carrying passenger is required to exercise a greater degree of care than if he had no passenger. *Tindle v. Denny*, 567.

AUTOMOBILES—Continued

§ 40. Pedestrians

Duties and rights of pedestrian and motorist where pedestrian is in an unmarked crosswalk at an intersection. *Bowen v. Gardner*, 529.

§ 43. Pleadings and Parties

Pleadings in automobile accident case properly raised the issue of joint enterprise. *McAdams v. Blue*, 169.

In this auto accident case nonsuit for variance between pleadings and proof was properly granted. *Henson v. Motor Lines*, 447.

§ 62. Sufficiency of Evidence in Striking Pedestrians

Evidence of defendant's negligence in striking a pedestrian held sufficient to go to jury. *Bowen v. Gardner*, 529.

§ 63. Sufficiency of Evidence in Striking Children

Nonsuit properly allowed where evidence fails to show defendant knew minor plaintiff was playing in close proximity to defendant's auto. *Edens v. Adams*, 431.

§ 83. Nonsuit on Ground of Pedestrian's Contributory Negligence

Evidence that pedestrian was injured as he crossed highway at place other than crosswalk during the daytime is held to disclose contributory negligence on part of pedestrian. *Jones v. Smith*, 396.

Evidence discloses plaintiff-pedestrian's contributory negligence in crossing intersection without seeing oncoming motorcycle that struck her. *Bowen v. Gardner*, 529.

§ 89. Sufficiency of Evidence on Issue of Last Clear Chance

In action for injuries sustained by a pedestrian, evidence is insufficient to require submission of case to jury on last clear chance doctrine. *Jones v. Smith*, 396.

§ 90. Instructions in Auto Accident Cases

In automobile accident case, evidence warrants trial court's instruction on the law applicable to skidding. *Woodward v. Shook*, 129.

Court's charge as to use of Mortuary Tables held proper. *Mattox v. Huneycutt*, 63.

§ 92. Liabilities of Driver to Guests and Passengers

Evidence of motorcyclist's negligence in causing injuries of his passenger who was thrown off motorcycle held sufficient to go to jury. *Tindle v. Denny*, 567.

§ 94. Contributory Negligence of Guest or Passenger

Whether passenger on motorcycle was guilty of contributory negligence is question for jury. *Tindle v. Denny*, 567.

§ 113. Sufficiency of Evidence in Assault and Homicide Prosecution

Evidence of intoxication, speeding, and intentional failure to stop for a stop sign held sufficient to show culpable negligence in manslaughter prosecution. *S. v. Williams*, 463.

§ 130. Verdict and Punishment for Driving While Under Influence of Intoxicants

Defendant is not entitled to have his active prison sentence for driving

AUTOMOBILES—Continued

under the influence set aside on ground that active sentence for this crime is contrary to prevailing custom. *S. v. Grant*, 586.

§ 140. Operating Motorcycle Without Wearing Safety Helmet

Statute requiring motorcycle operators to wear helmets held constitutional. *S. v. Anderson*, 124.

BASTARDS

§ 1. Elements of Offense of Wilful Refusal to Support Illegitimate Child

Elements of the offense of unlawfully and willfully refusing to support an illegitimate child. *S. v. Coffey*, 133.

The crime is not the mere begetting of a child, but is the wilful refusal to support the child. *Ibid.*

§ 3. Limitations on Prosecutions

If the defendant is the reputed father, it must be shown that the prosecution has been instituted within one of the time periods provided in G.S. 49-4. *S. v. Coffey*, 133.

§ 6. Sufficiency of Evidence and Nonsuit

Evidence warrants the submission to jury of issue of defendant's guilt of the wilful refusal to support his illegitimate child after demand. *S. v. Snyder*, 114.

Testimony of a physician that period of gestation is 36 weeks is an expression of opinion and does not bind the State on motion to nonsuit. *Ibid.*

§ 7. Instructions

Trial court properly instructed jury that they may take judicial notice that normal period of gestation is between seven and ten months. *S. v. Snyder*, 114.

§ 9. Judgment and Sentence

In prosecution for nonsupport of illegitimate child in the District Court, defendant could properly appeal from an adverse finding on the issue of paternity, but Superior Court could not submit issue of defendant's wilful refusal to support his illegitimate child when that issue was determined in his favor in the District Court. *S. v. Coffey*, 133.

§ 11. Right to Custody of Illegitimate Child

The mother of an illegitimate child, if a suitable person, has the legal right to the child's custody. *In re Custody of Owenby*, 53.

Order finding that neither father nor mother of illegitimate child is fit and proper person to have custody and that custody should be placed in the Welfare Department is held proper. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS

§ 2. Breaking and Entering Otherwise Than Burglariously

A room in a rooming house is included within the meaning of the term "dwellinghouse" in statute proscribing felonious breaking and entering. *S. v. Clinton*, 571.

In a prosecution for feloniously breaking and entering with intent to steal, the State must establish that at the time defendant broke and entered he intended to steal something, but the State need not establish the ownership of the property which he intended to steal. *S. v. Crawford*, 337.

BURGLARY AND UNLAWFUL BREAKINGS—Continued

§ 3. Indictment

Indictment charging felonious breaking and entering of "a certain dwelling house and building" occupied by a named person held sufficient. *S. v. Roper*, 94.

§ 5. Sufficiency of Evidence and Nonsuit

Issue of defendant's guilt of felonious breaking and entering and attempted safecracking is properly submitted to jury. *S. v. Godwin*, 55.

Nonsuit properly denied where an accomplice testified that defendant acted as a lookout and shared in stolen property. *S. v. Kirby*, 43.

Evidence of defendant's guilt of the felony of breaking and entering an ABC store is properly submitted to the jury. *S. v. Lynch*, 228.

In prosecution for breaking and entering with intent to steal, fact that indictment alleges intent to steal property of a named corporation while evidence discloses property actually stolen belonged to another is not fatal. *S. v. Crawford*, 337.

Issue of defendant's guilt of felonious breaking and entering is properly submitted to the jury. *S. v. Clinton*, 571.

§ 7. Verdict and Instructions as to Possible Verdicts

Trial court did not err in failing to submit to jury issue of non-felonious breaking and entering. *S. v. Clinton*, 571.

In prosecution for breaking and entering with felonious intent to steal, court must submit issue of nonfelonious breaking and entering where the only evidence of defendant's alleged felonious intent to steal is circumstantial. *S. v. Biggs*, 589.

§ 8. Sentence and Punishment

Sentence of seven to ten years for felonious breaking and entering is not cruel and unusual punishment. *S. v. Kelly*, 72.

Sentence of two years imprisonment upon plea of guilty to nonfelonious breaking and entering is within statutory limits. *S. v. Thompson*, 231.

§ 9. Elements of Unlawful Possession of Housebreaking Implements

Elements of unlawful possession of implements of housebreaking. *S. v. Styles*, 204.

§ 10. Prosecution for Unlawful Possession of Housebreaking Implements

In prosecution under G.S. 14-55, evidence of defendant's possession of lockpicking devices held sufficient for jury. *S. v. Styles*, 204.

A tire tool is not an implement of housebreaking, and evidence of its possession is not sufficient to support a conviction under G.S. 14-55. *S. v. Godwin*, 55.

CARRIERS

§ 10. Loss of or Injury to Goods in Transit

In action by lesse of a vehicle under an interstate trip-lease agreement against the lessor to recover for damages to the cargo allegedly caused by negligence of lessor's driver, defendant's demurrer is properly overruled where the complaint alleged the vehicle's driver was defendant-lessor's agent, notwithstanding the trip-lease agreement vested control of the vehicle in the plaintiff lessee. *Freight Line v. Truck Lines*, 1.

CARRIERS—Continued

§ 19. Liability for Injury to Passenger

Evidence that plaintiff bus passenger had ample opportunity to be seated but failed to do so, held sufficient for jury on issue of contributory negligence. *Barbour v. Coach Co.*, 185.

In action by bus passenger for personal injuries, error in defining contributory negligence was cured by further instructions giving proper standard of care for common carrier. *Barbour v. Coach Co.*, 185.

CHARITIES AND FOUNDATIONS

§ 3. Liability for Injury to Patrons

Common law defense of charitable immunity has been abolished by statute as to causes of action arising subsequent to 1 September 1967. *Habuda v. Rex Hospital*, 11.

CHATTEL MORTGAGES AND CONDITIONAL SALES

§ 9. Registration of Instruments Executed in Another State

Where vehicle subject to conditional sales contract executed in another state is brought into this State without security being perfected under the laws of the other state or of this State, a subsequent creditor of the vendee who has perfected his lien by taking possession of the vehicle has a superior right. *Bank v. Sprinkle*, 242.

The burden of proof is on the person claiming under the lien of a conditional sales contract executed in another state to show that his lien was perfected under the law of such other state. *Ibid.*

CONSPIRACY

§ 1. Elements of Civil Conspiracy

Elements of civil conspiracy. *McAdams v. Blue*, 169.

§ 2. Actions for Civil Conspiracy.

Allegations that defendants were negligent "in conspiring" to do certain things are properly stricken on motion. *McAdams v. Blue*, 169.

CONSTITUTIONAL LAW

§ 11. Police Power in General

The Legislature has the inherent power to define and punish any act as a crime. *S. v. Anderson*, 124.

§ 13. Safety, Sanitation and Health

Statute requiring motorcycle operators to wear helmets held constitutional. *S. v. Anderson*, 124.

§ 23. Scope of Protection of Due Process, Vested Rights

Statute barring wrongdoer from certain property rights does recognize a husband's right to lifetime possession of entirety property and thereby avoids constitutional issue of forfeiture of a vested property right upon conviction of crime. *Porth v. Porth*, 485.

CONSTITUTIONAL LAW—Continued

§ 24. Requisites of Due Process

Court possessed no authority to determine controverted issues where jury trial was not waived. *Sullivan v. Johnson*, 581.

§ 30. Due Process in Trial in General

Fact that accused is in prison serving time for another offense does not mitigate against his right to speedy trial. *S. v. Johnson*, 420.

Factors considered by court in determining whether defendant has been denied a speedy trial. *Ibid.*

Defendant serving prison sentence was not denied right to speedy trial by delay of four years and four months where he made no request to be brought to trial and made no showing of prejudice caused by delay. *Ibid.*

Defendant is not prejudiced by possibility that had trial occurred earlier trial judge might have allowed sentence for this offense to run concurrently with previous sentences. *Ibid.*

An accused waives his right to a speedy trial unless he demands it. *Ibid.*

§ 31. Right of Confrontation

Trial court's refusal to allow defendant to inquire into identity of informer is rendered moot. *S. v. Moore*, 286.

The propriety of disclosing the identity of an informer must depend upon the circumstances of the case and at what stage of the proceedings the request is made. *Ibid.*

In joint trial of three defendants, defendant's Sixth Amendment right to confront witnesses against him is violated by admission into evidence of portions of nontestifying co-defendant's extrajudicial confession which implicated defendant, but is not violated by extrajudicial confession of another co-defendant who testified at the trial. *S. v. Justice*, 363.

Admission of confession implicating defendants made by persons not on trial is held invited by defendants' cross-examination of officers to whom confessions were made. *Ibid.*

§ 32. Right to Counsel

Indigent defendant charged with a misdemeanor does not have an absolute right to court-appointed counsel. *S. v. White*, 31.

The fact that defense counsel was not present when robbery victim identified defendant from photographs does not render inadmissible in-court identification of defendant from the photographs. *S. v. Stamey*, 200.

An accused has a right to counsel at a police identification lineup. *Ibid; S. v. Hunsucker*, 281.

Victim's in-court identification of defendant is admissible in this robbery prosecution. *S. v. Hunsucker*, 281.

§ 36. Cruel and Unusual Punishment

Punishment within the maximum fixed by statute cannot be considered cruel and unusual in the constitutional sense. *S. v. Kelly*, 72; *S. v. Mitchell*, 70; *S. v. Mosteller*, 67; *S. v. Jones*, 69.

CONTRACTS

§ 21. Performance and Breach

Anticipatory breach of contract defined. *Cook v. Lawson*, 104.

CONTRACTS—Continued

§ 26. Competency and Relevancy of Evidence

In action on written contract, court properly excluded evidence of conversation between the parties prior to the date of the written contract and correctly admitted evidence of changes in the contract made after that date. *Holloway v. Medlin*, 89.

§ 27. Sufficiency of Evidence and Nonsuit

In action for breach of contract to purchase land and divide profits upon its resale, evidence of a statement by defendant that he had bought the land and that plaintiff had no more to do with it is held sufficient to show anticipatory breach of contract by defendant. *Cook v. Lawson*, 104.

§ 28. Instructions

Instruction that jury could answer the issue of plaintiff's damages in breach of contract action "in such amount as you feel they are entitled to under the evidence" held prejudicial error. *Holloway v. Medlin*, 89.

§ 29. Measure of Damages for Breach

Measure of damages for breach of contract to purchase and sell property and divide the profits is one-half of the profits which would have been made on resale of the property in exercise of reasonable care and judgment. *Cook v. Lawson*, 104.

COURTS

§ 7. Appeals from Inferior Courts to Superior Court

Superior court has no jurisdiction to hear and determine appeal from district court where notice of appeal is given on or after 1 October 1967. *Wiggins v. Ins. Co.*, 476.

Evidence that words "Papers sent up" and "Appeal Bond $200" were written on back of warrant is insufficient to support finding that defendant appealed from district court to superior court. *S. v. White*, 443.

CRIME AGAINST NATURE

§ 1. Elements of the Offense

Elements of crime against nature. *S. v. Chance*, 459.

G.S. 14-177 condemns crimes against nature whether committed against adults or children; G.S. 14-202.1 condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of G.S. 14-177. *Ibid.*

§ 2. Prosecutions

Failure of court to instruct jury as to attempt to commit crime against nature is not error where all of the State's evidence tended to show the completed crime against nature and no evidence of the State or defendant shows an attempted act falling short of the completed offense. *S. v. Chance*, 459.

Whether crime of taking indecent liberties with children in violation of G.S. 14-202.1 is a lesser included offense of crime against nature is not necessary to decision in this case. *Ibid.*

CRIMINAL LAW

§ 1. Nature and Elements of Crime in General

The Legislature has inherent power to define crime. *S. v. Anderson*, 124.

§ 3. Attempts

An attempt to commit a crime is an overt act in partial execution of the crime which falls short of the actual commission but which goes beyond mere preparation to commit it. *S. v. Chance*, 459.

§ 9. Principals in the First or Second Degree; Aiders and Abettors

Aider and abettor who is present at the crime scene is guilty as a principal. *S. v. Kirby*, 43.

A person aids or abets in the commission of a crime when he shares in the criminal intent of the actual perpetrator, and renders assistance or encouragement to him in the perpetration of the crime. *S. v. Beasley*, 323.

Evidence sufficient to show defendant's guilt as aider and abettor in the offense of maiming a privy member. *Ibid.*

§ 15. Venue.

Motion for change of the venire properly denied. *S. v. Ray*, 470.

§ 18. Jurisdiction on Appeals to Superior Court

Defendant has statutory right to appeal from district court to superior court in prosecution for nonsupport of his illegitimate child upon adverse finding establishing his paternity of the child, notwithstanding the verdict found him not guilty of the offense. *S. v. Coffey*, 133.

Evidence that words "Papers sent up" and "Appeal Bond $200" were written on back of warrant is insufficient to show defendant appealed from district court to superior court. *S. v. White*, 443.

§ 23. Plea of Guilty

The fact that trial court accepted plea of guilty entered by defendant's attorney without inquiring of defendant personally as to the voluntariness of the plea is not error. *S. v. Miller*, 227.

§ 34. Evidence of Guilt of Other Offenses

Testimony by prosecutrix that defendant had committed similar assaults upon her in the past is competent. *S. v. Spain*, 266.

§ 40. Evidence and Record at Former Trial on Proceeding

Unverified copy of commitment issued under seal and signature of clerk of Superior Court is admissible to show lawfulness of defendant's confinement. *S. v. Cooper*, 308.

§ 42. Articles Connected With the Crime

Trial court properly allowed witness to identify carton of cigarettes as crime-connected article in defendant's possession on day of the offense. *S. v. Ray*, 470.

§ 66. Evidence of Identity by Sight

In these prosecutions the in-court identifications of defendants are not rendered incompetent on ground that defendants were previously submitted to the view of the witnesses in the absence of counsel. *S. v. Stamey*, 200; *S. v. Hunsucker*, 281.

Where accused is not afforded counsel at police lineup, testimony of

CRIMINAL LAW—Continued

in-court identification of accused is incompetent unless such identification had an origin independent of the illegal out-of-court confrontation. *S. v. Stamey*, 200.

The fact that defense counsel was not present when robbery victim identified defendant from photographs does not render inadmissible in-court identification of defendant from the photographs. *Ibid.*

§ 71. "Shorthand" Statement of Fact

Testimony is admissible as a shorthand statement of fact. *S. v. Clinton*, 571.

§ 75. Voluntariness of Confession; Admissibility in General

Miranda v. Arizona is not applicable to statements made by defendant in a law officer's presence while receiving hospital treatment. *S. v. White*, 31.

A general objection is sufficient to challenge the admissibility of a confession. *S. v. Freeman*, 50.

A confession made prior to the decision of *Miranda v. Arizona* is admissible in trial which occurred after date of that decision where the police officers complied with constitutional standards applicable at the time of the confession. *S. v. Johnson*, 420.

A confession may be unlawfully coerced without the use of physical force. *S. v. Justice*, 363.

Incriminating statements made by defendants following their unlawful arrest are competent upon a finding that the statements were freely and voluntarily made. *S. v. Moore*, 286.

Failure of officers to warn defendant that anything he said could be used against him in a court of law renders inadmissible defendant's incriminating statement to officers. *S. v. Roper*, 94.

Statement by officer that he could not promise defendant anything but that defendant could help himself "in the eyes of the court" if he returned the stolen property is held to render involuntary defendant's subsequent confession. *Ibid.*

§ 76. Determination and Effect of Admissibility of Confession

Whether defendant did or did not make a confession attributed to him is a question of fact to be determined by the jury from the evidence admitted in its presence. *S. v. Justice*, 363.

The court erred in admitting, over objection, defendant's confession where a voir dire hearing was held but the court made no findings of fact as to whether defendant's confession was understandingly and voluntarily made. *S. v. Freeman*, 50.

Defendant's confession is not rendered involuntary by fact it was made after police officers brought all five suspects together and elicited statements incriminating defendant from two suspects who had already separately confessed to the officers. *S. v. Justice*, 363.

At joint trial of three defendants, defendant's Sixth Amendment right to confront witnesses against him is violated by admission into evidence of portions of nontestifying co-defendant's extrajudicial confession incriminating defendant, but is not violated by admission of confession of another co-defendant who testified at the trial. *Ibid.*

§ 80. Books, Records and Private Writings

Physician may testify as to contents of medical records in his office where

CRIMINAL LAW—Continued

it is shown the records were kept by his nurse in the regular course of business. *S. v. Snyder*, 114.

§ 83. Competency of Husband or Wife to Testify for or Against Spouse

Child's mother is a competent witness against her husband to testify as to husband's assault upon the child. *S. v. Spain*, 266.

§ 84. Evidence Obtained by Unlawful Means

Where defendant interposes a general or specific objection to the admission of evidence obtained by a search and seizure, the trial judge must determine the legality of the search by a preliminary inquiry in the absence of the jury. *S. v. Fowler*, 17.

Evidence seized by search without warrant incident to lawful arrest is admissible. *S. v. Furr*, 300.

Where lineup identification violated defendant's right to an attorney, in-court identification of defendant is admissible only when State shows that in-court identification had origin independent of lineup identification. *S. v. Stamey*, 200.

In prosecutions for kidnapping and robbery, defendant's contention that trial court erred in failing to exclude a shirt belonging to defendant on the ground that the shirt was illegally seized *is held* without merit. *S. v. Ray*, 470.

§ 86. Credibility of Defendant and Parties Interested

Continued cross-examination of defendant as to prior convictions after defendant had denied such convictions is held proper. *S. v. Jeffries*, 218.

When defendant denies impeaching questions as to his prior criminal record, solicitor is not precluded from rephrasing questions to include more specific details of the criminal record. *S. v. Weaver*, 439.

Defendant was not prejudiced in this case by solicitor's cross-examination as to defendant's conviction for a felonious assault which had been subsequently set aside. *Ibid.*

§ 88. Cross-examination

Trial court's action in putting prosecuting witness on stand for a few qualifying questions in order to allow a physician to testify and to leave as soon as possible was within trial court's discretion and did not deny defendant right of cross-examination. *S. v. Snyder*, 114.

After a witness has been cross-examined and re-examined, it is in the discretion of the court to permit or refuse a second cross-examination. *S. v. Hardee*, 426.

§ 89. Credibility of Witness; Corroboration and Impeachment

Evidence that defendants were identified from SBI photographs is admissible as corroborative evidence. *S. v. Stamey*, 200.

Court properly admitted testimony of deputy sheriff as to what investigating officer told him occurred at crime scene for purpose of corroborating officer's testimony. *S. v. Crawford*, 337.

Slight variances in corroborating testimony do not render such testimony inadmissible. *Ibid.*

§ 91. Continuance of Trial

In prosecution for driving under the influence, defendant was not entitled under G.S. 1-180.1 to have his case continued by fact that on preceding day trial judge, in presence of all jurors, discharged a jury which had re-

CRIMINAL LAW—Continued

turned a verdict of not guilty in a driving under the influence case. *S. v. Hiatt*, 584.

§ 93. Order of Proof

Trial court's action in putting prosecuting witness on stand for a few qualifying questions in order to allow a physician to testify and to leave as soon as possible was within trial court's discretion and did not deny defendant right of cross-examination. *S. v. Snyder*, 114.

§ 95. Admission of Evidence Competent for Restricted Purpose

General admission of evidence which is competent for a restricted purpose is not error where defendant interposes only a general objection. *S. v. Spain*, 266.

At joint trial of three defendants, defendant's Sixth Amendment right to confront witnesses against him is violated by admission into evidence of portions of nontestifying co-defendant's extrajudicial confession incriminating defendant, but is not violated by admission of confession of another co-defendant who testified at the trial. *S. v. Justice*, 363.

Admission of confession implicating defendants made by persons not on trial are held invited by defendants' cross-examination of officers to whom confessions were made. *Ibid.*

§ 97. Introduction of Additional Evidence

After a witness has been cross-examined and re-examined, it is in the discretion of the court to permit or refuse a second cross-examination. *S. v. Hardee*, 426.

§ 98. Custody of Defendant or Witness

In prosecution for defendant's wilful refusal to support his illegitimate child, trial court's action in placing two of defendant's witnesses in custody after they had testified to having sexual relations with the 15-year-old mother did not intimidate other witnesses nor was it an expression of opinion in violation of G.S. 1-180. *S. v. Snyder*, 114.

§ 99. Expression of Opinion on Evidence by Court During Trial

Questions propounded by trial judge held to be for clarification and not expression of opinion. *S. v. Hoyle*, 109.

§ 101. Custody and Conduct of Jury and Misconduct Affecting Jury

G.S. 1-180.1 does not require trial judge to discharge jury from further service in absence of other jurors summoned for the session. *S. v. Hiatt*, 584.

§ 102. Argument and Conduct of Counsel or Solicitor

Remark of solicitor that "He hasn't put the defendant up" in objecting to admission of evidence held not prejudicial. *S. v. Hoyle*, 109.

§ 103. Function of Court and Jury in General

Judge determines the admissibility of evidence while jury determines its weight and credibility. *S. v. Perry*, 356.

§ 104. Consideration of Evidence on Motion to Nonsuit

Consideration of evidence on motion for nonsuit. *S. v. Beasley*, 323.

CRIMINAL LAW—Continued

§ 105. Necessity for and Functions of Motion to Nonsuit

Nonsuit is properly denied where evidence is sufficient to show lesser degree of the crime charged. *S. v. Beasley*, 323.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

Unsupported testimony of an accomplice is sufficient to support conviction. *S. v. Kirby*, 43.

Test of the sufficiency of circumstantial evidence to withstand motion for nonsuit is the same as the test applicable to direct evidence. *S. v. Godwin*, 55.

Sufficiency of direct or circumstantial evidence to overrule nonsuit. *S. v. Baker*, 180.

Sufficiency of evidence on motion for nonsuit. *S. v. Williams*, 463.

§ 109. Directed Verdict and Peremptory Instructions

Consideration of evidence on motion for directed verdict. *S. v. Thompson*, 193.

§ 113. Statement of Evidence and Application of Law Thereto

Trial court did not err in failing to define "reasonable doubt" and "presumption of innocence". *S. v. Snyder*, 114.

Court's statement in recapitulation of defendant's evidence that defendant and deceased "went together" instead of using some other words to convey how the defendant and deceased engaged in a fight in which deceased was killed held proper. *S. v. Hoyle*, 109.

Defendant must specially request the court to instruct the jury that certain evidence was admitted solely for corroboration. *S. v. Spain*, 266.

Trial court properly instructed jury on weight and credibility of the evidence. *S. v. Perry*, 356.

In instructing the jury, recapitulation of all the evidence is not required. *S. v. Hardee*, 426.

§ 115. Instructions on Lesser Degrees of Crime and Possible Verdicts

Trial court is not required to charge on lesser included offense where there is no evidence to support conviction of the offense. *S. v. Stevenson*, 46.

When court must submit lesser degrees of crime charged. *S. v. Lilley*, 276; *S. v. Chance*, 459.

§ 117. Credibility of Witness

Instruction that it is dangerous to convict upon unsupported testimony of an accomplice is held without error. *S. v. Kirby*, 43.

§ 124. Sufficiency and Effect of Verdict in General

Jury's original verdict of assault with a deadly weapon with intent to kill is sensible and responsive in light of the indictment and instructions, and action of the trial court in failing to accept the verdict is erroneous. *S. v. Burris*, 35.

Verdict need not be consistent. *S. v. Jones*, 455.

Verdict of guilty as to one count of indictment, but not to all, amounts to an acquittal on the counts not referred to. *Ibid.*

§ 126. Unanimity and Acceptance of Verdict

Where jury's verdict of guilty of assault with a deadly weapon with in-

CRIMINAL LAW—Continued

tent to kill is complete and responsive to the indictment and to the instructions, it is error for the court to refuse to accept the verdict. *S. v. Burris*, 35.

§ 129. New Trial in Trial Court for Error of Law

When criminal judgment becomes final, Superior Court may not review the judgment except upon defendant's petition for habeas corpus or post-conviction review. *Williams v. State*, 212.

§ 131. New Trial for Newly Discovered Evidence

Where case is on appeal, motion for new trial on ground of newly discovered evidence may be made at the next succeeding term of superior court. *S. v. Thomas*, 223.

§ 134. Form and Requisites of Judgment

There is a presumption that the judgment of a court is valid and just. *S. v. Waddell*, 58.

§ 138. Severity of Sentence and Determination Thereof.

Punishment for a general misdemeanor is two years. *S. v. Burris*, 35.

Upon appeal from conviction in an inferior court, the superior court may impose a longer or shorter sentence than that imposed by the inferior court. *In re Wilson*, 136.

Defendant is not entitled as a matter of right to credit for the time spent in jail awaiting trial because of inability to make bail. *Ibid.*

Trial court may properly consider defendant's past criminal record in passing judgment. *S. v. Jones*, 69.

Sentence within the statutory maximum and within the authority of the trial court will not be disturbed on appeal. *S. v. Mosteller*, 67.

Active prison sentence will not be set aside on the ground that active sentence for the crime is contrary to prevailing custom. *S. v. Grant*, 586.

§ 140. Concurrent and Cumulative Sentences

Consecutive sentences for three charges of forgery are not cruel and unusual where each sentence was within statutory maximum. *S. v. Mosteller*, 67.

§ 143. Revocation or Suspension of Judgment or Sentence

In a proceeding to revoke defendant's judgment of probation, (1) it is error for trial court to fail to make specific findings as to what condition of probation defendant had violated, (2) defendant need not sign the service of notice of intention to pray revocation, (3) where probation officer is subject to cross-examination, his verified report may be introduced into evidence. *S. v. Langley*, 189.

§ 144. Modification and Correction of Judgment in Trial Court

When criminal judgment becomes final, superior court may not review the judgment except upon defendant's petition for habeas corpus or post-conviction review. *Williams v. State*, 212.

§ 154. Case on Appeal

Rules relating to preparation and filing of record on appeal in the Court of Appeals. *S. v. Waddell*, 58.

Criminal appeal is subject to dismissal either ex mero motu or upon motion of Attorney General where defendant fails to comply with rules relating

to preparation of reporter's transcript and to exceptions and assignments of error. *S. v. Wilson*, 225.

§ 155. Docketing of Transcript of Record

Authority of trial court to extend time for docketing record on appeal cannot be accomplished by order allowing appellant additional time to serve appellee with case on appeal. *S. v. Farrell*, 196.

Appeal will be dismissed where record on appeal is not docketed within time prescribed by the Rules. *Ibid; S. v. Justice*, 363.

§ 156. Certiorari

Defendant's purported record in petition for writ of certiorari does not become the record on appeal upon the allowance of the writ, and where record is fragmentary, appeal is dismissed. *S. v. Waddell*, 58.

Certiorari to review post-conviction judgment is dismissed as improvidently granted where it appears that petitioner had previously had full post-conviction review. *Glover v. State*, 210.

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted

The charge is presumed correct when it is not included in the record on appeal. *S. v. Jones*, 455.

§ 159. Form and Requisites of Transcript

Rules relating to preparation and filing of record on appeal in the Court of Appeals. *S. v. Waddell*, 58.

§ 161. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General

An appeal is itself an exception to the judgment and to any matters appearing on the face of the record proper. *S. v. Ruffin*, 307; *S. v. Sutton*, 221; *S. v. Thompson*, 231; *S. v. Sutton*, 230.

Exception to judgment presents the face of the record proper for review. *S. v. Perry*, 356.

When an objection is made upon certain grounds stated, only those stated can be made the subject of review, except where the evidence is excluded by statute. *S. v. Furr*, 300.

§ 162. Objections, Exceptions and Assignments of Error to Evidence

Assignment of error to admission of testimony which presents questions not embraced in an exception will not be considered on appeal. *S. v. Furr*, 300.

§ 163. Exceptions and Assignments of Error to Charge

Assignment of error to the charge is ineffectual where defendant excepted to no portion of the charge. *S. v. White*, 31.

Misstatement of evidence in the charge must be called to trial court's attention to be reviewable on appeal. *S. v. Hoyle*, 109.

Objection to the manner in which judge recapitulated evidence in the charge must be called to his attention in apt time to afford correction. *S. v. Weaver*, 439.

§ 166. The Brief

Criminal appeal is subject to dismissal where defendant's brief does not contain proper presentation of exceptions and assignments of error and authorities relied upon. *S. v. Hogsed*, 480.

CRIMINAL LAW—Continued

§ 168. Harmless and Prejudicial Error in Instructions

Trial court's sustaining of objection to portions of solicitor's argument is tantamount to an instruction to jury to disregard the argument, and court need not make further instructions thereon in the charge. *S. v. Hunsucker*, 281.

§ 170. Harmless and Prejudicial Error in Remarks of Court, Argument of Solicitor and Incidents During Trial

Assignments of error to remarks by solicitor in jury argument is overruled where they were invited by remarks of defendant's counsel in addressing the jury. *S. v. Williams*, 463.

Remark of solicitor that "He hasn't put the defendant up" in objecting to admission of evidence held not prejudicial. *S. v. Hoyle*, 109.

Remark of trial court, while disapproved, held not to constitute prejudicial error. *Ibid.*

§ 171. Error Relating to One Count

Where sentences in eleven consolidated cases are to run concurrently with a valid sentence in another case, error in two of the consolidated sentences is not prejudicial to defendant. *S. v. Perry*, 356.

§ 176. Review of Judgments on Motions to Nonsuit

Appellate review of the trial court's failure to grant motion for nonsuit. *S. v. Clinton*, 571.

§ 181. Postconviction Hearing

Before a new trial may be granted as a result of a post-conviction review of a criminal case, the record must clearly show defendant's consent to be tried again. *Williams v. State*, 212.

Petitioner for post-conviction review impliedly consents to a new trial where he alleges he was not represented by counsel at his trial. *Ibid.*

Where defendant is convicted of two crimes in a consolidated trial and seeks post-conviction review of one of the convictions, court acquires no jurisdiction thereby to review and set aside the conviction not attacked. *Ibid.*

DAMAGES

§ 9. Mitigation of Damages

The doctrine of mitigation of damages is not a cause of action and therefore may not be pleaded as such. *Bank v. Easton*, 414.

§ 11. Punitive Damages

Punitive damages are not recoverable against the personal representative of deceased wrongdoer, however aggravated the circumstances. *McAdams v. Blue*, 169.

§ 12. Necessity for and Sufficiency of Pleading of Damages

Allegations asserting a cause of action for breach of contract will not support award of punitive damages, and such allegations are properly stricken on motion. *Bank v. Easton*, 414.

§ 16. Instruction on Measure of Damages

Instruction that jury could answer the issue of plaintiffs' damages in breach of contract action "in such amount as you feel they are entitled to under the evidence" held prejudicial error. *Holloway v. Medlin*, 89.

Court's charge as to use of Mortuary Tables held proper. *Mattox v. Huneycutt*, 63.

DEATH

§ 7. Damages

Funeral expenses do not constitute an element of damages in a wrongful death action. *Crawford v. Hudson*, 555.

DEEDS

§ 12. Estates Created by Construction of the Instrument in General

A conveyance of realty to a trustee to hold the land "forever" is an unlawful restraint upon alienation, and grantee gets title in fee simple absolute. *Trust Co. v. Construction Co.*, 157.

It is the established policy of our law to prevent undue restraint upon or suspension of the right of alienation. *Porth v. Porth*, 485.

The word "hold" as used in the habendum clause of a deed is never construed to place a restraint on alienation. *Ibid.*

DESCENT AND DISTRIBUTION

§ 1. Nature and Titles by Descent in General

There is no natural or inherent right to succeed to intestate property. *Vinson v. Chappell*, 348.

§ 6. Wrongful Act Causing Death as Precluding Inheritance

Statute barring property rights upon conviction of a crime must be construed in the light of long established policy that no man shall be permitted to take advantage of his own wrong. *Porth v. Porth*, 485.

Statute providing that husband-slayer of his wife shall hold all the entirety property during his life, subject to pass on his death to the estate of the wife, is held not to bar alienation of the fee simple title to the property upon joint conveyance of the slayer-husband and the heirs of decedent. *Ibid.*

In statute providing the husband-slayer of his wife shall hold entirety property during his life, subject to pass upon his death to wife's estate, the words "pass upon his death" refer exclusively to possession and enjoyment of the property and not to a vesting of interest. *Ibid.*

The words "the estate of the wife" as used in G.S. 31A-5 mean the estate of the murdered wife as the same comes into existence at her death. *Ibid.*

Rights of slayer-husband of wife in joint bank account. *Ibid.*

DISORDERLY CONDUCT AND PUBLIC DRUNKENNESS

§ 2. Prosecutions

Upon conviction of public drunkenness, sentence which committed defendant to custody of Commissioner of Correction for an indeterminate period from 30 days to six months is lawful. *S. v. Sutton*, 221.

DIVORCE AND ALIMONY

§ 8. Abandonment

Evidence that defendant was ordered by court to move out of home because of continued cruelty toward his wife is sufficient to show his constructive abandonment of the wife. *Somerset v. Somerset*, 473.

§ 20. Decree of Divorce as Affecting Right to Alimony

The husband is not responsible for his wife's attorney fees for services incurred after the divorce. *Zande v. Zande*, 149.

DIVORCE AND ALIMONY—Continued

§ 22. Jurisdiction and Procedure in Action for Custody and Support

Where no final judgment has been entered in husband's action for absolute divorce instituted after 1 October 1967, petition by wife to have custody of children determined in habeas corpus proceeding is subject to dismissal. *In re Custody of King*, 466.

Judgment determining custody and support of minor children may be modified upon change of conditions. *Zande v. Zande*, 149.

§ 23. Support of Children of the Marriage

Award of $1000 for support of children is erroneous where there is no competent evidence before court of reasonable needs of the children. *In re McCraw Children*, 390.

Father may be ordered to pay attorney fees incurred for services rendered on behalf of the minor children of the marriage. *Zande v. Zande*, 149.

Father is not entitled to an accounting from the mother for support money awarded for the children. *Ibid.*

Where custody of the children has been taken from the father and placed in another, the father is not entitled to direct the higher education of the child. *Ibid.*

§ 24. Custody of Children of the Marriage

Establishment of adultery does not of itself render the guilty party unfit to have custody of minor children. *In re Custody of McCraw Children*, 390.

In custody proceeding, failure of court to find petitioner "abandoned" respondent rather than merely finding "the parents separated" is not error. *Ibid.*

EASEMENTS

§ 3. Creation of Easement by Implication or Necessity

Easement by implication upon severance of title. *Dorman v. Ranch*, 559.

An easement in a roadway which is appurtenant to granted land passes by each conveyance to subsequent grantees thereof. *Ibid.*

§ 6. Actions to Establish Easements

Complaint alleges sufficient facts to show creation of easement by implication in a roadway leading to plaintiff's land. *Dorman v. Ranch*, 559.

ELECTRICITY

§ 2. Control and Regulation of Service to Customers

Where building is located outside of a municipality and initially required electric services after 20 April 1965, and building is not located wholly within 300 feet of the lines of any electric supplier, and is not located partially within 300 feet of the lines of two or more electric suppliers, G.S. 62-110.2(b)(5) gives the building owner the right to choose its electric supplier, and Utilities Commission properly declined to consider whether owner's choice constituted unnecessary and wasteful duplication of facilities. *Utilities Comm. v. Electric Membership Corp.*, 309; *Utilities Comm. v. Electric Membership Corp.*, 318.

EMINENT DOMAIN

§ 6. Evidence of Value

Landowner can be cross-examined as to price paid by him for property subject to highway condemnation. *Highway Comm. v. Moore*, 207.

EMINENT DOMAIN—Continued

Expert witness who testifies as to value of condemned land may be cross-examined as to other property values for purpose of testing witness' knowledge of values and for purpose of impeachment. *Redevelopment Comm. v. Stewart*, 271.

Evidence of apprised value of the property at a time prior to the taking held admissible in this condemnation proceeding. *Ibid.*

§ 7. Proceeding to Take Land and Assess Compensation, Generally

The fact that landowner was not given statutory ten days notice by the Highway Commission in its action for condemnation of land does not deprive trial court of jurisdiction to hear the matter. *Highway Comm. v. Stokes*, 541.

Where counsel for landowner failed to appear in condemnation proceedings which was calendared for trial, the right to jury trial was waived. *Ibid.*

EQUITY

§ 2. Laches

When plaintiff's action is not barred by the statute of limitations, equity will not bar relief on the ground of laches except upon special facts. *Howell v. Alexander*, 371.

ESCAPE

§ 1. Elements of, and Prosecutions for, the Offense

Sentence of nine months for felonious escape is not cruel and unusual punishment. *S. v. Jones*, 69.

Trial court properly considered defendant's past criminal record in passing judgment upon defendant's plea of guilty to a felonious escape. *Ibid.*

Unverified copy of commitment issued under seal and signature of clerk of superior court is admissible to show lawfulness of defendant's confinement. *S. v. Cooper*, 308.

ESTATES

§ 3. Nature and Incidents of Life Estates and Remainders in General

A remainderman may have relief in equity when the life tenant is claiming a right to the property adverse to that of the remainderman. *Howell v. Alexander*, 371.

In statute providing that husband-slayer of his wife shall hold all of the entirety property during his life subject to pass upon his death to the estate of his wife, the words "pass upon his death" refer exclusively to possession and enjoyment of the property and not to vesting in interest. *Porth v. Porth*, 485.

§ 5. Actions for Waste

Life tenant is not liable for waste in cutting and selling timber if proceeds are used for making necessary repairs to buildings already on the premises. *Temple v. Carter*, 515.

Where land in which life estate is created was used for tree farming from which salable timber was periodically cut and sold, life tenant may continue cultivation and sale of the trees for his own profit. *Ibid.*

Life tenant has not shown justification for cutting timber beyond amount needed for repairs to dwellings on the land where it does not appear that testator who created the life estate conducted a tree farming operation on the property. *Ibid.*

EVIDENCE

§ 4. Presumptions in General

Evidence that a letter was properly mailed establishes a rebuttable presumption that it was received by the addressee in the usual course of the mail. *Daves v. Ins. Co.*, 82.

§ 11. Transactions or Communication With Decedent

In action to recover money allegedly loaned by plaintiff to defendant's intestate, testimony by plaintiff is held violative of the Dead Man's Statute. *Brown v. Green*, 506.

Plaintiff is not precluded by G.S. 8-51 from testifying as to her own act based upon independent knowledge not derived from personal transactions or communications with deceased. *Ibid.*

§ 18. Communications Between Attorney and Client

Trial court properly required attorney to testify as to his preparation of a deed of trust for plaintiff and defendant's intestate where he was acting as attorney for both plaintiff and deceased and communications were not regarded as confidential. *Brown v. Green*, 506.

§ 23. Competency of Allegations in Pleadings

Parol evidence rule renders inadmissible verbal agreement which changes the terms of a written contract made before or at the time of the execution of the contract, but has no application to written or parol agreement made subsequent to the written instrument. *Holloway v. Medlin*, 89.

§ 34. Admissions Against Interest by Parties to the Action

Purported family agreement is not competent as admission against interest where defendant administratrix signed the writing as an individual and not in her representative capacity. *Brown v. Green*, 506.

EXECUTORS AND ADMINISTRATORS

§ 5. Attack on Appointment

Motion for removal of administrator must be presented by direct proceedings before clerk of superior court. *Porth v. Porth*, 485.

§ 24. Right of Action for Personal Services Rendered Decedent

Evidence in action to recover for personal services rendered to decedent held sufficient to be submitted to jury on issue of quantum meruit. *McSwain v. Lane*, 22.

Allegations that personal services rendered decedent were under an express contract to reimburse plaintiff therefor does not preclude recovery on quantum meruit. *Ibid.*

§ 33. Distribution of Estate Under Family Agreements

Family settlements for distribution of estate contrary to the terms of a will are enforced where the rights of creditors are not impaired and there is no fraud. *Reese v. Carson*, 99.

FORGERY

§ 2. Prosecution and Punishment

Three consecutive sentences of six to ten years each imposed upon defendant's plea of guilty to three charges of uttering a forged check are within the statutory maximum and are not cruel and unusual punishment. *S. v. Mosteller*, 67.

FRAUDS, STATUTE OF

§ 6. Contracts Affecting Realty.

Oral contract to divide profits from purchase and sale of real estate is not within the statute of frauds. *Cook v. Lawson*, 104.

GRAND JURY

§ 3. Challenge to Composition

Defendant's motion to quash indictments on the ground that Negroes were systematically excluded from grand jury solely by reason of their race was properly denied. *S. v. Ray*, 470.

HABEAS CORPUS

§ 3. Determination of Right to Custody of Children

Where no final judgment has been entered in husband's action for divorce instituted after 1 October 1967, petition by the wife to have custody of the children determined in a separate habeas corpus proceeding is subject to dismissal. *In re Custody of King*, 466.

Order in habeas corpus hearing leaving custody of minor children in foster parents and refusing to award custody to their natural mother is held supported by evidence. *In re Custody of Burchette*, 575.

§ 4. Review

No appeal lies from a habeas corpus judgment, review being available only by petition for a writ of certiorari. *In re Wilson*, 136.

HOMICIDE

§ 6. Manslaughter

Involuntary manslaughter defined. *S. v. Lilley*, 276.

§ 15. Relevancy and Competency of Evidence in General

Cause of death may be established in homicide prosecution without use of expert medical testimony. *S. v. Thompson*, 193.

§ 21. Sufficiency of Evidence and Nonsuit

Evidence in homicide prosecution held sufficient to show causal relation between the shooting and the death. *S. v. Thompson*, 193.

Motion for nonsuit in manslaughter prosecution properly denied where State's evidence shows defendant admitted intentionally shooting deceased. *S. v. Hefner*, 359.

Evidence of intoxication, speeding, and intentional failure to stop for a stop sign held sufficient to show culpable negligence in manslaughter prosecution. *S. v. Williams*, 463.

In prosecution for manslaughter of deceased with a knife, nonsuit is properly denied where defendant's exculpatory statement showed he and deceased were arguing and that he was holding the knife in such a manner as to indicate intentional use thereof. *S. v. Lane*, 353.

§ 23. Instructions in General

In this prosecution for a homicide which occurred in the home in which defendant was staying, the court did not express an opinion on the evidence in instructing the jury as to their duty to determine the status of deceased in the home at the time of his death. *S. v. Hefner*, 359.

HOMICIDE—Continued.

§ 24. Instructions on Presumptions and Burden of Proof

Instruction which assumed that defendant fired the fatal shot is erroneous as expression of opinion by the court. *S. v. Hardee*, 426.

§ 28. Instructions on Defenses.

Court did not err in failing to explain the meaning of the words "was the defendant at a place where he had a right to be" in its instructions relating to self-defense. *S. v. Hoyle*, 109.

Instruction on self-defense which omitted the element of apparent necessity is erroneous. *S. v. Hardee*, 426.

§ 30. Submission of Question of Guilt of Lesser Degree

In homicide prosecution, failure of court to submit issue of involuntary manslaughter held prejudicial error. *S. v. Lilley*, 276.

§ 31. Verdict and Sentence

Imprisonment to a term of three to seven years on a plea of guilty to involuntary manslaughter is constitutional. *S. v. Thomas*, 223.

HOSPITALS

§ 3. Liability of Hospital to Patient

Public hospital maintained primarily as a charitable institution may plead common-law defense of charitable immunity in cause of action arising in April 1964. *Habuda v. Rex Hospital*, 11.

In personal injury action arising in April 1964 against a charitable hospital for damages allegedly incurred when a student nurse gave plaintiff a laxative containing soap, the evidence was insufficient to show hospital's negligence in selection and retention of nurse as would destroy hospital's immunity as a charitable institution; nor was doctrine of res ipsa loquitur applicable in this case. *Ibid.*

Plaintiff failed to show that the hospital was negligent in failing to promulgate rules relating to storage and handling of drugs. *Ibid.*

§ 4. Personal Liability of Nurses to Patient

A nurse has the duty to use her best effort to carry out instructions of the attending physician unless obvious injury would result. *Habuda v. Rex Hospital*, 11.

HUSBAND AND WIFE

§ 15. Nature and Incidents of Estate by Entireties

During the joint life of husband and wife, husband is solely entitled to the use and possession of the entirety property. *Porth v. Porth*, 485.

INDICTMENT AND WARRANT

§ 14. Motions to Quash

Sufficiency of a bill of indictment may be raised only by a motion to quash or motion in arrest of judgment and not by motion for judgment of nonsuit. *S. v. Roper*, 94.

§ 17. Variance Between Averment and Proof

Fatal variance occurs where the warrant charges the operation of a mo-

INDICTMENT AND WARRANT—Continued

tor vehicle while license was revoked on one date and the evidence shows the alleged offense occurred on another date. *S. v. White*, 31.

Variance between allegation and proof as to date of the offense held not fatal in this homicide prosecution. *S. v. Lilley*, 276.

In a prosecution for breaking and entering with intent to steal, fact that indictment alleges intent to steal property of a named corporation while evidence discloses property actually stolen belonged to another is not fatal. *S. v. Crawford*, 337.

There is a fatal variance where indictment charges larceny of money of a named corporation and evidence discloses money was stolen from a vending machine owned by another company and that the money was under control and ownership of the other company. *Ibid.*

INFANTS

§ 9. Hearing and Grounds for Awarding Custody of Minor

The polar star for determining the custody of children is what serves the best interest of the children. *In re Custody of Owenby*, 53.

Establishment of adultery does not of itself render the guilty party unfit to have custody of minor children. *In re McCraw Children*, 390.

In custody proceeding, failure of court to find petitioner "abandoned" respondent rather than merely finding "the parents separated" is not error. *Ibid.*

INJUNCTIONS

§ 2. Inadequacy of Legal Remedy

Injunction will not lie when there is an adequate remedy at law. *Setser v. Development Co.*, 163.

§ 6. Injunction to Enforce Personal Contractual Obligation

Complaint in action to restrain premature termination of a contract is held insufficient in failing to allege facts showing irreparable damage or that defendants are unable to respond in damages. *Setser v. Development Co.*, 163.

§ 12. Issuance, Continuance and Dissolution of Temporary Orders

Injunction sought as a subsidiary remedy in aid of another action may not be granted unless there is probable cause that plaintiff will be able to establish its asserted right at the final hearing. *Cablevision v. Winston-Salem*, 252.

Court erred in restraining Winston-Salem aldermen from granting cable television franchises pending final hearing on plaintiff's action for writ of mandamus directing aldermen to grant franchise to plaintiff. *Ibid.*

INSURANCE

§ 78. Motor Cargo Insurance

Where an insurer pays the insured lessee of a truck under an interstate trip-lease agreement for damage occurring to the cargo during a trip, the insurer becomes subrogated to the rights of the lessee against the lessor under an indemnity provision of the trip-lease agreement. *Freight Lines v. Truck Lines*, 1.

INSURANCE—Continued.

§ 128. Waiver of, and Estoppel to Assert, Forfeiture on Fire Policy

Evidence in an action on a fire policy held sufficient to justify the submission of the issue as to whether defendant's insurer waived the policy requirement of written proof of loss and whether defendant was estopped to plead lack of such notice. *Daves v. Ins. Co.*, 82.

§ 129. Cancellation of Fire Policies

Question of whether insured received notice of cancellation mailed by insurance company is for jury. *Daves v. Ins. Co.*, 82.

§ 145. Subrogation as to Property Damage Insurance

Where an insurer pays the insured lessee of a truck under an interstate trip-lease agreement for damage occurring to the cargo during a trip, the insurer becomes subrogated to the rights of the lessee against the lessor under an indemnity provision of the trip-lease agreement. *Freight Lines v. Truck Lines*, 1.

Where an insurance company pays only part of the loss of an insured, the insured must bring an action to recover for the loss in his own name, but the insurer is a proper party to such an action. *Ibid.*

JOINT VENTURES

The terms "joint adventure" and "joint enterprise" are legally distinguishable. *McAdams v. Blue*, 169.

JUDGMENTS

§ 3. Conformity to Verdict and Pleadings

Judgment must be supported by the verdict. *Oil Co. v. Fair*, 175.

§ 25. What Conduct Justifies Relief for Mistake or Excusable Neglect

Defendant's neglect in failing to file answer is not excusable where he delivered the suit papers to an unknown person in his insurer's office and thereafter did nothing further about the case. *Ellison v. White*, 235.

§ 34. Determination of Motion to Set Aside Default Judgment

Review of judgment setting aside default judgment. *Ellison v. White*, 235.

§ 40. Judgments as of Nonsuit

Judgment of involuntary nonsuit for variance between allegations and proof does not preclude plaintiff from instituting a new action. *Henson v. Motor Lines*, 447.

JURY

§ 1. Right to Trial by Jury

Court possessed no authority to determine controverted issues where jury trial was not waived. *Sullivan v .Johnson*, 581.

LARCENY

§ 5. Presumptions and Burden of Proof

Presumption of defendant's guilt arising from his possession of recently stolen property. *S. v. Jones*, 455.

LARCENY—Continued

§ 7. Sufficiency of Evidence and Nonsuit

There is a fatal variance where indictment charges larceny of money of a named corporation and evidence discloses money was taken from a vending machine owned and controlled by another company. *S. v. Crawford*, 337.

§ 9. Verdict

Jury's verdict of not guilty of count of felonious breaking and entering but guilty of the second count of larceny of property of more than $200 value by breaking and entering will not be set aside on ground of inconsistency. *S. v. Jones*, 455.

§ 10. Judgment and Sentence

Sentence of three years imprisonment imposed upon verdict of guilty of larceny of property of more than $200 in value by breaking and entering is proper. *S. v. Jones*, 455.

LIMITATION OF ACTIONS

§ 7. Ignorance of Cause of Action

Purpose of statute allowing plaintiff to designate unknown defendant by a fictitious name is to provide means to toll statute of limitations. *Funeral Home v. Stafford*, 578.

MANDAMUS

§ 2. Ministerial or Discretionary Duty

Mandamus does not lie to compel Board of Aldermen of Winston-Salem to grant plaintiff a cablevision franchise. *Cablevision v. Winston-Salem*, 252.

MASTER AND SERVANT

§ 10. Duration of Employment and Wrongful Discharge

Employment contract which specified compensation at a rate per year but which did not specify the duration of the contract is for an indefinite period, terminable at the will of either party. *Freeman v. Hardee's*, 435.

Employee has the burden to establish duration of a contract. *Ibid.*

§ 85. Nature and Extent of Jurisdiction of Industrial Commission in Workmen's Compensation Action

Determination of jurisdiction of Industrial Commission. *Crawford v. Board of Education*, 343.

§ 89. Common-Law Right of Action Against Third Person Tortfeasor

Superior court had no authority to make finding based on evidence introduced for first time at appellate hearing that dependents of deceased under Compensation Act are not the same as distributees of deceased and to conclude that provisions of Wrongful Death Act control over provisions of Compensation Act for distribution of wrongful death recovery. *Byers v. Highway Comm.*, 139.

§ 93. Prosecution of Claim and Proceedings Before Commissioner

Procedure of Industrial Commission need not necessarily conform to court procedure. *Crawford v. Board of Education*, 343.

MASTER AND SERVANT—Continued

§ 96. Appeal and Review in Court of Appeals

Appeal from Industrial Commission after 1 October 1967 goes directly to Court of Appeals. *Byers v. Highway Comm.*, 139.

Appellate court has jurisdiction to review only for errors of law. *Ibid.*

If findings by Industrial Commission are insufficient, appellate court may remand the cause to the Commissioner for proper findings, but not for taking additional evidence. *Ibid.*

MAYHEM

§ 1. Nature and Elements of the Crime

Elements of crime of maliciously maiming a privy member as condemned by G.S. 14-28. *S. v. Beasley*, 323.

Offense of maiming a privy member condemned by G.S. 14-29 is a lesser included offense of G.S. 14-28. *Ibid.*

§ 2. Prosecution and Punishment

Evidence held sufficient to be submitted to jury on issue of son's guilt of maiming a privy member without malice aforethought and the father's guilt as an aider and abettor in the offense. *S. v. Beasley*, 323.

Intent to maim or disfigure a privy member is prima facie to be inferred from an act which does in fact disfigure. *Ibid.*

MUNICIPAL CORPORATIONS

§ 5. Distinction Between Governmental and Private Powers

Governmental v. proprietary functions. *Stone v. Fayetteville*, 261.

§ 8. Validity, Enforcement and Attack on Ordinances Generally

Construction of municipal ordinance defining a criminal offense. *S. v. Dorsett*, 331.

§ 12. Liability of Municipal Corporations for Torts

Municipal corporation has tort liability only for injuries caused while exercising governmental functions. *Stone v. Fayetteville*, 261.

§ 20. Injuries in Connection With Water Supply; Drains and Culverts

Municipal corporation is immune from civil liability for death resulting from operation and maintenance of a public storm drainage system. *S. v. Fayetteville*, 261.

§ 23. Municipal Franchises

Board of Aldermen of Winston-Salem has absolute discretion in granting or refusing to grant cablevision franchise. *Cablevision v. Winston-Salem*, 252.

§ 29. Nature and Extent of Municipal Police Power Generally

City's police power to control nuisances extends to the reasonable prevention of disturbing noise. *S. v. Dorsett*, 331.

§ 37. Regulations Relating to Health

Municipality's anti-noise ordinance is not unconstitutional for vagueness. *S. v. Dorsett*, 331.

Evidence of two defendants' guilt of violating municipal anti-noise ordinance is properly submitted to the jury where State's evidence, which was competent, tended to show that the total intensity of the noise made by the

MUNICIPAL CORPORATIONS—Continued

group of motorcyclists in which defendants were riding was proscribed by the ordinance. *Ibid.*

§ 45. Mandamus Against Municipal Corporations

Mandamus does not lie to compel Winston-Salem Aldermen to grant plaintiff cablevision franchise. *Cablevision v. Winston-Salem*, 252.

NEGLIGENCE

§ 1. Acts and Omissions Constituting Negligence Generally

Negligence defined. *Tindle v. Denny*, 567.

§ 12. Doctrine of Last Clear Chance

Doctrine of last clear chance defined. *Jones v. Smith*, 396.

§ 18. Contributory Negligence of Minors

Fourteen-year-old plaintiff is guilty of contributory negligence in riding on rear of truck. *Edwards v. Edwards*, 215.

§ 23. Pleadings

Pleadings held sufficient to allege contributory negligence by plaintiff bus passenger in failing to be seated. *Barbour v. Coach Co.*, 185.

§ 26. Presumptions and Burden of Proof

Negligence is not presumed from injury. *Edens v. Adams*, 431; *Bray v. A & P Tea Co.*, 547.

§ 28. Questions of Law and Fact

The standard of care is a question of law; the degree of care required under the particular circumstances is a question of fact. *Tindle v. Denny*, 567.

§ 29. Sufficiency of Evidence of Negligence

In order to withstand motion for nonsuit, plaintiff's evidence must establish the essentials of negligence. *Edwards v. Edwards*, 215.

§ 30. Nonsuit

In 14-year-old plaintiff's action for injuries resulting from fall from rear of a pickup truck operated by defendant, judgment of nonsuit was properly entered. *Edwards v. Edwards*, 215.

§ 34. Sufficiency of Evidence of Contributory Negligence for Jury

Contributory negligence must be proved substantially as alleged in the answer. *Barbour v. Coach Co.*, 185.

Evidence that plaintiff bus passenger had ample opportunity to be seated but failed to do so, held sufficient for jury on issue of contributory negligence. *Ibid.*

§ 35. Nonsuit for Contributory Negligence

Rules for nonsuit for contributory negligence. *Jernigan v. R. R. Co.*, 408; *Duke v. Tankard*, 563; *Tindle v. Denny*, 567.

§ 37. Instructions on Negligence

Trial court's failure to define negligence per se in one part of the charge is not error when it is defined in another part. *Woodward v. Shook*, 129.

NEGLIGENCE—Continued

§ 40. Instructions on Proximate Cause

Trial court did not err in defining proximate cause and foreseeability. *Woodward v. Shook*, 129.

§ 53. Duties and Liabilities to Invitees

Duties of store owner to invitee. *Bray v. A & P Tea Co.*, 547.

§ 57. Sufficiency of Evidence and Nonsuit in Actions by Invitees

Evidence that plaintiff, a guest in defendant's home, fell on a scatter rug is insufficient to show negligence by defendant. *Jenkins v. Brothers*, 303.

Evidence held insufficient for jury in action for injuries received by minor plaintiff in defendant's grocery store when wheel on grocery cart jammed. *Bray v. A & P Tea Co.*, 547.

NOTICE

§ 1. Necessity of Notice

Parties are fixed with notice of all motions made during session of court in causes pending therein. *Highway Comm. v. Stokes*, 541.

PARENT AND CHILD

§ 5. Right of Parent to Recover for Injuries to Child

Father of unemancipated minor child whose death resulted from negligence of third party has cause of action against such third party for funeral expenses and loss of services of child. *Crawford v. Hudson*, 555.

Failure to allege child was unemancipated is not fatal. *Ibid.*

§ 7. Duty to Support Child

Where custody of child has been taken from the father by order of the court, father no longer has right to direct the higher education of the child. *Zande v. Zande*, 149.

PARTIES

§ 4. Proper Parties

Where an insurance company pays only part of the loss of an insured, the insured must bring an action to recover for the loss in his own name, but the insurer is a proper party to such an action. *Freight Line v. Truck Line*, 3.

PLEADINGS

§ 2. Statement of Cause of Action in General

The complaint must allege the ultimate facts. *McAdams v. Blue*, 169.

§ 7. Prayer for Relief

Party is entitled to relief which allegations in the pleadings justify, notwithstanding prayer for relief is insufficient. *Oil Co. v. Fair*, 175.

§ 9. Filing and Time for Filing Answer

Until demurrer has been passed upon on the merits, the time for filing answer has not expired. *Fixture Co. v. Restaurant Associates*, 74.

§ 10. Form and Contents of Answer

Allegations of new matter in defendant's answer not relating to a counterclaim are deemed denied without a reply. *Sullivan v. Johnson*, 581.

PLEADINGS—Continued

§ 11. Counterclaims and Cross Actions

G.S. 1-166 does not expressly authorize a defendant to set up a cross action against an unknown additional defendant. *Funeral Home v. Stafford*, 578.

§ 13. Counterclaim in Contract

In action to recover overpayments made under a lease, defendants may counterclaim for commissions allegedly due by plaintiff to defendants under terms of the same lease. *Oil Co. v. Fair*, 175.

§ 19. Office and Effect of Demurrer

Effect of demurrer. *Dorman v. Ranch*, 559.

§ 23. Frivolous Demurrers

In plaintiff's action to recover money judgment on contract, defendant's demurrer is held not frivolous. *Fixture Co. v. Restaurant Associates*, 74.

§ 29. Judgment on Demurrer

When demurrer is sustained, action will be dismissed only if complaint contains a defective cause of action. *Setser v. Development Co.*, 163.

§ 32. Motions to be Allowed to Amend

An amendment allowed in open court and appearing in the record is self-executing. *Crawford v. Board of Education*, 343.

§ 33. Scope of Amendment to Pleadings

Pleadings may not be amended so as to confer jurisdiction but may be amended to show that jurisdiction exists. *Crawford v. Board of Education*, 343.

§ 37. Issues Raised by the Pleadings and Necessity for Proof

An issue of fact is raised for determination of the jury whenever a material fact is alleged by one party and denied by the other. *Sullivan v. Johnson*, 581.

§ 38. Motion for Judgment on the Pleadings

Although the complaint does not allege facts sufficient to constitute a cause of action, defendants' motion for judgment on the pleadings is improperly allowed where a material issue of fact is joined between the parties in the further answer and defense of the defendants and the reply thereto of the plaintiff. *Setser v. Development Corp.*, 163.

§ 41. Motions to Strike, Generally

It is error for the court to fail to rule on a motion to strike made in apt time. *Sullivan v. Johnson*, 581.

§ 42. Right to Have Allegations Stricken on Motion

It is proper to strike repetitious, irrelevant or argumentative allegations. *Bank v. Easton*, 414.

Allegations asserting a cause of action for breach of contract do not support an award of punitive damages and are properly stricken. *Ibid.*

PRINCIPAL AND AGENT

§ 4. Proof of Agency

Existence and scope of agency cannot be proved by extra-judicial declara-

PRINCIPAL AND AGENT—Continued

tions of alleged agent but must be established by evidence aliunde. *D. L. H., Inc. v. Mack Trucks*, 290.

Even when fact of agency is proved by facts aliunde, extrajudicial declarations of the agent are not competent against the principal unless made within the actual or apparent scope of the agent's authority. *Ibid.*

In an action to recover upon oral warranty allegedly made by an agent of the manufacturer, the evidence was insufficient to show authority of agent to make the warranty. *Ibid.*

§ 5. Scope of Authority

One dealing with an agent must ascertain the extent of the agent's authority. *D. L. H., Inc. v. Mack Trucks*, 290.

QUASI CONTRACTS

§ 1. Elements and Essentials of Right of Action

Where one performs services for another which are knowingly and voluntarily accepted, the law implies a promise on the part of the recipient to pay the reasonable value of the services. *McSwain v. Lane*, 22.

§ 2. Actions to Recover on Implied Contract

Evidence held sufficient to be submitted to the jury on the issue of quantum meruit in an action for personal services rendered decedent. *McSwain v. Lane*, 22.

RAILROADS

§ 5. Crossing Accidents

Railroad crossing is itself notice of danger. *Jernigan v. R. R.*, 408.

Motorist who has knowledge that railroad crossing lies ahead must exercise due care to protect himself. *Ibid.*

In action for injuries received when plaintiff motorist collided at nighttime with a train engine standing on a railroad crossing, plaintiff's evidence is held to establish contributory negligence in failing to look and listen to determine presence of the train at the crossing with which plaintiff was thoroughly familiar. *Ibid.*

Conceding defendant's engine blocked only a portion of the crossing so that plaintiff was given the illusion of an open crossing, plaintiff was not thus relieved of the duty to exercise due care at the crossing. *Ibid.*

§ 6. Warning or Protective Devices at Crossings

Motorist familiar with custom of railroad to have flagman at grade crossing may place some reliance on the custom, but it does not entitle him to rely entirely thereon and omit all care for his own safety. *Jernigan v. R. R. Co.*, 408.

RAPE

§ 18. Prosecutions

In prosecution of defendant for assault with intent to commit rape upon his stepdaughter, (1) the child's mother may testify as to what she saw at the time of the offense and as to statements of her daughter concerning prior offenses, (2) the evidence of defendant's guilt is sufficient to go to the jury notwithstanding medical examination revealed no bruises on prosecutrix' body, (3) instructions properly defined the offense. *S. v. Spain*, 266.

REFERENCE

§ 3. Compulsory Reference

In action to quiet title, court properly ordered compulsory reference as to all issues where the case involved complicated boundary question. *Development Co. v. Phillips*, 295.

Party may appeal at once from order of compulsory reference. *Ibid.*

§ 11. Right to Trial by Jury

A compulsory reference does not deprive one of the right to trial by jury. *Development Co. v. Phillips*, 295.

RETIREMENT SYSTEMS

§ 2. Creation, Nature and Existence

Purpose of Teachers' and State Employees' Retirement System is defined. *Powell v. Retirement System*, 39.

§ 5. Claims of Members

Where member of State Employees' Retirement System dies prior to effective date of her retirement, her nominated beneficiary is not entitled to receive her reduced retirement allowance for remainder of his life but is entitled only to her accumulated contributions. *Powell v. Retirement System*, 39.

ROBBERY

§ 1. Nature and Elements of the Offense

Common law robbery defined. *S. v. Hollis*, 61.

§ 4. Sufficiency of Evidence and Nonsuit

Evidence held sufficient for jury in common law robbery prosecution. *S. v. Hollis*, 61.

Circumstantial evidence held sufficient for jury in armed robbery prosecution. *S. v. Baker*, 180.

§ 5. Submission of Lesser Degrees of the Crime

In armed robbery prosecution, evidence did not require submission of issues of defendant's guilt of lesser included offenses. *S. v. Stevenson*, 46.

SAFECRACKING

Issues of defendant's guilt of felonious breaking and entering and of attempted safecracking are properly submitted to the jury. *S. v. Godwin*, 55.

SALES

§ 15. Burden of Proof of Breach of Warranty

In action to recover upon oral warranty, the buyer has the burden to establish the warranty relied upon. *D. L. H., Inc. v. Mack Trucks*, 290.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Search of defendant's bedroom immediately after his arrest in adjacent room is held incidental to lawful arrest. *S. v. Furr*, 300.

STATE

§ 4. Actions Against State

The State may not be sued unless by statute it has consented to be sued or has otherwise waived its immunity from suit. *Construction Co. v. Dept. of Administration*, 551.

§ 7. Filing of Claim and Procedure Under Tort Claims Act

In Tort Claims Act proceeding, the Industrial Commission properly allowed amendment of claimant's affidavit to allege the name of the negligent State employee. *Crawford v. Board of Education*, 343.

Defendant is held to have waived any objection to second Tort Claims hearing. *Ibid.*

§ 8. Contributory Negligence of Person Injured

Industrial Commission's findings of fact that minor claimant is not guilty of contributory negligence in school bus accident are conclusive on appeal when supported by competent evidence. *Crawford v. Board of Education*, 343.

STATUTES

§ 3. Form and Contents; Vague and Contradictory Statutes

An ordinance is presumed to have meaning and will be upheld if its meaning is ascertainable with reasonable certainty. *S. v. Dorsett*, 331.

§ 4. Construction in Regard to Constitutionality

Any act passed by the Legislature is presumed to be constitutional. *S. v. Anderson*, 124.

If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional, the former will be adopted. *S. v. Dorsett*, 331; *Vinson v. Chappell*, 348.

§ 5. General Rules of Construction

Intent and spirit of a statute are controlling in its construction. *Powell v. Retirement System*, 39.

A particular statute will be construed as controlling in a particular situation unless it appears that the Legislature intended to make a general statute relating to the same subject matter controlling. *Utilities Comm. v. Electric Membership Corp.*, 309.

Statute permitting State agency to be sued must be strictly construed. *Construction Co. v. Dept. of Administration*, 551.

§ 10. Construction of Criminal Statutes

The rule that statutes will be construed to effectuate the legislative intent applies to criminal statutes. *S. v. Dorsett*, 331.

TAXATION

§ 41. Foreclosure of Tax Lien

Service of summons by publication upon a named person is held sufficient notice as to that person in tax foreclosure proceeding against certain realty. *Newbern v. Barnes*, 521.

TIME

Where last day to file an answer falls on a Saturday, and the office of the clerk is closed on Saturday, demurrer filed by defendant the following Monday was timely. *Fixture Co. v. Restaurant Associates*, 74.

TORTS

§ 4. Right of One Defendant to Have Others Joined for Contribution

Defendant may not invoke statutory right of contribution under [former] G.S. 1-240 against an additional defendant in a tort action unless defendant alleges facts which, if established, would constitute joint and concurring negligence by both parties in producing the injury complained of by plaintiff. *Nelson v. Carroll*, 26.

TRESPASS

§ 1. Civil Trespass, Generally

G.S. 113-120.1 prohibits hunting, fishing or trapping on properly posted land or water without written consent of the owner or his agent, and whether body of water is a "private pond" is not relevant to a prosecution under the statute. *S. v. Manning*, 451.

§ 12. Nature and Elements of Criminal Trespass

Whether a body of water is a "private pond" is not relevant to a prosecution for trespass under G.S. 113-120.1. *S. v. Manning*, 451.

§ 13. Prosecutions for Criminal Trespass

In prosecution for trespassing by fishing on properly posted land and waters of private club, nonsuit should be allowed where State's evidence discloses the private club is a lessee and not the actual owner of the land and water. *S. v. Manning*, 451.

TRIAL

§ 1. Notice and Calendars

Trial court did not exceed its authority in resetting case for trial during the session in which it was calendared. *Highway Comm. v. Stokes*, 541.

§ 6. Stipulations

Stipulation in three cases to abide the event of another suit is binding without regard to whether the facts in the cases are the same. *R. R. Co. v. Horton*, 383.

Party desiring to have stipulations set aside should seek to do so by some direct proceeding. *Ibid.*

§ 15. Objections and Exceptions to Evidence, and Motions to Strike

Where question is competent, exception to witness' answer which is incompetent in part should be taken by motion to strike the objectionable part. *Brown v. Green*, 506.

§ 18. Province of Court and Jury in General

Function of court and jury in consideration of evidence on motion for nonsuit. *Tindle v. Denny*, 567.

§ 21. Consideration of Evidence on Motion to Nonsuit

Consideration of evidence on motion to nonsuit. *McSwain v. Lane*, 22; *Daves v. Ins. Co.*, 82; *Jernigan v. R. R. Co.*, 408; *Edens v. Adams*, 431; *Freeman v. Hardee's*, 435; *Price v. Tomrich Corp.*, 402; *D. L. H., Inc. v. Mack Trucks*, 290; *Bowen v. Gardner*, 529; *Tindle v. Denny*, 567.

§ 22. Sufficiency of Evidence to Overrule Nonsuit, Generally

Sufficiency of evidence to overrule nonsuit. *Jones v. Smith*, 396.

TRIAL—Continued

§ 32. Form and Sufficiency of Instructions in General

Instruction that the jury might consider together two issues, one of which plaintiff has the burden of proving and the other which defendant has the burden of proving, held prejudicial error. *Holloway v. Medlin*, 89.

§ 33. Statement of Evidence and Application of Law Thereto in Instructions

An instruction about a material matter not based on sufficient evidence is erroneous. *Holloway v. Medlin*, 89.

In action by bus passenger for personal injuries, error in defining contributory negligence was cured by further instructions giving proper standard of care for common carrier. *Barbour v. Coach Co.*, 185.

§ 40. Form and Sufficiency of Issues

Court must submit such issues as are necessary to settle the material controversies arising on the pleadings. *Oil Co. v. Fair*, 175.

Trial judge must submit issues necessary to settle material controversies raised by the pleadings. *Temple v. Carter*, 515.

Trial court erred in submitting issues with respect to defendant's counterclaim after having allowed plaintiff's motion for nonsuit as to the counterclaim. *Brown v. Green*, 506.

§ 42. Form and Sufficiency of Verdict

Verdict must establish facts sufficient to enable court to proceed to judgment. *Oil Co. v. Fair*, 175.

§ 56. Waiver of Trial by Jury and Agreement to Trial by Court

Court possessed no authority to make findings of fact as to the controverted issues where no evidence was heard, jury trial was not waived, and there was no agreement as to the facts. *Sullivan v. Johnson*, 581.

Stipulation to abide result of another suit is a waiver of jury trial. *R. R. Co. v. Horton*, 383.

§ 57. Trial and Hearing by the Court

In a trial before the judge without a jury, there is a rebuttable presumption that judge disregarded incompetent testimony. *Zande v. Zande*, 149.

TRUSTS

§ 4. Charitable Trusts

A conveyance of realty to trustee to hold land forever for use and benefit of a named charity vests in the trustee a title in fee simple absolute. *Trust Co. v. Construction Co.*, 157.

In trustee's action seeking right to convey fee simple title to property which he holds in trust for a charity, trial court properly exercised its equitable jurisdiction to permit sale of the property. *Ibid.*

§ 14. Creation of Constructive Trusts

Constructive trust arises when land is acquired through fraud or when it is against equity that land should be retained. *Howell v. Alexander*, 371.

§ 15. Limitations of Constructive Trusts

A constructive trust is governed by the ten year statute of limitations. *Howell v. Alexander*, 371.

UTILITIES COMMISSION

§ 4. Jurisdiction and Authority of Commission Over Electric Companies

Where building is located outside a municipality and initially required electric services after 20 April 1965, and building is not located wholly within 300 feet of the lines of any electric supplier and is not located partially within 300 feet of the lines of two or more electric suppliers, G.S. 62-110.2(b)(5) gives the building owner the right to choose its electric supplier, and Utilities Commission properly declined to consider whether owner's choice constituted unnecessary and wasteful duplication of facilities. *Utilities Comm. v. Electric Membership Corp.*, 309; *Utilities Comm. v. Electric Membership Corp.*, 318.

Where consumer chooses electric supplier under G.S. 62-110.2(b)(5), the electric supplier has the right to deny such services. *Ibid.*

WILLS

§ 28. General Rules of Construction

The intention of testator must be given effect in interpreting a will. *Howell v. Alexander*, 371.

§ 34. Fees, Life Estates and Remainders

Life estate expressly created by a will is not converted into a fee merely because a power of disposition is coupled with the life estate, and the life tenant is not authorized to acquire in her individual name fee simple title to land purchased with proceeds subject to the life estate and the remainder interest. *Howell v. Alexander*, 371.

A remainderman may have relief in equity when the life tenant is claiming a right to the property adverse to that of the remainderman. *Ibid.*

Remaindermen are entitled to have constructive trust imposed upon property held by life tenant where action of the tenant adversely affects their remainder interest. *Ibid.*

§ 35. Time of Vesting and Whether Estate is Vested or Contingent

Where will provided that residue of estate should go to testator's daughter unless she should die before complete distribution of the estate, the residue effectively vested in the daughter prior to her death, notwithstanding her husband failed to negotiate a check as payment for a bequest. *Reese v. Carson*, 99.

§ 36. Defeasible Fees

Estate which may last forever but which may end upon the happening of a specified event is a fee simple defeasible. *Newbern v. Barnes*, 521.

§ 40. Devisees With Power of Distribution

A life estate expressly created by the language of an instrument will not be converted into a fee or into any other form of estate greater than a life estate merely by reason of there being coupled with it a power of disposition, however general or extensive. *Howell v. Alexander*, 371.

§ 43.5. Devise to Class or Individuals

Persons named specifically in a will by name or other personal designation takes as individuals and not as a class. *Newbern v. Barnes*, 521.

§ 44. Representation

Ordinarily, those who take a remainder interest under a will are determined at the death of testator and not at the death of the life tenant. *Porth v. Porth*, 485.

WILLS—Continued.

§ 60. Renunciation

A testamentary beneficiary has a right to renounce a bequest in his favor and may do so in writing or by parol. *Reese v. Carroll*, 99.

Purported family agreement is not a proper renunciation of an interest in an estate where it does not meet the requirements of G.S. 29-10. *Brown v. Green*, 506.

§ 61. Dissent of Spouse and Effect Thereof

Statute providing that second or successive spouse who dissents from will of deceased spouse shall take only one-half the amount provided by the Intestate Succession Act for surviving spouse if testator has surviving him lineal descendants by a former marriage but no lineal descendants by the second or successive marriage held constitutional. *Vinson v. Chappell*, 348.

§ 66. Lapsed Legacies

G.S. 31-42(a) applies to prevent lapse of a residuary devise or bequest as well as a specific devise or bequest. *Bear v. Bear*, 498.

G.S. 31-42(c)(2) applies only where there are other residuary devises or legatees named in the will who survive testator and does not operate to pass the lapsed portion of a residuary devise or bequest to surviving issue who are substituted under G.S. 31-42(a) for other deceased residuary devisees or legatees. *Ibid.*

Under a will devising one-half of testator's homeplace to named grandchildren with proviso that if they or either of them die without lawful bodily heirs the portion given them to go to testator's family, the devise to one grandchild who predeceased the testator without issue surviving becomes a lapsed devise upon testator's death, and where testator leaves surviving him four children and the remaining grandchild, each inherit by intestate succession one-fifth of the one-half undivided interest in the portion of the homeplace described in the devise which lapsed. *Newbern v. Barnes*, 521.

§ 69. Contingent Remaindermen

An ascertained remainderman whose interest will take effect only on the happening of an event uncertain may convey whatever interest he has prior to the occurrence of the uncertain event. *Davis v. Davis*, 536.

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§ 5. Evidence Competent for Purpose of Corroboration

Slight variances in corroborating testimony do not render such testimony inadmissible. *S. v. Crawford*, 337.

Court properly admitted testimony of deputy sheriff as to what investigating officer told him occurred at crime scene for purpose of corroborating officer's testimony. *Ibid.*

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