NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
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CALL OF THE CALENDAR IN THE COURT OF APPEALS

FALL SESSION 1969

(Showing when records and briefs must be filed).

The Court of Appeals will meet in the City of Raleigh in the Ruffin 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, August 19, 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, July 22, 1969.

Appellant's Brief must be filed by noon of July 29, 1969.

Appellee's Brief must be filed by noon of August 5, 1969.

EIGHTEENTH AND NINETEENTH DISTRICTS appeals will be called Tuesday, August 26, 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, July 29, 1969.

Appellant's Brief must be filed by noon of August 5, 1969.

Appellee's Brief must be filed by noon of August 12, 1969.

TWENTIETH, TWENTY-SECOND AND TWENTY-THIRD DISTRICTS appeals will be called Tuesday, September 2, 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, August 5, 1969.

Appellant's Brief must be filed by noon of August 12, 1969.

Appellee's Brief must be filed by noon of August 19, 1969.

SECOND DIVISION

NINTH, TWELFTH AND THIRTEENTH DISTRICTS appeals will be called Tuesday, September 16, 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, August 19, 1969.

Appellant's Brief must be filed by noon of August 26, 1969.

Appellee's Brief must be filed by noon of September 2, 1969.

TENTH AND ELEVENTH DISTRICTS appeals will be called Tuesday, September 23, 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, August 26, 1969.

Appellant's Brief must be filed by noon of September 2, 1969.

Appellee's Brief must be filed by noon of September 9, 1969.

FOURTEENTH, FIFTEENTH AND SIXTEENTH DISTRICTS appeals will be called Tuesday, September 30, 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, September 2, 1969.

Appellant's Brief must be filed by noon of September 9, 1969.

Appellee's Brief must be filed by noon of September 16, 1969.

FOURTH DIVISION

TWENTY-SIXTH, TWENTY-NINTH AND THIRTIETH DISTRICTS appeals will be called on Tuesday, October 21 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, September 23, 1969.

Appellant's Brief must be filed by noon of September 30, 1969.

Appellee's Brief must be filed by noon of October 7, 1969.

TWENTY-FOURTH, TWENTY-FIFTH, TWENTY-SEVENTH AND TWENTY-EIGHTH DISTRICTS appeals will be called on Tuesday, October 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, September 30, 1969.

Appellant's Brief must be filed by noon of October 7, 1969.

Appellee's Brief must be filed by noon of October 14, 1969.

FIRST DIVISION

FIRST, SECOND, THIRD AND SEVENTH DISTRICTS appeals will be called Tuesday, November 18, 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, October 21, 1969.

Appellant's Brief must be filed by noon of October 28, 1969.

Appellee's Brief must be filed by noon of November 4, 1969.

FOURTH, FIFTH, SIXTH AND EIGHTH DISTRICTS appeals will be called Tuesday, November 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, October 28, 1969.

Appellant's Brief must be filed by noon of November 4, 1969.

Appellee's Brief must be filed by noon of November 11, 1969.

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

27 August 17 September 22 October 19 November 17 December

The following fees are payable in advance.

Upon docketing the appeal	$10.00
Motion to docket and dismiss Under Rule 17	14.00
Petition for certiorari	10.00
In pauper appeal (in civil cases only)	2.00
Mimeographing ($1.30 per page, Records and Briefs)	1.30

The above as to advance fees does not apply in criminal cases.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION, 1969

CITY OF RALEIGH v. NORFOLK SOUTHERN RAILWAY COMPANY
No. 68SC90

(Filed 26 February 1969)

1. Declaratory Judgment Acts § 1— justiciable controversy

A *bona fide* justiciable controversy which may be determined under the Declaratory Judgment Act, G.S. Chap. 1, Art. 26, is presented where, pursuant to a written agreement between the parties, a new railroad overpass was constructed by defendant railway company, plaintiff municipality has reimbursed the railway for its costs thereby incurred, and the parties have submitted to the court for determination the question of which of them must ultimately bear the expense.

2. Constitutional Law § 11— exercise of police power — validity

The validity of an exercise of the police power depends upon whether under all the existing circumstances it is reasonably calculated to accomplish a purpose falling within the legitimate scope of the power without burdening unduly the person or corporation affected.

3. Constitutional Law § 11— exercise of police power — reasonableness

The reasonableness of an exercise of the police power is to be determined by the court, and is based on human judgment, natural justice, and common sense in view of all the facts and circumstances.

4. Constitutional Law § 11— police power — test of reasonableness — changed conditions

While the standard of reasonableness by which exercise of the police power is tested does not change, changed conditions may bring the subject matter in question within the operation of approved testing principles of reasonableness or remove it therefrom.

5. Constitutional Law § 11— police power — test of reasonableness — changed conditions

The effects of the exercise of the police power in particular situations may vary as social, economic and political conditions change, so that what was once a proper exercise of such power may later become arbitrary and unreasonable as a result of changed conditions and circumstances.

6. Constitutional Law § 15; Railroads § 2; Municipal Corporations § 35— rebuilding railroad bridge to accommodate widened city street — responsibility for cost

An attempt by a municipality to impose upon defendant railway company the entire cost of rebuilding a railroad bridge to accommodate the increased width of a city street passing below the bridge *is held* an unreasonable exercise of the police power where the need to rebuild the bridge resulted entirely from the municipality's street widening project to facilitate a greatly increased flow of traffic caused by factors unrelated to the existence or location of defendant's railroad tracks or the operation of trains thereon, economic conditions have changed favorably to the financial position of the municipality and unfavorably to that of defendant railroad, and reconstruction of the bridge will result in no benefit to defendant but solely to the benefit of its competitors.

7. Municipal Corporations § 35; Railroads § 2— responsibility for cost of rebuilding railroad bridge — widened city street — evidence

In a declaratory judgment action to determine whether plaintiff municipality may require defendant railroad to pay the entire cost of rebuilding its bridge to accommodate the increased width of the city street passing below the bridge, the trial court did not err in excluding expert testimony offered by the municipality which would have tended to show that the former width of the street was unsafe for the volume of traffic using it, such evidence tending to show the wisdom of widening the street but not that it would be reasonable for the municipality to require the railroad to pay the cost of a new bridge necessitated by the widening.

APPEAL by plaintiff from *Canaday, J.*, November 1967 Non-Jury Civil Session of WAKE Superior Court.

This is an action for a declaratory judgment to determine whether plaintiff municipality or defendant railway company should bear the costs of constructing a new bridge to replace the original bridge carrying defendant's tracks over Peace Street in the City of Raleigh. The parties waived jury trial and submitted the case to the trial court on stipulations of fact and evidence presented at the hearing. The court entered judgment making findings of fact substantially as follows:

On 18 January 1907 plaintiff City duly adopted an ordinance granting defendant railway's predecessor in interest the right, privilege and franchise to construct, maintain, and operate a railroad through said City and to that end to construct and maintain tracks

upon and across certain named streets, including Peace Street, within said City. The ordinance provided that the railroad should cross Peace Street upon a bridge having steel girders which would provide an opening 30 feet wide for roadway purposes and six feet on each side for sidewalk purposes (providing a total lateral clearance of 42 feet under the bridge for street roadway and sidewalks) and having a vertical clearance of 10½ feet from the street surface to the bottom of the girder. At the time the bridge was constructed the right of way of Peace Street was about 60 feet wide at the location of the bridge, and said right of way remains the same width at the present time. Defendant's predecessor built the railroad bridge across Peace Street in conformity with the provisions of the franchise and thereafter maintained its main line tracks over the bridge. Pursuant to the terms of the franchise the abutments of the bridge were constructed on the street right of way.

On 2 March 1959 the City Council of plaintiff City approved a "thoroughfare plan" for the City of Raleigh designating certain streets of the City, including Peace Street, to be widened for the accommodation of the increasing volume of vehicular traffic within the City. The proposed widening of Peace Street required the reconstruction of the railway bridge, and in 1962 the City and the defendant railway jointly prepared plans for a new bridge. It developed that the defendant railway could do the reconstruction according to the agreed plans for an estimated cost of approximately $47,000.00 and that it would cost considerably more for the work to be done by someone else. After the plans had been prepared and cost estimates made, the City attorney first learned that the abutments of the defendant's then existing bridge were in the Peace Street right of way. He then proposed that the City adopt an ordinance requiring the railway to remove the abutments from the street right of way under penalty of $100.00 per day for failure to commence and to complete such work within specified periods of time. The defendant railway appeared before the City Council in opposition to the proposed ordinance. After extended consideration, the parties entered into an agreement dated 8 January 1963 by which they agreed that the defendant railway would forthwith undertake the reconstruction of the bridge in conformity with the plans and specifications which had been agreed upon, that upon completion of the work the City would pay the railway the cost of such reconstruction, and that the determination as to which of the parties should ultimately bear such cost should be submitted to the court in a suit for declaratory judgment. Pursuant to this agreement the plaintiff City has brought this action for

declaratory judgment to determine whether it or the defendant railway must bear the cost of constructing the new bridge.

The agreement recited that the plans and specifications for the new bridge provide for piers for support of the reconstructed bridge on the north and south sides of Peace Street to be located so as to allow a lateral clearance of 51 feet, to set back 18 inches from the face of the curbs, and to be four feet in thickness. The agreement further recited that the City approved these plans on condition the railway provide from its own property and dedicate to public use area sufficient to provide for pedestrian walkways five feet wide on the north side of the north pier and on the south side of the south pier. The railway bridge over Peace Street has now been reconstructed in accordance with the plans and specifications prepared by the parties and approved by the City. In accordance therewith the new piers for the support of the reconstructed bridge have been placed within the street right of way of Peace Street, as is specifically provided for in the approved plans and specifications.

The trial judge made additional findings of fact, principally relating to changed conditions which had occurred in the years after the granting of the 1907 franchise to defendant's predecessor in interest. These findings include the following: In 1907 and for a number of years thereafter traffic on the public streets consisted mainly of horse-drawn vehicles, which were comparatively few in number, and only to a very negligible extent of automotive vehicles. At the time of the construction of the defendant's first bridge over Peace Street the lateral clearance of 42 feet between the abutments of the bridge was adequate to meet the public demand for the use of Peace Street at the location of the bridge. In 1910 the population of Raleigh was 19,218, whereas in 1960 the population was 93,931. The number of motor vehicles licensed by the City of Raleigh, in 1947 (the earliest date for which figures are available) was 8,763. In 1962 the number of such vehicles was 36,913. The official daily count of motor vehicles using Peace Street within the vicinity of defendant's bridge was 12,600 in 1950, decreased to 10,203 in 1954 (due in large measure to construction of Downtown Boulevard which tended to decrease the traffic on Peace Street in the vicinity of the bridge) and increased to 14,700 in 1961. Motor vehicles registered in North Carolina increased from 1,681 in 1909 to 2,056,888 in 1962. Automobile registration in Wake County increased from 15,292 in 1927 to 65,945 in 1961. Truck registration in Wake County increased from 2,190 in 1927 to 23,476 in 1961.

The defendant railway is no longer in the business of transporta-

tion of passengers, and over the years motor vehicles have handled a greatly increasing volume of the transportation of property which was formerly or would otherwise be handled by railroads. In 1907 no *ad valorem* taxes on motor vehicles were collected by the City of Raleigh, whereas in 1961 and 1962 the City collected substantial sums in such taxes. As its portion of gasoline taxes imposed by the State of North Carolina and allotted to it under the provisions of the Powell Act (Chapter 260, Session Laws of 1951; G.S. 136-41.2 *et seq.*) the City of Raleigh received the sums of $277,403.00 in 1960, $313,540.00 in 1961, and $362,069.00 in 1962. For the fiscal year ending 30 June 1963, the City had a surplus of over $213,000.00 of unspent funds received under the Powell Act. Changes in the economic conditions of the City and of the defendant from 1907 to 1962, as set forth in the foregoing findings of fact, are favorable to the financial condition of the plaintiff City and unfavorable to the financial condition of the defendant railway. Under the present highly competitive transportation conditions and systems, it is no longer possible for the defendant to include in its rates and charges the costs of rebuilding the bridge, as it might have done in former years under former conditions and circumstances.

There has never been a grade crossing at Peace Street, and Peace Street at the location of the defendant railway's overpass is not now on either the State or Federal systems of highways. The reconstruction of the defendant's bridge is a part of the City's program of extensive street improvements to handle a larger flow of motor vehicular traffic principally to and from other areas of the City. Peace Street is one of the principal and most convenient streets for the passage of automobile and truck traffic from downtown Raleigh to the northwestern section of the City, which is and has been for a number of years one of the most rapidly developing sections of the City. Neither the general location of the railroad tracks of the defendant nor their use for train operations is a reasonably related factor in producing heavy motor vehicular traffic on Peace Street in the vicinity of the bridge. Peace Street, prior to the recent reconstruction of the railway overpass, was adequate to handle all street and vehicular traffic originating in and around the immediate vicinity of the bridge. The only reason for the enlargement of the railway bridge over Peace Street is to provide an underpass for Peace Street wide enough to accommodate the greatly increased motor vehicle traffic to and from other parts of the City due to the growth of the City, and the same is not caused by any need for change on the part of the railway. The reconstructed bridge benefits only the motor vehicular travel-

ing public, including the chief competitors of the defendant, to wit, the owners and users of automobiles, trucks, and buses.

Pursuant to the foregoing findings of fact, the trial judge concluded as a matter of law: That to require the defendant to bear the expense of constructing the new bridge would amount to the taking of defendant's property without just compensation and without due process of law; that if the provisions of the Charter of the City of Raleigh involved in this action should be construed to require defendant to bear the expense of constructing the new bridge, then said provisions are arbitrary, unreasonable and unconstitutional and violate the Fourteenth Amendment to the United States Constitution and Article I, Section 17, of the North Carolina Constitution, in that they would deprive defendant of its property without due process and contrary to the law of the land; that the plaintiff has waived and is estopped from asserting any power to require defendant to remove any part of its bridge that lies within the right of way of Peace Street; that the imposition upon defendant of the entire cost of reconstructing the bridge is not fair or reasonable; that the present action constitutes an attempted condemnation and unlawful seizure by the plaintiff of the property rights and property of the defendant; that the plaintiff has no authority or right so to condemn the defendant's property rights in the manner here attempted; that the present action is not a condemnation action, and even if the City had any right to condemn the property rights of the defendant, it could not do so in this action; that this action is insufficient for any such purpose and is therefore improper; and that in so seeking to condemn the property rights and franchise of the defendant in this action, plaintiff is seeking to deprive defendant of its property without due process of law in violation of the provisions of the Federal and State Constitutions.

Pursuant to these findings of fact and conclusions of law, judgment was entered that the plaintiff bear the entire costs of constructing the new bridge over Peace Street and recover nothing of the defendant by this action. From this judgment, plaintiff appeals.

Paul F. Smith, by Donald L. Smith, for plaintiff appellant.

R. N. Simms, Jr., for defendant appellee.

Joyner & Howison, by W. T. Joyner, Jr., for Southern Railway Company, amicus curiæ.

Maupin, Taylor & Ellis, by Thomas F. Ellis, for Seaboard Coast Line Railroad Company, amicus curiæ.

PARKER, J.

[1-3] Decision of the questions presented by this appeal is controlled by the principles announced in *Winston-Salem v. R. R.*, 248 N.C. 637, 105 S.E. 2d 37. In that case the North Carolina Supreme Court held that a city ordinance of Winston-Salem requiring a railroad to bear the entire cost of reconstructing an overpass to accommodate the widening of the street below was unconstitutional as an unreasonable exercise of the police power, under the circumstances of that case. In that case the City had sought *mandamus* to enforce the challenged ordinance. In the present case, in very similar factual circumstances, the City seeks a declaratory judgment to ascertain its power to impose the entire costs upon the railroad. Pursuant to a written agreement between the parties the new overpass has been constructed by the defendant railway company, the City has reimbursed the railway its costs thereby incurred, and the parties have submitted to the Court for determination the question of which of them must ultimately bear the expense. A bona fide justiciable controversy being presented, the Declaratory Judgment Act, G.S., Chap. 1, Art. 26, offers an appropriate procedure for resolving the conflict. In deciding the extent of the plaintiff City's power in the case before us we are guided by the same standards and principles as was the Court in the *Winston-Salem* case, i.e., whether under all existing circumstances the City's exercise of the police power is reasonably calculated to accomplish a purpose falling within the legitimate scope of the power without burdening unduly the person or corporation affected. 16 Am. Jur. 2d, Constitutional Law, § 277, p. 537. Reasonableness in this context is a matter to be determined by the Court, *Durham v. R. R.*, 185 N.C. 240, 117 S.E. 17, and is said to be based on human judgment, natural justice, and common sense in view of all the facts and circumstances, *Bonnett v. Vallier*, 136 Wis. 193, 116 N.W. 885; 16 Am. Jur. 2d, Constitutional Law, § 278, p. 539.

[4-6] As noted in *Winston-Salem v. R. R., supra,* the standard of reasonableness by which exercise of the police power is tested does not change, but changed conditions as they evolve may bring the subject matter in question within the operation of approved testing principles of reasonableness or remove it therefrom. The effects of exercise of the police power in particular situations may vary as social, economic and political conditions change; therefore, what was once a proper exercise of such power may later become arbitrary and unreasonable as a result of changed conditions and circumstances. In *Winston-Salem v. R. R., supra,* the Court found that con-

ditions which in earlier years might have brought the attempted exercise of the police power by the City within the testing standard of reasonableness, and which had supported earlier Court decisions so holding, had so changed that exercise of the power had become no longer reasonable and therefore no longer compatible with constitutional requirements of due process. Under the special facts and all the surrounding circumstances of the present case, we reach the same conclusion and for essentially the same reasons emphasized by the Supreme Court in *Winston-Salem v. R. R., supra.*

In *Winston-Salem v. R. R., supra,* the Court pointed out that most of the earlier cases which had upheld imposition of financial burdens upon railroads in making crossing improvements had relied upon considerations of public safety and public convenience — the protection of the traveling public from the dangers of grade crossing accidents and the inconveniences caused by traffic interruptions at heavily traveled crossings — with greater emphasis being placed on the factor of public safety. In the present case as in *Winston-Salem v. R. R., supra,* "the element of public safety usually involved in railroad crossing cases is entirely missing; and the need for promoting the public convenience derives from the necessity for relieving traffic congestion, principally in other areas of the City, not caused in any manner by the location of the railroad tracks." There is not now, and never has been, any crossing at grade at the point where Peace Street intersects defendant's tracks.

[6] From the time defendant's tracks were first constructed into the City of Raleigh continuously until the present time, they have been carried over Peace Street on a bridge. The original bridge did not deteriorate or become in any manner in itself unsafe to the public passing under it. Rather, the need to rebuild the bridge resulted entirely from the City's street widening project, which in turn was made necessary to accommodate a greatly increased flow of vehicular traffic which was caused by factors totally unrelated to the existence or location of defendant's railroad tracks or the operation of trains thereon. Furthermore, the facts stipulated by the parties and the evidence submitted by the defendant fully support the trial court's finding of fact that economic conditions have evolved favorably to the financial position of the City and unfavorably to that of the defendant, and that the construction of the new bridge will result in no benefit to the defendant but solely to the benefit of its principal competitors. Under these circumstances, we agree with the trial court's conclusion that to require defendant to bear the cost of constructing the new bridge would be so arbitrary and unreasonable as

to fail to meet the test for a valid constitutional exercise of the City's police power.

[7] At the trial plaintiff attempted to introduce evidence in the form of opinion testimony by expert witnesses which would have tended to show that the width of Peace Street, before it was widened, was unsafe for the volume of traffic using the street at that time. Plaintiff assigns as error the court's action in excluding this proffered testimony. This evidence, however, would not have tended to show that the bridge under existing conditions was itself a safety hazard, but would have shown only that the width of the street was unsafe, thereby justifying the City's decision to widen it. It is true that the excluded evidence would further have tended to show that if Peace Street had been widened and a new bridge had not been constructed, a traffic bottleneck would possibly have arisen at the bridge, thereby causing a safety hazard to arise. As in *Winston-Salem v. R. R., supra,* however, this situation would have resulted entirely from the City's attempt to relieve traffic congestion by widening Peace Street and would not have been caused by the existence or location of defendant's tracks. In referring to the same situation in *Winston-Salem v. R. R.,* the Court said, 248 N.C. 637, 650, 105 S.E. 2d 37, 46:

> "True, the City's evidence discloses that the present underpass is not wide enough to accommodate the full width of the proposed new street which is to intersect and cross the present street under the trestle at an oblique angle so as to make the proposed X crossing under the trestle. Therefore, unless the opening under the present trestle is widened, the new street will have to be reduced in width at the approaches to the present abutments. This would create on the new street a bottleneck at the approaches to the underpass and make for a hazardous situation for motorists approaching the underpass on the new street. But this situation of possible danger would be entirely of the City's making in its attempt to eliminate traffic congestion, originating principally in other areas of the City, by establishing a north-south intercity thoroughfare to accommodate traffic to be diverted and rerouted into it from outlying areas. Thus, in the case at hand the need for rebuilding the trestle is to promote the public convenience by providing a new street, and the need for opening the new street is to provide a necessary link in the proposed intercity thoroughfare, designed to relieve traffic congestion brought about by reason of the increase in motor vehicular traffic, and not by any conditions at or along

the railroad right of way tending to interrupt or impede the free movement of traffic at the crossing. Hence the need for the new trestle is not brought about by the location of the railway roadbed or by the operation of trains thereon."

[7] In the present case the railroad is not contesting, and we are not concerned with, the right of the City to widen its streets. We are concerned here only with whether the City may require the railroad to pay the entire cost of rebuilding its bridge to accommodate the increased width of the City street passing below. The testimony which the City offered, and which the court excluded, tended to show the wisdom on the part of the City authorities in deciding to widen Peace Street; it did not tend to show that it would be reasonable for the City to require the defendant railway to pay the cost of a new bridge made necessary by such widening. There was no prejudicial error in excluding such evidence.

Appellant's brief seeks to distinguish the facts which existed in *Winston-Salem v. R. R., supra,* from the facts here, by pointing out that in that case the need for widening the trestle arose from the opening of a new street, whereas in the present case the need arises from the widening of an existing street. We do not consider this difference to be a controlling basis for distinguishing the two cases. In both cases the necessity for widening the roadbed under the railroad bridge arose from the need of a growing City to provide wider arteries for carrying greatly increased vehicular traffic from one part of the City to another. Whether the City chose to meet this need by widening an existing traffic artery or creating an entirely new one, is immaterial insofar as bearing upon the only question before us for decision, which is the reasonableness of imposing the resulting cost of widening the bridge upon the defendant railway company. For the reasons which were set forth in the decision of the Supreme Court in *Winston-Salem v. R. R., supra,* which we deem to be controlling in the present case, the decision of the trial court is

Affirmed.

MALLARD, C.J., and BROCK, J., concur.

SOUTHERN RAILWAY COMPANY v. CITY OF WINSTON-SALEM

No. 6921SC2

(Filed 26 February 1969)

1. Constitutional Law § 11— exercise of police power — test of validity

When the exercise of the police power is challenged on constitutional grounds, the validity of the police regulation primarily depends on whether under all the surrounding circumstances and particular facts of the case the regulation is reasonably calculated to accomplish a purpose falling within the police power without burdening unduly the person or corporation affected.

2. Constitutional Law § 11— police power — changed conditions

In determining the validity of an exercise of the police power, changed conditions as they arise may bring the subject matter in question within the approved testing principle of reasonableness or may remove it therefrom.

3. Constitutional Law § 13; Municipal Corporations § 35; Railroads § 2— grade crossing improvements — allocation of costs

A State or its subdivisions, in the exercise of the police power, may validly allocate a portion, or under some circumstances even all, of the costs of grade crossing improvements to the railroads provided the allocation of costs is fair and reasonable under all existing circumstances.

4. Constitutional Law § 13; Municipal Corporations § 35; Railroads § 2— ordinance requiring railroad to construct grade crossing warning device — allocation of costs

Municipal ordinance requiring a railway to install automatic warning signals at two grade crossings of its tracks by city streets and allocating the costs of the signals between the municipality and the railway *is held* a constitutional exercise of the police power for the promotion of the general welfare and public safety, the hazard to the public at the grade crossings arising solely because of the railway's tracks and the operation of its trains thereon, the railway benefiting from the signals in the form of a reduction of its potential tort liability, and the allocation of costs being reasonable under existing facts and circumstances.

5. Railroads § 2; Highways and Cartways § 1— grade crossings — authority of Highway Commission — G.S. 136-20

G.S. 136-20, which gives the State Highway Commission jurisdiction to require installation of safety devices at railroad crossings and provides a formula for allocating the costs of such devices, by its express terms applies only to railroad crossings of a road or street forming a link in or a part of the State highway system.

6. Highways and Cartways § 4; Municipal Corporations § 33— parts of State highway system — city streets

In a declaratory judgment action to determine the validity of a municipal ordinance requiring a railway to install automatic warning signals

at two grade crossings and allocating the costs of the signals between the municipality and the railway, findings by the court that the city streets at the grade crossings are not part of or a link in the State highway system *are held* supported by testimony that no State highway funds were used in construction or maintenance of such streets and that the State Highway Commission has never attempted to exert control over such streets, notwithstanding there was evidence that the streets provided the shortest or most practical route for motorists to travel between parts of the State highway system, the State Highway Commission being the sole authority to determine which roads and streets shall become a part of or link in the State highway system. G.S. 136-54, G.S. 136-58, G.S. 136-59, G.S. 136-66.2(b).

7. Municipal Corporations §§ 33, 35; Railroads § 2— grade crossings — State highway system — city streets — G.S.136-20

G.S. 136-20 does not adopt a statewide policy with respect to the allocation of costs of safety devices at railroad crossings which is binding upon municipalities in administering city streets which are not parts of or links in the State highway system.

Appeal by plaintiff from *Olive, J.*, 15 April 1968 Civil Session of Forsyth Superior Court.

Plaintiff railway company instituted this action for a declaratory judgment to determine the validity and enjoin enforcement of two ordinances adopted by the defendant City. The ordinances require the railway to install automatic warning signals at two points where city streets cross its tracks at grade level, one at 27th Street and the other at Bethesda Road in Winston-Salem. Both ordinances allocate payment for such signals as follows: The defendant City will pay one-half of the cost of installation up to a maximum of $5,000.00; the plaintiff railway is required to pay the balance of the installation cost and all of the costs of maintenance. Plaintiff prayed for judgment declaring the ordinances void under the Federal and State Constitutions as a taking of plaintiff's property without due process and adjudging that the section of the Charter of the City of Winston-Salem (Section 54, Chap. 232, Private Laws of 1927) under which the ordinances were enacted is unconstitutional and void as applied to the facts of this case. In addition plaintiff prayed for judgment declaring the ordinances void and in violation of the laws of North Carolina as an attempt to legislate in a field which has been preempted by State legislation. The parties waived jury trial and submitted the case to the court upon stipulations of fact and evidence presented at the hearing. The court entered judgment making findings of fact which, insofar as material to the questions raised on this appeal, are substantially as follows:

Plaintiff's railroad tracks, which are an integral part of its inter-

state railway system, are crossed at 27th Street and Bethesda Road by dedicated streets of defendant City of Winston-Salem. The crossing at 27th Street has existed at all times since 1925. Five accidents have occurred at this crossing during the period from 4 November 1952 through 12 January 1967, resulting in two fatalities, two persons being injured, property damage to motor vehicles totaling $1,800.00, and damages to plaintiff's railroad engines in an unknown amount. A traffic count was conducted at this crossing for a 24-hour period commencing Thursday, 2 November 1967, which showed that 1,150 vehicles crossed plaintiff's tracks at this crossing. Another 24-hour traffic count conducted at this crossing on 21 July 1966 showed 885 vehicles crossing eastbound and 89 westbound. During this last mentioned traffic count, three southbound and five northbound trains or engines crossed 27th Street on plaintiff's tracks, with total blockage time of the crossing of two minutes and 57 seconds. Normal train traffic on plaintiff's tracks at 27th Street consists of two trains and six yard engines each 24 hours.

Plaintiff's tracks at Bethesda Road have been in existence for some 70 years and the crossing in the general vicinity of Bethesda Road has existed at all times at least since 1925. During the period from 23 December 1954 to 17 August 1966, five accidents have occurred at this crossing resulting in two fatalities, two persons being injured, property damage to motor vehicles totaling $4,100.00, and total damage to railroad engines and equipment of $2,125.00. A traffic count at this crossing conducted during a 24-hour period commencing Thursday, 2 November 1967, showed that 3,103 vehicles crossed plaintiff's tracks at Bethesda Road. Normal train or engine traffic on plaintiff's tracks at the Bethesda Road crossing consists of six trains and engines per 24-hour period.

The cost of installing a standard railroad crossing flashing light signal is approximately $13,250.00 for each installation, with annual maintenance cost for each installation of approximately $750.00. In 1967 the defendant City received $521,522.31 under the provisions of the Powell Act (G.S. 136-41.2 *et seq.*) while in the year 1925 such Act had not been enacted. In 1925 total motor vehicle registration in Forsyth County was 18,695 and in North Carolina was 341,126; in 1966 the comparable figures were 99,993 for Forsyth County and 2,587,117 for North Carolina. In 1963 the City collected $279,884.56 *ad valorem* taxes on automobiles and trucks.

Both the 27th Street and the Bethesda Road crossings of the plaintiff's tracks constitute hazardous crossings and a danger to persons and property. Neither 27th Street nor Bethesda Road as they

cross the plaintiff's tracks is a part of or a link in the State maintained system of streets and roads, nor have any North Carolina State Highway funds ever been used in the construction or maintenance of the streets as they cross the plaintiff's tracks. The North Carolina State Highway Department has never exerted or attempted to exert any control or supervision over either of the streets as they cross the plaintiff's tracks.

On these findings of fact the trial judge then concluded as a matter of law that each of the ordinances "are reasonable and necessary exercises of the power and authority of the Board of Aldermen of the City of Winston-Salem for the protection of the general welfare and public safety of the citizens of Winston-Salem and said ordinances are valid and subsisting ordinances of the City of Winston-Salem."

From judgment declaring both ordinances valid and directing plaintiff railway to comply with their terms, the plaintiff appealed.

Joyner, Moore & Howison, by W. T. Joyner, Jr., and Deal, Hutchins & Minor, by John M. Minor and William K. Davis, for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by Norwood Robinson and Thomas E. Capps, for defendant appellee.

Parker, J.

[1] Appellant railway attacks the allocation of the cost of erecting and maintaining the required signal devices at the two grade crossings of its tracks by City streets made by the two ordinances here in question as an arbitrary and unreasonable exercise of its police powers by the defendant City under all existing conditions and circumstances, thereby violating the Fourteenth Amendment of the United States Constitution and Article I, Section 17, of the North Carolina Constitution. The standard by which a valid exercise of the police power is to be tested has been stated by the North Carolina Supreme Court in *Winston-Salem v. R. R.*, 248 N.C. 637, 642, 105 S.E. 2d 37, 41, as follows:

> "Therefore, when the exercise of the police power is challenged on constitutional grounds, the validity of the police regulation primarily depends on whether under all the surrounding circumstances and particular facts of the case the regulation is reasonable; that is, whether it is reasonably calculated to accomplish a purpose falling within the legitimate scope of the

police power, without burdening unduly the person or corporation affected."

[2] The Court in that case further pointed out that changed conditions as they arise may bring the subject matter in question within the operation of the approved testing principle of reasonableness or may remove it therefrom. Therefore, in determining the validity of the cost allocation made by the two ordinances here in question, we must determine whether such allocation was reasonable under all existing conditions and surrounding circumstances of this case.

The North Carolina Supreme Court in *Winston-Salem v. R. R., supra,* held that an attempted exercise of its police powers by the City of Winston-Salem to require the railroad company in that case to bear the entire expense of constructing a new trestle to replace an existing trestle carrying its tracks over an existing street, which new trestle was made necessary by the widening incident to construction by the City of a new street which intersected with the existing street underneath the trestle, was unreasonable under the facts and circumstances of that case. On somewhat similar facts, this Court has also held in the case of *Raleigh v. R. R.,* 4 N.C. App. 1, 165 S.E. 2d 751, that an attempt by the City of Raleigh to impose the entire cost of a new bridge carrying the railroad's tracks over a city street made necessary by reason of the widening of such street by the city in order to facilitate the flow of traffic to and from other areas in the City, was an unreasonable exercise of the police power. The facts and circumstances of the case presently before us, however, are clearly distinguishable from the special facts and circumstances with which the North Carolina Supreme Court was concerned in *Winston-Salem v. R. R., supra,* and with the facts and circumstances with which this Court was concerned in *Raleigh v. R. R., supra.* Neither of those cases involved exercise of the police power to eliminate or minimize any danger to the traveling public such as exists in a grade crossing of a city street by railroad tracks. In each of those cases the new construction was not required to eliminate or minimize any element of danger arising from the existence or location of the railroad tracks or the operation of trains thereon. On the contrary the new construction in each of those cases was required solely to accommodate a wider underpass for the city street made necessary to accommodate an increasing flow of vehicular traffic which was in no way related to the existence or location of the railroad tracks. The new construction in no way benefited the railroads, but benefited many of their principal competitors. Under such circumstances, and in view of the changed economic conditions as they bore upon the

financial condition of the City on the one hand and the railroad on the other, it was held that the attempted imposition of the entire cost of the new construction on the railroad would be so unreasonable and arbitrary as to fail to meet the accepted testing standard for a constitutional exercise of the police power.

[4] In the case with which we are presently concerned, however, the grade crossings involved clearly constitute hazards to the traveling public. This danger arises solely and directly by reason of the existence of appellant's tracks and the operation of its trains thereon. Appellant railroad will receive direct benefits from the installation of the required signal devices in the form of a reduction in its potential tort liability. The facts and circumstances of this case, therefore, are more nearly comparable to those which existed in the earlier cases cited by the Supreme Court in *Winston-Salem v. R. R., supra,* particularly such cases as *Durham v. R. R.,* 185 N.C. 240, 177 S.E. 17; and *R. R. v. Goldsboro,* 155 N.C. 356, 71 S.E. 514. In discussing these and other cases which had upheld as reasonable, and therefore as constitutional exercises of the police power, imposition of costs upon the railroad of eliminating dangers at crossings, the North Carolina Supreme Court in *Winston-Salem v. R. R., supra,* said (248 N.C. 637, 649) the following:

> "The basic pattern of the foregoing decisions relied on by the City is that where impelling considerations of safety or convenience of the traveling public require alterations or improvements at a grade crossing, or that the grade crossing be eliminated entirely by carrying the tracks over a public way or the public way over the tracks by bridge, the duty of making the required alterations or improvements, or of providing the necessary bridge, ordinarily devolves upon the railroad company. The basis of this rule is the superior nature of the public's right to the safe and unimpeded use of streets and highways. *Erie R. R. v. Board of Utility Commissioners, supra* (254 U.S. 394, 65 L. ed. 322). The thread of decision seems to be that if the operation of the railroad, either at grade level or upon a particular type of elevated overhead support for its tracks, interferes materially with the public safety or with the public convenience in the exercise of the superior right of the public to use the public way, then the railroad company, being regarded in law as the agency causing the dangers or inconveniences, is charged with a legal duty to remedy the situation and may be required to make alterations and changes of its crossing facilities. *R. R. v. Minneapolis,* 115 Minn. 460, 133 N.W. 169, Ann. Cas. 1912D,

1029; *Erie R. R. v. Board of Utility Commissioners, supra.* However, the legal duty imposed by law on railroad companies and enforced by exercise of the police power in most of these crossing cases relates to the elimination of dangers and inconveniences to the traveling public which may be said to be of the company's own making in the sense that the railroad is located so as to interfere with the superior right of the traveling public to the use of the public way. And, where the police power is invoked to require a railroad company to pay for a crossing improvement in furtherance of public safety, the exercise of the power usually relates to measures designed to eliminate specific dangers at the crossing, to prevent or minimize crossing accidents. Similarly, where the police power is invoked to promote the public convenience, the exercise of the power usually relates to measures providing for the removal of conditions which unduly interrupt and impede the free movement of traffic at the crossing."

[3] The Supreme Court of the United States has consistently held that a State or its subdivisions, in the exercise of the police power to promote public safety and convenience, may validly allocate a portion, or under some circumstances even all, of the costs of grade crossing improvements to the railroads; *Atchison, Topeka & S. F. R. Co. v. Public Util. Com.*, 346 U.S. 346, 98 L. ed. 51, 74 S. Ct. 92; *Erie R. R. v. Board of Public Utility Comrs.*, 254 U.S. 394, 65 L. ed. 322, 41 S. Ct. 169; subject to the limitation that such allocation of costs must be fair and reasonable under all existing circumstances; *Nashville, C. & St. L. R. Co. v. Walters*, 294 U.S. 405, 79 L. ed. 949, 55 S. Ct. 486. See Annotations, 79 L. ed. 966 and 98 L. ed. 62. Recent decisions of courts of some of our sister states are in accord. *Southern Pacific Co. v. Corporation Commission*, 83 Ariz. 333, 321 P. 2d 224; *Underwood v. R. R. Co.*, 105 Ga. App. 340, 124 S.E. 2d 758; *City of Shively v. R. R. Co.*, 349 S.W. 2d 682 (Ky.), (appeal dismissed by U.S. Supreme Court for want of a substantial federal question, 369 U.S. 120, 7 L. ed. 2d 611, 82 S. Ct. 653); *Sayreville v. R. R. Co.*, 44 N.J. Super. 172, 129 A. 2d 895.

[4] In the light of the foregoing well established principles and giving consideration to all of the existing conditions and circumstances as disclosed by the record in this case, we agree with the conclusion of the trial court that the allocation of costs provided by the ordinances here in question is reasonable and that such ordinances are valid exercises of the police power on the part of the defendant City for the promotion of the general welfare and public

safety of its citizens. In arriving at this conclusion we have given particular consideration to the facts relating to changed economic and other conditions, growth in the number of motor vehicles, increases in the tax income derived by the defendant City from Powell Act funds and *ad valorem* taxes on motor vehicles, the relative use of the crossings here involved as between the plaintiff railroad and the automobile traveling public, and the other circumstances stressed by appellant in its brief. Giving full weight to these factors, but considering them together with the fact that the public dangers here involved are directly related to the existence of appellant's tracks and operation of its trains, and the further fact that minimizing the clear danger to persons and property at these grade level crossings benefits the railway as well as the public, we cannot agree with appellant's contention that the cost allocation provided by the ordinances is arbitrary or unreasonable. It follows that such ordinances are not subject to attack on constitutional grounds. Similarly, the section of the Charter of the City of Winston-Salem, Chap. 232, Section 54, Private Laws of 1927, under which the ordinances were enacted, is not unconstitutional *as it applies to the facts of this case.*

[5] Apart from constitutional considerations, appellant contends that the ordinances are invalid as being contrary to G.S. 136-20. That statute provides that:

> "Whenever any road or street *forming a link in or a part of the State highway system* . . . shall cross or intersect any railroad at the same level or grade, or by an underpass or overpass, and in the opinion of the chairman of the State Highway Commission such crossing is dangerous to the traveling public, or unreasonably interferes with or impedes traffic *on said State highway* . . ." (emphasis added),

the Commission may require the railroad to appear at a show cause hearing. If after hearing the Commission shall determine that said crossing is

> ". . . dangerous to public safety and its elimination or safeguarding is necessary for the proper protection of the traffic *on said State highway,* the Commission shall thereupon order the construction of an adequate underpass or overpass at said crossing or it may in its discretion order said railroad company to install and maintain gates, alarm signals or other approved safety devices if and when in the opinion of said Commission upon the hearing as aforesaid the public safety and convenience will be secured thereby. And said order shall specify that the cost of construction of such underpass or overpass or the in-

stallation of such safety device *shall be allocated between the railroad company and the Commission* in the same ratio as the net benefits received by such railroad company from the project bear to the net benefits accruing to the public using the highway, and in no case shall the net benefit to any railroad company or companies be deemed to be more than ten per cent (10%) of the total benefits resulting from the project. *The Highway Commission* shall be responsible for determining the proportion of the benefits derived by the railroad company from the project, and shall fix standards for the determining of said benefits which shall be consistent with the standards adopted for similar purposes by the United States Bureau of Public Roads under the Federal-Aid-Highway Act of 1944." (Emphasis added.)

[5, 6] This statute by its express terms applies to railroad crossings of "any road or street *forming a link in or a part of the State highway system.*" (Emphasis added.) Appellant assigns as error the trial court's finding in the present case that neither 27th Street nor Bethesda Road at the points where they are crossed by appellant's tracks are a part of or a link in the State highway system. Appellant contends these findings were contrary to law and against the greater weight of the evidence. We do not agree. At the hearing of this case the local Division Engineer for the State Highway Commission testified that no State highway funds had ever been used in construction or maintenance of either of the city streets at the location of the railroad crossings here involved and that the State Highway Commission had never exerted or attempted to exert any control or supervision of either of said streets at such locations. This evidence clearly supported the court's findings. Even conceding there was evidence that one or both of these streets may have provided the shortest or most practical route for motorists to travel between parts of the State highway system, the State Highway Commission itself has the sole authority to declare what roads and streets shall be absorbed as parts of or links in the State highway system. G.S. 136-54, G.S. 136-58, G.S. 136-59. In the case of city streets, G.S. 136-66.2(b) provides that ". . . the governing body of the municipality and the State Highway Commission shall reach an agreement as to which of the existing and proposed streets and highways included in the plan will be a part of the State highway system and which streets will be a part of the municipal street system." Under these statutes it is for the State Highway Commission rather than for the courts to determine which particular roads and streets shall become a part or link in the State highway system.

[7] Appellant contends that even if the city street at the railroad crossings here involved are not considered to be parts or links in the State highway system, nevertheless defendant City was bound by the State policy implicit in G.S. 136-20. Appellant contends that when a municipal ordinance conflicts with State policy the conflict must be resolved in favor of the State policy, citing *Upchurch v. Funeral Home,* 263 N.C. 560, 140 S.E. 2d 17; *Davis v. Charlotte,* 242 N.C. 670, 89 S.E. 2d 406; *Cox v. Brown,* 218 N.C. 350, 11 S.E. 2d 152; *State v. Sasseen,* 206 N.C. 644, 175 S.E. 142; *State v. Stallings,* 189 N.C. 104, 126 S.E. 187. These cases, however, are clearly distinguishable from the present case in that here the language of the statute involved, G.S. 136-20, expressly and clearly limits its applications to railroad crossings of roads or streets which are parts of the State highway system. The hearing provided for is to be before the State Highway Commission and determination of the cost allocation as directed in the statute is to be made by the Commission. The explicit language chosen by the Legislature clearly negatives any intention that the statute should be construed as the adoption of a statewide policy binding upon municipalities in administering their city streets which were not parts or links in the State highway system. Had the Legislature intended the statute to be binding upon municipalities in all cases where railroads crossed its city streets, surely the Legislature would have employed language which expressed, rather than language which would negative, that intent.

The judgment of the superior court is

Affirmed.

MALLARD, C.J., and BRITT, J., concur.

PATRICIA JOHNSON v. MARTHA HUGHES PETREE, DONALD GRAY PETREE AND ALEXANDER JOHNSON

No. 6919SC96

(Filed 26 February 1969)

1. Appeal and Error § 6— orders appealable — motion to strike

Although an appeal from an order striking allegations contained in the pleadings is generally not proper, an immediate appeal is available from an order granting a motion to strike which has the effect of sustaining a demurrer. Rule of Practice in the Court of Appeals No. 4(b).

2. Appeal and Error § 2— matters reviewable — appeal from motion to strike

Where appellants were entitled to immediate appeal from portions of trial court's order striking essential parts of their further answer which had the effect of sustaining a demurrer, the appeal also brought up for review other portions of the further answer.

3. Pleadings § 42— striking of pleadings — irrelevant matter

Irrelevant or redundant matter inserted in a pleading is subject to a motion to strike. G.S. 1-153.

4. Pleadings § 41— striking of pleadings — definiteness of motion

Where motion to strike paragraph of defendants' further answer is not directed to any specific allegation claimed to be redundant or irrelevant, the paragraph should not be stricken in its entirety if it contains any proper allegations relevant to the controversy.

5. Pleadings § 42; Automobiles § 43— pleadings in accident case — insulating negligence — motion to strike

The fact that the factual allegations supporting defendants' pleas of insulating negligence and sudden emergency might have been more concisely stated is not sufficient cause for a motion to strike.

6. Automobiles § 21— sudden emergency doctrine

A party cannot invoke the sudden emergency doctrine in exculpation of his own negligent conduct.

7. Torts § 4; Automobiles § 43— Uniform Contribution Among Joint Tort-Feasors Act

In an action, arising out of a three-car collision, against the drivers of two automobiles for injuries sustained by plaintiff who was a passenger in a third automobile, cross claim by one defendant against the other defendant for contribution pursuant to G.S. 1B-8(a) is not barred on the ground that plaintiff's present action is but a continuation of plaintiff's first action which was begun prior to January 1, 1968, the effective date of G.S. Ch. 1B, since plaintiff's voluntary nonsuit taken in the first action effectively terminated the original action and the present action was begun after January 1, 1968. G.S. Ch. 1B, G.S. 1-25.

8. Torts § 4— Uniform Contribution Among Tort-Feasors Act — effective date

The Uniform Contribution Among Tort-Feasors Act, G.S. Ch. 1B, does not apply to litigation pending on 1 January 1968. Session Laws of 1967, Ch. 847.

9. Judgments § 36; Torts § 5— judgment in prior action as res judicata on right to contribution

In an action, arising out of a three-car collision, against the drivers of two automobiles for injuries sustained by plaintiff who was a passenger in a third automobile, judgment obtained in another action by one defendant against the other defendant for damages incurred in the same accident is not *res judicata* on the first defendant's right to contribution in the

present case, where plaintiff passenger was not injured in the original collision between the two defendants but was injured in the subsequent collision which immediately followed.

APPEAL from *Crissman, J.*, 23 September 1968 Civil Session, Superior Court of RANDOLPH.

This is an action by the plaintiff to recover damages for personal injuries sustained in a three-car accident on 25 December 1965.

Plaintiff alleges the following facts:

On the date of this accident the plaintiff was riding in a car driven by her husband. They were traveling in a southerly direction on Flint Hill Road in Randolph County. The defendant, Alexander Johnson, was traveling just ahead of the automobile in which the plaintiff was riding and in the same direction. The defendant, Martha Hughes Petree, was driving north on Flint Hill Road at the same time. The car in which the plaintiff was riding stopped just behind Alexander Johnson so that he could make a left turn. As Alexander Johnson was making a left turn, the car driven by Martha Hughes Petree came over a hill and struck his vehicle in the side. The Petree automobile bounced off the vehicle driven by Alexander Johnson and struck the vehicle in which the plaintiff was riding.

Plaintiff alleges that the defendant Johnson was negligent in not keeping a proper lookout; in not keeping his vehicle under control; in failing to give the Petree automobile one-half of the traveled portion of the highway; in not ascertaining that his intended move could be made in safety; and in failing to give a signal of his intentions to turn.

It is alleged that Martha Hughes Petree was negligent in failing to keep a proper lookout; in not keeping her vehicle under control; in failing to reduce her speed when approaching a hill crest; in failing to reduce her speed to avoid colliding with the defendant Johnson; and that she operated her car at a speed greater than was reasonable and prudent under the existing circumstances. Donald Gray Petree, husband of Martha Hughes Petree, was made a defendant as owner of the Petree car.

The Petrees answered the plaintiff's allegations denying any acts of negligence. As a "further answer", they alleged that Alexander Johnson turned in front of the Petree automobile when it was so close that a collision could not be avoided; that Martha Hughes Petree applied her brakes but was unable to avoid hitting the vehicle driven by Alexander Johnson. In the alternative it was alleged that if Martha Hughes Petree should be found to have been negli-

gent, the negligence of Alexander Johnson was a new, independent, and wrongful act, and was the proximate cause of any injuries sustained by the plaintiff. This intervening and insulating negligence was pleaded as a bar to the plaintiff's recovery against the Petrees.

The Petrees also alleged in their "further answer" that a sudden emergency was created when Alexander Johnson pulled in front of the Petree automobile; that this sudden emergency was not contributed to by Martha Hughes Petree; and that she reacted as a reasonable and prudent person would do in such an emergency.

In a second "further answer" the Petrees filed a cross claim for contribution against the defendant Alexander Johnson.

In a third "further answer" the Petrees pleaded a judgment obtained by them at the 25 March 1968 Civil Session of Superior Court of Guilford County, against Alexander Johnson as being an adjudication of their right to contribution from Johnson. That judgment was affirmed by this Court in *Petree v. Johnson,* 2 N.C. App. 336, 163 S.E. 2d 87.

Upon the filing of answer by the Petrees, the defendant Alexander Johnson filed a demurrer to the cross claim against him; and the plaintiff filed a motion to strike all of the essential parts of the first "further answer", the entire cross claim against Alexander Johnson, and all of the allegations concerning the previous judgment. At the hearing on these motions the defendant Johnson withdrew his demurrer and adopted the plaintiff's motion to strike. Crissman, J., heard the matter, and on 12 October 1968 sustained the motion to strike in its entirety. Defendants Petree appeal from this order.

Ottway Burton and Silas B. Casey for plaintiff appellee.

Sapp and Sapp by Armistead W. Sapp, Jr., for Alexander Johnson, defendant appellee.

Smith, Moore, Smith, Schell and Hunter by Stephen Millikin and Larry B. Sitton for Martha Hughes Petree and Donald Gray Petree, defendant appellants.

MORRIS, J.

[1-4] Under our rules an appeal from an order striking allegations contained in the pleadings is generally not proper. If a party believes that such an order is prejudicial to him, he may petition this Court for a writ of *certiorari* within thirty days from the date of the entry of the order. Rule 4(b), Rules of Practice in the Court

of Appeals of North Carolina. "However when an order is entered allowing a motion to strike in its entirety a further answer or defense, or an order is entered allowing a motion to strike an entire cause of action set up in a pleading, the order amounts to the granting of a demurrer, and is immediately appealable." 1 Strong, N. C. Index 2d, Appeal and Error, § 6; *Sharpe v. Pugh,* 270 N.C. 598, 155 S.E. 2d 108. Since defendants Petree are entitled to immediate appeal from those portions of the court's order which have the effect of sustaining a demurrer, appellants' first assignment of error, based on exception taken to the court's granting appellee's motion to strike in its entirety, paragraph 1 of defendants Petree's further answer is also before us. *Sharpe v. Pugh, supra.* The paragraph stricken is a narrative account of their version of the collision. By the further answer, the defendants Petree contend that the accident resulted from the negligence of defendant Alexander Johnson. Following the paragraph stricken by the court are specific allegations of negligence on the part of defendant Johnson. Appellees contend that this narrative statement has no substantial relation to the controversy, is massively redundant, and was properly stricken. Under G.S. 1-153, irrelevant or redundant matter inserted in a pleading is subject to a motion to strike. Appellees did not direct their motion to any specific allegation claimed by them to be redundant or irrelevant to the controversy. Therefore, if the paragraph contained any proper allegations, it should not have been stricken in its entirety. While it may be conceded that the allegations might have been stated more succinctly, in our opinion the paragraph stricken does contain some proper allegations relevant to the controversy. This assignment of error is sustained.

Assignments of error Nos. 2 and 3 are addressed to the court's allowing a motion to strike the pleas of insulating negligence and sudden emergency. *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331, involved facts very similar to the present case. In that case defendant Burns turned his car directly in front of Hasty's car, the other defendant. Hasty's car struck Burns' car, bounced off, went across the road and struck the plaintiff who was standing beside the road. The question before the Court was whether Burns' negligence had intervened and insulated any prior negligence of Hasty so that Burns' negligence was the sole proximate cause of the plaintiff's injuries. There was evidence that Hasty was speeding prior to the original collision. Because of this, the Court held that Hasty's motion for nonsuit, based on the theory of insulating negligence, was properly denied. However, the Court makes it clear that this was a question for the jury and was to be considered in connection with

determining whose negligence was the proximate cause of the plaintiff's injuries.

[5] In the present case, plaintiff alleges certain specific acts of negligence by Martha Hughes Petree, among which is the allegation that she was operating her car at a speed greater than was reasonable and prudent under the existing circumstances. In the Petrees' answer these allegations are denied, and in their first "further answer" they allege facts which, if proven, would tend to show that they were not negligent and that plaintiff's injuries were caused solely by the negligence of defendant Johnson. It was error to strike the plea of insulating negligence from the Petrees' answer. Though the factual allegations may have been more concisely stated, this is not sufficient cause for striking them from the reply. *Barron v. Cain,* 216 N.C. 282, 4 S.E. 2d 618.

[6] Counsel for appellees concede that the defense of sudden emergency is available to defendants Petree if properly pleaded. They contend, however, that as pleaded here, it is redundant and repetitious and further that defendants Petree may not avail themselves of the plea of sudden emergency without admitting negligence. In support of this contention, appellees cite no authority. However, the rule is to the contrary. A party cannot invoke the sudden emergency doctrine in exculpation of his own negligent conduct. *Forga v. West,* 260 N.C. 182, 132 S.E. 2d 357; *Jones v. Horton,* 264 N.C. 549, 142 S.E. 2d 351; *Boykin v. Bissette,* 260 N.C. 295, 132 S.E. 2d 616. Appellees did not direct their motion to strike to any specific allegations which in their opinion might be redundant or repetitious, and the paragraph should not have been stricken in its entirety, if any part of the paragraph was proper. Defendants Petree are entitled to plead the doctrine of sudden emergency. Appellants' assignments of error Nos. 2 and 3 are sustained.

[7] Also, we think the court erred in striking the cross claim made by the Petrees against the other defendant, Alexander Johnson, for contribution. The plaintiff started an action to collect dammages for the injuries received in this same accident in September of 1966. That action was brought only against the Petrees. In their answer the Petrees had Alexander Johnson joined as an additional party defendant under the provisions of G.S. 1-240. On 18 July 1968, the plaintiff took a voluntary nonsuit in this action and, on the same date, started a new action. In this action, plaintiff joined the Petrees and Alexander Johnson as joint and concurrent tort-feasors. The appellees argue that the present action is only a continuation of the action started in 1966; therefore, G.S. 1B-8 would have no applica-

tion. They argue that G.S. 1-240 controls, and under *Greene v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82, the cross claim against Alexander Johnson was improper because he was made an original party defendant.

[8] G.S. 1B did not apply to litigation pending on 1 January 1968. Chapter 847, Session Laws 1967. However, it is our view that the present action was not pending on 1 January 1968. Appellees rely on G.S. 1-25, which allows a new action within one year after a judgment of nonsuit for their argument that the present action and the action started in 1966 are the same; therefore, the present action was pending on 1 January 1968.

Appellees do not seek the protection of G.S. 1-25 to allow a new action which would otherwise be barred by the applicable statute of limitations. The second action was brought within the time limited by the statute of limitations for the institution of the original action. They contend that the provisions of the statute are equally applicable to the situation here and make the second action merely a continuation of the first. They cite no authority for their position, nor do we find any decisions construing the statute to mean that a new action is a continuation of the first action for the purpose of determining whether a newly enacted statute is applicable to the new action. G.S. 1-25 provides:

> "If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in forma pauperis."

In *Bourne v. R. R.*, 224 N.C. 444, 31 S.E. 2d 382, Barnhill, J. (later C.J.) wrote: "The words 'new action', 'new suit', and 'original suit' as used in this statute, G.S. 1-25, clearly import that a judgment of nonsuit terminates the original action. They indicate a difference in the two actions though the causes may be identical. *Cooper v. Crisco*, 201 N.C. 739, 161 S.E. 310. The distinction is observed in decisions referring to the causes of action in the respective suits, to a restatement of the same cause in the latter action, and to 'another action', 'second action', the 'former action', and a 'subsequent action'."

We note also the statement of the court in *Grimes v. Andrews*,

170 N.C. 515, 87 S.E. 341, referring to the same statute: "The provisions as to bringing a new action within one year after a nonsuit or dismissal, reversal, or other termination of the first suit, as prescribed in the statute, refers only to those cases where the statute of limitations is applicable, and would bar, but for this clause, which, if complied with, saves the cause of action."

It is also to be noted that in the original action Alexander Johnson was not an original defendant, and plaintiff did not seek recovery against him. In the second action, plaintiff made Alexander Johnson an original defendant, alleged negligence on his part, and prayed for recovery against him.

We are of the opinion and so hold that the cross claim of defendants Petree against Alexander Johnson was proper under G.S. 1B-8(a): "A joint tort-feasor who is a party to an action may file a cross claim for contribution or indemnity from any other joint tort-feasor who is a party."

[9] We now come to the plea of *res judicata* raised by the Petrees. In March of 1968 the Petrees obtained a judgment against Alexander Johnson for the injuries and property damage they received in this same accident. The defendants Petree now argue that this judgment should be used to establish their right to contribution if the jury should happen to find that they are liable to the present plaintiff and Alexander Johnson was not. The Petrees rely on *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345; and *Sisk v. Perkins,* 264 N.C. 43, 140 S.E. 2d 753, for their argument that the judgment previously recovered by them against Alexander Johnson constitutes an adjudication of their right to contribution in this case. These cases present a fact situation in which there was a two-car collision and a passenger in one of the cars is suing the two drivers; or, the passenger sues one driver and the other driver is brought into the suit by way of a cross claim. In each case there had previously been an adjudication of the rights and liabilities of the two drivers to each other. The Court, in these cases, held that the previous judgment was *res judicata* on the issue of contribution. We note that in *Stansel v. McIntyre, supra,* and *Sisk v. Perkins, supra,* there were only two cars involved, and there was but one collision. In each case the plaintiff was a passenger in one of the two cars. Also, see *Hill v. Edwards,* 255 N.C. 615, 122 S.E. 2d 383; *Jenkins v. Fowler,* 247 N.C. 111, 100 S.E. 2d 234; and *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269. It is difficult to imagine a situation, under these facts, in which a determination of the negligence of the drivers to each other, would not determine their right to contribution in a suit

brought by a passenger in one of the cars. In these cases, the issue of contribution and the issue of negligence between the two drivers in the first suit, depended exactly on the same facts. "There is no doubt that a final judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, wherever the existence of that fact is again in issue between them, not only *when the subject is the same,* but when the point comes incidentally in question in relation to a different matter, in the same or any other court." (Emphasis added.) *Stansel v. McIntyre, supra.*

We hold that the present case is distinguishable from the *Stansel* case and the *Sisk* case because the Petrees' right to contribution does not depend on the same facts that were involved in the previous action in which the Petrees recovered from Alexander Johnson. In the present case the plaintiff was riding in a third car. She was not injured in the original collision between Martha Hughes Petree and Alexander Johnson; her injuries were received in a second collision. Alexander Johnson can be liable for contribution only if his negligence was a proximate cause of this plaintiff's injuries. That question has not been determined. Granted, that the two collisions were close in time, and that the situation was such that Alexander Johnson may have reasonably foreseen that his actions in pulling in front of the Petree automobile would cause it to veer across the road and strike another car; however, that question is yet to be determined and until it is determined the Petrees' right to contribution remains undecided.

Reversed in part.

Affirmed in part.

CAMPBELL and BROCK, JJ., concur.

CYRUS N. HICKS v. JUANITA J. HICKS

No. 6921SC14

(Filed 26 February 1969)

1. Divorce and Alimony § 5— defenses — recrimination

The doctrine of recrimination bars a plaintiff's right to divorce if the defendant proves that plaintiff has himself been guilty of conduct which would entitle defendant to a divorce.

2. Divorce and Alimony §§ 5, 14; Evidence § 12— defenses — recrimination — evidence of wife's adultery — competency of husband's testimony

Where the wife sets up abandonment as a defense in the husband's action for divorce on the ground of two years' separation, the husband may testify as to the adultery of his wife in order to explain his separation from the wife and to establish his defense of recrimination to the wife's charge of abandonment, the husband's testimony being neither for nor against the wife on the issue of adultery and therefore not coming within the purview of G.S. 8-56 or G.S. 50-10.

3. Divorce and Alimony § 14— circumstantial evidence of adultery

Where circumstantial evidence is relied upon to establish adultery, there must be evidence of both inclination and opportunity on the part of the party charged.

PARKER, J., dissenting.

APPEAL by plaintiff from *Martin, S.J.*, at the 1 April 1968 Session of FORSYTH Superior Court.

The plaintiff filed his complaint 10 August 1965 alleging that he and the defendant were married 9 April 1955, that they separated 8 January 1964 and had lived apart continuously since that time. He prayed for absolute divorce, custody of the children and possession of the home.

The defendant answered 19 August 1965 denying the allegations of the complaint and pleading, as a defense and cross-action, that the plaintiff was guilty of mental cruelty toward the defendant. She prayed for temporary and permanent alimony, custody of and support for the children and possession of the home.

Plaintiff filed a reply 24 September 1965 pleading the adultery of the defendant in response to her allegations of cruelty, and withdrawing his prayer for absolute divorce on grounds of separation.

On 31 July 1967, Anglin, J., ordered that all the pleadings in the action be consolidated into an amended complaint, an amended answer and counterclaim and an amended reply. Pursuant to this order, plaintiff filed his amended complaint 2 August 1967 alleging two years' separation from 8 January 1964, except for visits to the children and caring for the property, and that the separation has been absolute and total, if not from 8 January 1964, then certainly from 10 August 1965. As a second cause of action, plaintiff alleged the adultery of the defendant with one Walter Hale, Sr., on 8 January 1964.

The defendant filed her amended answer 4 August 1967 denying the allegations of the complaint and alleging as a cross-action aban-

donment of the defendant by the plaintiff and indignities to the person of the defendant by the plaintiff.

Plaintiff replied to the cross-action on 1 September 1967 denying the allegations of the cross-action and pleading recrimination against the defendant based on her constructive abandonment and adultery.

At the close of plaintiff's evidence, the court granted defendant's motion for nonsuit as to the cause of action for adultery. Issues were presented to the jury and the jury found the plaintiff guilty of abandonment and indignities. The court entered judgment granting defendant the possession and control of the home as alimony and ordering plaintiff to pay the costs of court and defendant's counsel fees. From this judgment, plaintiff appeals, assigning error.

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

Booe, Mitchell, Goodson & Shugart by Wayne C. Shugart for defendant appellee.

BRITT, J.

The first assignment of error presents the question whether the plaintiff may offer his own testimony as to the adultery of the defendant for the purpose of explaining his abandonment of the defendant and to establish his defense of recrimination to her cross-action based on abandonment.

[1] The doctrine of recrimination is a rule which bars a plaintiff's right to divorce if the defendant proves that the plaintiff has himself been guilty of conduct which would entitle the defendant to a divorce. 1 Lee, N. C. Family Law, § 88, p. 336. *Sears v. Sears*, 253 N.C. 415, 117 S.E. 2d 7; 3 Strong, N. C. Index 2d, Divorce and Alimony, § 5, p. 326.

[2] In the case at hand, the defendant (plaintiff as to the cross-action) put on evidence tending to show that the plaintiff had abandoned her without cause, left her without adequate support and engaged in erratic, undependable conduct, both prior to and since the abandonment. Her evidence also tended to show that she was faithful, dutiful and without fault. After the defendant rested her case, the plaintiff took the stand and attempted to testify that he had caught the defendant engaged in an act of adultery in the home of the plaintiff on 8 January 1964, and that was why he left on that date and proceeded to live separate and apart from defendant. The

court excluded all the testimony of plaintiff relating to the alleged adultery.

Plaintiff insists that the testimony was competent and that the trial judge committed prejudicial error in not allowing him to testify. Defendant contends that the testimony was inadmissible by reason of the following statutes:

> "§ 8-56. *Husband and wife as witnesses in civil action.* — In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery; or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges: * * *."
>
> "§ 50-10. *Material facts found by jury; parties cannot testify to adultery; waiver of jury trial in certain actions.* — The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact. * * *"

No issue involving adultery was submitted to the jury. Issue No. 5 was as follows: "Has the plaintiff, Cyrus N. Hicks, unlawfully abandoned his wife, Juanita J. Hicks, without adequate provocation on the part of the defendant, Juanita J. Hicks, as alleged in the cross action?" Issue No. 6 was as follows: "Did the plaintiff, Cyrus N. Hicks, offer such indignities to the person of the defendant, Juanita J. Hicks, as to render her conditions intolerable and life

burdensome without adequate provocation on the part of the defendant, Juanita J. Hicks, as alleged in the cross action?"

At the time the challenged testimony was offered, plaintiff's action for divorce on the grounds of adultery had been dismissed; therefore, it was not offered "in any action or proceeding for divorce on account of adultery" as forbidden by G.S. 8-56. For the same reason, the prohibition set forth in G.S. 50-10 was not applicable because a divorce action grounded on adultery was not being tried at the time. Therefore, we must decide if the challenged testimony offended the following portion of G.S. 8-56: "Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other *in any action or proceeding in consequence of adultery.*" (Emphasis added.)

In *Broom v. Broom,* 130 N.C. 562, 41 S.E. 673, the plaintiff husband brought suit against his wife for divorce on the grounds of adultery. Two witnesses introduced by plaintiff testified each for himself that he had engaged in sexual intercourse with the defendant since her marriage. Defendant took the witness stand in her own behalf and testified that the testimony given by the witnesses was untrue. From judgment for the defendant, plaintiff appealed, contending that defendant was not competent to give the testimony aforesaid. In an opinion by Clark, J. (later C.J.), the Supreme Court held:

> "The Code, sec. 588 [now G.S. 8-56], makes husband and wife competent and compellable witnesses in all cases, except that in three cases named, i.e., in criminal actions, in any action for divorce on account of adultery, or action for criminal conversation, it is provided that the husband and wife shall not be competent or compellable 'to give evidence *for or against* the other.'"

Plaintiff's testimony regarding defendant's adultery challenged in this action did not come within either of the three exceptions.

In *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933, our Supreme Court held that the purpose of the exception set forth in the quoted statutes is to prevent collusion in divorce actions. In an opinion by Hoke, J., we find the following: "The legislation is based upon the gravest reasons of public policy and, as stated in the authorities cited, is designed, not only to prevent collusion where the same exists, but to remove the opportunity for it." Certainly, the testimony of plaintiff, offered and excluded in the instant case, did not violate the safeguards against collusion.

In the case of *Biggs v. Biggs,* 253 N.C. 10, 116 S.E. 2d 178, *Broom*

and *Hooper* were strongly relied on. In *Biggs,* plaintiff husband brought an action for absolute divorce on the ground of adultery. In her answer, defendant denied the allegations of adultery and by amendment set up the defense of condonation, contending that the parties resumed their marital relations and cohabited with each other as husband and wife at Homestead, Florida, on Sunday night, 18 October 1959. Issues of residence, marriage, adultery and condonation were submitted to and answered by the jury in favor of plaintiff. At trial defendant testified that she spent the night in question with plaintiff in a motel in Florida and at the time of trial was pregnant as the result of intercourse with plaintiff on that occasion. Over defendant's objection, plaintiff, on redirect examination, was allowed to testify that although he saw defendant in Florida for a few minutes on the date in question, he did not spend the night with her and had no sexual relations with her. Defendant contended that plaintiff was not competent to testify to nonaccess. In an opinion by Moore, J., we find the following:

> " 'At common law husband and wife were absolutely incompetent to testify in an action to which either was a party.' Stansbury: N. C. Evidence, s. 58, p. 99. G.S. 8-56 was designed to remove the common law disabilities, except in the instances therein set out. It disqualifies both spouses from testifying *for* or *against* the other in any action or proceeding in consequence of adultery or for divorce on account of adultery. The purpose of the exception is to prevent collusion in divorce actions. *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933. But it does not prevent the party charged with adultery from denying the charge. *Broom v. Broom,* 130 N.C. 562, 41 S.E. 673.
>
> In the *Broom* case two of plaintiff's witnesses said they had had intercourse with defendant wife since her marriage to the plaintiff. Defendant denied the testimony of these witnesses. Referring to the exceptions in G.S. 8-56, the Court said: 'If the intention had been to exclude the husband and wife absolutely as witnesses in such cases, . . . [sic] the proviso . . . would have been that . . . the husband and wife were "not competent or compellable as witnesses." ' The proviso merely disqualifies both spouses from testifying *for* or *against* the other. The Court held that her testimony was not prohibited by the statute because 'she did not testify *for* the husband so as to enable him to obtain a collusive divorce, nor did she testify *against* him to prove anything against him. Her evidence was in defense of herself, and not "for or against" the other party, and the statute

> disqualifies neither as a witness in his or her own behalf, except only when it is for or against the other. . . . These words (for or against each other) mean something, and when given their natural significance simply prevent either party proving a *ground* of divorce *against* the other or *for* the other by his or her own testimony.'
>
> The situation in the instant case is somewhat analogous. Any contention that Mrs. Biggs was not competent 'in an action or proceeding for divorce on account of adultery,' to testify in her own behalf in support of her affirmative defense of condonation would be untenable. It is true that it is testimony against the husband in the sense that it tends to oppose the ultimate purpose of the suit. But the same was true in the *Broom* case. The wife's denial of the acts of adultery was calculated to affect the ultimate outcome against the husband, but was not collusive. By the same reasoning the testimony of plaintiff Biggs in denial of the alleged condonative act of intercourse with his wife was purely defensive, related only to the issue of condonation, and was not collusive. He was not disqualified by the statute to defend himself against the charge of condonation."

The testimony challenged in the case at bar was not offered for or against the defendant on an issue of adultery. It was not offered "in any action or proceeding in consequence of adultery" but was offered by the plaintiff in his defense against the charges of unlawful abandonment and of offering indignities without provocation, and the cross-action under G.S. 50-16. Defendant's evidence tended to show abandonment by plaintiff on or about 8 January 1964, and plaintiff was entitled to testify to defendant's adultery to explain and justify his separating from defendant, and to show that he had adequate provocation for his subsequent conduct and attitude toward her.

Defendant's counsel strongly contends that the case before us is controlled by *Becker v. Becker*, 262 N.C. 685, 138 S.E. 2d 507. Although it is a narrow one, we think there is a distinction between the principles of law involved in the two cases. In *Becker,* the plaintiff wife sued for divorce on grounds of two years' separation; defendant husband pled adultery of the wife in recrimination and in support of his plea attempted to testify as to the adulterous disposition of the plaintiff. The court held that the proffered evidence was inadmissible and cited G.S. 8-56 and G.S. 50-10 along with five decisions of our Supreme Court. The testimony challenged in *Becker* had but one purpose — to defeat the wife's action for divorce; there-

fore, it was *against* her. In the case before us, the primary purpose of the challenged testimony was in *defense* of the husband — from wife's charges of abandonment and indignities and her cross-action under G.S. 50-16. A review of the decisions cited in *Becker* reveals that two were cases by husbands for absolute divorce on grounds of adultery in which the court stated the collusion principle, and the other three were cases for criminal conversation in which admissions of the accused spouses were ruled inadmissible.

The assignment of error was well taken and we hold that the trial court erred in not admitting the challenged testimony.

Plaintiff also assigns as error the granting of defendant's motion for nonsuit of his cause of action for divorce on grounds of adultery. This assignment of error is without merit and is overruled.

[3] Plaintiff offered no admissible direct evidence of the defendant's adultery. It is settled that, where circumstantial evidence is relied upon to establish adultery, there must be evidence of both inclination and opportunity on the part of the party charged. 1 Lee, N. C. Family Law, § 65, p. 262. No evidence was offered tending to show an inclination toward adultery on the part of the defendant. The evidence of opportunity, while sufficient to arouse conjecture, was insufficient to be submitted to the jury. Needless to say, the testimony of plaintiff discussed in the first assignment of error herein would not have been admissible in plaintiff's action for divorce on grounds of adultery.

For the reasons stated, plaintiff is awarded a

New trial.

MALLARD, C.J., concurs; PARKER, J., dissents.

PARKER, J., dissenting:

Because it seems to me that this case is controlled by *Becker v. Becker,* 262 N.C. 685, 138 S.E. 2d 507, and that the trial court complied with that case in excluding the husband's testimony concerning adultery of the wife, I vote to affirm.

NANNIE PARSONS v. ALLEGHANY COUNTY BOARD OF EDUCATION
No. 6923IC66

(Filed 26 February 1969)

1. Courts § 21; State § 7— tort committed in another state — what law governs

In an action brought in this State under the Tort Claims Act for a collision which occurred in Virginia, the substantive law of Virginia and the procedural law of North Carolina apply.

2. State § 8— school bus accident in Virginia — negligence of bus driver

In an action brought in this State under the Tort Claims Act for injuries sustained in Virginia when defendant's school bus backed into plaintiff's automobile, findings of fact by the Industrial Commission supported by competent evidence *are held* sufficient to show that defendant's school bus driver violated Virginia Code § 46.1-216 by backing the school bus without first seeing that such movement could be made in safety and was therefore negligent under Virginia law in the operation of the school bus.

3. State § 8— school bus accident in Virginia — contributory negligence

In an action under the Tort Claims Act for injuries sustained in Virginia when defendant's school bus backed into plaintiff's automobile, finding by the Industrial Commission that plaintiff was not contributorily negligent, which is in effect a finding that plaintiff met the requirement of Virginia law that she use reasonable care to avoid injury from defendant's negligence, *is held* supported by evidence that plaintiff blew her horn when she ascertained the school bus driver was not going to stop but did not have time to back her automobile out of the path of the school bus.

4. State § 10— review of Industrial Commission decision

Appeal to the Court of Appeals from a decision of the Industrial Commission is for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission are conclusive if there is any competent evidence to support them.

5. State § 10— sufficiency of findings by Industrial Commission

In this action under the Tort Claims Act, the facts found by the Industrial Commission *are held* pertinent to the issues and ample to determine the dispute and support the award, the Commission not being required to make findings coextensive with the credible direct evidence.

6. State § 7— contributory negligence — pleadings

In order to rely upon contributory negligence as a defense to an action under the Tort Claims Act, it must be pleaded in the answer, G.S. 143-297, G.S. 1-139, and failure of the Industrial Commission to make findings of fact as to contributory negligence is not error where defendant did not file an answer setting forth that defense.

7. State § 10— sufficiency of findings by Industrial Commission

In this action under the Tort Claims Act, there is nothing in the record to indicate a desire on the part of the Industrial Commission to arbitrarily and capriciously deprive defendant of the successful chance to overturn its decision on appeal by intentionally excluding from its findings direct evidence which was believed.

DEFENDANT appealed from award of Industrial Commission filed herein on 23 September 1968.

This is a claim for damages under the Tort Claims Act, as provided in G.S. 143-291, et seq.

Plaintiff filed a claim as required in the form of an affidavit with the North Carolina Industrial Commission on 26 April 1966 and amended it on 3 May 1966. The defendant did not file an answer, demurrer or other pleading to the affidavit.

Plaintiff asserted that she lived in Virginia and on 30 March 1966 received personal injuries and damages to her automobile as a result of the negligent operation of defendant's school bus by John Church, agent and employee of the defendant.

After a hearing on 22 March 1968, the Deputy Commissioner of the Industrial Commission on 24 April 1968 made the following findings of fact:

"1. That John Church stopped the school bus he was driving to let a student off on Highway #93 over the North Carolina line in Virginia and then proceeded to back said school bus into a Virginia Secondary Road #708, which he did every school day at this point.

2. That as John Church backed the school bus at a speed of four to six miles per hour, he failed to keep a proper lookout as he was backing, and hit the plaintiff's car that had stopped behind the bus; that said employee, John Church, failed to do that which and did other than a reasonable person would have done under the same or similar circumstances. This constitutes negligence upon his part and such negligence was the proximate cause of the accident giving rise hereto and the damages sustained by the plaintiff.

3. Plaintiff acted the same as a reasonable prudent person would have done under the same or similar circumstances and there was no contributory negligence upon her part.

4. Following the accident, the plaintiff contacted Dr. J. C. Moxley of Independence, Virginia, Dr. Thomas H. Kuhnert of

Bristol, Tennessee and Dr. Jonas Stankaitis of Cleveland, Ohio, when she visited with her daughter in Ohio; that the plaintiff was examined by Dr. David D. Anderson, Orthopedic Specialist, at Bowman Gray Hospital in Winston-Salem, North Carolina, and that the plaintiff's case was diagnosed as an acute cervical and lumbar strain.

5. Plaintiff still complains that she has back pain and neck pain and is unable to carry on her normal work on her farm.

6. As a result of the injury by accident giving rise hereto, the plaintiff sustained $473.07 damages to her automobile and she has incurred $531.90 in medical expenses and has suffered with pain and suffering. By reason of such things, plaintiff was damaged in the total amount of $4,500.00 as a result of the accident giving rise hereto."

Upon such finding, the hearing Commissioner made an award to the plaintiff of $4,500.00. The defendant appealed to the Full Commission asserting that the material findings of fact were "contrary to fact and applicable law," and filed a motion, which was allowed, for the finding of evidentiary facts dealing with the actions of the plaintiff on the occasion complained of. The Full Commission thereupon held:

"The defendant's motion is in order and is allowed, and to that end Findings of Fact 1 and 2 in Mr. Dandelake's decision and order are expunged from the record and in lieu thereof the following:

'1. Highway #93 is a rural paved road that runs from Alleghany County, North Carolina, into Virginia. Just after crossing the North Carolina-Virginia line (into Virginia) Secondary Road #708 intersects said Highway #93 to form a "T" intersection; Highway #708 is a dirt road.

'2. John Church's bus route requires him to drive the school bus on Highway #93 and proceed across into Virginia and then turn around by backing the school bus into Highway #708, the dirt road. On the day in question plaintiff saw the bus and brought her car to a stop on Highway #708, the dirt road, approximately fifty-five feet from the intersection of Highway #93. The bus is approximately 30 to 35 feet long. As John Church backed the school bus at a speed of four to six miles per hour onto Highway #708, he failed to keep a proper lookout as he was backing and backed the bus into the front of plaintiff's car. The plaintiff blew her horn but despite this the school bus

struck her car. John Church, the defendant's agent, was negligent in that he did not keep a proper lookout and act as an ordinary prudent man would act under the same conditions. This negligence is imputed to the defendant and such negligence was the sole proximate cause of the accident.'

In all other respects the said decision and order of Deputy Commissioner C. A. Dandelake, filed April 24, 1968, is affirmed."

From the findings and award of the Full Commission, the defendant assigns error and appeals.

Arnold L. Young and J. Colin Campbell for plaintiff appellee.

Attorney General Robert Morgan by Staff Attorney R. N. League, and R. F. Crouse for defendant appellant.

MALLARD, C.J.

[1] This case grew out of a collision in the State of Virginia between a school bus owned by the defendant and an automobile owned by the plaintiff. The substantive law of the State of Virginia is applicable. The procedural laws of the State of North Carolina are applicable. Thus, whether under the substantive law of Virginia the evidence offered by plaintiff is sufficient to support the findings of fact is determinable in accordance with the laws of the State of North Carolina. *Conrad v. Motor Express,* 265 N.C. 427, 144 S.E. 2d 269.

In the case of *Kirby v. Fulbright,* 262 N.C. 144, 136 S.E. 2d 652, Justice Bobbitt said:

"The substantive rights and liabilities of the parties are to be determined in accordance with the laws of Virginia, the *lex loci.* Procedural matters are to be determined in accordance with the law of North Carolina, the *lex fori. Nix v. English,* 254 N.C. 414, 419, 119 S.E. 2d 220, and cases cited; *Knight v. Associated Transport,* 255 N.C. 462, 464, 122 S.E. 2d 64; *Frisbee v. West,* 260 N.C. 269, 271, 132 S.E. 2d 609. G.S. 8-4 requires that we take judicial notice of the pertinent Virginia law.

Whether, under the substantive law of Virginia, the evidence was sufficient to require its submission to the jury is determinable in accordance with the procedural law of this jurisdiction."

[2] There was ample evidence to support the findings of fact of the Industrial Commission. The findings of fact reveal a violation by the defendant's bus driver of that portion of the Virginia Code

§ 46.1-216 reading as follows: "Every driver who intends to start, back, stop, turn or partly turn from a direct line shall first see that such movement can be made in safety . . ." A violation of this section constitutes negligence under the Virginia law. *Unger v. Rackley,* 205 Va. 520, 138 S.E. 2d 1.

The defendant's driver testified that he did not hear the plaintiff sound her horn and that he did not even see plaintiff's vehicle until after he had backed his bus off of Highway #93 into Virginia Secondary Road #708. According to defendant's agent, (the bus driver), he violated the provision of this statute, in that he backed the school bus into Road #708 and struck plaintiff's automobile without even seeing it until after the collision. It is clear that he backed the school bus into Road #708 without first seeing that such movement could be made in safety and was therefore guilty of negligence in the operation of the school bus. The Supreme Court of Virginia said in the case of *Messick v. Barham,* 194 Va. 382, 73 S.E. 2d 530, that "(i)t is as much the duty of the driver of a car intending to back his car to give proper warning of his intention, and while backing to look where he is backing, as it is his duty to look to the front while proceeding forward and to give timely warning of his approach. Backing is naturally more dangerous than driving forward, and, therefore, should require no less care than the latter. . . .

. . . It is as much the duty of the driver of a car to keep and maintain a proper lookout after his car starts to move as it is to look before it moves."

[3] Defendant contends that the Industrial Commission committed error in finding that plaintiff was not contributorily negligent and that only defendant's negligence proximately caused plaintiff's injuries. This contention is without merit. The evidence tends to show that plaintiff had stopped her car on a downhill grade about 55 or 60 feet from the traffic island. That the school bus was 30 or 35 feet long. That when the school bus driver kept coming on back, she blew her horn, and the bus was coming too fast for her to move before it hit her.

Defendant cites many Virginia cases holding in substance that a plaintiff has the duty to use reasonable care to avoid injury from a defendant's negligence if such action is reasonable. Defendant also cites the case of *Penoso v. D. Pender Grocery Co.,* 177 Va. 245, 13 S.E. 2d 310, which states that "the duty to maintain a lookout involves not only the physical act of looking, but also a reasonably prudent reaction to whatever might be seen." We think this rule ap-

plied both to the plaintiff and the driver of defendant's bus. Under the circumstances disclosed by this evidence, the plaintiff, under the Virginia law, also had the right to rely on the presumption that the driver of the school bus would comply with the applicable provisions of the Virginia law in backing the vehicle. *Luck v. Rice,* 182 Va. 373, 29 S.E. 2d 238; *Unger v. Rackley, supra.* Plaintiff testified in substance that after she ascertained the driver of the school bus was not going to stop, she blew her horn but did not have time to back her vehicle out of the path of the school bus. The Industrial Commission, the fact-finding body, found that plaintiff was not contributorily negligent and in so doing found, in effect, that she saw and then reacted to what she saw in a reasonably prudent manner. *Whitfield v. Dunn,* 202 Va. 472, 117 S.E. 2d 710.

[4] The findings of fact of the Industrial Commission are supported by competent evidence. It is provided in G.S. 143-293 that the appeal to the Court of Appeals from the decision of the Full Commission is for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them. In fact, defendant in its brief says:

> "While at the trial level defendant disputed certain of the facts on which findings were based, it does not challenge the content of the existing findings on appeal since evidence exists to support them."

[5] Defendant contends that "the substantive aspects of this case may not be properly before the Court of Appeals because of the sketchy findings of fact made below." Defendant moved for additional findings of fact and excepted to the failure to find them. This contention is without merit. The facts found are pertinent to the issues and are ample to determine the dispute and support the award. G.S. 97-84. Defendant has cited no authority and we have found none which requires the Industrial Commission to make findings coextensive with the credible direct evidence as defendant contends. In the case of *Guest v. Iron & Metal Co.,* 241 N.C. 448, 85 S.E. 2d 596, the Court said: "The Commission is not required to make a finding as to each detail of the evidence or as to every inference or shade of meaning to be drawn therefrom."

[6] It is noted in the record that there is no answer filed by the defendant alleging contributory negligence or any other defense. It was admitted on oral argument that no answer was filed. The last paragraph of G.S. 143-297 reads as follows:

"The department, institution or agency of the State against whom the claim is asserted shall file answer, demurrer or other pleading to the affidavit within thirty (30) days after receipt of copy of same setting forth any defense it proposes to make in the hearing or trial, *and no defense may be asserted in the hearing or trial unless it is alleged in such answer,* except such defenses as are not required by the Code of Civil Procedure or other laws to be alleged." (emphsais added)

G.S. 1-139 reads as follows:

"In all actions to recover damages by reason of the 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."

Applying these two statutes, we are of the opinion that since the defendant did not file an answer setting forth contributory negligence as a defense, its contention that the Industrial Commission did not make any additional findings of fact as to contributory negligence is without merit.

Defendant in its brief also asserts:

"It seems clear from the above that the failure to find the facts moved for was not because they were untrue or unbelieved but because of one of the following errors of law:

(a) the Industrial Commission arbitrarily and capriciously desired to deprive defendant of the successful chance to overturn its decision on appeal by intentionally excluding from its findings direct evidence which was believed;

(b) the Industrial Commission did not feel that its written findings needed to be coextensive with the credible direct evidence in order to afford appellate review to defendants; (sic)

(c) the Industrial Commission did not feel the evidence was relevant or conclusive;

Defendant submits that '(a)' above is a violation of due process of law; '(b)' above goes against the citations set out above under this question; '(c)' above is contrary to the case law cited under Question I in this brief."

[7] We have carefully examined the entire record and are of the opinion and so hold that on this record there is nothing to indicate a desire on the part of the Industrial Commission to arbitrarily and capriciously deprive defendant of the successful chance to overturn its decision on appeal by intentionally excluding from its findings

direct evidence which was believed, and that there is no violation of due process as contended by defendant.

We find nothing in this record or the citations in defendant's brief to indicate any feeling, negative or positive, on the part of the Industrial Commission with respect to making necessary findings in order to afford appellate review to defendant. Such contention, as is set out in section (b) above, is without merit.

We also do not find anything in this record or the case law cited in defendant's brief to indicate that the Industrial Commission did not feel the evidence was relevant or conclusive.

The award of the North Carolina Industrial Commission is

Affirmed.

BRITT and PARKER, JJ., concur.

RUSSELL L. CLAYTON, BY HIS NEXT FRIEND, HENRY L. CARTER v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

No. 6919SC37

(Filed 26 February 1969)

1. Insurance § 37— action on group life policy — nonsuit

In plaintiff's action to recover death benefits under a policy of group life insurance issued by the defendant on plaintiff's mother, plaintiff's evidence is sufficient to make out a *prima facie* case that he was the named beneficiary in the policy.

2. Trial § 17; Evidence § 29— admission of evidence competent for restricted purpose — letter

Where part but not all of a letter offered in evidence is competent, it is the duty of the objecting party to point out the incompetent parts thereof, and upon his failure to do so, the admission of the entire letter is without error.

3. Evidence § 53— expert testimony — handwriting

A witness found by the court to be an expert in the field of handwriting may give his opinion that the signatures on two exhibits were written by one and the same person. G.S. 8-40.

4. Evidence §§ 15, 29— irrelevant evidence — envelope bearing handwriting of insured

In an action to recover under a policy of group life insurance, an envelope addressed to the deceased's husband and bearing the purported signature

of deceased insured *is held* irrelevant and therefore incompetent on the issue of whether the insured signed a card designating her husband as the beneficiary of the policy.

5. Insurance § 7— what law governs — group life insurance

In the absence of evidence whether policy of group life insurance was delivered in this State, the statute, G.S. 58-211, relating to the standard provisions of a group life policy is inapplicable in plaintiff's action to recover death benefits under such a policy.

6. Trial § 33— instructions — application of law to the evidence

Trial judge is required to relate and apply the law to the variant factual situations supported by the evidence and based upon allegations in the pleadings, and the giving of such instructions in the form of the contentions of the parties is not sufficient. G.S. 1-180.

7. Trial §§ 33, 40— application of law to evidence — form and sufficiency of the issues

Trial judge erred in failing to instruct the jury as to the circumstances under which the issue in the case should be answered in the affirmative and the circumstances under which it should be answered in the negative.

APPEAL by plaintiff from *Seay, J.*, June 1968 Session of Superior Court of CABARRUS County.

This action was instituted by plaintiff to recover death benefits under a group insurance policy issued by the defendant on plaintiff's mother as an employee of Eastern Air Lines, Inc., (Eastern).

This case has been heretofore appealed by the plaintiff to the Supreme Court from a judgment of nonsuit, and the opinion of the Supreme Court in that case is reported in *Clayton v. Insurance Co.*, 270 N.C. 758, 155 S.E. 2d 145, in which it is stated:

> "The plaintiff alleged that the only certificate of insurance issued by the defendant and delivered to Margie C. Jones prior to her death was certificate No. 15291 (which was based on policy No. G-5918). In answer to this allegation 'The defendant expressly denies that it issued a certificate to Margie C. Jones at any time,' and further said in the answer, 'It is admitted that the life of Margie C. Jones was fully insured on the 25th day of November, 1963, under the provisions of a policy issued by the defendant Prudential Insurance Company to Eastern Air Lines, Inc., that said Margie C. Jones had fully complied with and duly performed all the terms, provisions and conditions in said policy to be performed by her.' Further saying 'that Prudential has made payment in the amount of $12,500 under the policy to the beneficiary of record Floyd Bradley Jones.'

Payment of the amount due under the policy and to the right person are matters of defense, and the burden of establishing them is upon the Insurance Company after the plaintiff has made out a *prima facie* case.

'The burden of proof is on defendant to establish the facts in support of its defense that it had properly paid the amount due under the policy, or that it had been otherwise discharged or released from its liability thereunder.' 46 C.J.S., Insurance § 1316(8).

If upon the trial Prudential can establish that it was justified in paying the estranged husband instead of the minor son of the deceased, it would, of course, absolve it from responsibility of the latter. However, the plaintiff is entitled to go to the jury."

In this case the court submitted the case to the jury upon the following issue:

"Was the plaintiff, Russell L. Clayton, the beneficiary designated at the time of the death of Margie C. Jones to receive the benefits of the group life insurance policy issued by The Prudential Insurance Company of America on the life of Margie C. Jones, as alleged in the Complaint?"

The jury answered the issue "no" and from judgment entered on the verdict, the plaintiff appeals, assigning error.

Hartsell, Hartsell & Mills by K. Michael Koontz and William L. Mills, Jr., for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman by Charles V. Tompkins, Jr., for defendant appellee.

MALLARD, C.J.

Appellee argues and contends in its brief that this Court should not consider any of appellant's assignments of error because appellee's motion for nonsuit should have been allowed. Appellee states in its brief that plaintiff's evidence at the second trial was substantially the same as the evidence at the first trial with the following two exceptions: first, the group contract of insurance was not introduced on the first trial but was admitted into evidence on the second trial; second, the evidence of the defendant "explaining the terms of the group contract and how it worked" was not before the court on the first trial.

[1] We think that the additional evidence offered on the second trial did not defeat plaintiff's cause of action as a matter of law,

and therefore the case was properly submitted to the jury under the ruling of the Supreme Court in *Clayton v. Insurance Co., supra.*

Plaintiff contends that the court committed error in the admission of evidence and in its charge to the jury. The first question plaintiff presents is: Did the court err in allowing defendant's exhibit 7 to be admitted into evidence?

Exhibit 7 is a letter dated 31 December 1963 to Floyd B. Jones and signed by C. W. Dean, assistant to Eastern's manager of payroll and personnel records, acting as agent of defendant, in which he said: "In reply to your letter of December 16 to Mr. DeBor, we attach hereto Prudential Insurance Company draft No. 041083, in the amount of $12,500., which is the amount due you as beneficiary on the Group Life Insurance of your wife, Margie C. Jones."

[2] Although plaintiff objected to the contents of the entire letter, he now argues that the part thereof reading "which is the amount due you as beneficiary on the Group Life Insurance of your wife, Margie C. Jones," should not have been admitted because it contained a self-serving declaration and an opinion. Part of the letter was competent to corroborate the witness, C. W. Dean, with respect to his testimony of sending the check for $12,500 to Floyd B. Jones. When the letter was offered and upon objection being made, it was the duty of the plaintiff to point out to the trial judge the incompetent parts thereof. This he did not do. The admission of the entire letter, under these circumstances, was not error. *Cobb v. Dibrell Brothers, Inc.*, 207 N.C. 572, 178 S.E. 213.

Plaintiff complains that the trial court committed error in allowing defendant's witness Lawrence A. Kelly to testify that in his opinion the signature "Margie C. Jones" in the upper left hand corner of defendant's exhibit 3 and the signature "Margie Lee Carter Clayton" on the bottom of defendant's exhibit 1 were written by one and the same person, and then admitting defendant's exhibit 3 into evidence.

Defendant's exhibit 3 is an envelope addressed to Floyd B. Jones, Route #1, Box 242A, Kannapolis, N. C., with the return address of Margie C. Jones in the upper left hand corner. The envelope was marked "AIR MAIL" and has two four-cent stamps thereon which have been marked cancelled. The cancellation shows the date of Jan. 16, 1963.

Plaintiff asserts that the testimony of the witness Lawrence A. Kelly as to the signatures and the admission into evidence of defendant's exhibit 3 was prejudicial because such resulted in raising

questions in the minds of the jurors which could only create conjecture and suspicion. Plaintiff does not say what suspicious questions he contends were or could be raised in the minds of the jurors by such evidence.

[3] The witness Kelly was found by the court "to be an expert in the field of handwriting and identification," without objection on the part of the plaintiff. It was competent for the witness to give his opinion as to the signatures involved. G.S. 8-40 provides for the proof of handwriting by comparison. See also *Kaperonis v. Highway Commission,* 260 N.C. 587, 133 S.E. 2d 464.

Plaintiff contends that defendant's exhibit 3 and the evidence identifying it should have been excluded as irrelevant and immaterial. In order to determine the relevancy of defendant's exhibit 3, it is necessary to state briefly a summary of some of the evidence.

Margie C. Clayton had a son, the plaintiff Russell L. Clayton, when she was first employed by Eastern on 1 June 1959 and at the time that she married Floyd Bradley Jones on 5 December 1959. The evidence for defendant tends to show that the deceased, Margie Clayton Jones, was employed by Eastern on three different occasions. The first time was on 1 June 1959 when her name was Margie C. Clayton. She left the employment of Eastern on 1 June 1961. The second time was on 24 November 1961 when her name was Margie Clayton Jones. Thereafter, she left the employment of Eastern either in June 1962 when she stopped work because of a strike or in September 1962 when she was placed in "lay-off status" by Eastern. Thereafter on 29 April 1963, she was "recalled" to work for Eastern under the name of Margie C. Jones and continued to work until her death on 25 November 1963.

Defendant's evidence also tends to show that defendant's exhibit 1 was a type of group insurance card furnished by the defendant herein to Eastern to enroll its employees in the insurance program in effect in 1959. This was a yellow card. It is dated 1 June 1959 and bears the signature "Margie Lee Carter Clayton" and designates as beneficiary therein "Russell L. Clayton, Son."

Defendant's evidence tends to show that defendant's exhibit 2 was a type of group insurance card furnished by the defendant herein to Eastern to enroll its employees in the insurance program in effect in 1961. This was a white card. It is dated 24 November 1961, bears the signature "Mrs. Margie Clayton Jones," and designates as beneficiary therein "Floyd Bradley Jones, Husband."

[4] The witness Kelly testified, without objection, that he com-

pared the signatures on defendant's exhibits 1 and 2 and that in his opinion the signatures were written by the same person. Defendant's exhibit 1 tended to corroborate plaintiff's contention with respect to the beneficiary. Defendant's exhibit 2 tended to corroborate defendant's contention with respect to the beneficiary. Defendant's exhibit 3 tends to show that the deceased, Margie C. Jones, had for some unstated reason, communicated with her estranged husband by letter with a postmark of 16 January 1963. In view of the fact that the authenticity of defendant's exhibit 3 is established by comparison with defendant's exhibits 1 and 2, if it is established, we fail to see what the signature on this envelope proves or disproves. There is no evidence other than by the handwriting expert that Margie C. Jones signed defendant's exhibit 3. Mrs. Henry L. Carter, mother of Margie C. Jones, testified that she could not tell whether it was or was not the signature of her daughter, but it looked like it. We do not think it tends to prove, as defendant contends, that Margie C. Jones signed defendant's exhibit 2. To hold that it did would be to say that defendant's exhibit 3 tends to prove that by which the defendant contends it was proved. We think defendant's exhibit 3 was irrelevant and therefore incompetent.

The general rule with respect to irrelevant evidence is stated in *Corum v. Comer,* 256 N.C. 252, 123 S.E. 2d 473, where it is said:

> "As a general rule, evidence, to be admissible, must have some bearing on the issues involved. It must tend to prove or disprove some fact material to the cause of action alleged, or to the defense interposed. This is so for very sound reason. '. . . such facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of juries from material matters.' *Pettiford v. Mayo,* 117 N.C. 27, 23 S.E. 252. 'All the authorities are agreed that if the evidence is merely conjectural or is remote, or has no tendency except to excite prejudice, it should be rejected, because the reception of such evidence would unduly prolong the trial of causes, and would probably confuse and mislead the jury, . . .'"

Plaintiff's contention that the provisions of G.S. 58-211 relating to the standard provisions of a group life insurance policy are applicable here is without merit. The statute relates to a policy of life insurance *delivered in this state.* In this case there is no evidence cited in the appendices to the briefs, and we have found none, as to where the policy of insurance was delivered. There is evidence that the deceased lived in North Carolina, after her separation from her husband, but no evidence as to where the "policy" was delivered, if

in fact it was ever delivered. The policyholder in this case is Eastern. G.S. 58-210(1).

[5] The provisions of G.S. 58-211 are applicable to a policy of group life insurance delivered in this state. In the absence of evidence as to where the policy was delivered, this statute is not applicable and the trial judge did not commit error in failing to peremptorily charge the jury thereon as contended by plaintiff.

Plaintiff contends the trial judge committed error in stating a contention of the defendant that the "enrollment card" was to be strongly considered by the jury. The judge specifically referred to this as a contention of the defendant, and we are of the opinion and so hold that such did not constitute prejudicial error.

Plaintiff appellant contends, and we agree, that the trial judge failed to instruct the jury as to the circumstances under which the issue submitted should be answered "yes" and the circumstances under which that issue should be answered "no."

[6, 7] G.S. 1-180 requires the trial judge to declare and explain the law arising on the evidence in the case. This is not done by the judge stating the contentions of the parties. In the instant case the judge stated the contentions of the parties and told the jury how the parties contended the issue should be answered. However, the judge failed to instruct the jury as to the circumstances under which the issue should be answered in the affirmative and the circumstances under which it should be answered in the negative. Giving such instructions as contentions of the parties is not sufficient. The judge is required to relate and apply the law to the variant factual situations supported by the evidence and based upon allegations in the pleadings. 7 Strong, N. C. Index 2d, Trial, § 33; *Saunders v. Warren,* 267 N.C. 735, 149 S.E. 2d 19; *Tate v. Golding,* 1 N.C. App. 38, 159 S.E. 2d 276.

We are of the opinion and so hold that because of the errors mentioned, there must be a

New trial.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. DERMONT JARREL CONRAD, TALTON GALLIMORE, JR., AND TERRY JAMES DAVIS

No. 6922SC68

(Filed 26 February 1969)

1. Criminal Law § 92— consolidation of indictments for trial

The court is expressly authorized by statute to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class which are so connected in time or place that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. G.S. 15-152.

2. Criminal Law § 92— consolidation of indictments for trial

Trial court did not abuse its discretion in consolidating for trial an indictment charging three defendants with conspiracy to commit murder and indictments charging two of the defendants with feloniously damaging real and personal property of the victim of the conspiracy by use of dynamite.

3. Criminal Law § 15— change of venue

Motion for change of venue on grounds of prejudice is addressed to the discretion of the trial court, and trial court's denial of such a motion is not reviewable on appeal in the absence of a showing of abuse of discretion.

4. Criminal Law § 15— change of venue — unfavorable newspaper publicity

In prosecutions for conspiracy to murder and feloniously damaging real and personal property by use of dynamite, the evidence is sufficient to support the trial court's denial of defendants' motion for a change of venue or for a jury selected from an adjoining county because of newspaper publicity of the crimes, and defendants have shown no abuse of discretion in the court's denial of their motion.

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

The granting or denial of a motion for a bill of particulars is within the discretion of the court and not subject to review except for palpable and gross abuse thereof.

6. Indictment and Warrant § 13; Conspiracy § 4— indictment for conspiracy — co-conspirators — bill of particulars

In a prosecution upon an indictment charging that three named defendants "did conspire, confederate, agree and scheme among themselves, with each other and divers others" to commit a murder, defendants were not prejudiced by denial of their motion for a bill of particulars setting forth the names of the "divers others" referred to in the indictment where the solicitor advised the court that he did not know the names of any others against whom he could prove the charge of conspiracy.

7. Conspiracy § 3— conspiracy defined

A criminal conspiracy is the unlawful concurrence of two or more per-

sons in a scheme or agreement to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, and the crime is complete when the agreement is made.

8. Conspiracy § 6— proving conspiracy — circumstantial evidence

A criminal conspiracy need not be established by direct proof but may be established by circumstantial evidence.

9. Conspiracy § 6— sufficiency of evidence

The evidence *is held* sufficient to be submitted to the jury as to defendants' guilt of conspiracy to commit murder.

10. Constitutional Law § 31; Criminal Law §§ 76, 95— joint trial — admission of confession implicating codefendant

Under the decision of *Bruton v. United States*, 391 U.S. 123, the admission in a joint trial of a nontestifying defendant's confession implicating a codefendant violates the codefendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

11. Constitutional Law § 31; Criminal Law § 95— joint trial — admission of evidence for consideration against only one defendant

In this joint trial of three defendants for conspiracy to commit murder, the decision of *Bruton v. United States* does not prohibit the admission of testimony for consideration against only one defendant where the witnesses were testifying merely to something that was said or done in their presence and were subject to cross-examination by all defendants, and the testimony related only to the defendant against whom it was introduced and in no way implicated either of the other defendants.

APPEAL by defendants Gallimore and Davis from *Collier, J.*, at the 24 June 1968 Mixed Session of DAVIDSON Superior Court.

By indictment in case No. 13,678, defendants Gallimore, Davis and Conrad were charged with conspiracy to kill and murder one Fred C. Sink. In indictments in cases Nos. 13,664 and 13,680, defendant Davis was charged with feloniously damaging a dwelling house occupied by Fred C. Sink and others by the use of dynamite, in violation of G.S. 14-49.1; and feloniously injuring personal property, a Mercury Comet automobile, belonging to Fred C. Sink, by the use of dynamite. By indictments in cases Nos. 13,665 and 13,679, defendant Gallimore was similarly charged with damage to real property and personal property by the use of dynamite. On the dates charged, Fred C. Sink was Sheriff of Davidson County.

In case No. 13,678, the jury was unable to agree as to the defendant Conrad, whereupon a juror was withdrawn and a mistrial declared as to him. Defendants Gallimore and Davis were found guilty as charged in all indictments against them, and from active prison sentences aggregating seventy years, each appealed.

Attorney General Robert Morgan and Staff Attorney Andrew A. Vanore, Jr., for the State.

Barnes & Grimes by Jerry B. Grimes for defendant appellants.

BRITT, J.

(1) Defendants assign as error the trial court's allowance of the State's motion to consolidate the cases for trial.

[1] The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. *State v. White,* 256 N.C. 244, 123 S.E. 2d 483; G.S. 15-152. In *State v. Wright,* 270 N.C. 158, 153 S.E. 2d 883; we find: "The defendants also excepted to the order consolidating the cases for trial. We have held so many times that this is discretionary that we do not deem the exception worthy of discussion. *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128; *State v. Combs,* 200 N.C. 671, 158 S.E. 252."

[2] In allowing the State's motion to consolidate the cases for trial, the trial judge exercised his discretion and defendants show no abuse of discretion. The assignment of error is overruled.

(2) Defendants assign as error the failure of the trial court to grant their motion for change of venue or, in the alternative, to have a jury selected from an adjoining county.

[4] In their motion, defendants contended that the cases against them had received intensive and continuous publicity in newspapers, radio and television programs widely read, heard and seen by residents, citizens and prospective jurors in Davidson County, all of which had created extensive discussion among the citizens of the county to the extent that defendants would be unable to receive a fair trial from a jury selected from Davidson County. In support of their motion, defendants introduced affidavits and numerous clippings from newspapers published in Lexington and Thomasville in Davidson County and also clippings of articles appearing in daily newspapers published in Greensboro, High Point and Winston-Salem. The State introduced numerous affidavits to the effect that defendants could get a fair trial from a Davidson County jury.

[3] It is well-established law in this jurisdiction that a motion for change of venue on grounds of prejudice is addressed solely to

the discretion of the trial court. *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Lea,* 203 N.C. 13, 164 S.E. 737. And the action of the trial court in denying defendants' motion is not reviewable on appeal in the absence of showing of abuse of discretion. *State v. Lea, supra.*

[4] The evidence was sufficient to support the action of the trial judge in overruling the motion and defendants have shown no abuse of discretion. Of passing note is the fact that three of the newspapers from which clippings were introduced by defendants were published in counties adjacent to Davidson County.

The assignment of error relating to defendants' motion for change of venue is overruled.

(3) Defendants assign as error the failure of the trial court to grant their motion for a bill of particulars in case No. 13,678, charging conspiracy.

G.S. 15-143 provides as follows:

> "§ 15-143. *Bill of particulars.* — In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, *in its discretion,* require the solicitor to furnish a bill of particulars of such matters." (Emphasis added).

[5, 6] The granting or denial of motions for bills of particulars is within the discretion of the court and not subject to review except for palpable and gross abuse thereof. *State v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594. The bill of indictment in case No. 13,678 charged that the three defendants named in the bill, *inter alia,* "did conspire, confederate, agree and scheme among themselves, with each other and divers others," etc. Defendants contend that they were entitled to have furnished them the names of the persons referred to as "divers others." The record discloses that the solicitor advised the court that at the time of the motion he did not know the names of any others against whom he could prove the charge of conspiracy. We conclude that the defendants were not prejudiced by the denial of their motion for a bill of particulars. *State v. Gallimore,* 272 N.C. 528, 158 S.E. 2d 505.

The assignment of error is overruled.

(4) Defendants assign as error the failure of the trial court to grant their motions for judgment of nonsuit interposed at the close of the State's evidence and renewed at the conclusion of all the evidence.

[7] Although the transcript of testimony indicates that defendants' motions were to all the charges against them, in their brief they direct their arguments only to the failure of the court to grant their motions in No. 13,678, the conspiracy charge. As was said by Higgins, J., in *State v. Gallimore, supra,* "[a] conspiracy is the unlawful concurrence of two or more persons in a wicked scheme — the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means." The crime of conspiracy is complete when the agreement is made. *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *State v. Whiteside,* 204 N.C. 710, 169 S.E. 711.

[8] In *State v. Davenport, supra,* in an opinion by Denny, J. (later C.J.), at page 494 we find the following:

> "In proving a conspiracy, it is not necessary to establish the acts charged by direct proof. 'It is not necessary to prove that the defendants came together and actually agreed upon the unlawful purpose and its pursuit by common means.' 11 Am. Jur., 570. Direct proof of a conspiracy is rarely obtainable. It is said in *S. v. Whiteside, supra:* 'It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. *S. v. Wrenn, Supra* [198 N.C. 260, 151 S.E. 261]. When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists. 5 R.C.L., 1088.' *S. v. Lea, supra; S. v. Shipman, supra* [202 N.C. 518, 163 S.E. 657]."

[9] We do not deem it necessary to review the evidence introduced by the State in support of the charge of conspiracy against the defendants; when considered in the light most favorable to the State, it was sufficient to withstand the motions to nonsuit and to be submitted to the jury. Of like effect was the evidence in the other cases against the defendants.

The assignment of error relating to the overruling of defendants' motions for judgment of nonsuit is overruled.

(5) In their assignments of error Nos. 7, 8 and 9, defendants contend that the trial court erred in admitting evidence which, under the ruling of the court, was admissible only as to defendant Conrad, in admitting evidence which by the ruling of the court was admissible only as to defendant Davis, and in admitting evidence which the trial court ruled was admissible only as to defendant Gallimore. Defendants contend that although the trial court instructed the jury to consider the evidence only as to the defendant against whom it was introduced, with the defendants being tried together, prejudicial error was committed.

[10] Defendants cite the recent case of *Bruton v. United States,* 391 U.S. 123, 20 L. Ed. 2d 476, in which the Supreme Court of the United States held that the admission in evidence of the extrajudicial confession of one defendant in a joint trial with another defendant constituted prejudicial error as to such other defendant. In the cited case, the defendants Bruton and Evans were tried jointly on a charge of armed postal robbery. Evans' confession, which implicated Bruton, was admitted in evidence. In granting a new trial, the Court said:

> "* * * We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. * * *"

[11] We do not think the *Bruton* decision is controlling in the case before us. In this case an extrajudicial confession was not admitted as against any of the appealing defendants. In the testimony complained of, the witnesses were testifying merely to something that was said or done in their presence and were subject to cross-examination by either or all of the defendants. Furthermore, we have painstakingly reviewed the transcript of testimony, and in each instance the challenged testimony related only to the defendant against whom it was introduced and in no way implicated either of the other defendants.

The assignments of error are overruled.

We have carefully considered each of the other assignments of error brought forth and argued in defendants' brief and finding them without merit, they are overruled.

The defendants were well represented by their court-appointed attorney and received a fair trial, free from prejudicial error. The sentences imposed were within statutory limits.

No error.

MALLARD, C.J., and PARKER, J., concur.

IN THE MATTER OF THE CONDEMNATION OF PROPERTY OF T. GLENN HENDERSON AND WIEF, HAZEL B. HENDERSON, RESPONDENTS, BY THE CITY OF GREENSBORO, PETITIONER

No. 6918SC6

(Filed 26 February 1969)

Trial § 39— additional instructions — prejudicial error

After the jury had been deliberating for five hours and twenty minutes the trial court gave them additional instructions to the effect that he did not know where to find twelve more intelligent jurors than they were, that "intelligent people like you are can get together," but that "an ignorant person stays right to himself, you can't move an ignorant person." Shortly thereafter the jury returned with a question concerning the right of the parties to appeal, and twenty minutes later they returned their verdict. At no time had the jury informed the judge of an inability to agree. *Held:* The additional instructions were prejudicial in improperly influencing the jury in that (1) the trial judge failed to charge that no juror should surrender his conscientious convictions or his free will and judgment in order to agree upon a verdict and that (2) the jury may well have received the impression that their failure to agree would be a reflection upon their intelligence and integrity.

APPEAL by petitioner City of Greensboro from *Olive, E.J.*, 18 March 1968 Civil Session of Superior Court of GUILFORD County, Greensboro Division.

This is a proceeding for the condemnation of 538.03 acres of a 658.33-acre tract of land of T. Glenn Henderson and wife, Hazel B. Henderson, lying and being in Monroe Township, Guilford County, North Carolina, initiated by the City of Greensboro pursuant to the provisions of Chapter 1137 of the Session Laws of 1959. Appraisers were appointed as provided by law and appraised the value of the condemned land to be $112,500. The appraisal figure was approved, and the respondent landowners appealed as provided by law to the Superior Court.

Upon trial in the Superior Court, only the issue of damages was submitted to the jury. The jury answered the issue in the sum of $242,100. Upon the entry of judgment on the verdict, the petitioner City of Greensboro appealed, assigning error.

Jesse L. Warren, and Cooke & Cooke by William Owen Cooke for petitioner City of Greensboro, appellant.

Shreve & Carrington by Clyde Shreve, and Cahoon & Swisher by Robert S. Cahoon for respondents, appellees.

MALLARD, C.J.

The only assignment of error brought forward in the petitioner appellant's brief is based on exception to the supplementary instructions given by the court to the jury in urging them to reach a verdict. Such instructions, given after the jury has begun its deliberations, are sometimes referred to as supplementary instructions, additional instructions, and verdict-urging instructions.

In this case the evidence with respect to damages varied widely. Respondents' evidence tended to show that the lands of respondents had been damaged by the taking in a sum from $371,682 to $574,330. Petitioner's evidence tended to show that the lands of respondents had been damaged by the taking in a sum from $103,500 to $112,500.

The record reveals that the judge finished charging the jury and the jury began its deliberations on Thursday, 21 March 1968, at 12:05 p.m. At 12:40 p.m. the jurors were permitted to separate and go to lunch. At 2:00 p.m. the jurors resumed their deliberations and continued until 5:20 p.m. when they were excused and permitted to separate to return at 9:30 a.m. on Friday, 22 March 1968. At 9:30 a.m. on Friday all the jurors, as directed, returned to the jury room to continue their deliberations. At 10:55 a.m. the jurors returned to the courtroom. At this time the jury had been in their room deliberating for a total of five hours and twenty minutes. The record is silent as to whether they returned of their own accord or whether the judge sent for them. Upon their return, the judge gave the instructions complained of, as follows:

> "As I understand it, ladies and gentlemen of this jury, you haven't agreed, but I just wanted to say to you that you haven't been out too long. We have got plenty of time. Don't rush. Just take your time. I've held you (sic) in your County right much and I don't know where we're going to get twelve — I've seen a lot of jurors — I don't know where we're going to get twelve

more intelligent jurors than you are. Of course, intelligent people can get together, they can see what the other person says and get their views and they can get together on their views; but, of course, an ignorant person stays right to himself, you can't move an ignorant person, but intelligent people like you are can get together. So you've got plenty of time and you just take your time and go on back to your jury room and take your time and when you arrive at a verdict bring it into court."

The jurors retired from the courtroom and returned at 11:40 a.m. and asked the court if either party had the right to appeal. The judge, without exception thereto, instructed the jury, in substance, that such a question did not concern them at all. Whereupon, the jurors retired from the courtroom and returned at 12:00 noon with the verdict of $242,100.

Our research indicates that the principles or considerations governing the propriety or impropriety of additional instructions which have as their purpose the urging of the jury to reach a verdict appear to be essentially the same in the trial of civil cases as in the trial of criminal cases. 109 A.L.R. 72.

Counsel have not cited, and in our research we have not found, a case in this or any other jurisdiction in which the trial judge used words similar to those used in the instructions complained of here.

In *Trantham v. Furniture Co.*, 194 N.C. 615, 140 S.E. 300, the Supreme Court said:

"The verdict of a jury is sacred. It should represent the concurring judgment, reason and intelligence of the entire jury, free from outside influence from any source whatever. The trial judges have no right to coerce verdicts or in any manner, either directly or indirectly, intimidate a jury."

In the case of *State v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767, Chief Justice Parker, after quoting from *Trantham v. Furniture Co., supra; State v. Barnes*, 243 N.C. 174, 90 S.E. 2d 321; *State v. Green*, 246 N.C. 717, 100 S.E. 2d 52; and *In Re Will of Hall*, 252 N.C. 70, 113 S.E. 2d 1, said:

"The instruction in the *Barnes* case, the instruction in the *Green* case, and the instruction in the case of *In Re Will of Hall* were each to the effect that *no juror should surrender his conscientious conviction in order to agree on a verdict.* The challenged instruction in the instant case begins in the second sentence with the words, 'You must consider this case until we have exhausted

every possibility of an agreement,' *and fails to instruct the jury that no one of them should surrender his conscientious convictions or his free will and judgment in order to agree upon a verdict.* The challenged instruction might reasonably be construed by a minority of the jury as coercive, suggesting to them that they should surrender their well-founded convictions conscientiously held or their own free will and judgment in deference to the views of the majority, and concur in what really is a majority, rather than a unanimous, verdict." (emphasis added)

The Supreme Court of New Jersey said in the case of *In Re Stern,* 11 N.J. 584, 95 A. 2d 593 (1953):

"The design of a jury trial is a determination of the facts in keeping with legal principles; yet that determination can rest only on the conscientious convictions of the individual jurors comprising the number sufficient for a verdict, based on the evidence and the law as expounded by the judge. The instruction in question depends not upon the motive of the judge, laudable as it may have been; it is assessed by the natural sense and significance of the words used. It was within the discretionary province of the judge to allude to all the factors making agreement desirable, including the expense attendant upon a retrial; but such an instruction is fundamentally deficient unless the jurors be told that none should surrender his conscientious scruples or personal convictions to that end."

In the case under consideration the trial judge failed to include in the supplementary instructions to the jury that none of them should surrender his conscientious convictions or his free will and judgment in order to agree upon a verdict.

It is common knowledge that jurors are easily influenced by the words and actions of the judge presiding at the trial. Although the time of giving instructions does not make them prejudicial, the time and circumstances under which instructions are given may tend to emphasize the words of the court. The trial judge therefore should, in giving additional instructions to the jury urging a verdict, state in plain, clear, and concise language that he is not expressing an opinion as to what their verdict should be and also that he does not mean to infer that any of them should surrender his conscientious convictions or his free will and judgment in order to agree upon a verdict. *State v. McKissick, supra.*

In this case the able and experienced trial judge inadvertently, by the challenged instruction, may well have left the impression with the jury that if they did not agree upon a verdict, they were ignorant.

The rule is stated in 53 Am. Jur., Trial, § 961:

"Comments or remarks of the trial judge reflecting upon the honesty, integrity, or *intelligence* of the jurors in case of failure to agree are not permissible." (emphasis added)

In the case of *Kesley v. United States,* 47 F. 2d 453, it is said:

"But comments, not upon the evidence, but reflecting on the jurors, are not permissible. *People v. Sheldon, supra; Hagen v. N. Y. Central R. R.,* 79 App. Div. 519, 80 N.Y.S. 580. In *State v. Bybee,* 17 Kan. 462, Justice Brewer said: 'No juror should be induced to agree to a verdict by a fear that a failure so to agree will be regarded by the public as reflecting upon either his intelligence, or his integrity. Personal considerations should not influence his conclusions; and the thought of them should never be presented to him as a motive for action.' Because of the imputation of stubbornness, or worse, which is likely to arise if the numerical division of the jury is publicly revealed, to require disclosure of it is held error per se in the courts of the United States. *Brasfield v. United States,* 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345."

See annotation in 85 A.L.R. 1447, entitled "Statements reflecting on integrity of jurors." See also annotations in 19 A.L.R. 2d 1257 and 109 A.L.R. 72, entitled "Coercive effect of verdict —urging by judge in civil case."

Personal considerations should never be permitted to influence the decisions of a juror. Nothing should be said by the trial judge in urging the jury to agree, which could reasonably be interpreted to mean or infer that a failure to do so would in any way tend to reflect upon their honesty, integrity, or intelligence.

Respondents contend in this case that the petitioner has failed to show prejudicial error. We think that prejudice is shown when the words of the trial judge tend to coerce or improperly influence the jury to such an extent that such words deprive the jury of their freedom of action. We think that the words used by the trial judge in this case improperly influenced the jury to such an extent that they were deprived of their freedom of action. It should be noted that when the instructions complained of were given, the jury had not informed the judge of an inability to agree and that shortly thereafter they returned with the question concerning the right to appeal, and twenty minutes later returned their verdict.

Respondents contend that the case of *Kanoy v. Hinshaw,* 273 N.C. 418, 160 S.E. 2d 296, is in point and controlling. We do not

agree. The *Kanoy* case is distinguishable. There the contention was that the court erred "in the time when and manner in which the trial judge submitted the case to the jury." After the jury had deliberated for some time, the court at 7:40 p.m. asked the jury if they wanted to come back that night and continue their deliberations. The judge was asked by the "jury" if they did not agree how long would they have to stay, and the judge replied:

> "You have to stay until you indicate to the Court that you are hopelessly deadlocked. A verdict of the Jury is a unanimous verdict of 12 people reasoning together and not a verdict of six or of eleven, but a verdict of twelve reasoning together and unanimous. If you can't reach a verdict, it will be necessary for the Court to withdraw a juror and declare a mistrial and try these cases all over again; the next Jury will have about the same evidence and same law and won't be any more intelligent that you are and it will have to be done all over again."

Justice Branch in writing the opinion said:

> "Without indicating any opinion as to the weight of the evidence or what the verdict should be, the trial judge courteously and considerately reminded the jury of its duty and of the result if it failed to reach a unanimous verdict. The record fails to show that the verdict was coerced or that the jury was intimidated by the actions or words of the trial judge."

In the *Kanoy* case there was nothing said that would in any way reflect upon the honesty, integrity, or intelligence of the jurors in case of a failure to agree. We think this distinguishes the *Kanoy* case from the case under consideration.

In the challenged instructions the judge appeared to be flattering the jurors by telling them that "intelligent people like you are can get together." However, he had just told them, "of course, an ignorant person stays right to himself, you can't move an ignorant person." The vice in the instruction complained of is that the jury may well have received the impression from what the judge said that a failure upon their part to agree was a reflection upon their intelligence and integrity. We also think, under the circumstances, that the jury received the impression that if they did not agree upon a verdict they would prove that the judge's appraisal of them as being intelligent people would be wrong and that they would fit the description stated by the judge of being ignorant people who could not be moved. In the case of *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44, Justice Lake said:

"Of course, the judge should leave the jury 'free and untrammeled to find the facts,' but the test of this is whether '[t]he language of the court addressed to the jury was * * * subversive of that freedom of thought and of action so very essential to a calm, fair, and impartial consideration of the case.' *State v. Windley,* 178 N.C. 670, 673, 100 S.E. 116."

In our opinion, and we so hold, the instruction complained of tended to and did have the effect of improperly influencing the jury and deprived them of their freedom of thought and of action and that this was prejudicial error, requiring a

New trial.

BRITT and PARKER, JJ., concur.

DENNIS RAY SUMMEY, BY HIS NEXT FRIEND, JOHN LESPIE SUMMEY, AND RONDA S. HUGHES, BY HER NEXT FRIEND, JERRY HUGHES, PLAINTIFFS V. HERMAN MCDOWELL AND WIFE, OPAL MCDOWELL, DEFENDANTS AND VONZELLE WOOD SUMMEY NEWSOME AND HUSBAND, ROBERT JOE NEWSOME; SHIRLEY SUMMEY PARKS AND HUSBAND, ODELL PARKS; LEWIS WOOD AND WIFE, LEONA WOOD; HOMER WOOD (DIVORCED); BERNICE WOOD SKEEN AND HUSBAND, WAN SKEEN; AND ANY UNBORN CHILDREN OF VONZELLE WOOD SUMMEY NEWSOME; AND J. HOWARD REDDING, GUARDIAN AD LITEM FOR ANY UNBORN CHILDREN OF VONZELLE WOOD SUMMEY NEWSOME, ADDITIONAL DEFENDANTS

No. 6919SC19

(Filed 26 February 1969)

1. Appeal and Error § 14— appeal from judgment rendered out of term — appeal entry

G.S. 1-279 and G.S. 1-280 require an appellant who gives notice of appeal from a judgment rendered out of term to cause his appeal to be entered by the clerk on the judgment docket within ten days after notice thereof.

2. Appeal and Error § 41— form of record and proceedings — two or more appeals in one action

Rule of Practice in the Court of Appeals No. 19(b), which renders necessary only one copy of the record and trial proceedings where there are two or more appeals in one action, is not applicable where the appeal of the original defendants was docketed and argued in the Court of Appeals prior to the time the additional defendants in the same case were required to serve their case on appeal.

3. Appeal and Error § 67— effect of decision of Court of Appeals — res judicata as to additional defendants

Where appeal of original defendants was docketed in the Court of Appeals prior to the time additional defendants in the same case were required to serve their case on appeal, decision of the Court on the appeal of the original defendants, which decision was filed prior to time the additional defendants were required to docket their case on appeal, is not *res judicata* as to the additional defendants.

4. Evidence § 22— relevancy of evidence — judgments and records of former trials

In an action to determine title to timber land under a will executed in 1946, trial court properly excluded as irrelevant court records, both criminal and civil, relating to the domestic difficulties of plaintiff's next friend occurring in 1964 and 1965.

APPEAL by additional defendants Vonzelle Wood Summey Newsome and husband, Robert Joe Newsome, from *Martin, S.J.*, 29 April 1968 Session of Superior Court of RANDOLPH County.

This case was here before on a record on appeal filed by the original defendants, Herman McDowell and wife, Opal McDowell, on 5 July 1968 and is reported as *Summey v. McDowell*, 2 N.C. App. 360, 163 S.E. 2d 115. It is now here on an appeal by the additional defendants.

This civil action was instituted by the plaintiffs, seeking a permanent injunction against the original defendants restraining them from cutting timber on the lands described in the complaint. The original defendants alleged that they claimed title to the timber by virtue of a timber deed from Vonzelle Newsome and husband, Robert Joe Newsome, and that the additional defendants were necessary parties for a complete determination of the question of title to both the land and timber.

Judge Martin found that Vonzelle had only a life estate in the property, and upon her death, the property should go to the children of her body in fee simple, providing she left a child or children; and if not, then it was to go to Lewis Wood, Homer Wood, and Bernice Wood Skeen in fee simple, share and share alike. The injunction against the original defendants was made permanent. From this judgment, this appeal was taken.

L. T. Hammond, Sr., for plaintiff appellees.

Ottway Burton for additional defendants Vonzelle Wood Summey Newsome and Robert Joe Newsome, appellants.

MALLARD, C.J.

This record on appeal was docketed here on 20 September 1968 and is from the same trial as the appeal of the original defendants. The record in the original defendants' appeal reveals that the case was heard "at the May 10, 1968 Session of Randolph Superior Court," and the record here reveals that the case was heard "at the April 29, 1968 Session of Randolph Superior Court." However, it is clear upon reading the two records that the appeal is from the same trial and judgment that the original defendants appealed from and that the actual trial occurred on 10 May 1968 at the 29 April 1968 Session of Superior Court of Randolph County, and the judgment was signed 25 May 1968.

There is no mention made in the record on appeal of the original defendants that the additional defendants had also appealed. The appeal of the original defendants was argued in this Court on 28 August 1968 and opinion was filed on 18 September 1968.

[1] The appeal entries of the additional defendants contained in this record on appeal reveal that although they are dated 25 May 1968, in chambers, they were not actually filed until 13 August 1968. There is nothing in the record indicating where these appeal entries were located during that time. The record brought up on the appeal of the original defendants does not show that an appeal was taken by the additional defendants at the trial. The record on appeal now brought up by the additional defendants shows "these appeal entries entered as of the 25th day of May, 1968, in Chambers." However, the plaintiff appellees do not move to dismiss for a failure to comply with the provisions of G.S. 1-279 and G.S. 1-280, which, among other things, require an appellant who gives notice of appeal from a judgment rendered out of term to cause his appeal to be entered by the clerk on the judgment docket within ten days after notice thereof. Both records are silent as to whether this appeal entry was *entered by the clerk on the judgment docket* before it was filed, as required by the statute. *Mason v. Commissioners of Moore,* 229 N.C. 626, 51 S.E. 2d 6. Counsel for appellees admits on oral argument that the case on appeal was timely served, and the record reveals that the record on appeal was docketed within the time provided by the Rules of this Court. The question of whether appellants failed to comply with the provisions of G.S. 1-279 and G.S. 1-280 is not presented or decided.

[2] A motion was filed by appellees to dismiss the appeal of the additional defendants for that, among other things, the appellants failed to comply with the provisions of Rule 19(b) of the Rules of

Practice in the Court of Appeals of North Carolina. This rule reads as follows:

> "(b) *Two Appeals.* When there are two or more appeals in one action, only one copy of the record and the proceedings of the trial in the trial tribunal shall be necessary. In the event counsel cannot agree, the trial tribunal shall determine which of the methods described in Rule 19(d) shall be followed, who is to prepare it, and the part of the costs to be advanced by each appealing party."

The appeal of the original defendants was docketed in this Court on 5 July 1968, which was before these additional defendants were required by order of the trial judge to serve their case on appeal. There is nothing in the record in either case which would make the provisions of Rule 19(b) applicable. Additional defendants, if they comply with the applicable rules in giving notice of, serving, and docketing their appeal, are entitled to be heard on proper assignments of error. The fact that other defendants may have docketed a record on appeal in the same case does not deprive additional defendants of the right to be heard.

[3] Appellees also move that appellants' case on appeal be dismissed for that, appellees contend the decision of this Court on the appeal of the original defendants is *res judicata* as to these additional defendants. This contention is without merit because to so hold would deprive the additional defendants of the right to have their proper assignments of error considered.

[4] On this appeal the additional defendants, appellants, assign as error and bring forward in their brief a contention that the trial court committed error in refusing to admit into evidence the following Randolph County records:

> *"State vs. Lespie Summey* — Recorder's Court File No.23318B *Vonzelle Wood Summey vs. John Lespie Summey* — Judgment Roll No. A33202.
>
> *Vonzelle Wood Summey vs. John Lespie Summey* — Judgment Roll No. A33203".

All of these records relate to the individual, John Lespie Summey, who as an individual is not a party to this action. The connection he has with this case is as next friend of the plaintiff Dennis Ray Summey.

The first record excluded by the trial court is in the case of *State v. Lespie Summey*. In this record the verdict and sentence is revealed,

and also it is shown that Vonzelle Summey is the affiant in a warrant issued under date of 20 April 1963, charging Lespie Summey with abandonment and nonsupport of his wife, Vonzelle Summey, and two minor children, Ronda Faye Summey and Dennis Ray Summey. In this connection it is noted that the will of R. J. Wood under which the parties claim title to the timber and land involved in this case is dated 27 February 1946. Appellants assert in their brief that R. J. Wood died prior to 7 October 1946. This action was instituted on 4 May 1967. We are of the opinion and so hold that it was not prejudicial error to exclude this criminal record.

The second record excluded by the trial court is judgment roll #A33202 in the case of *Vonzelle Wood Summey v. John Lespie Summey.* This action was instituted on 22 July 1964 for custody of the child, Dennis Ray Summey, support, and alimony without divorce against John Lespie Summey by his wife, Vonzelle Wood Summey. In this record there is included, among other things, summons, complaint, answer, many affidavits, a final account by Lewis E. Wood, Executor of the Estate of Celia Ann Snider Wood which was filed 9 January 1964, many orders, many motions, contempt citations against John Lespie Summey, and a consent judgment dated 29 September 1965. We are of the opinion and so hold that it was not prejudicial error to exclude this judgment roll containing a record of marital difficulties between Vonzelle Wood Summey and John Lespie Summey.

The third and last record excluded by the trial court is judgment roll #A33203 in the case of *Vonzelle Wood Summey v. John Lespie Summey.* This action was instituted 4 June 1965 for an absolute divorce, in which it is alleged by Vonzelle Wood Summey that she and John Lespie Summey were married 17 April 1940 and lived together as husband and wife until their separation on or about 9 March 1964. In this case, after service by publication was had, John Lespie Summey filed an answer admitting the allegations of the complaint. Judgment of divorce was entered, after trial by jury, on 29 September 1965. We are of the opinion and so hold that it was not prejudicial error to exclude this judgment roll.

On this appeal the additional defendants contend that the trial court committed error in making permanent the restraining order against the original defendants, in signing the judgment, and in holding therein as a matter of law that the Rule in Shelley's Case does not apply in construing that portion of the will of R. J. Wood relating to the land and timber involved here. The pertinent parts

of the will are quoted in the decision of this Court in the appeal of the original defendants.

In the appeal of the original defendants in *Summey v. McDowell*, 2 N.C. App. 360, 163 S.E. 2d 115, the same question of the applicability of the Rule in Shelley's Case to the same portion of the will of R. J. Wood was presented, argued, and decided. The decision there controls here.

In the assignments of error of the additional defendants, we find no prejudicial error. The judgment of the Superior Court entered herein is

Affirmed.

BRITT and PARKER, JJ., concur.

CHARLIE HARTSELL, JR., EMPLOYEE, PLAINTIFF, v. PICKETT COTTON MILLS, INC., EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 6918IC57

(Filed 26 February 1969)

1. Master and Servant §§ 85, 93— workmen's compensation — setting aside award — G.S. 1-220

G.S. 1-220, which authorizes a judge to set aside a judgment for mistake, inadvertence, surprise, or excusable neglect, does not apply to proceedings before the Industrial Commission, the Commission not being a court of general jurisdiction and having no jurisdiction except that conferred upon it by statute.

2. Master and Servant § 93— compromise agreement — motion to set aside — mistake of fact — review before Full Commission

In a proceeding to set aside for mutual mistake of fact a compromise settlement agreement of a workmen's compensation claim which had been approved by the Industrial Commission, the Industrial Commission did not abuse its discretion in refusing to set aside the hearing commissioner's order denying plaintiff's motion to set aside the agreement and to remand the proceeding for the introduction of additional medical evidence by plaintiff where plaintiff was given every opportunity to present his evidence at a hearing upon his motion, and neither plaintiff nor defendant made a motion before the hearing commissioner that the hearing be continued for the taking of additional evidence.

APPEAL from opinion of 28 August 1968 entered by the North Carolina Industrial Commission.

On 8 November 1965 Charlie Hartsell, Jr., (plaintiff) received injuries to his back while performing a lifting operation in the course of his employment with Pickett Cotton Mills, Inc. (defendant-employer). The injury was accepted by the insurance carrier, American Mutual Liability Insurance Company (defendant-insurer) as a compensable claim under the North Carolina Workmen's Compensation Act. The plaintiff was examined by Dr. R. L. McDonald and then treated for some three weeks by a Dr. Smith, both of Thomasville, before becoming a patient of Dr. James A. Johnson, a neurosurgeon in High Point, on 3 January 1966. Dr. Johnson referred him to Dr. Robert C. Johnson, an orthopedic surgeon in High Point, and Dr. Richard H. Ames, a neurosurgeon in Greensboro, for consultation and evaluation. On 15 November 1966 Dr. James Johnson discharged the plaintiff as a patient.

On 4 January 1967 the plaintiff and defendants entered into a "clincher agreement" (agreement), which stated that the plaintiff had suffered a back injury and that he had received from the defendants weekly payments while out of work for a period of thirty-one and three-sevenths weeks covering a period through 28 November 1966. The agreement included the following quotation from Dr. James Johnson's report of 29 November 1966:

" 'I have been unable to arrive at a positive diagnosis of a herniated disc and in spite of two hospitalizations and multiple office visits, I am unable to explain all of his symptoms on an organic basis. At any rate, he does seem to have some discomfort in his back and in order to give him the benefit of the doubt I would feel that a rating of 15 percent is reasonable.' "

The agreement further set out that after reviewing x-rays and examining the plaintiff, Dr. Ames had reported that in his opinion the plaintiff had reached maximum improvement and that he could do nothing to benefit the plaintiff. In order to close the case, Dr. Ames also reported that he would be inclined to give the plaintiff a permanent partial disability rating of twenty percent of the back. The agreement further provided:

". . . I hereby expressly agree that any and all rights which I may have as a result of Section 47 of the North Carolina Workmen's Compensation Act (G.S. 97-47) giving me the right to reopen my claim for further compensation or medical benefits at any time is expressly waived hereby, and the Pickett Cotton Mills, Inc.,

and the American Mutual Liability Insurance Company are hereby released and discharged from any and all further liability to me by reason of any further or additional disability, medical expenses or any other benefits arising or growing out of any injury by accident on December 8, 1965. This agreement, release and payment are all subject to approval by the North Carolina Industrial Commission."

The agreement was submitted to the North Carolina Industrial Commission (Commission) and under date of 11 January 1967 it was approved with an award that the defendants should pay the plaintiff $1,968.75 in a lump sum without commutation and that the defendants should pay all medical expenses up to the date of the agreement and the costs.

After the approval of the agreement and the payment of all sums therein specified by the defendants, the plaintiff instituted this proceeding before the Commission. The date of its institution does not appear in the record. The first matter appearing in the record is a letter under date of 2 February 1968 from plaintiff's attorney to the Commission advising that it would be necessary to have the testimony of Dr. James Johnson and a doctor from the Veterans Administration Hospital in Durham and suggesting that it might be preferable to hold a hearing in Durham at a subsequent date to have the testimony of the doctor there. Under date of 6 February 1968 the Secretary of the Commission wrote plaintiff's attorney advising that if the parties could not agree to submit a report from the doctor in Durham, a motion could be made to set a hearing in Durham.

On 22 and 23 May 1968 Deputy Commissioner Robert F. Thomas conducted a hearing in High Point. The plaintiff contended that there was a mutual mistake of fact on the part of all parties in entering into the "agreement and judgment." He therefore requested that the "agreement and judgment" be set aside and the case be reinstated.

At the hearing the plaintiff and defendants offered testimony, but the only medical testimony was that of Dr. James Johnson, a witness on behalf of the plaintiff. At the conclusion of the hearing the Deputy Commissioner inquired of the defendants whether they desired to reset the hearing in Greensboro in order to have the testimony of Dr. Ames. The attorney for the defendants stated that he thought this would be necessary. However, the Deputy Commissioner suggested that it might not be necessary and the attorney for the plaintiff stated: "Your Honor, I don't see that Dr. Ames' testimony is going to be necessary at all." The hearing was then adjourned,

and neither the plaintiff nor the defendants made a motion for any additional hearing in Greensboro, Durham or elsewhere.

Under date of 4 June 1968 the Deputy Commissioner filed an opinion and award denying the plaintiff's request to set aside this compromise settlement agreement. After receipt of the opinion and award the plaintiff's attorney wrote a letter under date of 10 June 1968 requesting for the first time a further hearing in order to permit the introduction of evidence of doctors from the Veterans Administration Hospital in Durham. This was treated as a notice of appeal to the full Commission.

The matter was heard by the full Commission on 28 August 1968, and it adopted and affirmed the opinion and award of the Deputy Commissioner in its entirety. The plaintiff appealed to the Court of Appeals.

Stephen E. Lawing for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr., for defendant appellees.

CAMPBELL, J.

The plaintiff presents two questions for review, both of which stem from the contention that the Commission committed error in failing to set aside and vacate the opinion and award of the Deputy Commissioner on the basis of surprise and excusable neglect. The plaintiff asserts that G.S. 1-220 is applicable and that if it had been applied, the Commission should have set aside the findings of fact and award and proceeded to take additional evidence pertinent to the issue of mutual mistake of fact with reference to the execution of the agreement and the order approving same.

G.S. 1-220 provides:

> "*Mistake, surprise, excusable neglect.* — The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding. The clerk may hear and pass upon motions to set aside judgments rendered by him, whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term, who shall hear and pass upon such motion de novo: Provided, however, nothing in this section shall be construed to affect the rights of

innocent purchasers for value in foreclosure proceedings where personal service is obtained."

[1] This statute is not applicable to proceedings before the Commission, because "(t)he Industrial Commission is not a court of general jurisdiction. It has no jurisdiction except that conferred upon it by statute." (citation omitted) *Bryant v. Dougherty,* 267 N.C. 545, 148 S.E. 2d 548.

[2] There is no merit in the plaintiff's position. This proceeding was instituted by the plaintiff for the purpose of setting aside the agreement on the ground of mutual mistake of fact. On 22 and 23 May 1968 a hearing was held and the plaintiff was given every opportunity to present his evidence. Under date of 6 February 1968 the Secretary of the Commission advised the plaintiff that if an agreement could not be reached for the submission "of the report of the Veterans Administration doctor as his testimony, you may move on February 14 that this case be reset later in Durham to permit you to offer additional medical evidence." However, neither the plaintiff nor defendants made a motion before the Deputy Commissioner to reset the hearing in Greensboro, Durham or elsewhere in order to take additional medical testimony. Although the defendants' attorney suggested on two occasions that he might desire a hearing in Greensboro in order to take the testimony of Dr. Ames, no motion to that effect was ever made. On the second such occasion, the plaintiff's attorney stated his opposition as follows: ". . . I don't see that Dr. Ames' testimony is going to be necessary at all." Therefore, the plaintiff, who opposed the taking of Dr. Ames' testimony in Greensboro, is not in a position now to say that he was in any way surprised when the defendants took no further action and permitted the Deputy Commissioner to go ahead and file his findings of fact and award. Certainly, the Commission did not abuse any discretion in refusing to permit the case to be reopened and the award set aside and further hearings conducted.

The evidence adduced in this record clearly supports the findings of fact of the Commission and the conclusions of law based thereon.

More than a year elapsed between plaintiff's injury and the consummation of the agreement. During all of this time the plaintiff complained of back trouble, and he was still complaining when he signed the agreement. In *Caudill v. Manufacturing Co.,* 258 N.C. 99, 128 S.E. 2d 128, which is a stronger case for the plaintiff than the instant case, the Supreme Court stated:

"A compromise is essentially an adjustment and settlement of

differences. If there are no differences or uncertainties there is no reason for compromise. The law permits compromise settlements between employers and employees who are bound by and subject to the Workmen's Compensation Act, provided they are submitted to and approved by the Industrial Commission. G.S. 97-17. The law thus undertakes to protect the rights of the employee in contracting with respect to his injuries. The presumption is that the Industrial Commission approves compromises only after a full investigation and a determination that the settlement is fair and just. In the instant case it is clear that the parties were contracting with reference to future uncertainties and were taking their chances as to future developments, relapses and complications, or lack thereof. If not, why the compromise and release? The nature and extent of the injury were known. These had been explored and discovered by surgery. Remedial action had been taken. The plaintiff was 'pressuring' for a settlement. The doctor gave a rating of 40 per cent disability and advised that it was a minimum rating and it was too early to give a permanent rating. The doctor stated that the abcess and osteomylitis which developed later were undiagnosable at the time he made the rating. His opinion, given at the hearing, that he had made a mistake was, as he said, 'in retrospect.' He stated that the abcess and osteomylitis *probably* did exist in October 1958 and *probably* had been there in a latent state. They were only consequences of a known injury and developed after the release was executed. There is no competent evidence that they were 'facts' at the time the compromise settlement was made and approved. The parties contracted with respect to such consequences. The mistake disclosed by this record is not such as will enable a court of equity to set aside a release."

The opinion and award of the Commission is

Affirmed.

BROCK and MORRIS, JJ., concur.

BERNADINE WILES, D/B/A CENTERVIEW TAXI v. RALPH P. MULLINAX, JR., AND MULLINAX INSURANCE AGENCY, INC.

No. 6919SC13

(Filed 26 February 1969)

1. Evidence § 23; Insurance § 2— admission of allegations in answer

In an action for damages by reason of the alleged negligent failure of defendant insurance agents to procure for plaintiff workmen's compensation insurance coverage and their negligent failure to notify plaintiff that they had not done so, the court properly allowed plaintiff to introduce portions of defendants' further answer and defense to the effect that two insurance companies had been dismissed as defendants in a workmen's compensation proceeding before the Industrial Commission on the ground that they were not insurance carriers for this plaintiff, the parts of the further answer admitted being distinct and separate facts pertinent to the issues and competent as judicial admissions as well as admissions against interest.

2. Evidence § 23— allegations in pleadings — competency

Admissions of specific facts in the answer may be introduced into evidence, and the opposing party may then qualify or explain the admission.

3. Judgments § 36— parties concluded

Opinion and award of the Industrial Commission is not *res judicata* as to defendants in this action who were not parties to the proceeding before the Industrial Commission, although one of the defendants was a witness in that proceeding.

4. Evidence § 22— judgment in former trial or proceeding

Except where the principle of *res judicata* is involved, the judgment or finding of a court or the decision of an administrative officer or tribunal cannot be used in another case as evidence of the facts found.

5. Appeal and Error § 48— admission of evidence — error cured by pleading

The admission of incompetent evidence is cured when the fact sought to be established is alleged in appellant's pleading.

6. Evidence § 22; Insurance § 2— admission of Industrial Commission judgment

In an action for damages by reason of the alleged negligent failure of defendant insurance agents to procure for plaintiff workmen's compensation insurance coverage and their negligent failure to notify plaintiff that they had not done so, the court committed prejudicial error in admitting into evidence an opinion and award of the Industrial Commission in which it was found that plaintiff had no workmen's compensation insurance coverage on the date in question, where defendants were not parties to the proceeding before the Industrial Commission.

7. Trial § 35; Insurance § 2— agent's failure to procure insurance — binders — burden of proof

In an action for damages by reason of the alleged negligent failure of

defendant insurance agents to procure for plaintiff workmen's compensation insurance, it was prejudicial error for the court to place the burden of proof on defendants to establish an insurance binder introduced by defendants which allegedly bound an insurance company to provide coverage for plaintiff, the binder not constituting an affirmative defense but being evidence to refute plaintiff's claim that defendants negligently failed to procure the insurance coverage.

APPEAL by defendants from *Seay, J.*, at the 3 June 1968 Session of CABARRUS Superior Court.

Plaintiff filed her complaint on 10 April 1961 alleging the negligent failure of the defendants to procure workmen's compensation insurance for her or to notify plaintiff of cancellation of her coverage, resulting in the liability of the plaintiff for an injury occurring on 29 November 1958.

In their answer, defendants contended that plaintiff had coverage on 29 November 1958 and that they were not negligent.

This is the third appeal of this case from the superior court. A sufficient statement of the facts may be found in the opinions in *Wiles v. Mullinax,* appearing in 267 N.C. 392, 148 S.E. 2d 229, and 270 N.C. 661, 155 S.E. 2d 246.

In the third trial in superior court, the jury answered the issues submitted in favor of plaintiff, and from judgment on the verdict defendants appealed, assigning error.

Williams, Willeford & Boger by Brice J. Willeford, Jr., for plaintiff appellee.

Hartsell, Hartsell & Mills by William L. Mills, Jr., and K. Michael Koontz for defendant appellants.

BRITT, J.

[1] (1) Defendants assign as error the trial court's allowing plaintiff to introduce paragraphs 1, 2, 3, 4, 7 and 11 of defendants' fourth further answer and defense. These paragraphs are summarized as follows: Defendants are informed and believe that after claim was made against plaintiff by Estelle Tucker (widow of the deceased employee) a hearing was set before the North Carolina Industrial Commission at Concord, N. C. Plaintiff herein, as the employer of Murray Lee Tucker, appeared at said meeting, presided over by Deputy Commissioner Shuford, on 3 December 1959. Royal Indemnity Company and Dixie Fire and Casualty Company appeared

before the commissioner on said date as the carriers for the employer. Royal and Dixie each denied that they were the insurance carriers for plaintiff, who appeared before the Industrial Commission without legal counsel or advice. Defendants are informed and believe that the Industrial Commission dismissed Royal Indemnity Company and Dixie Fire and Casualty Company as defendants in the matter pending before the Industrial Commission; that plaintiff thereafter communicated with Royal and Dixie and said companies denied plaintiff's claim, but plaintiff has never attempted to recover at law from either of said companies.

[2] It is well settled that admissions of specific facts in the answer may be introduced into evidence, though it is not necessary to do so. The opposing party may then qualify or explain the admission. *Chavis v. Insurance Co.*, 251 N.C. 849, 112 S.E. 2d 574; *Winslow v. Jordan*, 236 N.C. 166, 72 S.E. 2d 228; Stansbury, N. C. Evidence 2d, § 177; 3 Strong, N. C. Index 2d, Evidence, § 23, p. 634. In *Chavis v. Insurance Co., supra,* in an opinion by Higgins, J., it is said: "The assignments of error based on the introduction of parts of defendant's answer are without merit. The parts of the answer offered were of distinct and separate facts pertinent to the issues. They were competent as judicial admissions as well as admissions against interest. (Citations including *Winslow v. Jordan, Supra.)*"

[1] We hold that the court did not err in permitting plaintiff to introduce the above-mentioned portions of defendants' answer, and the assignment of error pertaining thereto is overruled.

(2) Defendants assign as error the court's allowing plaintiff to introduce in evidence the opinion and award of the Industrial Commission rendered in the proceeding referred to above.

[3, 4, 6] Although the individual defendant testified as a witness in the hearing before the Industrial Commission, neither of defendants was a party to the proceeding. The opinion and award of the Industrial Commission was not *res judicata* as to the defendants herein. *Wiles v. Mullinax,* 270 N.C. 661, 155 S.E. 2d 246. Except where the principle of *res judicata* is involved, the judgment or finding of a court, or the decision of an administrative officer or tribunal, cannot be used in another case as evidence of the facts found. Stansbury, N. C. Evidence 2d, § 143; *Warren v. Insurance Co.,* 215 N.C. 402, 2 S.E. 2d 17. We think the trial court erred in permitting plaintiff to introduce the opinion and award of the Industrial Commission in evidence. We must now determine if the error was prejudicial to defendants.

[5] The reception of incompetent evidence to prove an admitted fact is not cause for disturbing the result of a trial. *In Re Will of Crawford,* 246 N.C. 322, 98 S.E. 2d 29; *Rudd v. Casualty Co.,* 202 N.C. 779, 164 S.E. 345. The admission of testimony over defendants' objection as to a particular fact cannot be prejudicial where defendants allege the identical matter in their answer. *Ray v. Membership Corp.,* 252 N.C. 380, 113 S.E. 2d 806. The admission of incompetent evidence is cured where the fact sought to be established is alleged in appellant's pleading, or the substance of the incompetent testimony is abundantly established by competent evidence. 1 Strong, N. C. Index 2d, Appeal and Error, § 48, pp. 196, 197.

[6] But, the findings of fact and conclusions of law contained in the opinion and award of the Industrial Commission went far beyond the admissions in defendants' answer. We quote two examples:

> "* * * (On) 29 November 1958, the defendant employer had no workmen's compensation insurance with defendant insurance carriers.
>
> * * *
>
> The defendant insurance carriers had no workmen's compensation insurance policy in force for the protection of defendant employer at the time of the injury by accident giving rise hereto. Defendant employer was a non-insurer at such time."

We hold that the error was prejudicial to defendants, entitling them to a new trial. The assignment of error is sustained.

[7] (3) Defendants also assign as error a portion of the trial judge's charge placing the burden of proof on defendants to establish an insurance binder which they introduced in evidence.

The second issue submitted to the jury was as follows: "Did the defendants negligently fail to procure such workmen's compensation insurance coverage, as alleged in the complaint?" After stating this issue, the trial judge properly instructed the jury that the burden of proof on the issue was on the plaintiff. As evidence that they did not fail to procure coverage for plaintiff, defendants introduced what they contended was a binder which bound the Dixie Insurance Company to provide coverage for plaintiff. This evidence was vital to defendants and in referring to it the trial judge stated in his charge: "* * * And, if you find from the evidence and by its greater weight the supporting evidence concerning the binder, the date which it was mailed to the Dixie Insurance Company, the receipt thereby, the contract between the Dixie Insurance Company and the defendants, if you find the supporting evidence to be true, the same is

sufficient for you to find that there was a valid binder issued by the Dixie Insurance Company." A little later in his charge, in referring to the binders, the trial judge stated: "* * * [T]he defendant argues and contends that you should find from the evidence and by its greater weight * * *."

It is true that the burden of proving an affirmative defense is on the defendant, and ordinarily such defense must be proved by the greater weight of the evidence. 3 Strong, N. C. Index 2d, Evidence, § 9, pp. 606, 607. But, the binders alleged and introduced in evidence by defendants did not constitute an affirmative defense; they were evidence in defense of plaintiff's claim that defendants negligently failed to procure workmen's compensation insurance coverage for plaintiff.

The assignment of error is well taken and the error was prejudicial to defendants.

We refrain from discussing the other assignments of error brought forward and argued in defendants' brief, as the questions raised probably will not arise upon a retrial of this action.

We realize that the cause of action alleged in this case has existed for more than ten years, that there have been three trials in the superior court and three appeals to the Appellate Division. Nevertheless, all parties are entitled to a trial free from prejudicial error and for the prejudicial errors discussed above, defendants are entitled to a

New trial.

MALLARD, C.J., and PARKER, J., concur.

ARTIS LECK KENNEDY v. PILOT LIFE INSURANCE COMPANY

No. 6919SC36

(Filed 26 February 1969)

1. Insurance § 44— action on medical policy — computation of time for benefits — "month" defined

Under group medical expense policy providing that the employee shall be eligible for insurance on the day immediately following the completion of one month of continuous and active employment, plaintiff employee is not entitled to benefits under the policy where he begins work on July 8

and his son is hospitalized for injuries on August 7, the word "month" signifying a calendar month and not a thirty-day or lunar month.

2. Time— "month" used in statutes

When the word "month" is used in the General Statutes, it is to be construed to mean a calendar month, unless otherwise expressed. G.S. 12-3.

3. Time— "month" defined

Unless an intention to the contrary is expressed, the word "month" signifies a calendar month, regardless of the number of days it contains.

APPEAL by defendant from *Crissman, J.*, 23 September 1968 Session, RANDOLPH Superior Court.

This is an action to recover medical expense benefits from defendant under a group insurance policy issued to plaintiff's employer, Leward Cotton Mills.

During the week before Monday, 8 July 1963, plaintiff applied and was accepted for work at Leward Cotton Mills, and was to report for work on Monday, 8 July 1963. On the same date that he applied for work, plaintiff signed an application for insurance coverage, including coverage for dependents, under defendant's group insurance policy. The policy contains the following provision:

> "Each such person shall be eligible for insurance hereunder on the date of issue of this policy, except that if the employment of such person with the Policyholder commences after February 11, 1960, *he shall be eligible for insurance hereunder on the day immediately following the completion of one month of continuous, active employment* with the Policyholder." (Emphasis added.)

With respect to the effective date of coverage, the policy provides:

> "The insurance of any person hereunder *shall become effective* on
>
> "(a) The date *on which he first becomes eligible* for such insurance . . ." (Emphasis added.)

With respect to medical expense benefits the policy provides:

> "If any person or an eligible dependent of any person shall become confined as a registered bed-patient in a hospital . . . and *if such confinement commences while insurance for Hospital Expense Benefits is in force under this policy* . . . Pilot Life shall pay. . . ." (Emphasis added.)

Plaintiff first reported for work with Leward Cotton Mills on 8 July 1963, and remained in its continuous active employment for several months. On 7 August 1963, plaintiff's son was hospitalized for injuries received that day in an accident.

The parties stipulated that if defendant is liable to the plaintiff, the benefits due are $509.94, with interest thereon from 1 December 1963.

The case was heard by Judge Crissman upon stipulated facts, and he concluded therefrom that plaintiff was entitled to recover, and accordingly entered judgment awarding to plaintiff the sum of $509.94, plus interest from 1 December 1963. Defendant appealed.

Ottway Burton for plaintiff appellee.

Wharton, Ivey & Wharton, by Richard L. Wharton, for defendant appellant.

BROCK, J.

[1] The sole question involved in this appeal centers upon an interpretation of that portion of the group insurance policy which reads: "[H]e shall be eligible for insurance hereunder on the day immediately following the completion of one month of continuous, active employment with the Policyholder."

Plaintiff contends that this means he is covered under the policy on the day immediately following the completion of *thirty days* of continuous active employment. He argues that he commenced work on 8 July and completed thirty days of employment on 6 August; and, therefore, under the terms of the policy, he is entitled to medical expense benefits for his son's hospitalization which began on 7 August.

Defendant contends that the above quoted portion of the policy means that plaintiff's coverage began on the day immediately following the completion of *one calendar month* of continuous active employment. Defendant argues that plaintiff commenced work on 8 July and completed one calendar month of employment on 7 August; and, therefore, under the terms of the policy, plaintiff would be entitled to medical expense benefits only for hospitalization which began on or after 8 August. Defendant argues that plaintiff's son's hospitalization began before he became covered under the policy and therefore defendant is not liable to plaintiff under the policy.

It seems that plaintiff contends there are three kinds of months: (1) a lunar month, (2) a calendar month, and (3) when neither lunar nor calendar is specified, a thirty-day month. Apparently the trial judge adopted this view.

A disposition of this case requires that we determine what period of time is intended, absent any explanation, when the word "month" is used in an insurance contract.

[2] In North Carolina, when the word "month" is used in our General Statutes it is to be construed to mean a calendar month, unless otherwise expressed. G.S. 12-3. In 1875 our Supreme Court stated: "We have not found in any modern case or any treatise on the law any definition of the word 'month' which makes it synonymous with thirty days . . ." *State v. Upchurch,* 72 N.C. 146. In 1891 our Supreme Court, in ruling upon the time within which an action could be instituted under the terms of an insurance policy which provided that actions must be commenced within twelve months, stated: "Twelve months, in the absence of a legislative definition of the word 'month,' must be interpreted, according to the ordinary popular understanding, as meaning twelve calendar (not lunar) months." And the court went on to observe: "The courts of this country have very generally adopted a different rule of construction from that which obtained in England before the Revolution, because the popular sense of the word 'month' was, in America, a calendar, not a lunar, month." *Muse v. Assurance Co.,* 108 N.C. 240, 13 S.E. 94.

Not since 1853, in the case of *Rives v. Guthrie,* 46 N.C. 84, have we found any indication by the Supreme Court of North Carolina that the word "month" is to be taken as meaning anything other than a calendar month, except where it might be specified as some type of month. Indeed, five years later, with two of the members of the 1853 Court still sitting, the Court approved an instruction to the jury that the word "month" in a contract, without explanation or addition, meant a calendar month. *Satterwhite v. Burwell,* 51 N.C. 92.

[3] At early common law the term "month" meant a lunar month of twenty-eight days, but in the United States the common law rule was followed in only the early days of the republic. In the United States the term "month" is now universally computed by the calendar, unless a contrary meaning is indicated by the statute or contract under construction. Also, the term "thirty days" and the term "one month" are not synonymous, although where the particular cal-

endar month is composed of exactly thirty days the number of days involved happen to be the same. The word "month" has a clear and well-defined meaning, and refers to a particular time. Unless an intention to the contrary is expressed, it signifies a calendar month, regardless of the number of days it contains. *Guaranty Trust Co. v. Green Cove Railroad,* 139 U.S. 137, 11 S. Ct. 512, 35 L. Ed. 116; *State v. Upchurch, supra; Muse v. Assurance Co., supra; Daniel v. Ormand,* 26 Ala. App. 441, 163 So. 361; *Parseghian v. Parseghian,* 206 Ark. 869, 178 S.W. 2d 49; *Allbritten v. National Acceptance Co.,* 183 Kan. 5, 325 P. 2d 40; *Bohles v. Prudential Insurance Co.,* 83 N.J.L. 246, 83 A. 904; *Needham v. Moore,* 200 Tenn. 445, 292 S.W. 2d 720; *In Re Lynch's Estate,* 123 Utah 57, 254 P. 2d 454; 52 Am. Jur., Time, § 11, p. 336; 86 C.J.S., Time, § 10, p. 837; Annot., 97 A.L.R. 982 (1935).

[1] We hold that, under the terms of the group insurance policy, plaintiff's coverage did not commence until 8 August 1963, one day after his son's hospitalization, and therefore defendant is not liable for the medical expense incurred. This may appear to work a hardship on plaintiff merely because the hospitalization was necessary on 7 August instead of 8 August, but we are not at liberty to rewrite the contract because of sympathy.

It follows that we disagree with the ruling of the trial judge, and the judgment appealed from is

Reversed.

CAMPBELL and MORRIS, JJ., concur.

ADRIAN P. STOUT AND NOEL N. COLTRANE, JR., D/B/A STOUT & COLTRANE, ARCHITECTS v. JOE F. SMITH

No. 6918SC4

(Filed 26 February 1969)

1. Quasi Contracts § 2— recovery on quantum meruit — instructions

In an action to recover architectural fees upon alternative allegations of express contract or of *quantum meruit,* if the services are not furnished in accordance with the contract, recovery on *quantum meruit* is limited to the reasonable value of the services accepted and appropriated by defendant, and an instruction permitting recovery for the value of all services furnished by plaintiff, whether or not they were accepted, is prejudicial to defendant.

2. Contracts § 25; Quasi Contracts § 2— recovery on quantum meruit — pleadings

In an action to recover for personal services, it is permissible for the one rendering the services to abandon his allegations of special contract and proceed on the principle of *quantum meruit*, but the measure of such recovery is the reasonable value of the services rendered by plaintiff and accepted by defendant.

APPEAL by defendant from *Gwyn, J.*, at the 11 March 1968 Session of GUILFORD Superior Court (Greensboro Division).

In their complaint, plaintiffs alleged substantially as follows: They are architects practicing their profession as partners. Plaintiff Coltrane and defendant made an agreement whereby the plaintiffs would design a personal residence for the defendant, with the features and materials desired by the defendant, their fee to be based on a percentage of the cost of construction. Plaintiff Coltrane advised the defendant as to suitable lots and had numerous conferences with the defendant in order to tailor the house to the needs of the defendant. When the bids were submitted on the final plans and specifications, they were greatly in excess of the cost reasonably expected by either party, although no specific limit had ever been set. Subsequently, the cost was reduced, but the defendant remained unsatisfied and finally decided not to build the house proposed by plaintiffs. Defendant built a house with many features suggested by plaintiffs on a site recommended by them. Plaintiffs prayed for their fee based upon the agreement and, in the alternative, for *quantum meruit.*

In his answer, defendant admitted that the parties made an agreement whereby plaintiffs would design a house with features and materials suitable to the defendant, and that the plaintiffs were to be paid a fee for their work. He denied the remainder of the complaint and contended that the agreement was conditioned on the plaintiffs' designing a house capable of being built for a maximum cost of $45,000. Defendant denied any liability under an express contract and also denied liability under the theory of *quantum meruit,* contending that the plans submitted were for a house costing so much in excess of $45,000 as to be worthless to him.

The parties introduced testimony substantially as alleged in their respective pleadings. The case was submitted to the jury and the jury found that the plaintiffs had rendered services to the defendant for which they were entitled to be paid in the amount of $3,861.75. Defendant appeals from judgment on the verdict, assigning error.

Sapp & Sapp by Armistead W. Sapp, Jr., and W. Samuel Shaffer, II, for plaintiff appellees.

Smith, Moore, Smith, Schell & Hunter by Herbert O. Davis for defendant appellant.

BRITT, J.

[1] In his first assignment of error, defendant contends that the court erred in charging the jury on the measure of damages where a contract does not specify the compensation for the services to be rendered under the contract; also, that the court erred in failing to charge the jury on the proper measure of damages.

Among the challenged portions of the court's charge are the following:

> "* * * But, where a person performs services for another at his request and to be paid for it AND WHERE THE AMOUNT HAS NOT BEEN EXPRESSLY AGREED UPON, then the law would say that there would be an obligation to pay what the services were fairly and reasonably worth, worth being what services of that character would cost when procured on the open market, the open market being the kind of market where a person is willing to render such services but not required to and where the purchasing or using public or person is willing to purchase such services and pay for it but doesn't have to. * * *
>
> But you are further instructed that if the plaintiff has satisfied you, the jury, from the evidence and by its greater weight that the defendant engaged the plaintiff to perform architectural services and that such architectural services were performed and that no express agreement was entered into as to the amount to be paid for the services, then the law would say that compensation would be due and to the extent of what was fair and reasonable, and upon such finding, that is by the greater weight of the evidence, it would be your duty to answer the first issue YES. * * *
>
> * * * So, he [the plaintiff Coltrane] says and contends he was working on a quantum meruit basis, that he was undertaking to perform services not knowing what the defendant would probably pay * * *."

No issue as to whether there was an express contract between the parties was submitted to the jury. The judge's charge was based entirely on what he declared to be the principle of *quantum meruit*.

In paragraph 3 of the complaint, plaintiffs alleged: "Defendant agreed that he would pay plaintiffs for their professional services and work product and the architect's fee based upon the fee schedule of the American Institute of Architects, then in effect. And agreed to make said payment in accordance with the provisions of said schedule requiring payment of seventy-five per cent of the architect's fee based upon 8.3% of the construction costs at the time plans and specifications were completed and submitted to bidders." Plaintiff Coltrane gave testimony in support of this allegation and testified that the amount sued for, $5,071.84, was on the basis of a $78,000 project.

There is a difference between the measure of damages in a claim on express contract, one on implied contract, and one on *quantum meruit*. "A promise to pay for services is implied when they are rendered and received in such circumstances as authorize the party performing to entertain a reasonable expectation of payment for them by the party benefited. However, the law will not imply a promise to pay the value of services rendered and accepted, where there is proof of a special agreement to pay therefor a particular amount or in a particular manner * * *." 58 Am. Jur., Work and Labor, § 6, pp. 514, 515. "If there is no special agreement as to the amount of compensation and the services are not intended to be gratuitous, the law implies a promise by the employer to pay what services reasonably are worth, which is determined largely by the nature of the work and the customary rate of pay for such work in the community and at the time the work was performed." Ibid, § 10, p. 518. "The measure of recovery for services furnished or goods received under the doctrine of unjust enrichment, as distinguished from the doctrine of contracts implied in fact, is the value of the actual benefit realized and retained." Ibid, § 32, p. 536.

[2] It is permissible under our practice, in an action to recover for personal services, for the one rendering the services to abandon his allegations of special contract and proceed on the principle of *quantum meruit*. *Lindsey v. Speight,* 224 N.C. 453, 31 S.E. 2d 371. But, the measure of such recovery, predicated on implied assumpsit, is the reasonable value of the services rendered by plaintiff and *accepted* by defendant. *Thormer v. Mail Order Co.,* 241 N.C. 249, 85 S.E. 2d 140.

In *Thormer v. Mail Order Co., supra,* cited in defendant's brief, the action was instituted to recover for advertising material furnished by plaintiff. The Supreme Court held that if the material was not furnished in accordance with the contract, recovery on *quantum*

meruit was limited to such materials and services as were accepted and appropriated by defendant, and an instruction permitting recovery for the value of all services and materials furnished by plaintiff, regardless of whether they were accepted or not, was reversible error. In an opinion by Bobbitt, J., and referring to the materials and services accepted and appropriated by defendant, the Court said: "As to these, and these alone, defendant must pay, on the basis of *quantum meruit;* and the basis of liability therefor is *quasi*-contract, i.e., unjust enrichment."

[1] The effect of the judge's charge in the instant case was that plaintiffs were entitled to recover the reasonable value of *all* services performed by them for or on account of the defendant. In view of the express contract pleaded by plaintiffs, it was error, prejudicial to the defendant, for the court to charge the jury that plaintiffs were entitled to recover for the reasonable value of their services, without limiting such recovery to the reasonable value of the services *accepted and appropriated* by defendant. Defendant's assignment of error is well taken.

We will refrain from discussing the other assignments of error brought forth and argued in defendant's brief for the reason that they probably will not recur upon a retrial of this action.

For error in the court's instructions to the jury which was prejudicial to defendant, there must be a

New trial.

MALLARD, C.J., and PARKER, J., concur.

CHARLES W. GILLIAM AND WIFE, HETTIE P. GILLIAM v. BRUCE RUFFIN AND WIFE, PAULINE J. RUFFIN; CHARLES RUFFIN AND WIFE, JO ANN B. RUFFIN; RUFFIN & RUFFIN REALTY & CONSTRUCTION, INC., A CORPORATION; AND R. G. HANCOCK AND WIFE, CORA E. HANCOCK

No. 6918SC30

(Filed 26 February 1969)

1. Parties § 1— necessary parties

G.S. 1-73 contemplates that all persons necessary to a complete determination of the matters in litigation may, in some instances, and must in others, be made parties plaintiff or defendant.

2. Pleadings § 29— judgment on demurrer — misjoinder of causes

Where a demurrer is sustained for misjoinder of causes only, the several causes of action may be divided. G.S. 1-132.

3. Pleadings § 29— judgment on demurrer — misjoinder of parties and causes

Where demurrer is sustained for misjoinder of parties and causes of action, the action must be dismissed and the court is without authority to allow plaintiffs to amend or to direct a severance of the causes of action for trial under G.S. 1-132.

4. Pleadings § 29; Parties § 3— misjoinder of parties and causes — dismissal of action — amendment — joinder of same defendants under G.S.1-73

Where an action is dismissed as to certain defendants for misjoinder of parties and causes of action, plaintiffs may not thereafter amend their complaint and bring such defendants back into the action as new parties under G.S. 1-73, and motion that the action again be dismissed as to such defendants should be allowed.

APPEAL by defendants R. G. Hancock and wife, Cora E. Hancock, from *Gwyn, J.*, 9 September 1968 Session of Superior Court of GUILFORD County, Greensboro Civil Division.

This case has been here before on an appeal by plaintiffs from a judgment allowing demurrer and dismissing the action as to some of the defendants, including the defendants R. G. Hancock and wife, Cora E. Hancock (Hancocks). This Court held that the demurrer should have been allowed and the action dismissed as to the Hancocks and others because of a misjoinder of parties and causes of action. For a summary of the causes of action, see opinion by Morris, J., in *Gilliam v. Ruffin*, 1 N.C. App. 503, 162 S.E. 2d 145, which was filed 10 July 1968.

Under date of 20 July 1968, plaintiffs moved "to amend their complaint in this action by striking therefrom defendants Jerry Williams and BOFA, Inc., as parties, and by striking therefrom the Fifth and Sixth Causes of Action." On 26 July 1968 Judge Exum denied this motion and ordered that "(t)he plaintiffs are allowed to and including the first day of September, 1968, to amend as permitted by Judge Crissman's Judgment of March 15, 1968."

The pertinent parts of the 15 March 1968 judgment of Judge Crissman read:

> "IT APPEARING TO THE COURT upon argument of counsel that there is a misjoinder of parties and causes, and that the Demurrer as to defendants Hancock, Jerry Williams and BOFA, Inc. should be allowed, and the matter dismissed as to them, and IT

FURTHER APPEARING TO THE COURT that the Demurrer as to the defendants Ruffin should be allowed, but the Court in its discretion being of the opinion that the plaintiffs should be allowed to amend their complaint as to the defendants Ruffin and the corporate defendant Ruffin;

NOW, THEREFOBE, IT IS ORDERED, ADJUDGED AND DECREED that the Demurrers of the defendants Williams, BOFA, Inc. and Hancock be and the same are hereby sustained and allowed and this matter is dismissed as to them, and as to the defendants Ruffin the Demurrer is allowed, but the Court in its discretion allows the plaintiffs twenty (20) days within which to amend their complaint, if any they have, against the other defendants herein."

On 5 August 1968 plaintiffs filed a motion in which it is asserted that plaintiffs have amended their complaint *pursuant to permission of the court* and request that the Hancocks be made parties. On 5 August 1968 an assistant clerk of the superior court signed an order making the Hancocks parties hereto.

On 26 August 1968 the Hancocks filed a motion to again dismiss the case as to them, alleging, among other things:

"That the complaint which the plaintiffs have caused to be served on these defendants, pursuant to the order making them parties, is in its essence identical in allegations of purported causes of action to the Amended Complaint as to which demurrer has been granted herein. That this Court has refused to allow the plaintiffs to amend their complaint as to these defendants and informed the attorney for the plaintiffs in open court that this cause has been dismissed as to these defendants. That the plaintiffs have contrary to the intentions and purposes of the Order of 26 July 1968 and without the knowledge of the Presiding Judge of this Court procured an Order from the Clerk of this Court bringing in these defendants to defend the same cause a second time.

WHEREFORE, these defendants would pray the Court that this matter be dismissed as to them for that this Court has no jurisdiction to try this action to final Judgment more than once."

From an order of the Superior Court dated 27 September 1968 denying their motion to dismiss, the Hancocks appeal.

David M. Clark for plaintiff appellees.

Hoyle, Boone, Dees & Johnson by J. Sam Johnson, Jr., for defendants Hancock, appellants.

MALLARD, C.J.

[4] The plaintiffs had no authority to amend their complaint in this case so as to again make the Hancocks necessary parties. We find no statute under these circumstances giving them such authority. The order of Judge Crissman of 15 March 1968 does not give them such authority. The order of Judge Exum dated 26 July 1968, to which the plaintiffs did not except, specifically denies their motion of 20 July 1968 to be permitted to amend. Plaintiffs have not cited any authority permitting them to amend but argue in their brief:

> "So far as we could determine, the situation presented was unique. But no reason in law or equity presented itself why the appellants could not be brought back into the action as new parties under G.S. 1-73, since the objection of misjoinder of parties and causes had been removed by the dropping of the Fifth and Sixth Causes of Action involving Williams and BOFA, Inc."

[1] G.S. 1-73 contemplates that all persons necessary to a complete determination of the matters in litigation may, in some instances, and must in others, be made parties plaintiff or defendant. *Moore v. Massengill,* 227 N.C. 244, 41 S.E. 2d 655. In the instant case the court had specifically dismissed it as to the Hancocks, and G.S. 1-73 is not applicable.

[2] Under G.S. 1-132, where a demurrer is sustained for misjoinder of causes only, the several causes of action may be divided. In the instant case the plaintiffs attempted to divide the causes of action by amendment deleting portions thereof. This they could not do.

[3] The Supreme Court has held that under G.S. 1-132 a cause of action cannot be divided where there is both a misjoinder of causes and also a misjoinder of parties. *Tart v. Byrne,* 243 N.C. 409, 90 S.E. 2d 692; *Southern Mills, Inc. v. Yarn Co.,* 223 N.C. 479, 27 S.E. 2d 289; *Bank v. Angelo,* 193 N.C. 576, 137 S.E. 705.

In the case of *Short v. Realty Co.,* 262 N.C. 576, 138 S.E. 2d 210, Justice Higgins said:

> "The court committed error in sustaining the demurrer for misjoinder of parties and causes and thereafter allowing the plaintiffs to amend. A misjoinder of parties and causes requires dismissal of the action."

In the case of *Bannister & Sons, Burch, Salter, Stock Yards, Troup v. Williams,* 261 N.C. 586, 135 S.E. 2d 572, Justice Sharp said:

> "Under our practice 'a misjoinder of parties and causes of action constitutes a fatal defect. A severance is not permissible.' *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295; *Moore County v. Burns,* 224 N.C. 700, 32 S.E. 2d 225. In other words, 'the Court is not authorized in such cases, to direct a severance of the respective causes of action for trial under the provisions of G.S. 1-132.' The action must be dismissed."

[4] When the demurrer was allowed on the grounds of misjoinder of parties and causes of action, the action should have been dismissed. *Kearns v. Primm,* 263 N.C. 423, 139 S.E. 2d 697; *Exterminating Co. v. O'Hanlon,* 243 N.C. 457, 91 S.E. 2d 222; *Snotherly v. Jenrette,* 232 N.C. 605, 61 S.E. 2d 708. It was dismissed as to these defendants. The order denying the motion of the Hancocks to again dismiss this case as to them is

Reversed.

BRITT and PARKER, JJ., concur.

TOMMY NELSON ARANT, BY HIS NEXT FRIEND, W. H. ROOKER v. ERNEST MONROE RANSOM, EVIE LEE SYKES RANSOM AND ALFRED B. ARMSTRONG

No. 6920SC75

(Filed 26 February 1969)

1. Automobiles § 43— sufficiency of pleadings

In an action for personal injuries sustained in an automobile collision, complaint alleging that the driver of the car in which plaintiff was a passenger suddenly turned left to enter a private driveway and was struck by defendant's car traveling in the same direction, and that defendant was traveling at a speed in excess of the posted maximum, was driving while under the influence of intoxicants and failed to give any signal of his intention to pass the vehicle in which plaintiff was riding, *is held* to state a cause of action against defendant and not to disclose that the sole proximate cause of the collision was the negligence of the driver of the vehicle in which plaintiff was riding.

2. Appeal and Error § 46— prejudicial error — burden of proof

Appellant has the burden not only to show error but that the alleged error was prejudicial and amounted to the denial of some substantial right.

3. Automobiles § 7— violation of traffic regulation — negligence per se

In the absence of specific provisions in particular statutes which are susceptible to a contrary interpretation, the violation of a motor vehicle traffic regulation constitutes negligence *per se*.

4. Automobiles § 7— violation of G.S. 20-138 — negligence per se

It is negligence *per se* to operate a motor vehicle while under the influence of an intoxicant in violation of G.S. 20-138.

5. Automobiles § 90— instructions — "under the influence" — harmless error

In an action for personal injuries sustained in an automobile accident, defendant was not prejudiced by error in portion of the charge defining "under the influence" of intoxicants where defendant testified that he had pleaded guilty to a criminal charge of driving under the influence of an intoxicant in violation of G.S. 20-138 on the occasion in question.

APPEAL by defendants Ransom from *Copeland, S.J.*, at the September 1968 Special Civil Session of UNION Superior Court.

In his complaint, plaintiff alleged that at about 6:15 p.m. on 25 December 1966 he was riding as a passenger in the back seat of an automobile operated by defendant Armstrong on Rural Paved Road 1120 in a residential section one-half mile north of the town of Bladenboro, in Bladen County; that defendant Armstrong carelessly and negligently turned to the left in order to enter a private driveway on the left side of R.P.R. 1120; that while the car in which plaintiff was riding was making a left turn into said private driveway, it was violently struck by an automobile owned by defendant Evie Ransom and operated by defendant Ernest Ransom. Among other allegations of negligence, plaintiff charged that defendant Ernest Ransom was driving approximately 55 mph in a 35 mph speed zone, was driving while under the influence of an intoxicant, failed to use due care in passing another automobile traveling in the same direction, and failed to give timely and adequate signal of his intention to pass the Armstrong automobile.

At trial plaintiff introduced evidence in support of his allegations and appropriate issues were submitted to the jury who answered the issues in favor of plaintiff and defendant Armstrong and against defendants Ransom. From judgment entered on the verdict against them, defendants Ransom appealed.

Koy E. Dawkins for plaintiff appellee.

Carpenter, Webb & Golding by John C. Golding and Michael K. Gordon for defendant appellee Armstrong.

Smith, Griffin, Smith & Clark by C. Frank Griffin for defendant appellants Ransom.

BRITT, J.

[1] Defendants Ransom filed in this Court a demurrer *ore tenus* to the complaint, contending that the complaint alleges no facts showing actionable negligence on the part of defendants Ransom but affirmatively discloses that the sole proximate cause of the collision was the negligence of defendant Armstrong.

In support of their demurrer, defendants Ransom cite *Hout v. Harvell,* 270 N.C. 274, 154 S.E. 2d 41. We think *Hout* is clearly distinguishable from the case before us. In *Hout,* the car in which plaintiff was riding as a passenger was traveling in the opposite direction from the car with which it collided; plaintiff alleged that the driver of the car in which he was riding suddenly turned to the left in front of the other car but that the operator of the oncoming car was negligent in failing to keep a proper lookout and maintain proper control and was driving at an excessive rate of speed. The court held that in *Hout* there was no allegation of any fact or circumstance sufficient to give Mrs. Harvell, the operator of the oncoming car, timely notice that the driver of the car in which plaintiff was riding intended to make a left turn directly in front of her in order to enter a filling station on his left side of the highway; on the contrary, plaintiff alleged that her driver turned without giving a proper signal. The court held that Harvells' demurrer was properly sustained because under the circumstances detailed in the complaint, irrespective of her speed or failure to keep a proper lookout, Mrs. Harvell could not have avoided a collision with the car in which plaintiff was riding; that the conduct of plaintiff's driver made the collision inevitable, insulated any prior negligence of Mrs. Harvell and constituted the sole proxicate cause of the collision.

In the case before us, the automobiles were traveling in the same direction in a 35 mph speed zone in a residential section near the town of Bladenboro. Although plaintiff alleged that the driver of the car in which he was traveling turned suddenly to the left in order to enter a private driveway on the left side of the road, he alleged, *inter alia,* that defendant Ernest Ransom was traveling at a speed in excess of 35 mph, was driving while under the influence of an intoxicant and failed to give any signal of his intention to pass the vehicle in which plaintiff was riding.

The demurrer interposed in this Court is overruled.

[2-5] Defendants Ransom assign as error a portion of the judge's

charge defining "under the influence" of intoxicants. While the challenged instruction is open to criticism, we are unable to conclude that the appellants were prejudiced thereby. *Garland v. Penegar,* 235 N.C. 517, 70 S.E. 2d 486. It is well established in this jurisdiction that the burden is on the 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. In the absence of specific provisions in particular statutes which are susceptible of a contrary interpretation, the violation of a motor vehicle traffic regulation constitutes negligence *per se.* 1 Strong, N. C. Index 2d, Automobiles, § 7, p. 383; *Correll v. Gaskins,* 263 N.C. 212, 139 S.E. 2d 202. One of plaintiff's allegations of negligence against defendants Ransom was that at the time of the collision defendant Ernest Ransom was operating an automobile while under the influence of an intoxicant, in violation of G.S. 20-138. A violation of this statute is negligence *per se. Bank v. Lindsey,* 264 N.C. 585, 142 S.E. 2d 357. As a witness called by plaintiff, defendant Ernest Ransom testified that he pleaded guilty in the Bladen County Court to driving under the influence of an intoxicant in violation of G.S. 20-138 on the occasion in question. In view of this admission of violating the statute, the challenged portion of the charge was not prejudicial to the defendants Ransom, and the assignment of error relating thereto is overruled.

We have considered the other assignments of error brought forward and argued in appellants' brief, but finding them without merit, they are overruled.

No error.

MALLARD, C.J., and PARKER, J., concur.

MINNIE W. YATES v. JOSEPH B. BROWN AND WIFE, LOUISE W. BROWN

No. 6919SC33

(Filed 26 February 1969)

1. Bills and Notes § 9— endorsers

Persons who sign their names on the back of a note are endorsers. G.S. 25-44.

2. Bills and Notes § 7— qualified endorsement

To constitute a qualified endorsement it is necessary to add to the en-

dorsers' signature the words "without recourse" or words of similar import. G.S. 25-44.

3. Bills and Notes § 9— language constituting unqualified endorsement

An endorsement containing the words "this note is transferred and assigned to Y" constitutes an unqualified endorsement.

4. Bills and Notes § 19— competency of parol evidence to qualify endorsement

In an action by holder in due course to recover on a note, trial court properly refused to allow the defendant endorsers to introduce parol evidence of an alleged contemporaneous agreement which would tend to qualify their endorsement.

APPEAL by defendants from *Crissman, J.,* at the 9 July 1968 Session of RANDOLPH Superior Court.

Plaintiff filed her complaint 15 September 1965 alleging substantially as follows: That she was owner and holder in due course of a note in the amount of $2,050.00 signed by Harlan Ray Lutz and wife, Ada W. Lutz, dated 20 August 1963, and made payable to Joseph B. Brown and wife, Louise W. Brown. That she took the note before maturity, without notice of any defect or infirmity, for value, and in good faith. That the makers left the State about December 1964 and failed and refused to make payments thereafter; that notice was given and demand made to the defendants, as endorsers, but they have refused to make payment. That foreclosure of a second deed of trust securing the note failed to yield more than the cost of sale and that the first deed of trust was being foreclosed. The plaintiff then prayed for $2,050.00 and interest.

The defendants answered, denying that the plaintiff was a holder in due course and contending that the note referred to in the complaint was one of eleven notes, secured by eleven second deeds of trust, all transferred to the plaintiff by defendants for the lump sum of $12,010.00.

The defendants further alleged that the transfer was based on a written agreement that the defendants had received no payments and that there were no prior liens on the land, except for the first deed of trust in each case, and an oral agreement that there would be no further liability on the part of the defendants.

At the trial, plaintiff introduced the note upon which the suit was based, the note providing that "any default in the payment of principal or interest shall cause the whole amount to become immediately due and payable upon demand by the holder." The final due

date was 1 August 1970, with monthly payments to begin 1 September 1963. On the back of the note was the following:

> "For valuable considerations, this note, together with the deed of trust securing it, is transferred and assigned to Minnie W. Yates.
>
> This 18th day of October, 1963.
>
> (Signed) Joseph B. Brown [SEAL]
>
> (Signed) Louise W. Brown [SEAL]"

The defendants introduced the written assignment wherein the eleven notes and second deeds of trust were listed, following which the defendants warranted that there were no prior liens on any of the property, except the first deed of trust, and that no payments had been received personally by the defendants.

From judgment on the jury verdict for the plaintiff, the defendants appealed.

Coltrane & Gavin by T. Worth Coltrane and H. Wade Yates for plaintiff appellee.

Ottway Burton for defendant appellants.

BRITT, J.

Subsequent to the filing of the case in this court, defendants' counsel filed a motion to add to the record an order entered by Crissman, J., on 17 October 1968 extending the time for defendants to docket their record on appeal to and including 16 November 1968. The motion is allowed.

In passing upon the merits of the appeal, the first question we must decide is whether the endorsement on the note which is the subject of this action was qualified or unqualified. We hold that it was an unqualified endorsement.

[1, 2] In reaching this conclusion, we must consider the law of our State as it existed on 18 October 1963, the date of the endorsement. Defendants were endorsers of the note. G.S. 25-69. To have constituted a qualified endorsement, it was necessary to add to the endorsers' signatures the words "without recourse" or words of similar import. G.S. 25-44.

[3] In the case before us, the endorsement contained the following words: "This note * * * is transferred and assigned to Minnie W. Yates." In *Davidson v. Powell,* 114 N.C. 575, 19 S.E. 601, the

words "I assign over the within note" were used; the court held that the words used did not limit the endorser's liability, and in the opinion we find the following: "When assigned or transferred by endorsement he becomes simply an endorser unless, by the terms of the assignment, his liability is limited. When, as in this case, he uses the words, 'I assign over the within note to S. M. Powell,' and S. M. Powell endorses, 'for value received I assign over the within note to G. A. Davidson,' there is no restriction upon their liability."

Our conclusion is also supported by decisions from other states. In *McCullough v. Stepp,* 91 Ga. App. 103, 85 S.E. 2d 159, the words "I hereby transfer my right to this note to W. E. McCullough" were used. The Georgia court held this to be an unqualified endorsement. In *Maine Trust & Banking Co. v. Butler,* 45 Minn. 506, 48 N.W. 333, the following words were used: "For value received, I hereby assign and transfer the within note, together with all interest in and all rights under the mortgage securing the same, to L. D. Cooke." The Minnesota court held this endorsement to be unqualified. See also *Jones County Trust & Savings Bank v. Kurt,* 192 Iowa 965, 182 N.W. 409; and 11 Am. Jur. 2d, Bills and Notes, § 363, p. 386.

[4] The next question for our consideration is whether the trial court erred in refusing to permit defendants to introduce parol evidence of an alleged agreement which would tend to qualify the endorsement. We hold that the court did not err in rejecting the proffered testimony. In *Bank v. Dardine,* 207 N.C. 509, 177 S.E. 635, it was held that evidence of a parol contemporaneous agreement that a person signing a note should not be obligated thereon in any way is incompetent, even as against the payee, the parol evidence being in contradiction of the written instrument. Of like effect were the holdings of our Supreme Court in *Kindler v. Trust Co.,* 204 N.C. 198, 167 S.E. 811, and *Bank v. Moore,* 138 N.C. 529, 51 S.E. 79.

We have carefully reviewed each of defendants' assignments of error but finding them without merit, they are overruled.

No error.

MALLARD, C.J., and PARKER, J., concur.

ANNIE STEWART PARSONS v. MARY ALICE BEAMAN USSERY AND ELLA JEAN BEAMAN HANSEN

No. 6919SC5

(Filed 26 February 1969)

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

Where appellant's 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' motion to dismiss the appeal should be allowed.

2. Appeal and Error § 44— motion to amend the brief

Appellant's motion to be allowed to amend her brief must be denied where the motion was filed after the case was argued, and in absence of leave to amend granted in open court and of notice to opposing counsel in the manner required by Rule 36. Rule of Practice in the Court of Appeals No. 11.

3. Automobiles § 62— nonsuit on issue of negligence — striking pedestrian

In an action by a pedestrian to recover for injuries sustained when she was struck by an automobile operated by defendant, nonsuit is properly allowed where there is no evidence of any occurrence to put defendant on notice that plaintiff intended to step around a parked car into the path of defendant's oncoming car in time to afford defendant opportunity to blow her horn or to avoid striking the plaintiff.

APPEAL by plaintiff from *Seay, J.*, May 1968 Civil Session of MONTGOMERY Superior Court.

This is a civil action to recover damages for personal injuries allegedly caused by the negligence of the defendants when plaintiff, a pedestrian, was struck by an automobile owned by defendant Ussery and being driven by defendant Hansen. Defendants answered, denied negligence, and pleaded contributory negligence. From judgment of nonsuit at the close of plaintiff's evidence, plaintiff appealed.

Edmund O. Kenion and Charles H. Dorsett for plaintiff appellant.

Brown, Brown & Brown, by Richard L. Brown, Jr., for defendant appellees.

PARKER, J.

[1] In apt time before entering upon the argument of this appeal upon its merits, appellees in accordance with Rule 16 of the Rules

of Practice of this Court filed a motion to dismiss this appeal for noncompliance by appellant with the requirements of the Rules of this Court. The record on appeal states that the evidence is submitted under Rule 19(d)(2). Appellant did file the complete stenographic transcript of the evidence presented at the trial. However, appellant failed to provide an appendix to her brief setting forth "in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what (s)he says the testimony of such witnesses tends to establish with citation to the page of the stenographic transcript in support thereof." This requirement of Rule 19 has been called to the attention of the Bar in the following cases: *Bryant v. Snyder,* 3 N.C. App. 65, 164 S.E. 2d 35; *Shephard v. Highway Commission,* 2 N.C. App. 223, 162 S.E. 2d 520; *Inman v. Harper,* 2 N.C. App. 103, 162 S.E. 2d 629; *State v. Evans,* 1 N.C. App. 603, 162 S.E. 2d 97; *Ring v. Ring,* 1 N.C. App. 592, 162 S.E. 2d 126; *Murrell v. Poole,* 1 N.C. App. 584, 162 S.E. 2d 121; *Buffkin v. Gaskin,* 1 N.C. App. 563, 162 S.E. 2d 164; *State v. Fowler,* 1 N.C. App. 552, 162 S.E. 2d 36; *State v. Mitchell,* 1 N.C. App. 528, 162 S.E. 2d 94; *Bost v. Bank,* 1 N.C. App. 470, 162 S.E. 2d 158; *White v. Hester,* 1 N.C. App. 410, 161 S.E. 2d 611; *Crosby v. Crosby,* 1 N.C. App. 398, 161 S.E. 2d 654. The reason for the above-quoted portion of Rule 19(d)(2) is obvious. It is particularly compelling in cases such as the present one in which a ruling on a motion for nonsuit is involved. Without the aid of the required appendix to appellant's brief we are required to search the entire transcript, much of which is not pertinent to the question raised on the appeal, in order to determine the correctness of the trial court's ruling.

[1, 2] In the present case, six days after the argument appellant filed an answer to appellees' motion to dismiss and also filed a motion for leave to amend her brief in order to add the required appendix. Rule 11 of the Rules of Practice of this Court provides in part: "No brief or written argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel." Appellant's motion does not show thereon the date and manner of notice to opposing counsel, as is required by Rule 36. In the absence of such notice and leave granted in open court, appellant's motion to be allowed to amend her brief must be denied. For appellant's failure to comply with the above-quoted portion of Rule 19(d)(2), appellees' motion to dismiss this appeal should be allowed.

We have, nevertheless, carefully reviewed the entire transcript.

Considering the evidence in the light most favorable to plaintiff, resolving all contradictions therein in her favor, and giving her the benefit of every inference in her favor which can reasonably be drawn therefrom, plaintiff's evidence tended to show: That at about 3:30 p.m. 13 February 1963 plaintiff left her place of employment at Capel Rug Mill on the west side of North Main Street in the town of Troy. The shift was changing, and other employees were also leaving at that time. Plaintiff's car was parked on the opposite side of North Main Street, in the employees parking lot on the east side of the street. North Main Street runs north and south, has a paved portion twenty feet wide, and there was a gravel or dirt shoulder on the west side of North Main Street. This graveled shoulder is a strip approximately ten feet wide extending between the rug mill fence and the west edge of the pavement. There was no gutter or curb at the pavement. North Main Street is straight and level, and the day was clear and the pavement dry. At the time in question, another employee had parked his automobile diagonally on the dirt shoulder on the west side of North Main Street in front of the rug mill and ten or twelve feet south of the entrance gate to the rug mill. The right rear fender of this parked car was about eighteen inches from the pavement. Plaintiff left the entrance to the rug mill, turned south and walked along the graveled strip on the west side of North Main Street. When she came to the parked car she looked before she started to go around it but didn't see anything. As plaintiff stepped around the parked car, she was struck by the right front fender of the car driven by defendant Hansen. Defendant Hansen had just brought another employee to the rug mill, and had stopped and let this employee out at a gate located approximately 40 feet northward from the gate used by plaintiff in leaving the mill. Defendant Hansen had then started driving southward on North Main Street, driving very slowly, approximately ten or fifteen miles per hour, and driving on the paved portion of North Main Street in the lane for southbound traffic. Defendant's car never left the paved portion of North Main Street, and stopped almost immediately after striking plaintiff, stopping within approximately five feet. Defendant Hansen did not blow her horn and the first time she saw plaintiff was when plaintiff stepped out into her car. The point where plaintiff was struck was not within a marked crosswalk or an unmarked crosswalk at an intersection.

[3] Giving plaintiff the benefit of every inference in her favor which can reasonably be drawn from the foregoing evidence, there was no evidence that anything occurred to put defendant Hansen on notice that plaintiff intended to step around the parked car into the

path of defendants' car in time to afford Hansen an opportunity to blow her horn or to avoid striking the plaintiff. There was no evidence sufficient to submit to the jury as to any negligence on the part of the defendants. The motion for nonsuit was properly allowed and the judgment appealed from is

Affirmed.

MALLARD, C.J., and BRITT, J., concur.

LENA RICHARDSON v. DAVID W. RICHARDSON
No. 6918SC112

(Filed 26 February 1969)

1. Divorce and Alimony § 16— alimony without divorce — sufficiency of pleadings — statute

Where complaint otherwise contained sufficient allegations to support a cause of action for alimony without divorce on ground of abandonment, the fact that the complaint referred to the repealed G.S. 50-16 rather than to the now effective G.S. 50-16.1 is not fatal.

2. Pleadings § 2— necessity of pleading statute

A complaint is to be judged by the facts alleged therein, and if the allegations are sufficient, reference to a particular statute is unnecessary and may be regarded as surplusage.

3. Divorce and Alimony § 16— alimony without divorce — sufficiency of pleadings

The plaintiff in an action for alimony without divorce on the ground of abandonment is not required to allege the acts and conduct relied upon as the basis of the action with that degree of particularity as is required when the cause of action is based on such indignities to the person as to render her condition intolerable and life burdensome. G.S. 50-16.1 *et seq.*

APPEAL from *Martin, S.J.*, 4 November 1968, Session of GUILFORD County Superior Court (High Point Division).

Lena Richardson (plaintiff) instituted this civil action for alimony without divorce against her husband, David W. Richardson, (defendant) by summons issued on 14 February 1968 in the Municipal Court of the City of High Point. The verified complaint, which was filed 14 February 1968, alleged citizenship and residence of both parties in Guilford County, North Carolina, and it further alleged the following:

"3. That the plaintiff and defendant are now legally married to each other with no minor children having been born of the marriage.

4. That on or about November 24, 1967, the defendant willfully and unlawfully abandoned this plaintiff while they were living at their home at Route 1, Jamestown, North Carolina; that said abandonment was without just cause or provocation on the part of the plaintiff, in violation of G.S. 50-7 and G.S. 50-16.

5. That the plaintiff at all times since her marriage to the defendant has been a faithful and dutiful wife and has contributed her time and energies to attempting to establish a home for herself and her husband, and has done all possible to help her husband maintain a home and prosper financially.

6. That since the defendant unlawfully abandoned plaintiff as aforesaid, he has failed and refused to provide any support for this plaintiff whatsoever and plaintiff has been left in dire need and destitute circumstances.

7. That the defendant is employed by Oakdale Cotton Mills and the plaintiff is informed and believes that the defendant is earning in excess of Eighty ($80.00) Dollars per week.

8. That the plaintiff is without means with which to support herself or her children or to enable counsel to prosecute this action and she is dependent for support upon the estate, real and personal, of her husband.

9. That this alimony without divorce action is brought under Chapter 50, Section 16, of the General Statutes of the State of North Carolina."

The defendant filed an answer on 12 March 1968. After hearing the cause, Judge Haworth of municipal court entered an order on 15 March 1968 requiring the defendant to pay alimony *pendente lite* in the amount of fifteen dollars per week and counsel fees in the amount of one hundred dollars. An appeal was taken from this order to superior court, where the cause was heard by Judge Lupton. Under date of 10 June 1968 he signed an order to the effect that the previous order of Judge Haworth was erroneous and that the cause be remanded to municipal court for finding of facts necessary to support the order and to consider other assignments of error. The attorneys for both parties consented to this order.

When the cause was returned to municipal court, the defendant

filed a demurrer *ore tenus* on 1 August 1968 in which he stated: "That this Court has no jurisdiction over the subject of this action, in that it is alleged in paragraph #9 of plaintiff's Complaint that the plaintiff's relief in this action was demanded under the provisions of G.S. 50-16, and on the 14th day of February, 1968, when this complaint was filed in this Court, G.S. 50-16 had been repealed and said law referred to therein was not in force and effect on said 14th day of February, 1968."

Judge Haworth denied the demurrer *ore tenus* and entered an order allowing the plaintiff's motion to amend the complaint by substituting "G.S. 50-16.1" in lieu of "G.S. 50-16." This order was entered on 13 September 1968, and on the same day he entered a second order finding as a fact that the plaintiff was substantially dependent upon the defendant for support and that the plaintiff did not have sufficient means to subsist during the prosecution of this action and to defray the necessary expenses thereof. It was also found as a fact that the defendant abandoned the plaintiff on 24 November 1967 without just cause or provocation on the part of the plaintiff. Judge Haworth then ordered the defendant to pay alimony *pendente lite* in the amount of ten dollars per week and counsel fees in the amount of one hundred twenty-five dollars.

The defendant excepted to each and every finding of fact and again appealed to superior court. Under date of 4 November 1968 Judge Robert M. Martin entered an order affirming and ratifying the orders entered by Judge Haworth on 13 September 1968. From this order, the defendant appealed to the Court of Appeals.

Morgan, Byerly, Post & Keziah by David M. Watkins for plaintiff appellee.

William H. Steed for defendant appellant.

CAMPBELL, J.

The defendant assigns as error the order signed by Judge Martin which affirmed Judge Haworth's orders of 13 September 1968. It is his contention that the complaint does not state a cause of action because the plaintiff did not amend her complaint to allege "G.S. 50-16.1" in lieu of "G.S. 50-16", as was allowed by one of Judge Haworth's orders. He also contends that the complaint does not state a cause of action because it is deficient in other particulars.

[1] The question presented to this Court is whether the complaint as originally filed on 14 February 1968 is sufficient to state a cause

of action in view of the reference to G.S. 50-16, which was repealed as of 1 October 1967. Effective as of 1 October 1967 actions for alimony and alimony *pendente lite* are provided for pursuant to G.S. 50-16.1 through G.S. 50-16.10. The answer to this question is "yes".

[2] In order to state a cause of action, it is not necessary to put in the complaint the statute upon which the pleader is relying. "The function of a complaint is to state in a plain and concise manner the material, essential or ultimate facts which constitute the cause of action, but not the evidence to prove them. . . . It is not necessary to plead the law. The law arises upon the facts alleged, and the court is presumed to know the law." *Moore v. W O O W, Inc.,* 253 N.C. 1, 116 S.E. 2d 186. A complaint is to be judged by the facts alleged therein, and if the allegations are sufficient, reference to a particular statute is unnecessary. Therefore, such a reference may be regarded as surplusage.

The complaint alleges: one, that the plaintiff and defendant are legally married; two, that the plaintiff, the dependent spouse, is dependent for support upon the defendant, who is the supporting spouse within the meaning and intent of G.S. 50-16.2; and three, that the defendant "willfully and unlawfully abandoned this plaintiff while they were living" together and he "has failed and refused to provide any support for this plaintiff whatsoever and plaintiff has been left in dire need and destitute circumstances."

[3] "The complaint states a cause of action based on abandonment. . . . Hence it is not necessary to allege with particularity acts and conduct as required when the cause is based on such indignities to the person as to render the condition intolerable and life burdensome." *Sguros v. Sguros,* 252 N.C. 408, 114 S.E. 2d 79.

Affirmed.

BROCK and MORRIS, JJ., concur.

EDWARD DOUGLAS JEFFERIES v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 6919SC91

(Filed 26 February 1969)

1. Pleadings § 38— motion for judgment on the pleadings

Motion for judgment on the pleadings admits, for the purpose of the motion, (1) the truth of all facts well pleaded by the adverse party to-

gether with all fair inferences to be drawn from such facts, and (2) the untruth of movant's allegations which are controverted by the pleadings of his adversary.

2. Insurance § 74; Pleadings §§ 18, 38— collision insurance — subrogation — judgment on pleadings — reply

In an action under an automobile collision insurance policy for physical damage to plaintiff's automobile, defendant insurer's motion for judgment on the pleadings is properly allowed where the pleadings establish that defendant has recovered the full amount of damages to his automobile in an action against the third party tortfeasor, that defendant insurer has a subrogation right to such recovery, that defendant has offered to pay plaintiff the full amount of damages to his automobile, but that plaintiff has refused to assign to defendant the judgment against the third party tortfeasor to the extent of defendant's subrogation right, notwithstanding allegations in plaintiff's reply to defendant's answer that under the contract of insurance he is entitled to be paid his expense of recovery in the other action and of storage to protect his damaged automobile, since plaintiff in his reply cannot set up a cause of action different from that contained in the complaint.

APPEAL by plaintiff from *Exum, J.,* 21 October 1968 Session, RANDOLPH Superior Court.

Plaintiff brings this action *ex contractu* to recover from defendant, under its policy of insurance issued to plaintiff for coverage to plaintiff's automobile for damages by collision.

On 29 October 1965 plaintiff's automobile was damaged in a collision with another automobile. It is not controverted that defendant's collision coverage was in effect at the time of plaintiff's loss. Plaintiff duly filed with defendant the proof of loss and demanded damages in the sum of $2,495.00, less the $100.00 deductible as provided by the policy of insurance. Defendant was unwilling to pay the amount demanded and made its counter-offer which was unacceptable to plaintiff.

Plaintiff filed his complaint and caused summons to be issued in the present action on 17 May 1966. On 9 June 1966 defendant filed a motion to strike from the complaint certain allegations. Thereafter this case lay fallow until 30 May 1967, at which time the Court ruled upon the motion to strike.

On 16 May 1966 (the day immediately preceding the day on which the present action was instituted) plaintiff instituted an action, *ex delicto,* in Davidson County, North Carolina, against the owner of the automobile involved in the collision with plaintiff's automobile on 29 October 1965. In the Davidson County case plaintiff alleged damages to his automobile in the sum of $2,495.00 (the same

as in the present action). The Davidson County case came on for trial, and, upon a verdict in plaintiff's favor, judgment was entered in Davidson County on 12 April 1967 awarding plaintiff $2,495.00 for damages to his automobile.

On 9 May 1967 defendant in the present action tendered to plaintiff the sum of $2,395.00 in satisfaction of the claim alleged under the insurance contract; the tender was made upon condition that plaintiff assign to this defendant $2,395.00 of the Davidson County judgment. Plaintiff declined the tender.

Thereafter, as noted above, on 30 May 1967, defendant's motion to strike was ruled upon, and defendant filed answer on 20 June 1967. In its answer, defendant set up the subrogation provisions of the insurance contract, the recovery by plaintiff in the Davidson County case and defendant's tender to plaintiff in this case, as a bar to plaintiff's right to recover herein. Plaintiff filed a reply wherein he admitted the provisions of the insurance policy, and the recovery of $2,495.00 in the Davidson County case. Plaintiff also admitted the tender of $2,395.00 by defendant in this case, but alleged it was ineffective because it required an assignment of a part of his Davidson County recovery.

The present case came on for hearing before Judge Exum, and, upon defendant's motion, judgment upon the pleadings was entered in favor of defendant. Plaintiff appealed, assigning error.

Ottway Burton for plaintiff appellant.

Smith & Casper, by Archie L. Smith, for defendant appellee.

BROCK, J.

[1] 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 insofar as they are controverted by the pleading of his adversary. *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384; *Setser v. Development Corp.*, 3 N.C. App. 163, (filed 11 December 1968).

[2] By plaintiff's complaint, and his admissions by reply, the defendant's rights of subrogation are established; the recovery by plaintiff of full damages to his automobile is established; the offer by defendant to pay plaintiff the full amount claimed under its contract of insurance is established; and plaintiff's refusal to assign to de-

fendant, under its right of subrogation the proceeds of the Davidson County judgment, to the extent to defendant's tender, is established. For the purposes of this lawsuit no further facts are necessary to establish defendant's right to judgment.

Plaintiff, however, strenuously argues that the judgment on the pleadings in defendant's favor was improper because under the contract of insurance he is entitled to be paid his expense of recovery in the Davidson County case, and is entitled to be paid his expense of storage to protect the damaged automobile.

Assuming, but not deciding, that plaintiff's policy provides such coverage, plaintiff's complaint alleges and seeks only a recovery for physical damage to his automobile in the sum of $2,495.00, less the $100.00 deductible. Nevertheless, plaintiff contends that by his reply to defendant's answer he asserts the right to recover for these two items of expense.

Plaintiff did not file an amended complaint, nor did he seek leave to file an amendment, to allege a cause for recovery of expense of the Davidson County litigation or the expense of storage. "The plaintiff cannot in his reply set up a cause of action different from that contained in his complaint." McIntosh, N. C. Practice 2d, § 1265; *Nix v. English*, 254 N.C. 414, 119 S.E. 2d 220.

We have examined plaintiff's remaining assignments of error and in them we find no prejudicial error.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES STRICKLAND AND AUBREY GENE TUCKER

No. 6920SC118

(Filed 26 February 1969)

1. Robbery § 5— armed robbery — submission of common law robbery

In a prosecution for robbery with a dangerous weapon, where the court did not rule that the pocketknife allegedly used in the robbery was a dangerous weapon but submitted that question to the jury for its determination, it was prejudicial error for the court to refuse to submit to the jury the lesser offense of common law robbery.

2. Criminal Law § 172— failure to submit lesser offense — whether cured by verdict

The error of failure to submit to the jury the question of guilt of a lesser included offense is not cured by a verdict convicting defendant of the higher offense.

APPEAL by defendants from *Seay, J.*, 28 October 1968 Session, UNION Superior Court.

Defendants were tried jointly upon identical bills of indictment charging each defendant with the felony of robbery with a dangerous weapon. From verdicts of guilty of robbery with a dangerous weapon, and from judgments of confinement entered thereon, each defendant appealed.

Robert Morgan, Attorney General, by James F. Bullock, Deputy Attorney General, for the State.

Robert B. Clark for defendant James Strickland.

James E. Griffin for defendant Aubrey Gene Tucker.

BROCK, J.

The State offered evidence which tended to show that the defendants used a pocketknife in effecting the alleged robbery. Neither of the defendants offered evidence. Without recounting the circumstances of the use of the pocketknife, we feel it is sufficient for present purposes to discuss only the instructions upon which the trial judge submitted the case to the jury.

[1] The trial judge did not rule that the pocketknife described by the State was a dangerous weapon; he submitted that question to the jury for its determination. Having done so, it would therefore have been possible, under the court's instructions, for the jury to have failed to find that the described pocketknife was a dangerous weapon. It follows then that it was incumbent upon the trial judge to submit the lesser offense of common law robbery to the jury; this he was requested by the defendants to do and refused. This refusal we hold to be error.

[2] The error of failure to submit to the jury the question of guilt of the lesser included offense is not cured by a verdict convicting the defendants of the higher offense. *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27; *State v. Calloway,* 1 N.C. App. 150, 160 S.E. 2d 501.

There are other assignments of error which may have merit, but,

since they probably will not reoccur, we refrain from discussing them.

Trial *De Novo.*

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JOHN CHARLES McKINNEY
No. 6918SC103

(Filed 26 February 1969)

1. Constitutional Law § 36— cruel and unusual punishment

Punishment within the statutory maximum cannot be considered cruel and unusual in the constitutional sense.

2. Criminal Law § 138— determination of sentence

On appeal from sentence of imprisonment imposed upon defendant's pleas of guilty to common law robbery and forgery, there is no merit in defendant's contention that the sentence was rendered unconstitutional because trial judge considered matters other than the actual robberies and forgery in determining the amount of punishment.

APPEAL by defendant from *Gwyn, J.*, 13 September 1968, Criminal Session of GUILFORD Superior Court (Greensboro Division).

Defendant was charged in two valid bills of indictment with common law robbery of Charles Sluder on 18 August 1968 and Ralph Lee Faulk on 18 August 1968. In another bill of indictment defendant was charged with the felony of forgery on 15 August 1968. To a charge of kidnapping and two other charges of forgery, the State entered a *nolle prosequi* with leave.

The defendant was twenty-two years old and a high school graduate. He knowingly, understandingly, voluntarily and of his own free will and accord entered a plea of guilty to each of the charges knowing that the trial court could impose a sentence of ten years in each case.

From a sentence of ten years on the first robbery charge, five years on the second robbery charge, which was to run consecutively, and an eight year suspended sentence on the forgery charge, the defendant appealed to the Court of Appeals.

It is the defendant's contention that the trial court abused its

discretion in the sentence imposed so as to constitute cruel or unusual punishment in violation of Article 1, Section 14, of the Constitution of North Carolina.

Attorney General Robert Morgan and Deputy Attorney General James F. Bullock for State.

Benjamin S. Marks, Jr., for defendant appellant.

CAMPBELL, J.

[1] In his brief the defendant frankly admits that the sentence imposed is within the statutory limit as prescribed by law. " '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)." *State v. Mitchell,* 3 N.C. App. 70, 164 S.E. 2d 62.

[2] Nevertheless, it is argued that the sentence was rendered unconstitutional because the trial judge was motivated by matters other than the actual robberies and forgery.

> "It is the accepted rule with us that within the limits of the sentence permitted by the law, the character and extent of the punishment is committed to the sound discretion of the trial court, and may be reviewed by this Court only in case of manifest and gross abuse." *State v. Sudderth,* 184 N.C. 753, 114 S.E. 828.
>
> "In making a determination of (what punishment should be imposed) after a plea of guilty or *nolo contender,* 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. In so doing the court is not bound by the rules of evidence which obtain in a trial where guilt or innocence is put in issue by a plea of not guilty." (citations omitted) *State v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695.

The able and conscientious trial judge in the instant case exhibited charitableness, understanding, and considerable leniency in

view of the facts disclosed by the record, and certainly there was no abuse of discretion in the sentence imposed.

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JOHN WILLIAM REED

No. 6918SC117

(Filed 26 February 1969)

1. Burglary and Unlawful Breakings § 8— felonious breaking — punishment

The maximum punishment for the felony of breaking and entering is ten years imprisonment. G.S. 14-54.

2. Larceny § 10— felonious larceny — punishment

The maximum punishment is ten years imprisonment for the felony of larceny of property from a building referred to in G.S. 14-72 by breaking or entering therein with intent to steal.

3. Constitutional Law § 36— cruel and unusual punishment

Punishment within the statutory maximum is not cruel and unusual in the constitutional sense.

APPEAL by defendant from *Bowman, S.J.*, 28 October 1968 Criminal Session of Superior Court of GUILFORD County, High Point Division.

Defendant was charged in the first two counts in a bill of indictment with the felonies of breaking and entering in violation of G.S. 14-54 and larceny by such breaking and entering, and in a third count with the misdemeanor of receiving stolen goods knowing them to have been stolen.

Defendant, an indigent, was represented by court-appointed counsel. Defendant, in writing, authorized his counsel to enter a plea of guilty to the charges of breaking and entering and larceny. The trial court, after making inquiry of the defendant in open court, found as a fact that the plea of guilty was freely, understandingly and voluntarily made by him. A *nol pros* was taken as to the count of receiving stolen goods knowing them to have been stolen. The charges to which the defendant pleaded guilty were consolidated for

the purpose of punishment. From a judgment imposing a prison sentence of not less than seven nor more than ten years, the defendant appealed. Counsel was appointed by the court to represent the defendant on the appeal.

Attorney General Robert Morgan and Assistant Attorney General Millard R. Rich, Jr., for the State.

Arthur M. Utley, Jr., for the defendant appellant.

MALLARD, C.J.

Counsel for defendant concedes in his brief that he has found no error in the proceedings in the trial court.

[1, 2] We have carefully examined the record and find no prejudicial error therein. The maximum punishment for the felony of breaking and entering is ten years imprisonment. G.S. 14-54. The maximum punishment is also ten years imprisonment for the felony of larceny of property from a building referred to in G.S. 14-72 by breaking or entering therein with intent to steal. *State v. Greer,* 270 N.C. 143, 153 S.E. 2d 849; *State v. Morgan,* 265 N.C. 597, 144 S.E. 2d 633; *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91. The sentence imposed in this case does not exceed the statutory maximum.

[3] The defendant freely, understandingly and voluntarily entered a plea of guilty as charged to the first two counts in the bill of indictment. The plea was made without undue influence, compulsion or duress, and without promise of leniency, after the defendant had been advised that upon such pleas of guilty he could be imprisoned for as much as twenty years. The law is succinctly stated in *State v. Wilson,* 270 N.C. 299, 154 S.E. 2d 102, as follows:

> "The sentences imposed by the court do not exceed the statutory maximum. G.S. 14-2, G.S. 14-54, G.S. 14-70 and G.S. 14-72; *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91. 'When punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense.' *State v. Davis,* 267 N.C. 126, 147 S.E. 2d 570; *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216; *State v. Daniels,* 197 N.C. 285, 148 S.E. 244."

In the trial we find

No error.

BRITT and PARKER, JJ., concur.

JOHN H. ELLIS AND WIFE, FRANCES N. ELLIS, v. GUILFORD COUNTY AND T. WADE BRUTON, AS ATTORNEY GENERAL OF NORTH CAROLINA

No. 6918SC123

(Filed 26 February 1969)

Appeal and Error § 39— time of docketing record on appeal

Where appellant fails to docket record on appeal within the time provided by the rules of the Court of Appeals, the appeal will be dismissed. Rule of Practice in the Court of Appeals No. 5.

APPEAL from *Collier, J.*, 19 August 1968 Civil Session, GUILFORD Superior Court, Greensboro Division.

Plaintiffs instituted this action for a declaratory judgment declaring Chapter 1006 of the Session Laws of 1959 and an ordinance adopted pursuant thereto by the Guilford County Board of County Commissioners unconstitutional and void.

Chapter 1006 of the Session Laws of 1959 is codified as Article 20B of Chapter 153 of the General Statutes, Sections 153-266.10 to 153-266.22. The act purports to authorize boards of county commissioners to enact regulations pertaining to zoning and regulation of buildings.

The defendant Guilford County filed a demurrer to the complaint asserting that the complaint did not state facts sufficient to constitute a cause of action. Judge Collier sustained the demurrer and dismissed the action by judgment dated and filed 21 August 1968.

From this judgment the plaintiffs in apt time appealed to this Court.

Turner, Rollins, Rollins & Suggs by Thomas Turner for plaintiff appellants.

David I. Smith and Ralph A. Walker for defendant appellees.

CAMPBELL, J.

The judgment appealed from was dated 21 August 1968. The record on appeal was agreed to by a stipulation entered into 31 October 1968.

The case and record on appeal was docketed in this Court on 7 January 1969. The rules of this Court require the record on appeal to be docketed within ninety days after the date of the judgment appealed from. Rule 5.

For failure to docket the record on appeal within the time provided by the rules of this Court, this appeal is

Dismissed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JOHN FRANKLIN CLINE

No. 6919SC100

(Filed 26 February 1969)

Criminal Law § 155— failure to aptly docket record on appeal

Appeal is dismissed for failure to docket the record on appeal within the time prescribed by Rule 5 of the Rules of Practice in the Court of Appeals.

APPEAL by defendant from *Exum, J.*, September 1968 Session of Superior Court of ROWAN.

Defendant was charged with driving a motor vehicle on a street or highway while under the influence of intoxicating liquor in violation of G.S. 20-138. From judgment entered on a jury verdict of guilty as charged, defendant appeals.

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

Robert M. Davis for defendant appellant.

MORRIS, J.

The record filed in this Court indicates that this action originated in the County Court of Salisbury, but the record is silent as to the disposition of the matter in that court. However, the Attorney General filed a motion suggesting diminution of the record to include in the record a true copy of the docket of that court showing that the defendant was found guilty and appealed to the Superior Court. We allowed this motion, thus curing this defect.

The record is also silent as to the date of the signing of the judgment and the date of its entry as required by Rule 19(a) of Rules of Practice in the Court of Appeals of North Carolina.

We, therefore, use the date of the beginning of the Session for purposes of computing time for docketing. The Session began on 9 September 1968. The appeal was not docketed in this Court until 19 December 1968. This is not within the time prescribed by our rules. Rule 5, Rules of Practice in the Court of Appeals of North Carolina.

We note also that although appellant states in the record that the evidence is submitted under Rule 19(d)(2), there is no appendix to his brief.

For failure to docket the record on appeal within the time required, the appeal is dismissed.

Appeal dismissed.

CAMPBELL and BROCK, JJ., concur.

CITY OF RANDLEMAN v. HENRY STEVENSON AND WIFE, MAHALA D. STEVENSON

No. 6919SC121

(Filed 26 February 1969)

Appeal and Error § 39— time of docketing record on appeal

Where appellant fails to docket record on appeal within the time provided by the rules of the Court of Appeals, the appeal will be dismissed. Rule of Practice in the Court of Appeals No. 5.

APPEAL from *Crissman, J.*, 23 September 1968 Civil Session of Superior Court of RANDOLPH.

The City of Randleman instituted this action on 21 December 1965 for the condemnation of an easement for a sewer line running through property of defendants and for assessment of damages therefor. The issue of damages was heard by Judge Crissman and a jury at the 23 September 1968 Session of the Superior Court of Randolph County. The jury returned a verdict for respondents in the amount of $2,000. Petitioner gave notice of appeal.

L. T. Hammond, Sr., for petitioner appellant.

Ottway Burton for respondent appellees.

MORRIS, J.

The record shows the judgment in this case to have been signed on 3 October 1968, although it bears a filing date of 2 October 1968. Record on appeal was not docketed in this Court until 6 January 1969. This, of course, was not within the ninety-day period required by Rule 5, Rules of Practice in the Court of Appeals of North Carolina. For failure to docket within the time prescribed by our rules, the appeal is

Dismissed.

CAMPBELL and BROCK, JJ., concur.

JESSIE Mc. OSBORNE v. ROCKY HENDRIX

No. 6923SC133

(Filed 26 February 1969)

Appeal and Error § 39— time of docketing record on appeal

Where appellant fails to docket record on appeal within the time provided by the rules of the Court of Appeals, the appeal will be dismissed. Rule of Practice in the Court of Appeals No. 5.

APPEAL by plaintiff from *Collier, J.,* August 1968 Civil Session, Superior Court of ALLEGHANY.

This is an action to recover damages to plaintiff's automobile allegedly resulting from the negligence of defendant. At the conclusion of all the evidence, the court allowed defendant's motion for judgment as of involuntary nonsuit. Plaintiff appealed.

McElwee and Hall by John E. Hall for plaintiff appellant.

W. G. Mitchell for defendant appellee.

MORRIS, J.

This action was tried at the August 1968 Civil Session of Alleghany Superior Court. Judgment of nonsuit was signed by the court on 27 August 1968 and filed on that date. Although counsel for the parties agreed to the case on appeal on 1 November 1968, the record on appeal was not docketed here until 13 January 1969. Rule 5, Rules of Practice in the Court of Appeals of North Carolina, re-

quires that the record on appeal be docketed within ninety days after the date of the judgment unless an extension of time shall have been granted by the trial tribunal. The record before us does not contain an order extending the time within which to docket.

For failure to docket the record on appeal within the time prescribed by our rules, this appeal is

Dismissed.

CAMPBELL and BROCK, JJ., concur.

E. LOIS LAND v. LESTER T. LAND
No. 6922SC97
(Filed 26 February 1969)

1. Appeal and Error § 45— the brief — failure to discuss exceptions

Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Rule of Practice in the Court of Appeals No. 28.

2. Appeal and Error § 44— the brief — effect of failure to file

Failure by appellant to file a brief works an abandonment of his assignments of error, except those appearing upon the face of the record proper, which are cognizable *ex mero motu*.

APPEAL by defendant from *Johnston, J.*, 9 September 1968 Session, DAVIDSON Superior Court.

Plaintiff brought this action to have the court declare that defendant holds title to certain real estate as trustee for plaintiff.

From a verdict and judgment in accordance with plaintiff's prayer for relief, defendant gave notice of appeal.

E. W. Hooper and L. D. McGuire for plaintiff appellee.
Clarence C. Boyan for defendant appellant.

BROCK, J.

[1, 2] No briefs have been filed, nor was oral argument undertaken. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited,

will be taken as abandoned by him. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Failure by appellant to file a brief works an abandonment of his assignments of error, except those appearing upon the face of the record proper, which are cognizable *ex mero motu. Dillard v. Brown,* 233 N.C. 551, 64 S.E. 2d 843.

Error does not appear upon the face of the record.

Appeal dismissed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND GREYHOUND LINES, INC., APPLICANT, AND SECRETARY OF THE ARMY, INTERVENOR, v. QUEEN CITY COACH COMPANY AND FORT BRAGG COACH COMPANY, PROTESTANTS

No. 6910UC109

(Filed 2 April 1969)

1. Carriers § 2; Utilities Commission § 7— what constitutes public convenience and necessity

What constitutes public convenience and necessity is primarily an administrative question with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service, whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest.

2. Carriers § 2— granting of certificate to common carrier — rights of existing carrier

If the proposed operation under the certificate sought would seriously endanger or impair the operations of existing carriers contrary to the public interest, the certificate should not be issued.

3. Utilities Commission § 1— procedure — findings of fact

The Utilities Commission is required to find all facts essential to a determination of the question at issue. G.S. 62-79.

4. Carriers § 2— application for franchise certificate — impairment of existing carrier services — findings of fact

In a hearing wherein the Utilities Commission granted application by a common carrier for a franchise certificate, failure of the Commission to make findings of fact (1) as to whether the granting of the application would endanger or impair the operation of an existing carrier contrary to the public interest and (2) as to whether the existing carrier can rea-

sonably meet the public needs, *is held* error, since the existing carrier alleged, and offered supporting evidence, that the granting of the application would adversely affect its profitable charter bus operations and thereby cause it to discontinue a needed commuter bus service between a military base and a nearby city.

APPEAL by protestants, Queen City Coach Company and Fort Bragg Coach Company, from final order of the North Carolina Utilities Commission dated 31 July 1968.

For purposes of brevity the parties to this proceeding will be referred to as "Greyhound" denoting Greyhound Lines, Inc.; "Army" denoting Secretary of the Army, Intervenor; "Queen" for Queen City Coach Company, and "Fort Bragg Coach" denoting Fort Bragg Coach Company.

Greyhound on 13 March 1967 filed an application with the North Carolina Utilities Commission (hereinafter referred to as "Commission") seeking a common carrier franchise certificate to operate from Fayetteville over N.C. Highway 87 to Fort Bragg; thence over S.R. 1613 to its junction with S.R. 1600; thence over S.R. 1600 to its junction with S.R. 1611; thence over S.R. 1611 to its junction with U.S. Highway 401, serving all intermediate points with a restriction that "no passenger is to be transported whose entire ride is between Fayetteville and Fort Bragg, North Carolina."

Queen and Fort Bragg Coach, a wholly owned subsidiary of Queen, filed a joint protest on 18 May 1967 and an amended protest on 1 September 1967. The allegations of Queen and Fort Bragg Coach pertinent to this appeal are, in summary, that Queen is certificated to serve the route between Greensboro and Fayetteville over N.C. Highway 87 between Jonesboro (Sanford) and Fayetteville through Fort Bragg which route has been adequately served to meet the requirements of public convenience and necessity; that Queen is certificated to serve the route between Lillington and Fayetteville over N.C. Highway 210 through Fort Bragg and that route has been adequately served by Queen for many years to meet the requirements of public convenience and necessity; that Queen is certificated to serve the route between N.C. Highway 210 at its junction with S.R. 1613 and thence over S.R. 1613 to its junction with S.R. 1600 and thence by various county roads to N.C. Highway 59 and over N.C. Highway 210 and return, which route is now being served by Queen even though in its opinion public convenience and necessity do not require the service; that Fort Bragg Coach is certificated to serve only the route between Fayetteville and Fort Bragg via N.C. Highway 87 and that route has been adequately

served for many years by Fort Bragg Coach to meet the requirements of public convenience and necessity; that the Greyhound application duplicates the franchise routes of Queen and Fort Bragg Coach for the entire distance between Fayetteville and Fort Bragg and the franchise route of Queen for the entire distance between Fort Bragg and Eureka Springs over S.R. 1613; that public convenience and necessity do not require the granting of the rights sought by Greyhound; that Queen and Fort Bragg Coach are rendering adequate service on N.C. Highway 87; that Queen is rendering service on the route on S.R. 1613 between Fort Bragg and the junction thereof with S.R. 1600 more than adequate to meet any requirements of public convenience and necessity; that the granting of the application would result in financial detriment to Queen and Fort Bragg Coach for that "(i) It would permit Greyhound Lines, Inc. to engage in competitive schedule service to these protestants over routes heretofore certificated by this Commission to these protestants and between points served by protestants over N.C. Highway 87 and Cumberland County Highway 1613 and other highways duly certificated to Queen City Coach Company, thereby diverting business from protestants to applicant Greyhound Lines, Inc. with consequent loss of revenues to protestants; (ii) It would permit Greyhound Lines, Inc. to originate charter service from Fort Bragg to any place in this State in direct competition with the charter service authority of these protestants, thereby diverting business to Greyhound Lines, Inc. with consequent revenue loss to these protestants"; that the granting of the application "with the diversion of schedule and charter traffic to applicant which would follow therefrom would adversely affect protestants' ability to render service to the public"; that protestants are ready, willing, and able to provide any additional service over their authorized routes that may become necessary to meet the reasonable needs and requirements of the traveling and shipping public.

On its petition, Army was permitted to intervene as its interests might be made to appear.

The matter was heard by the Full Commission on 19-22 September 1967, and on 31 July 1968, the Commission entered its order granting the application, Commissioner Biggs dissenting.

Protestants, in apt time, filed their exceptions and notice of appeal.

Joyner, Moore & Howison by R. C. Howison, Jr., and Nance, Collier, Singleton, Kirkman & Herndon by James R. Nance for protestant appellants.

Bailey, Dixon & Wooten by Ruffin Bailey for appellant appellee.

Edward B. Hipp and Larry G. Ford for the Utilities Commission.

MORRIS, J.

The order of the Commission contained the following findings of fact and conclusions:

"1. That Greyhound is a common carrier holding a franchise certificate to transport passengers, their baggage, mail and light express over various routes in intrastate commerce and interstate commerce in North Carolina and in other States, and that it has the equipment necessary and is fit, willing and able to provide the facilities necessary to properly perform the proposed service; that it is solvent and financially able to furnish adequate service such as is proposed on a continuing basis.

2. That Greyhound has applied for interstate authority which would be identical to that sought in this application; however, it does not intend to transport any passengers whose transportation is limited solely to movement between Fort Bragg and Fayetteville, North Carolina.

3. That Fort Bragg is a large military installation with its own shopping centers, banks, motels, schools and housing facilities and has a base population equal to or in excess of the population of Fayetteville, North Carolina.

4. That Greyhound proposes to serve Fort Bragg on its north-south schedule routes, proceeding south over U.S. Highway 401 to a junction with County Road 1611 and over County Road 1611 to the Fort Bragg Bus Station; from there it would go over N.C. Highway 87 into Fayetteville Bus Station and then proceed south over U.S. Highway 401. By this route it would serve not only Fort Bragg, but also passengers at Eureka Springs, North Carolina, a small community just east of Fort Bragg, as an intermediate point along this route. For northbound traffic the route would be the reverse of the foregoing description. Until September 1, 1967, there was no intrastate service operating to or from Eureka Springs, North Carolina. Although Queen has held a certificate to serve Eureka Springs since the 23rd day of

September, 1964, it had never offered service to or from Eureka Springs until September 1, 1967, after the interstate hearing and immediately prior to the prehearing conference in this particular docket, at which time it instituted a schedule offering service for the first time to Eureka Springs.

5. That the Fort Bragg Military Reservation is approximately 3½ to 4½ miles from the city limits of Fayetteville at its closest point along N.C. Highway 87. The proposed route amounts to an increase of approximately twelve miles to the present route operated by Greyhound and approximately twenty minutes to Greyhound's present time schedule. Greyhound is presently providing intrastate and interstate passengers with service to and from the Fort Bragg installation which requires its passengers to use other means of transportation from that installation to Fayetteville. The proposed service will eliminate the interline of passengers between the local bus service and the Greyhound bus service and will be a convenience to the passengers as well as better meet their needs for travel to and from the Fort Bragg installation.

CONCLUSIONS

1. The preponderance of the evidence leads this Commission to the conclusion that there is a need for the service as proposed by Greyhound in this case, with the exclusion or restriction as set forth in its application; that the testimony of the witnesses, including that of the Director of Services at Fort Bragg, has amply pointed up the fact that there is a need for the service between Fort Bragg and Eureka Springs and various points and places, including Wagram, Raleigh, Linden, Lillington, Durham, and other intrastate points in North Carolina.

2. Greyhound has borne the statutory burden of proof and has established to the satisfaction of the Commission that there is a public demand and need for the common carrier service proposed in the territory proposed in addition to the existing authorized service.

3. Greyhound has borne the burden of proof and has established that it is fit, willing and able to properly perform the proposed service.

4. Greyhound has borne the burden of proof and the protestants have stipulated that it is solvent and financially able to furnish adequate service on a continuing basis.

5. The route between Eureka Springs and Fayetteville via Fort Bragg although authorized for service is not being served

and was not served by Queen until after this application was filed and just prior to the prehearing conference, and protestants Queen and Fort Bragg Coach still contend there is no need for the service which it had so recently instituted though for many years it had abandoned.

6. Greyhound should be restricted as proposed in the application in order that no passenger is to be transported whose entire ride is between Fayetteville and Fort Bragg, North Carolina."

At the outset, it is to be noted that Greyhound has not applied for authority to operate the shuttle type service from Fort Bragg to Fayetteville and return, which service is presently furnished by Fort Bragg Coach by buses traveling throughout the military reservation.

The uncontroverted evidence in this case is that Greyhound proposes to divert some of its interstate North-South buses by way of Fort Bragg, from its shorter and direct North-South route over U.S. Highway 401. The proposed service of Greyhound would be a rerouting of five of its through northbound buses and four through southbound buses. The northbound buses going to Raleigh would leave Fort Bragg at 1:30 a.m., 4:35 a.m., 7:00 a.m., and 8:45 p.m. The southbound buses leaving Raleigh for Fort Bragg would arrive at Fort Bragg at 2:45 a.m., 8:50 a.m., 11:40 a.m., 3:10 p.m., and 7:00 p.m. The Fort Bragg Coach makes 56 round trips daily between Fort Bragg and Fayetteville over N.C. Highway 87. These two points are approximately 3½ miles apart. The population of Fort Bragg exceeds 58,000 persons. Military personnel living on Fort Bragg, in some cases, live as much as 4 miles from the Fort Bragg bus station; however, Fort Bragg Coach buses run throughout the military reservation; therefore, it is not necessary to go to the Fort Bragg bus station to get a bus to Fayetteville. This service is furnished every half hour, day and night. It is necessary for passengers going to Raleigh or Durham or other points to change buses at Fayetteville. Queen, Fort Bragg Coach and Greyhound all operate out of Fayetteville bus station. Queen also has flag stop service from Fort Bragg to Raleigh. There is also uncontroverted evidence that Queen is furnishing service to the residents of Eureka Springs into Fayetteville which service has been effective since 1 September 1967 although Queen has held a certificate for that route for many years.

Greyhound offered evidence from military personnel tending to show that through service to Raleigh and Durham and other points in North Carolina would be desirable without the necessity of chang-

ing buses in Fayetteville. There was some evidence that it was necessary to wait at various bus stops on the base for a Fort Bragg Coach bus to Fayetteville. Not all of the witnesses were familiar with the schedules proposed by Greyhound and only a few of those familiar with the proposed schedule testified that any bus on that schedule would be convenient for them. Greyhound also offered evidence from residents of Eureka Springs that bus service to Fayetteville, and to towns and communities north of Eureka Springs would be of convenience to them.

Greyhound's evidence was that the diversion of its buses from U.S. Highway 401 into Fort Bragg and to Fayetteville would require 12.5 miles additional travel for those through passengers on the bus and would require approximately 20 minutes additional travel time.

Protestants' evidence was that the additional travel time for each schedule proposed by Greyhound would be a minimum of 39 minutes based on an actual trial run. Protestants also presented military personnel who testified that they had had no difficulty in getting from Fort Bragg to Fayetteville or return with the present facilities and had no need or desire for through transportation from the Fort Bragg bus station to Raleigh or Durham or other points in North Carolina. There was also testimony that no complaint had been registered from enlisted personnel at Fort Bragg. The vice-president in charge of traffic for Queen and Fort Bragg Coach testified that there were 87 company buses stationed in Fayetteville, 10 of which are used in the regular Fayetteville-Fort Bragg service. The remainder are used for extra buses and charter service. That dispatches with radio equipment are employed to get extra equipment when needed and a standby bus and driver are always ready. Five buses are available on 30-minute notice. He further testified that Fort Bragg Coach showed a loss of $180,265 for the first eight months of that year in providing the Fayetteville-Fort Bragg service, the return being 32¢ per mile and the cost 48.9¢ per mile. He testified further that the company had been willing to sustain the loss in operating the shuttle bus to Fayetteville on a frequent basis because of the revenues derived from the volume of charter service, but that if Greyhound's application for originating service on the base be approved it would claim one-half of the charter service and he could not say how long his company could continue furnishing the shuttle service at a loss. Protestants testified that they would provide such additional trips from Fort Bragg to Raleigh as might be ordered by the Commission or as might be requested by the Army.

We turn now to the statutory requirements we think pertinent.

G.S. 62-262(e) provides that if the application filed with the Commission is for a certificate the applicant shall have the burden of proof of showing to the satisfaction of the Commission:

"(1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service, and

(2) That the applicant is fit, willing and able to properly perform the proposed service, and

(3) That the applicant is solvent and financially able to furnish adequate service on a continuing basis."

From the record before us, it appears that there is no serious contention that Greyhound has failed to sustain its burden of proof as to (2) and (3). Protestants, however, seriously contend that the conclusion of the Commission that Greyhound has borne the statutory burden of proof as to (1) is erroneous for that it is not supported by the findings of fact.

G.S. 62-79 provides that "All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include: (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and (2) [not applicable to this appeal]."

Protestants by their answer to the application filed by Greyhound particularly alleged that the granting of the application would result in financial detriment to them and adversely affect their ability to render service to the public. Evidence was presented in support of this contention. They also alleged that they were well able reasonably to meet the needs of the traveling public and willing and able to furnish such additional service as might be required. Evidence was presented on this contention.

[1] Our Supreme Court has said many times that "what constitutes 'public convenience and necessity' is primarily an administrative question with a number of imponderables to be taken into consideration, *e.g.*, whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest." *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201; *Utilities Commission v. Ray*,

236 N.C. 692, 73 S.E. 2d 870; *Utilities Commission v. Coach Co. and Utilities Commission v. Greyhound Corp.*, 260 N.C. 43, 132 S.E. 2d 249.

[2] We are not inadvertent to the fact that the factors denominated as imponderables, to wit: whether the existing carriers can reasonably meet the need for the service and whether the granting of the application would endanger or impair the operations of existing carriers contrary to the public interest, are not solely determinative of the right of the Commission to grant the application. Both are directed to the question of public convenience and necessity. *Utilities Commission v. Coach Co.*, 233 N.C. 119, 63 S.E. 2d 113. Nevertheless, if the proposed operation under the certificate sought would seriously endanger or impair the operations of existing carriers contrary to the public interest, the certificate should not be issued. *Utilities Commission v. Coach Co., supra.*

[3] The Commission is required by G.S. 62-79 to find all facts essential to a determination of the question at issue. *Utilities Commission v. Membership Corporation,* 260 N.C. 59, 131 S.E. 2d 865. Rodman, J., in the last cited case pointed out the fact that the duty imposed by this statute (then G.S. 62-26.3) is similar to that imposed upon a trial judge by G.S. 1-185 when a jury trial is waived and on the Industrial Commission by G.S. 97-84 before an award or denial of compensation can be made. "Bobbitt, J., speaking with reference to the duty imposed by G.S. 97-84, said in *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596: 'Specific findings of fact by the Industrial Commission are required. These must cover the crucial questions of fact upon which plaintiff's right to compensation depends. (Citing authorities) Otherwise, this Court cannot determine whether an adequate basis exists, either in fact or in law, for the ultimate finding as to whether plaintiff was injured by accident arising out of and in the course of his employment.'" *Utilities Commission v. Membership Corporation, supra.*

[4] The Commission's order in this case contains no finding of fact with respect to whether the granting of the application would endanger or impair the operations of existing carriers contrary to the public interest, nor is there a finding with respect to whether the existing carriers can reasonably meet the public needs.

We think that findings of fact with respect to these questions are particularly imperative to a conclusion and decision in this case. The pleadings and evidence presented indicate that the Fort Bragg charter service is at least a substantial part of this controversy. There seems to be no question but that the continuation of the Fort Bragg-

Fayetteville commuter service of Fort Bragg Coach on a frequent schedule basis is most desirable and necessary for the residents of the military installation. We are not able to determine whether the Commission considered these factors in reaching its decision.

There is a finding of fact that "Although Queen has held a certificate to serve Eureka Springs since the 23rd day of September, 1964, it had never offered service to or from Eureka Springs until September 1, 1967, after the interstate hearing and immediately prior to the rehearing conference in this particular docket, at which time it instituted a schedule offering service for the first time to Eureka Springs." There is also a conclusion that "The route between Eureka Springs and Fayetteville via Fort Bragg although authorized for service is not being served and was not served by Queen until after this application was filed and just prior to the prehearing conference, and protestants Queen and Fort Bragg Coach still contend there is no need for the service which it had so recently instituted though for many years it had abandoned." There was evidence that Queen was, at the time of the hearing, furnishing that service with no intent to abandon it, and we are unable to find any contradictory evidence in the record. We are unable to say whether this conclusion is the result of inadvertent phraseology or a misunderstanding on the part of the Commission as to whether the service had been abandoned. At any rate, we are not able to determine from the order of the Commission whether consideration was given to the two factors which we feel are crucial factors. For that reason, the matter must be remanded for findings of fact in accordance with this opinion.

Remanded.

CAMPBELL and BRITT, JJ., concur.

NELLO L. TEER COMPANY v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 6910SC17

(Filed 2 April 1969)

1. Highways § 9— claim against Highway Commission for additional payment — former G.S. 136-29

In a proceeding before a Board of Review under former G.S. 136-29 for additional payment allegedly due from the State Highway Commission for work on a highway project, recovery, if any, must be within the terms and framework of the contract with the Highway Commission and may not be based on *quantum meruit.*

2. Highways § 9— appellate review of decision of Board of Review

The Court of Appeals may review as questions of law whether the facts found by the Board of Review are supported by competent evidence, and whether the facts found support the Board's legal conclusions.

3. Highway § 9— proceeding against Highway Commission for additional payment — expense of delays

In this proceeding against the Highway Commission under former G.S. 136-29 for additional payment for highway construction work, the Board of Review could not use as a ground for changing the unit prices bid by the contractor to a force account basis the contractor's extra expense resulting from delays in its construction caused by failure of the prior contractor to perform properly the rough grading, drainage and shoulder work, where no provision in the contract with the Highway Commission permits the contractor to be compensated for delays and the expenses of such delays.

4. Highways § 9— paving contract — work to correct deficiencies in rough grading — necessity for bids

Work performed by a paving contractor at the direction of Highway Commission engineers to correct deficiencies in the rough grading, drainage and shoulder work which the prior contractor had failed to perform properly *is held* to be "Extra Work" or "Unforeseen Work" which could be performed and paid for on a force account basis under the paving contractor's existing contract with the Highway Commission without the necessity of letting a contract for this remedial work to a bidder after advertisement.

5. Highways § 9— "Extra Work"

The Highway Commission cannot circumvent the provisions of G.S. 136-28 requiring the letting of bids after advertisement by calling work not specifically covered by the contract "Extra Work;" what is meant by "Extra Work" as used in the Specifications of the Highway Commission must be determined under the facts and circumstances of each particular case.

6. Highways § 9— "Extra Work"

"Extra Work" under a contract with the Highway Commission cannot be construed to mean work required to perform the specific items for which unit prices were bid by the contractor.

7. Highways § 9— findings by Board of Review

In this proceeding against the Highway Commission under former G.S. 136-29 for additional payment for highway construction work, the evidence is insufficient to support findings of fact made by the Board of Review and adopted by the Superior Court to the effect that the contractor was directed by the Highway Commission to bring the entire project up to Interstate Standards on a force account basis, the contractor being required to perform the work for the unit prices bid in its proposal and according to the proposal, plans and specifications as set out in the contract.

8. Highways § 9— proceeding against Highway Commission for additional payment — extra work

In this proceeding against the Highway Commission for additional payment for highway construction work, the Board of Review erred in finding that all work performed by the paving contractor on the highway project was "Extra Work" under the provisions of the contract to be paid for on a force account basis, the contractor being required to perform the specific items of work covered by the contract at the unit prices bid in its proposal, and only extra work not specifically covered in the contract, including that required to correct deficiencies in the rough grading work of the prior contractor, being compensable on a force account basis.

9. Highways § 9— abandonment of contract — sufficiency of evidence

Evidence is insufficient to show that Highway Commission engineers directed contractor to abandon highway construction contract and to perform the work on a force account basis, the engineers having no such authority.

10. Highways § 9— extra work — rates for rental equipment

In this proceeding against the Highway Commission for additional compensation for highway construction work, the Board of Review erred in using actual equipment costs in determining rental rates for equipment used in performing extra work under highway construction contract instead of using the rate schedule published by the Associated Equipment Distributors as provided for in the contract.

11. Interest § 1; State § 4— actions against State — interest

Interest may not be awarded against the State without authorization by statute or contract.

12. Highways § 9— award against Highway Commission — interest

In a proceeding against the Highway Commission under former G.S. 136-29 for additional compensation for highway construction work, the

contractor is not entitled to interest on the amount awarded to it by the Board of Review, no statute or provision of the contract with the Highway Commission authorizing the payment of such interest.

13. Highways § 9— extra work performed by contractor — compensation for all work performed

The fact that paving contractor was directed by Highway Commission engineers to make extensive corrections of deficiencies in the rough grading, drainage and shoulder work which the prior contractor had not properly performed does not permit the contractor to be compensated on a force account basis for all work performed under its contract with the Highway Commission, the Highway Commission engineers having no authority to change the specific terms of the contract, and the contractor being required to perform the specific items of work covered in the contract at the bid prices in the absence of a supplemental agreement executed by the parties or approval of contract changes by the Director of Highways.

14. Highways § 9— claim against Highway Commission for additional payment — duty of Board of Review

In a proceeding against the Highway Commission under former G.S. 136-29 for additional compensation for highway construction work, it is the duty of the Board of Review to interpret the contract with the Highway Commission, but the Board may not by findings of fact rescind or alter the express provisions of the contract.

15. Highways § 9— proceeding against Highway Commission for additional payment — nonsuit

In this proceeding against the Highway Commission under former G.S. 136-29 for additional payment for highway construction work, the Superior Court properly denied the motion of the Highway Commission for judgment as of nonsuit.

APPEALS by Nello L. Teer Company and North Carolina State Highway Commission from *Hobgood, J.*, 13 May 1968 Special Non-Jury Civil Session of Superior Court of WAKE County.

This proceeding was initiated on 4 November 1961 by Nello L. Teer Company (Teer) against the State Highway Commission of North Carolina (Commission) under the provisions of G.S. 136-29 as written at that time. Teer seeks to recover sums alleged by it to be due from the Commission for work performed according to the provisions of a contract for the construction of a portion of Interstate Highway #95 under State Highway Project 8.13438, Cumberland County. The claim is based upon a construction contract (hereinafter referred to as Contract) dated 8 July 1958 entered into between Teer and the Commission for Project 8.13438 which provided

for the "Surfacing on Relocation of U.S. 301 From a Point Near Eastover, Northeast of Fayetteville, Northeast to Harnett County Line." Upon denial by the State Highway Engineer of the claim filed, Teer appealed to the full Commission as provided by statute. Thereafter, a Board of Review was constituted pursuant to the provisions of G.S. 136-29 as then written. The Board of Review, after holding hearings, made an award to Teer. Both parties appealed to the Superior Court. From the judgment of the Superior Court, both parties appealed to the Supreme Court. The opinion of the Supreme Court remanding the proceeding for further action not inconsistent therewith was filed 23 July 1965 and is reported in 265 N.C. 1, 143 S.E. 2d 247. After judgment was entered in Superior Court in compliance with the opinion of the Supreme Court, the same Board of Review reconvened on 25 April 1966 and heard additional evidence. Under date of 11 July 1967, the Board of Review again filed its award. One member of the Board of Review dissented from that portion of the award allowing interest and costs to Teer.

The Board made extensive findings of fact and conclusions before making an award to Teer in the following language:

> "There is awarded to Nello L. Teer Company from the North Carolina State Highway Commission the sum of Two Hundred Sixty-One Thousand Five Hundred Thirteen Dollars and Sixty-seven Cents ($261,513.67), with interest thereon at six (6) percent per annum from and after November 4, 1961, together with the costs to the Teer Company of these proceedings, except as said costs have otherwise been taxed by the Supreme Court of North Carolina. . . .
>
> It is provided, however, that if the Board had used the Schedule of Equipment Rental Rates of the Associated Equipment Distributors as specified by the Special Provisions to the contract, the Nello L. Teer Company is due a total award on its claim against the North Carolina State Highway Commission in the sum of Four Hundred Thirty-nine Thousand Four Hundred Fifty-seven Dollars and Twenty-six Cents ($439,457.26), with interest thereon at six (6) percent per annum from and after November 4, 1961, together with the costs to the Teer Company of these proceedings except as said costs have otherwise been taxed by the Supreme Court."

From this award, both parties appealed to the Superior Court of Wake County as permitted by statute. The Superior Court entered judgment providing that Teer recover the amount of $261,513.67, together with the costs of the proceeding but without interest. To

the signing and entry of this judgment of the Superior Court, both Teer and the Commission excepted and appealed to the Court of Appeals, assigning error.

Nye & Mitchell by Charles B. Nye, and Smith, Moore, Smith, Schell & Hunter by Stephen P. Millikin and Larry B. Sitton for Teer.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, Assistant Attorney General Henry T. Rosser, and Manning, Fulton & Skinner by Howard E. Manning for the Commission.

MALLARD, C.J.

Teer on its appeal contends that the Superior Court committed error in failing to allow interest on the amount awarded to it, in ruling that the Board of Review correctly used invoice rental rates for certain equipment, and in failing to adopt the alternate award of the Board of Review based upon the rental rates of the Associated Equipment Distributors.

The Commission on its appeal contends that there are five questions presented, as follows:

1. Does the principle of *quantum meruit* apply to the State and its agencies?
2. Is a claim in excess of one thousand dollars arising out of the performance of work not included within the terms of the original contract unrecoverable as repugnant to the terms of G.S. 136-28?
3. Was the award of the Board of Review made for work not performed under the terms of the contract of 8 July 1958?
4. Are the findings of fact, conclusions and award of 11 July 1967 by the Board of Review, affirmed by the Superior Court on 27 June 1968, supported by the evidence and exhibits of record?
5. What sum, if any, is the Nello L. Teer Company entitled to recover of the State Highway Commission as a matter of legal right under the contract of 8 July 1958?

[1] G.S. 136-29, as it was written before amendments in 1963 and subsequent years, provided the procedure for the settlement of claims against the Commission by a contractor who claimed, upon completion of any contract awarded by the Commission, that he failed to *"receive such settlement as he claims to be entitled to under his contract."* It should be noted that unless the claim arises under

the Contract, the provisions of this statute are not applicable. In the opinion in *Teer Co. v. Highway Commission,* 265 N.C. 1, 143 S.E. 2d 247, the above statute as written prior to 1963 is quoted in full.

We are concerned in this case with what Teer is entitled to recover, if anything, within the terms and framework of the Contract. That this is the basic question involved is settled by the opinion of the Supreme Court in this case, *Teer Co. v. Highway Commission, supra,* when it said:

> "Under the circumstances, we are of the opinion, and so hold, that Teer, in further hearings before the Board of Review, should be permitted to offer evidence tending to establish the amount, if any, to which it is entitled for work done and materials furnished in categories set forth in its claim of November 4, 1961. Even so, recovery, if any, must be within the terms and framework of the provisions of the contract of July 8, 1958 and not otherwise."

The question is not raised in this case with respect to whether the Contract between the parties was a valid one. It is assumed by all of the parties hereto and found by the Supreme Court that the Contract between the parties of 8 July 1958 for Project 8.13438 was awarded to Teer after compliance with the requirements of the statute, G.S. 136-28, relating to the letting of contracts to bidders after advertisement. We are, therefore, not concerned in this proceeding with the question of whether Teer is entitled to recover on a *quantum meruit* basis. Recovery, if any, must be within the terms and framework of the provisions of the Contract.

[2] Whether the facts found by the Board of Review are supported by competent evidence, and whether the facts found support the legal conclusion that all work performed by Teer on the project from and after 1 December 1959 was "Extra Work" as defined in the Contract are reviewable by this Court as questions of law. *Teer Co. v. Highway Commission, supra; Pearson v. Flooring Co.,* 247 N.C. 434, 101 S.E. 2d 301.

There appears to be no dispute between the parties about the fact that as a result of the failure of another contractor to perform properly the rough grading, under the contract for Project 8.13437, the work of Teer under its Contract was interrupted and delayed.

The Board of Review has found, without exception being brought forward by the Commission, that:

"In short, in undertaking to perform its contracts, the Teer

Company was frequently unable to proceed as scheduled on account of the prior contractor's failure to perform properly the rough grading, drainage and shoulder work covered by the prior project (No. 8.13437). The difficulties encountered by the Teer Company included the presence of approximately 168 soft yielding areas of varying size in the subgrade and shoulders due to the presence of stumps, roots, matted vegetation, and other unsuitable material. Before the Teer Company could proceed with the work required under its paving contract, it was necessary to remove such unsuitable material (undercutting) and to replace it with suitable (borrow) material.

The existence of these unanticipated and adverse roadway conditions during the early construction work of the Teer Company interfered with and impaired its work, disrupted its construction schedule, greatly increased its costs, and seriously delayed its paving contract. These adverse conditions were mostly hidden and were and could be discovered only in piecemeal fashion as the Teer Company attempted to carry out its paving work."

[3] Teer did not seek to rescind its Contract because of such deficiencies in the rough grading project, resulting in extra expense and delays, but performed the required extra remedial work in addition to that required to perform its Contract. Since we find no provision in the Contract, and none has been called to our attention allowing or permitting Teer to be compensated for the delays and the extra expense caused by such delay, we are of the opinion and so hold that such could not be used in this proceeding by the Board of Review as a ground for changing the unit prices bid by Teer in its proposal to a force account basis.

[4] The Engineers of the Commission, under the "Extra Work" or "Unforeseen Work" provisions of the Contract, directed Teer to remedy the deficiencies in the rough grading project which included drainage and shoulder work. In section 4.4 of the Specifications the terms "Extra Work" and "Unforeseen Work" are used synonymously. The provisions of the Contract with respect to "Extra Work" are contained in a volume, as amended and supplemented, entitled, "North Carolina State Highway and Public Works Commission, Raleigh, Standard Specifications for Roads and Structures, October 1, 1952" (herein referred to as Specifications). "Extra Work" is defined in these Specifications as "(a)dditional construction items which are not included in the original contract." This language appears to be contradictory in that it appears upon reading it that an

attempt is being made to include something within a contract that is not in fact included therein. However, we interpret this language to mean that extra work is also additional construction items that were not included in the unit prices in the original Contract.

The cost of this extra remedial work exceeded, many times, the sum of $1,000. The question arises as to whether such could be done under the existing Contract or whether G.S. 136-28 required the letting of a contract for this remedial work to a bidder after advertisement. In this connection, in this case of *Teer Co. v. Highway Commission, supra,* the Supreme Court said:

> "G.S. 136-28, at all times pertinent to decision herein, contained the following provision: 'All contracts over one thousand dollars that the Commission may let for construction, or any other kinds of work necessary to carry out the provisions of this chapter, shall be let, after public advertising, under rules and regulations to be made and published by the State Highway Commission, to a responsible bidder, the right to reject any and all bids being reserved to the Commission; except that contracts for engineering or other kinds of professional or specialized services may be let after the taking and consideration of bids or proposals from not less than three responsible bidders without public advertisement.' G.S. Vol. 3B, 1958 Replacement. It is noted that G.S. 136-28 was amended in 1963 (S.L. 1963, c. 525) by substituting 'five thousand dollars ($5,000.00)' for 'one thousand dollars.' G.S. Vol. 3B, 1964 Replacement.
>
> By the weight of authority, a statutory requirement for competitive bids constitutes 'a jurisdictional prerequisite to the exercise of the power of a public corporation to enter into a contract.' *Fonder v. City of South Sioux Falls,* 71 N.W. 2d 618, 53 A.L.R. 2d 493 (S.D.), and cases cited.
>
> This statement, supported by cited cases, appears in 135 A.L.R. 1266: 'In general, but subject to certain limitations and exceptions which are considered in subsequent subdivisions of this annotation, statutes requiring the letting of public contracts to the lowest bidder are regarded as rendering invalid and unenforceable subsequent agreements to pay one to whom a public contract has been duly awarded additional compensation for extras or additional labor and materials not included in the original contract, at least where the additional compensation exceeds the amount for which public contracts may be made without competitive bidding.'
>
> 'Persons dealing with the public agency are presumed to know

> the law with respect to the requirement of competitive bidding and act at their peril.' *Miller v. McKinnon,* 124 P. 2d 34 (Cal.), and cases cited; 49 Am. Jur., States, Territories, and Dependencies § 86; 81 C.J.S., States § 113, pp. 1087-1088. This includes knowledge that the officials and agents of the public agency may not waive the sovereign right of immunity or act in violation of statutory requirements. 19 Am. Jur., Estoppel § 166."

There is no contention nor evidence that there was a letting of a contract after advertisement for the work required to rectify the deficiencies in the work on the rough grading, including drainage system, and shoulders under Project 8.13437. All of the evidence tended to show that this extra remedial work was done by Teer as directed by the Engineer of the Commission and that Teer and the Engineers of the Commission acted upon the assumption that such work could be performed and paid for on a force account basis within the framework of the Contract.

Section 4.4 of the Specifications provides that "(t)he contractor shall perform unforeseen work, for which there is no price included in the contract whenever it is deemed necessary or desirable in order to complete fully the work as contemplated, and such extra work shall be performed in accordance with the specifications and as directed; provided, however, that before any extra work is started a supplemental agreement shall be entered into, *or* a written extra work order issued by the Engineer to do the work." (emphasis added) This section of the Specifications further provides that if the parties cannot agree upon a price for the work that such work will be performed on the force account basis as described in the Specifications. The Specifications also provide that when extra work is done on force account that the contractor shall furnish the Engineer with itemized weekly statements setting forth the cost of all force account work. The Specifications also provide in detail the rule as to compensation with respect to the cost of labor, as well as with respect to bonds, insurance, taxes, materials, equipment, superintendence and other compensation.

Counsel have not cited, and our research has not found, where the Supreme Court of North Carolina has specifically interpreted what the words "Extra Work" mean when used in the Specifications portion of contracts between the Commission and contractors for the construction of highways.

Teer in its brief cites 76 A.L.R. 268 where there is an annotation supported by cited cases to the effect that "(t)he general rule may be deduced from the decisions that where plans or specifications

lead a public contractor reasonably to believe that conditions indicated therein exist, and may be relied upon in making his bid, he will be entitled to compensation for extra work or expense made necessary by conditions being other than as so represented."

Teer also cites many cases relating to the right of a contractor to recover for extra work or expense made necessary by conditions being other than as represented in the Contract. None of the cases cited were brought under a statute like the one under which the parties are proceeding here, although some of them are based on statutes similar to our statutes relating to a referee and some are based on award and arbitration statutes.

In the case of *Equipment Co. v. Hertz Corp. and Contractors, Inc. v. Hertz Corp.*, 256 N.C. 277, 123 S.E. 2d 802, the Supreme Court, speaking of the powers of the Highway Commission, said:

> "The Legislature has not set out in detail every incidental power belonging to and which may be exercised by the Commission. As a practical matter the Legislature could not foresee all the problems incidental to the effective carrying out of the duties and responsibilities of the Commission. Of necessity it provided for those matters in general terms. Where a course of action is reasonably necessary for the effective prosecution of the Commission's obligation to supervise the construction, repair and maintenance of public highways, the power to take such action must be implied from the general authority given and the duty imposed. *Mosteller v. R. R.*, 220 N.C. 275, 280, 17 S.E. 2d 133. 'Administrative boards, commissions and officers have no common-law powers. Their powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication. . . . In determining whether a board or commission has a certain power, the authority given should be liberally construed in the light of the purposes for which it was created and that which is incidentally necessary to a full exposition of the legislative intent should be upheld as being germane to the law. In the construction of a grant of power, it is a general principle of law that where the end is required the appropriate means are given. . . . However, powers should not be extended by implication beyond what may be necessary for their just and reasonable execution.' 42 Am. Jur., Public Administrative Law, s. 26, pp. 316-318."

Applying the foregoing principles of law to the facts in this case, in the light of the circumstances in which the Commission and Teer found themselves after discovering the deficiencies in the rough grad-

ing project, we think that the correction of the deficiencies in the rough grading project were reasonably necessary and highly desirable for the effective prosecution of the construction of Highway Project 8.13438. The work required to remedy the deficiencies found in the rough grading project while the paving or surfacing contractor was carrying out the provisions of the surfacing contract, was unforeseen or extra work. This extra work was permitted under the terms of the Contract when found to be necessary or desirable to complete fully the work as contemplated in the Contract and after a supplemental agreement had been entered into, or a written work order issued by the Engineer of the Commission to do the work. However, after such finding of necessity or desirability, and upon authorization by the Engineer of the Commission, it then became work under the Contract which the contractor was required to perform, even though no supplemental agreement had been entered into. **[4]** We are of the opinion and so hold that upon a proper interpretation of the Contract in the light of the opinion of the Supreme Court in *Teer Co. v. Highway Commission, supra,* and in the light of the circumstances here, the extra remedial work to repair, construct, and perform properly the rough grading, drainage and shoulder work, that had been improperly and inadequately done by the contractor on Project 8.13437, could properly be performed under the existing Contract on Project 8.13438 and was, under the facts and circumstances of this case, such "Extra Work" or "Unforeseen Work" as referred to and defined in the Contract between the parties hereto on Project 8.13438.

[5] This holding, however, should not be interpreted to mean that by calling it "Extra Work," the Commission can circumvent the provisions of G.S. 136-28 requiring the letting of bids after advertisement. This cannot be done. What is meant by "Extra Work" as used in the Specifications of the Commission will have to be determined under the facts and circumstances of each particular case. In the case before us and under the circumstances shown, we think that necessity demanded and the Contract permitted that the extra remedial work required to remedy the deficiencies in the rough grading Project 8.13437 be classified as "Extra Work" and performed under the Contract on Project 8.13438.

[6] "Extra Work," under the Contract, cannot be construed to mean work required to perform the specific items for which unit prices were bid by Teer in its proposal, which are a part of the Contract.

[7] The Board of Review, in its findings of fact, often refers to

"bringing the project up to Interstate Standards." The Board of Review finds as a fact many times that Teer performed work on a force account basis in "bringing the project up to Interstate Standards," and in so doing committed error. The Contract does not provide for the project to be brought up to "Interstate Standards." There is nothing in the Contract about "Interstate Standards." Some of the letters from the Engineers to Teer mention bringing certain portions of the extra remedial work required to correct the deficiencies in the rough grading project up to "Interstate Standards," but do not say what is meant by "Interstate Standards."

One of these letters, from H. B. Smith, Resident Engineer, to Nello L. Teer, Sr., dated 25 November 1959, (P-112) cites as its subject, "Bringing above Project to Interstate 95 Standard." However, in the letter the writer, after referring to a conference about the project, says:

> "During this conference we discussed the procedure of bringing certain items on the project up to standard for Interstate 95. We examined several of the apparent unsatisfactory conditions and the following was agreed on, and I was instructed by Mr. John H. Davis to write you *confirming the conference and authorizing the following work.*
>
> All pipe culverts over the entire project are to be uncovered and all pipe lines found unsatisfactory are to be corrected according to State Specifications. All unservicable (sic) pipe shall be replaced with new pipe.
>
> All subgrade not paved is to be thoroughly checked for stumps, root mat, etc. This to be done by scarifying or disking, and any and all unsatisfactory material encountered removed. Certain ramps as directed by me are to be checked for stumps and other objectionable material and same removed and replaced with satisfactory material.
>
> It is understood and agreed you are to *do the above work* under my direction on Force Account in accordance with State Specifications." (emphasis added)

We do not think this letter directed Teer to bring the entire highway project up to "Interstate Standards" on a force account basis; we think it did direct Teer to do the work specified therein on force account in accordance with State Specifications, not "Interstate Standards." In a letter from H. B. Smith, Resident Engineer, to Nello L. Teer, Sr., dated 28 November 1959, (P-113) there were certain changes stated as to the method of payment set out in the

letter of 25 November 1959 (P-112). However, in a letter from H. B. Smith, Resident Engineer, to Nello L. Teer, Sr., dated 1 December 1959, (P-114) it is said, "This is to advise you to disregard my letter dated November 28, 1959. The above mentioned project is to be brought up to Interstate Standards in accordance to my letter dated November 25, 1959." We think that the words "in accordance to my letter of November 25, 1959" limit its application to the performance of and payment for the items set out in such letter.

The Contract requires that the work shall be performed for the unit prices bid by Teer in its proposal *and according to the proposal, plans and specifications,* which are a part of the Contract. "Interstate Standards" no doubt means something to the parties using the term, but there are no requirements or provisions in the Contract requiring that the project be brought up to "Interstate Standards." Teer, when it elected to perform the Contract, was required to perform the work for the unit prices bid by Teer in its proposal *and according to the proposal, plans and specifications* as set out in the Contract. Teer was not required to perform the work according to "Interstate Standards." The Board of Review was therefore in error in making and basing some of its findings of fact on bringing the entire project up to "Interstate Standards" after 30 November 1959.

The Board of Review found as a fact that:

> "After numerous discussions, conferences and negotiations between the Teer Company and the Highway Commission, the latter acting within its power under the contract and by various written orders and instructions, culminating on or about December 1, 1959, directed the Teer Company to bring the entire highway project up to Interstate Standards on a force account basis. Thereafter, other orders were issued as the need arose.
>
> The record contains convincing evidence as to these negotiations and orders, as shown by Claimant's Exhibits Nos. P-109, P-110, P-111, P-112, P-113, P-114, P-115, P-122, P-124, P-125, P-127, P-131, and P-132."

[7] The claimant's exhibits referred to as containing convincing evidence, two of which are hereinabove discussed, do not direct "the Teer Company to bring the entire highway project up to Interstate Standards on a force account basis," and the evidence therefore does not support such finding by the Board of Review. The Superior Court erred in adopting such finding.

[8] The Board of Review was in error in its findings and inter-

pretation of the Contract, and the Superior Court also committed error, when it found in substance that all work performed by Teer in performing the Contract, including the extra remedial work on and after 1 December 1959, was "Extra Work" under the provisions of the Contract to be paid for on a force account basis. There was evidence tending to show that the Engineers of the Commission did direct Teer to perform on a force account basis the extra remedial work necessary to correct the deficiencies in the rough grading, drainage and shoulder work on Project 8.13437. However, we do not think that this made a new contract out of the Contract on Project 8.13438 requiring or permitting all of the work performed on the surfacing project on and after 1 December 1959 to be compensated for on a force account basis. We are of the opinion and so hold that all of the specific items of work under the terms of the Contract for which unit prices were bid by Teer in its bid proposal, which is a part of the Contract, were to be completed and paid for according to the unit prices bid by Teer in its proposal as set forth in the Contract and that only such extra work as was embraced within the terms of the "Extra Work" provision of the Contract, which included the extra work required to remedy the deficiencies in the rough grading project, was to be paid for on the force account basis as provided in the Contract.

[9] The Engineers of the Commission did not have the authority to amend the Contract by changing the compensation to be paid for the items in the unit prices bid by Teer in its proposal and substitute in lieu thereof a provision requiring that compensation be made therefor on a force account basis. We are of the opinion that the Engineers of the Commission could not, and that there was not sufficient competent evidence that they did, direct Teer to abandon the Contract.

[10] Teer contends, among other things, that the Superior Court committed error in holding that the Board of Review had correctly used the invoiced rental rates rather than the rental rates contained in the Special Provisions of the Contract.

The Special Provision of the Contract with respect to rental rates is as follows:

> *"Rental Rates for Equipment Used in Performing Extra Work*
>
> The attention of contractors is called to the fact that in the event it is necessary to perform extra work in connection with the construction of this project, the rental rates to be allowed for equipment used in performing such work shall, except as otherwise specified below, be in accordance with the schedule

published by the Associated Equipment Distributors. The cost of fuel, lubricants, and cutting edges shall be added to the above rates.

When extra work is performed with equipment already on the project, the rental rates to be allowed shall be at the hourly rates of 1/160 (20 days @ 8 hours) of the applicable monthly rental rates shown in the above mentioned schedule. The cost of operators, fuel, lubricants and cutting edges shall be added to the above rates."

The Board of Review misinterpreted this Special Provision of the Contract and was in error when it used actual equipment costs as shown on Teer's records in determining rental rates for equipment used *in performing extra work* instead of using the rates set out in the Special Provision of the Contract, and the Superior Court committed error in failing to so find. The Special Provisions of the Contract cannot be ignored. We are of the opinion and so hold that the rental rates set out in the Special Provision of the Contract should be used in determining the compensation, if any, due Teer for the equipment used by it, if any, *in the performance of the "Extra Work."*

[11-12] Teer's contention that it is entitled to interest on the award and judgment is without merit. Our Supreme Court has held that interest may not be awarded against the State without authorization by statute or contract. We do not think that the Legislature authorized the payment of interest under the provisions of G.S. 136-29. No provisions of the Contract have been called to our attention, and we have found none, authorizing the payment of interest. *Reynolds Co. v. Highway Commission,* 271 N.C. 40, 155 S.E. 2d 473. In addition, it is noted that Teer did not assert a right to interest in its claim of 4 November 1961.

There were three types of work involved here. First, there was work under the provisions of the Contract, the unit prices for which were set out and specified under the specific items of the Contract. Second, there was work under the "Extra Work" provision of the Contract, payment for which was to be on a force account basis as set out in the Specifications. Third, there was extra work of a remedial type to correct the deficiencies in the rough grading, drainage and shoulder work on Project 8.13437, which was also extra work performed under the "Extra Work" provision of the Contract.

[13] Teer contends that after the deficiencies in the rough grading were found, the Engineers of the Commission, by oral agreement, letters and work order, directed it to bring the entire project up to

"Interstate Standards." Teer contends also that this changed the work to be done to such an extent that on and after 1 December 1959 compensation for all work was to be done on force account basis. No provision of the Contract has been called to our attention, and we have found none, which would permit this to be done by the Engineers of the Commission. On the contrary, the provisions of article one of the Contract read, in part, "The Contractor shall and will provide and furnish all the materials, machinery, implements, appliances and tools, and perform the work and required labor to construct and complete a certain project in Cumberland County, in the State of North Carolina, Surfacing on Relocation of U. S. 301 From a Point Near Eastover, Northeast of Fayetteville, Northeast to Harnett County Line for the unit prices bid by the contractor in his proposal and according to the proposal, plans and specifications prepared by said Commission, which proposal, plans and specifications show the details covering this project and are identified by the Chief Engineer of the Commission, and hereby become a part of this contract." In this Contract Teer is referred to as the "Contractor" and the State Highway Commission of North Carolina is referred to as "Commission." In the Specifications "Engineer" is defined as "(t)he State Highway Engineer, or other Engineer executive of the Commission, acting directly or through his duly authorized representative, such representative acting within the scope of the particular duties assigned to him or of the authority given him."

Other pertinent provisions of the Specifications are:

"4.3 ALTERATION OF PLANS OR OF CHARACTER OF WORK. The Engineer shall have the right to make alterations in plans or character of work as may be considered necessary or desirable during the progress of the work to complete satisfactorily the proposed construction. Such alterations shall not be considered as a waiver of any conditions of the contract nor invalidate any of the provisions thereof.

The right is reserved to increase or decrease any or all of the items in the estimate of approximate quantities as shown in the bid schedule. The length of the project may be increased or decreased by adding or omitting sections or by relocation.

Whenever an increase or decrease in the length of the project exceeds 25 per cent, and whenever any change or combination of changes results in increasing or decreasing the original contract amount as calculated from the bid quantities and contract unit prices by more than 25 per cent, a supplemental agreement ac-

ceptable to both parties to the contract shall be executed in advance of performing the affected work.

Whenever an overrun or underrun of more than 25 per cent of the original bid quantity for one or more major contract items occurs either party to the contract may demand that a supplemental agreement be negotiated with an adjustment of unit price or prices satisfactory to both parties. A major contract item shall be interpreted to be any item, the total cost of which is equal to or greater than 25 per cent of the total contract price, computed on the basis of the proposal quantity and the contract unit price.

Whenever an alteration in character of work involves a substantial change in the nature of the design or in the type of construction which materially increases or decreases the cost of the performance, the work shall be performed in accordance with the specifications and as directed, provided however that before such work is started a supplemental agreement acceptable to both parties to the contract shall be executed.

In all other cases the work involved in any changes shall be performed on the basis of the contract unit price and no supplemental agreement shall be necessary."

These provisions mean, among other things, that the Engineer may make such alterations as may be considered necessary or desirable during the progress of the work to complete satisfactorily the proposed construction, but when such alterations involve such a substantial change in the nature of the work as to materially increase or decrease the cost of the performance, then before such work is started a supplemental agreement acceptable to both parties to the Contract shall be executed. No executed supplemental agreement accepted by or acceptable to both parties has been called to our attention, and we have found none in our search through this voluminous record, transcript and briefs consisting of over 3850 pages with over 950 exhibits, one of the exhibits being a book of Specifications of over 500 pages. In the absence of an executed supplemental agreement, the parties are bound by the terms of the Contract, and recovery, if any, will be controlled by its provisions.

Such changes, as Teer contends occurred, are prohibited by the express terms of the Contract, which on the signature page thereof contains the following: "This contract is valid only when signed by the Director of Highways for the State Highway Commission, and the conditions and provisions herein cannot be changed except over

the signature of the said Director of Highways." Nothing has been called to our attention, and we have found nothing in this record, indicating that any changes in this Contract were authorized over the signature of the Director of the Highways.

In *Teer Co. v. Highway Commission, supra,* it is said that the Board of Review made no distinction between the work covered originally by the Contract and the extra remedial work performed by Teer. The Board of Review committed error, which error was affirmed by the Superior Court, in finding that all work performed from and after 1 December 1959 was to be done on a force account basis. Such a finding is not supported by the evidence, and the Contract does not so provide. The Engineers of the Commission were without authority to change the specific terms of the Contract.

We are not unmindful of the length of time that this proceeding has been pending. We know that a termination thereof is desirable. However, it is observed that this is not an ordinary civil action for the recovery of an undetermined amount of damages for breach of contract. Recovery, if any, must be within the terms and framework of the provisions of the Contract. As Justice Bobbitt said in *Teer Co. v. Highway Commission, supra,* "(t)he procedure is to resolve any controversy as to what (additional) amount, if any, the contractor is entitled to recover under its terms." The Board of Review could not change the provisions of the Contract and neither can this Court.

[14] It was the duty of the Board of Review to interpret the Contract, but the Board of Review could not by findings of fact rescind or alter the express provisions of the Contract.

In 2 Strong, N. C. Index 2d, Contracts, § 12, we find the rule with respect to the interpretation of contracts stated as follows:

> "When the language is clear and unambiguous the court may not, under the guise of construction, ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms. It is only in case of doubt and uncertainty as to the meaning of the language used that judicial construction is necessary, since it is the province of the court to construe the agreement and not to make a contract for the parties."

[15] We are of the opinion and so hold that the Superior Court did not commit error in overruling the motion of the Commission for judgment as of nonsuit. The controversy is one for determina-

tion by the Board of Review upon a correct interpretation of the applicable rules of law. *Teer Co. v. Highway Commission, supra.* However, the Superior Court should have remanded the proceeding to the Board of Review for further consideration in a manner consistent with applicable principles of law and with instructions that it permit the further introduction of evidence, if desired by either or both parties.

The costs of this appeal are taxed as follows: Each party shall pay the entire costs of its briefs, and all of the other costs incident to the appeals shall be taxed one-half against Teer and one-half against the Commission.

For the reasons stated, the judgment of Judge Hobgood is vacated and the cause is remanded to the Superior Court for the entry of a judgment vacating the decision of the Board of Review including all findings and conclusions stated therein, and remanding the proceeding to the Board of Review for further proceedings not inconsistent with the opinion of the Supreme Court in *Teer Co. v. Highway Commission, supra,* and this opinion.

Error and remanded.

BRITT and PARKER, JJ., concur.

JOHN HENRY GERDES v. RICHARD A. SHEW AND WIFE, IDALORA W. SHEW

No. 68SC114

(Filed 2 April 1969)

1. Deeds § 24— covenant against encumbrances

By the covenant against encumbrances a grantor of land gives to his grantee security against any outstanding rights to, or interest in, the land granted which may subsist in third persons to the diminution in value of the estate conveyed, although consistent with passing of the fee.

2. Deeds § 24— covenant against encumbrances — what constitutes an encumbrance

An encumbrance, within the meaning of a covenant against encumbrances, is any burden or charge on the land and includes any right existing in another whereby the use of the land by the owner is restricted.

3. Deeds § 24— action for breach of covenant against encumbrances — defense of knowledge and record notice

That grantee had actual knowledge and record notice of the existence

of an encumbrance upon the land at the time of purchase does not constitute a defense to grantee's action to recover damages for grantors' breach of covenant against encumbrances contained in the deed of conveyance.

4. Deeds § 24— action for breach of covenant against encumbrances — defenses — merger of prior negotiations in deed

In grantee's action to recover damages for breach of covenants in a deed, grantors may not allege as a defense the plaintiff's failure to comply with provision of written sales contract requiring that grantors should be notified and given opportunity to correct defects in the title, since (1) execution and delivery of the deed containing full covenants establish the extent of the grantors' obligations and (2) it is presumed the prior sales contract and all prior negotiations leading up to the sale became merged in the deed itself insofar as they relate to any matters covered by the covenants.

5. Contracts § 26— competency of evidence — prior negotiations — merger

When the terms of a contract are established, the negotiations which produced the contract cannot enlarge or restrict its provisions and are therefore not competent as evidence in an action to enforce it.

6. Deeds § 24— action for breach of covenant against encumbrances — defense of estoppel

In grantee's action to recover damages for grantors' breach of covenant against encumbrances in a deed, grantors may not assert as a defense the plaintiff's failure to comply with provision of the deed requiring grantor's approval before construction is begun on the premises, since, the defendant's covenant against encumbrances having been breached at the moment of execution and delivery of the deed, the fact that plaintiff may have thereafter violated different provision of the deed would not estop plaintiff from maintaining the action.

7. Cancellation of Instruments § 4— mistake of law

Ordinarily a mistake of law, as distinguished from a mistake of fact, does not affect the validity of a contract.

8. Deeds § 24; Cancellation of Instruments § 4— action for breach of covenant against encumbrances — defense of mutual mistake

In grantee's action to recover damages arising from grantors' breach of covenant against encumbrances in a deed, grantors may not allege that the deed had been made by them and accepted by plaintiff under a mutual mistake in that prior to the conveyance the parties had obtained legal advice to the effect that the lot in question could be conveyed free from a residential restriction, since this was nothing more than an erroneous conclusion by the parties and their attorneys as to the legal effect of known facts.

ON *Certiorari* to review orders of *Mintz, J.*, November 1967 Session of NEW HANOVER Superior Court.

This is a civil action to recover damages for breach of covenants

in a deed. Plaintiff filed complaint 27 June 1967 alleging: The defendants executed and delivered a deed dated 10 January 1966 conveying certain described real property to the plaintiff. The deed contained covenants of seizen, right to convey, against encumbrances, and warranty of title, but no restrictions as to use of the property. Plaintiff paid defendants $6,500.00 purchase price for the lot and purchased it for the purpose of erecting thereon a dental and medical office building, which purpose was known to the defendants. Plaintiff obtained a construction loan and began clearing the lot for construction of the office building, but was stopped when an action was commenced against him in superior court alleging that the lot was subject to restrictions limiting its use to residential purposes. Plaintiff notified defendants of this action and called upon them to defend title under their warranty, but defendants refused to do so. Plaintiff employed counsel to defend the action, but the trial resulted in a judgment enjoining plaintiff from erecting his office building or otherwise using the property other than for residential purposes, and on appeal the North Carolina Supreme Court affirmed. Plaintiff further alleged that for office building purposes the lot had a fair market value of $6,500.00, but restricted to residential purposes is worth only $1,000.00. Plaintiff prayed to recover damages in the amount of the difference in value of the lot for the two purposes, plus the amount of legal expenses and court costs which had been incurred by him in defending the injunction suit and the costs of the construction loan and expenses paid the building contractor up to the time the suit for injunction had been commenced.

Summons was served upon the defendants on 28 June 1967. On 24 August 1967 defendants filed a motion to strike certain portions of the complaint. On 25 August 1967 plaintiff moved for judgment by default and inquiry. On 21 September 1967 defendants moved for permission to withdraw their motion to strike portions of the plaintiff's complaint and to be allowed to defend the action by filing answer, which motions of defendants were allowed. On 21 September 1967 defendants filed answer, admitting execution and delivery of the deed and that it contained no restrictions as to use of the property, but denying that they had knowledge that the lot was being purchased to erect thereon a medical-dental office building, and denying plaintiff's allegations as to differences in values of the lot when considered for commercial or residential purposes. By way of defense, defendants' answer contained five further answers, in substance as follows: First: That plaintiff had purchased the lot with actual knowledge that it had previously been sold by defendants and repurchased by them subject to restrictions limiting its use. Second:

That the plaintiff had purchased with record notice of the restrictions which were contained in recorded deeds in his chain of title. Third: That plaintiff had purchased under a written contract which provided that if title be found defective by his attorney, the owner should be notified in writing of such defect and given an opportunity to cure the same, but no notice had been given by plaintiff or his attorney to defendants of any defect in the title prior to the time the sale was closed. Fourth: That the deed contained a condition that plans and specifications for any building must be submitted to and approved by defendants, and while plaintiff had submitted plans and specifications for his office building, the same had not been approved. Fifth: That defendants had offered to return the purchase price on reconveyance of the lot to him or to exchange said lot for another of equal value.

On motion of plaintiff the court entered an order dated 17 October 1967 striking portions of the answer and all of the five further answers, and allowing defendants 20 days within which to amend their answer. On 6 November 1967 defendants filed an amended answer to the complaint, containing three further answers and defenses substantially as follows: First: That prior to the conveyance the parties had secured legal advice to the effect that the lot could be conveyed free from any residential restrictions and plaintiff would not have purchased and defendants would not have sold but for their mutual mistake that said lot could be so conveyed; that when the parties discovered their mutual mistake, defendants sought to rescind and offered to pay plaintiff the full purchase price for a reconveyance of the lot or to exchange the lot for another similar lot which would not be subject to residential restrictions, but the plaintiff refused; that defendants are entitled to concellation of their contract and conveyance due to the mutual mistake of the parties as to a material fact, and plaintiff should be ordered to reconvey the lot to defendants upon their paying the plaintiff the purchase price thereof, less the amount of $4,000.00 for damages done to the lot by plaintiff after the date on which defendants had offered to rescind or, in the alternative, defendants are entitled to have their deed reformed to exclude from the covenants therein the existence of residential restrictions upon the lot. Second: That at the time the parties had conferred with regard to sale of the lot to plaintiff for the construction of a small dental office, plaintiff agreed to construct a building of residential type, and as a means of enforcing said agreement there had been placed in the deed a restriction that no building be erected until plans and specifications therefor shall have been first presented to and approved by the grantors; that the plaintiff submitted plans

for a large office building, which plans were for a building materially different from that which the plaintiff had agreed to construct; that the plans were not approved, but notwithstanding such disapproval the plaintiff violated the restriction and began construction of a large medical-dental office building; and that any damages plaintiff may have suffered are the sole result of his own material breach of said agreement. Third: That if defendants are liable to plaintiff for any breach of any covenant in their deed, the amount of plaintiff's recovery should be reduced by the amount the fair market value of the lot has been reduced by reason of acts done by plaintiff in cutting trees and pouring concrete thereon after the date the defendants had offered to rescind. In their answer, defendants prayed for judgment canceling their deed to plaintiff upon their return of the purchase price, less the amount of $4,000.00 damages done to the lot, or, in the alternative, that the deed be reformed due to the mutual mistake of the parties.

The plaintiff moved to strike from the amended answer the three further answers and defenses in their entirety. By order dated 15 November 1967 the court struck all of the second further answer and substantially all of the first and third further answers.

Defendants petitioned for writ of certiorari to review the orders of the superior court striking out their further answers and defenses from their original answer and from their amended answer, which petition was allowed by the Court of Appeals.

Marshall and Williams, by Lonnie B. Williams, for plaintiff appellee.

Douglas P. Connor for defendant appellants.

PARKER, J.

[1, 2] By the covenant against encumbrances a grantor of land gives to his grantee security against any outstanding right to, or interest in, the land granted which may subsist in third persons to the diminution in value of the estate conveyed, although consistent with passing of the fee. An encumbrance, within the meaning of such a covenant, is any burden or charge on the land and includes any right existing in another whereby the use of the land by the owner is restricted. 21 C.J.S., Covenants, § 42, p. 914. In the present case defendants have admitted execution and delivery by them of a deed conveying real property to plaintiff with a full covenant against encumbrances and that there was no exception therefrom for any restriction limiting use of the property to residential purposes. De-

fendants have also admitted that after receiving their deed, plaintiff had been enjoined from erecting an office building on the land conveyed, or from making any use of the property other than residential, and that judgment in the injunction proceeding had been affirmed by the North Carolina Supreme Court. Reference to the opinion in that case, reported in *Lamica v. Gerdes,* 270 N.C. 85, 153 S.E. 2d 814, reveals that at the time defendants executed and delivered their warranty deed to the plaintiff, the property was subject to a legally enforceable restrictive covenant limiting its use to residential purposes. By reason of the existence of such restriction, defendants' covenant against encumbrances was violated at the moment they executed and delivered their deed, entitled the covenantee to recover damages, which are generally to be based upon the impairment of the market value of the land by reason of the existence of the restriction. Annotation, 61 A.L.R. 10, 75; 100 A.L.R. 1194, 1199. The question presented for our decision on this appeal is whether any of the matters alleged in defendants' several further answers constitute legal defenses to plaintiff's action for the breach of their covenant.

[3] In the first two further answers, as filed with defendants' original answer, it is alleged that plaintiff had actual knowledge and had record notice of the existence of the restriction at the time he purchased. These allegations, even if proved, would not avail defendants as a defense.

> "As a general rule, encumbrances which affect or relate to the title to land or the record thereof are included in the covenant against encumbrances, regardless of the knowledge of the grantee at the time he took the conveyance of the land. Such a covenant embraces encumbrances which are unknown to the purchaser or the vendor, as well as those which are known. Both parties may be in possession of all the facts, and either or both may believe that an encumbrance is not an encumbrance; nevertheless, if the apparent encumbrance turns out to be real in character, the seller is responsible, unless he specifically excepts the encumbrance from his covenant. The reason has been advanced, in support of the general rule, that the covenantee in many instances may insist upon the covenant for the express purpose of guarding against encumbrances which he knows exist. Another theory enunciated in support of the rule is that a contrary view would be open to the objection that it would substitute the uncertainties of oral testimony for the certainty which should normally inhere in written contracts." 20 Am. Jur. 2d, Covenants, § 84, p. 648.

An early North Carolina case is in accord with this general rule. In *Gragg v. Wagner,* 71 N.C. 316, it is said:

"A conveys to B a tract of land with a covenant against encumbrances, both parties, at the time, having full knowledge of the existence of valid outstanding encumbrances upon the land conveyed: Can B recover upon the covenant? There is no allegation of fraud or mistake in procuring the covenants, and therefore, any oral evidence offered in the case, would fall under the general rule that it shall not be admitted to contradict, alter or vary, the written agreement of the parties. If there are known encumbrances, and it is the object of the vendor to except them from the operation of the covenant, it is always in his power to make it appear so on the face of the deed; and if he fails to do so, it is his own folly, and he will not be allowed to repair the error at the expense of the settled rules of construction which have become a part of the laws of property.

"The principle is *caveat emptor,* and therefore, if the vendee fails to investigate the title or take covenants, he is bound by the defect of title and must bear the loss; but if he, with ordinary prudence, protects himself by proper covenants, the vendor is then bound to indemnity. Thus the vendor must take care of the covenants he enters into, and notice of the encumbrance can make no difference, as was decided in *Lait v. Witherington,* Luter. 317."

There was no error in striking the first two further answers from the original answer.

[4, 5] The third further answer alleged the provisions of the written sales contract under which plaintiff had purchased and which, in substance, provided that upon approval of title by purchaser's attorney, the owners would convey by warranty deed with covenants of seizen, right to convey, and freedom from encumbrances; but if the title should be found defective by such attorney, the owners would be notified in writing and given an opportunity to correct the defect, failing which the down payment should be returned to the purchaser. Defendants allege that at no time prior to receipt of the deed from them did plaintiff notify defendants of any defect in title, and assert that because of the terms of the contract and plaintiff's failure to give such notice, plaintiff is now estopped to assert the defect. Acceptance of this argument would render completely meaningless all of the covenants in defendants' deed. If defendants did not mean to be bound by their covenants, they should not have included them in their deed. Execution and delivery of the deed containing full covenants established the extent of their obligations thereunder. It is presumed that the prior sales contract and all prior

negotiations leading up to closing of the sale, insofar as they related to any matters covered by the covenants in defendants' deed, became merged in the deed itself. "When the terms of a contract are established, the negotiations which produced the contract cannot enlarge or restrict its provisions and are therefore not competent as evidence in an action to enforce it." *Bank v. Slaughter,* 250 N.C. 355, 108 S.E. 2d 594. There was no error in striking the third further answer from the original answer.

[6] The fourth further answer as filed with the original answer contained allegations concerning the provisions in the deed given plaintiff which provided that no building should be erected on the premises until the plans and specifications thereof shall have been first presented to and approved by the grantors. Defendants alleged that while plaintiff had submitted plans and specifications, the same had not been approved by the defendants and that plaintiff had attempted to go forward with construction of his office building nevertheless. Defendants assert that for this reason plaintiff is estopped to maintain his action. As noted above, however, defendants' covenant against encumbrances was breached by them at the moment they executed and delivered their deed. The fact that the plaintiff may have thereafter violated a completely different provision of the deed would not estop plaintiff from maintaining his action for breach of the defendants' covenant, and the motion to strike the fourth further answer from the original answer was properly allowed. Defendants have alleged essentially the same facts as to the requirement for prior submission and approval of plans and specifications in their second answer filed with their amended answer, with the additional allegation that at the time the parties had conferred with regard to sale of the lot to plaintiff "for the construction of a small dental office, the plaintiff agreed to construct a building of residential type . . ." and that plaintiff had breached this agreement when he attempted instead to erect a large office type building. What was said above concerning merger of any prior negotiations and agreements into the written provisions of the deed itself, is equally applicable here. Even had there been such an agreement as defendants allege, it would not free them from liability for breach of their own covenant, and the facts alleged in defendants' second further answer filed with its amended answer would not constitute a defense to plaintiff's action. The motion to strike such second answer was therefore properly allowed.

[7, 8] The defendants allege in their first further answer filed with their amended answer that the deed had been made by them and accepted by plaintiff under a mutual mistake in that prior to

the conveyance the parties had sought and obtained legal advice to the effect that the lot could be conveyed free from the residential restriction. Even so, this was nothing more than an erroneous conclusion by the parties and their attorneys as to the legal effect of known facts. "(T)his is a mistake of law and not of fact, and the rule is that ordinarily a mistake of law, as distinguished from a mistake of fact, does not affect the validity of a contract." *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488. In *Roberson v. Penland,* 260 N.C. 502, 133 S.E. 2d 206, the North Carolina Supreme Court followed this long established principle. In that case the grantors of a warranty deed sought to set it aside on the grounds that at the time it had been given all parties acted under the belief, later found to be mistaken, that the legislative act granting a widower the right to dissent from his wife's will was valid. In an opinion written by Higgins, J., the Court said:

> "It is settled that mere ignorance of law, unless there is some fraud or circumvention, is not a ground for relief in equity whereby to set aside conveyances or avoid the legal effect of acts which have been done. *Foulkes v. Foulkes,* 55 N.C. 260. . . . In this case the rights of the parties are fixed by solemn warranty deed and consent judgment. These may not be set aside merely because eminent lawyers are unable to anticipate that this Court would strike down the Act of the General Assembly which permitted the dissent."

The case of *MacKay v. McIntosh,* 270 N.C. 69, 153 S.E. 2d 800, is distinguishable. In that case the defendant resisted specific performance of a contract by which she had agreed to purchase real property from plaintiff on the grounds that it had been the intention of plaintiff's sales agent to sell and intention of defendant to purchase only land zoned for business; that the contract was entered into by defendant as result of an innocent misrepresentation of plaintiff's agent to the effect that the property was zoned for business, whereas in fact it was not so zoned. The Court, in an opinion by Bobbitt, J., said: "In our opinion, and we so hold, whether the subject property was within the boundaries of an area zoned for business is a factual matter; and, under the evidence, the mutual mistake as to this fact related to the essence of the agreement." The Court cited 17 Am. Jur. 2d, Contracts, § 143, p. 490, to the effect that a contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended. In the case presently before us the parties did exactly what they intended to do. That they acted under a mistaken understanding as to the legal effects of the resi-

dential restrictions contained in prior deeds in their chain of title, does not entitle either party to avoid the contract. There was no error in striking the first further answer from the amended answer.

The fifth further answer to the original answer and the third further answer to the amended answer are both based on the theory that defendants had the right to rescind. They assert that since plaintiff refused to accept their offer to rescind, he is estopped to collect any damages thereafter accruing. However, defendants had no right to rescind their deed and their further answers predicated upon the existence of such a right were properly stricken.

In this appeal we are not called upon to decide, and do not express an opinion, as to the correct measure of any damages plaintiff may be entitled to recover. For collection of cases on that question, see Annotation in 61 A.L.R. 10, supplemented in 100 A.L.R. 1194.

The orders of the superior court striking defendants' five further answers from their original answer and striking all of their second further answer and substantially all of their first and third further answers from their amended answer, are

Affirmed.

MALLARD, C.J., and BROCK, J., concur.

JAMES HOWARD JACKSON v. GEORGE LAVELLE JACKSON AND EDNA BUTLER JACKSON

No. 6911SC94

(Filed 2 April 1969)

1. Automobiles § 94— duty of automobile passenger

An automobile passenger must use that care for his own safety which a reasonably prudent person would employ under the same or similar circumstances.

2. Automobiles § 94— contributory negligence of automobile passenger

Whether automobile passenger's failure to take affirmative action for his own safety constitutes contributory negligence is a matter for the jury where conflicting inferences may be drawn from the circumstances.

3. Automobiles § 94— contributory negligence of automobile passenger

In this action for personal injuries received in an automobile accident, plaintiff's evidence fails to disclose contributory negligence as a matter of law, that issue being for jury determination, where it tends to show

that defendant was arrested for reckless driving while plaintiff was a passenger in defendant's automobile, that when defendant was released from jail under bond he was angry and upset over being arrested, that shortly thereafter plaintiff was driving defendant's automobile but allowed defendant to drive when it appeared that he had "cooled off" and was no longer upset, that defendant drove in a careful manner for one mile and then began to increase the speed of the vehicle, that plaintiff cautioned defendant to slow down because of a curve ahead, but that defendant laughed and accelerated just before reaching the curve, and that the vehicle failed to negotiate the curve.

APPEAL by plaintiff from *Canaday, J.*, September 1968 Civil Session, Superior Court of HARNETT.

Plaintiff brings this action to recover damages for injuries sustained in an automobile accident which occurred on 18 November 1966.

At the time of this accident the plaintiff was a passenger in an automobile owned by Edna Jackson and driven by George Jackson, the husband of Edna Jackson. Since the question posed by this appeal essentially involves the conduct of the husband, George Jackson, we will simply refer to him as the defendant.

The evidence, taken in the light most favorable to the plaintiff, shows that on the afternoon of 18 November 1966 plaintiff and defendant rode around the town of Dunn, North Carolina, with defendant driving. During this time the defendant parked the car, got out and walked toward the liquor store which was approximately one block away. Defendant returned shortly and put a brown bag under the seat of the car. Defendant then took plaintiff back to the filling station at which plaintiff was employed. Plaintiff testified that he did not see the brown bag again.

At approximately 7:45 p.m. on this same day, defendant returned to the plaintiff's place of employment and invited the plaintiff to go to a turkey shoot. Plaintiff accepted, and the parties went to the turkey shoot in the automobile owned by Edna Jackson with defendant driving. After staying at the turkey shoot for approximately 10 or 15 minutes, the parties left and went to the Village Open Air Market where the defendant went in alone and paid his grocery bill. After leaving the Village Open Air Market the parties traveled back through Dunn and out on the Jonesboro Road. When they were only a short distance outside of Dunn, plaintiff told defendant that he wanted to be taken back to his car. Upon hearing this, the defendant pulled the automobile off on the shoulder of the road, accelerated the vehicle, and spun around in the road. Two ABC officers were only a short distance away, and they observed

these actions by the defendant. As the defendant went by these officers, they waved to him to stop. Plaintiff also told the defendant to stop because these officers wanted to see him; however, the defendant did not stop. He, apparently, made an attempt to outrun the officers. However, the officers apprehended him when he lost control of the car, and charged him with reckless driving. He was placed under $200 bond. At the defendant's request, the plaintiff left the jail to get one Shelton Butler to post bond for the defendant. Butler came, posted the bond, and the defendant was released from jail. Plaintiff, defendant, and Shelton Butler, with Butler driving, left the jail and went to Butler's home. While at the jail, and on the way to Butler's home, the defendant appeared to be angry and upset over being arrested. As plaintiff and defendant were leaving Butler's home, Butler advised plaintiff to drive the car because the defendant was upset. Plaintiff and defendant left Butler's home, with plaintiff driving, with the intention of taking the plaintiff to his car. When they were approximately one and one-half miles from Butler's home the defendant stated that he wanted to drive the car because he wanted to go see someone who lived outside of Dunn. Plaintiff testified that at this point it appeared to him that the defendant had "cooled off" and was no longer upset. After the defendant took over the operation of the vehicle he drove in a careful manner for approximately one mile, and then he began to increase the speed of the vehicle. Plaintiff cautioned defendant to slow down because there was a bad curve ahead. Instead of slowing down, the defendant looked at the plaintiff and laughed, and stepped on the gas just before they got into the curve. Plaintiff stated that in his opinion the defendant was going between 80 and 90 miles per hour. The vehicle went off the left side of the road and overturned, throwing the plaintiff out of the car and injuring him.

At the close of the plaintiff's evidence, the defendant's motion for judgment as of nonsuit was allowed. Plaintiff appeals.

D. K. Stewart and Bryan, Bryan & Johnson by Robert C. Bryan for plaintiff appellant.

Morgan and Jones by Robert H. Jones for defendant appellees.

MORRIS, J.

The sole question presented by this appeal is whether plaintiff's evidence, considered in the light most favorable to him, establishes his own negligence as one of the proximate causes of his injury so clearly that no other conclusion can be reasonably drawn therefrom.

[1, 2] It is settled law in this State that a passenger must use that care for his own safety that a reasonably prudent person would employ under the same or similar circumstances. *Samuels v. Bowers,* 232 N.C. 149, 59 S.E. 2d 787. If the passenger's conduct fails to measure up to this standard he may be guilty of contributory negligence. However, in considering the defendant's motion for nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, along with all reasonable inferences therefrom. "Where conflicting inferences may be drawn from the circumstances, whether the failure of the passenger to avail himself of opportunity for affirmative action for his own safety should constitute contributory negligence is a matter for the jury." *Samuels v. Bowers, supra.* "Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court." *Bell v. Maxwell,* 246 N.C. 257, 98 S.E. 2d 33.

Our Supreme Court has considered a number of cases in which the question of contributory negligence of a passenger was involved. In *Nettles v. Rea,* 200 N.C. 44, 156 S.E. 159, the defendant invited the plaintiff and two others to ride with him from Sylva to Asheville. He told them that he had driven to Sylva in 50 minutes and was going to make the return trip in 30 minutes. Plaintiff knew that the defendant had been drinking during the day, but he showed no signs of being intoxicated. The Court held that the question of contributory negligence on the part of the plaintiff was properly left to the jury because there was some evidence of willful and wanton conduct by the defendant.

In *King v. Pope,* 202 N.C. 554, 163 S.E. 447, the Court held that the question of contributory negligence on the part of the plaintiff was properly left to the jury because there was some evidence of willful and wanton conduct. (There was evidence that the defendant continued to speed although the plaintiff had asked him to slow down on several occasions.)

In *Groome v. Davis,* 215 N.C. 510, 2 S.E. 2d 771, the Court held that the plaintiff was not contributorily negligent as a matter of law. Here the evidence showed that the plaintiff and defendant left Raleigh together and that the defendant had driven fast until the accident occurred near Newton Grove. The Court stated: "We cannot find, as a matter of law, evidence of contributory negligence on the part of the plaintiff such as would bar his recovery."

It has been held that where the evidence showed that the plaintiff was a passenger on a speeding motorcycle, and the defendant, driving an automobile, made a left turn in front of the motorcycle,

that the issue of contributory negligence on the part of the plaintiff passenger should have been submitted to the jury. *Mason v. Johnston,* 215 N.C. 95, 1 S.E. 2d 379.

Samuels v. Bowers, supra, held that where the evidence showed that generally the defendant was a safe driver, but on this occasion he had been driving fast and the plaintiff had cautioned him to slow down, the plaintiff was not contributorily negligent as a matter of law. The Court stated:

> "The passenger is required to use that care for his own safety that a reasonably prudent person would employ under same or similar circumstances. Whether he has measured up to this standard is ordinarily a question for the jury. Contributory negligence when interposed as a defense to an action for damages for personal injury involves the element of proximate cause, and the determination of the proximate cause of an injury from conflicting inferences is a matter for the jury."

In *Bell v. Maxwell, supra,* the evidence showed that the plaintiff was riding with the defendant who was driving in a reckless manner. The plaintiff had gotten out of the car once in protest of the manner in which defendant was driving the car and defendant had told him that the horseplay was over. There was some evidence that the parties had been drinking. The trial court allowed the defendant's motion for judgment as of nonsuit. The Supreme Court reversed holding that conflicting inferences could be drawn from the evidence as to whether plaintiff measured up to the standard of care required of him for his own safety and that the question of plaintiff's negligence was a question for the jury.

In *Dinkins v. Carlton,* 255 N.C. 137, 120 S.E. 2d 543, defendant took over driving the car because he did not think that it was being driven fast enough. The passengers did not object to the defendant taking over the operation of the car, and while he was driving neither of the passengers objected to the manner in which the car was being driven. The Supreme Court upheld the verdict for the plaintiff, stating:

> "Our decisions, cited and reviewed by *Parker, J.,* in *Bell v. Maxwell,* 246 N.C. 257, 98 S.E. 2d 33, are in substantial accord. In all, except *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162, this Court held the issue, whether the guest passenger was guilty of contributory negligence, was for jury determination."

Davis v. Rigsby, 261 N.C. 684, 136 S.E. 2d 33; *Beam v. Parham,* 263 N.C. 417, 139 S.E. 2d 712; *Bank v. Lindsey,* 264 N.C. 585, 142

S.E. 2d 357; *Atwood v. Holland,* 267 N.C. 722, 148 S.E. 2d 851; and *Weatherman v. Weatherman,* 270 N.C. 130, 153 S.E. 2d 860, are cases dealing with the question of the contributory negligence of a passenger who rides with one known to be intoxicated. In *Davis v. Rigsby, supra,* plaintiff alleged that he knew the defendant was under the influence when he got into his car. The Court held that this allegation was binding and that the defendant's motion for judgment as of nonsuit should have been allowed. In *Beam v. Parham, supra,* evidence showed that the plaintiff's deceased, a woman, was some five miles from home and it was approximately 10:30 p.m., when the defendant took over the operation of the vehicle. There was evidence showing that the deceased knew the defendant had been drinking, but she did not know that he was drunk. The Court held that under these circumstances, the question of whether plaintiff's deceased was contributorily negligent was properly submitted to the jury. In *Bank v. Lindsey, supra,* the defendant and deceased had been riding around in the defendant's truck most of the day and had been drinking during this time. The Court, in a per curiam opinion, held that the deceased was contributorily negligent as a matter of law. In *Atwood v. Holland, supra,* it was held that the plaintiff was contributorily negligent as a matter of law where the evidence showed that she had been dancing with the defendant and he had drunk approximately 12 beers. She had observed that the defendant had trouble dancing and standing before she got into his car. The defendant was driving a sports car with two seats, and four people were riding therein.

In *Weatherman v. Weatherman, supra,* evidence showed that the deceased parties had been riding together during the day and that the driver of the car had been drinking. There was no evidence showing that the driver was intoxicated, although one witness stated that he did not walk or talk normal. One Edwards rode in the car prior to the accident, but asked to be let out because of the manner in which the vehicle was being operated. Later, at a drive-in, the driver jumped out of the car, waved a pistol in the air and asked if there was anyone that wanted to fight. He stated that he did not care if he lived or died. He got back into the car and drove off. The accident occurred some two or three minutes later. The jury found that the plaintiff's intestate was contributorily negligent. The Supreme Court reversed the judgment below on the ground that certain evidence was improperly admitted. However, speaking on the negligence of the passenger, the Court said, ". . . we hold that the evidence stated above is sufficient to go to the jury upon the question of contributory negligence." We take this to mean that the plaintiff's intestate was not contributorily negligent as a matter of law.

Except in cases where a passenger was riding with one whom he knew to be intoxicated, we have found only one case holding that the passenger was contributorily negligent as a matter of law. In *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162, plaintiff and defendant were man and wife. They were from Ohio and were traveling through North Carolina while on vacation when the accident in question occurred near Efland. Plaintiff testified that her husband drove at a high rate of speed during the entire trip, and when he was driving, he would look at the scenery instead of the road. She stated that his driving was such that when she rode with him, she continuously had to protest the manner in which he was driving. Our Court held that the plaintiff clearly knew beforehand that the defendant was a careless driver; therefore, she was contributorily negligent as a matter of law. The evidence on this point was not in conflict.

The present case would appear to be distinguishable from *Atwood v. Holland, supra,* and those cases which hold that a passenger who rides with one whom he knows to be intoxicated is contributorily negligent. The ABC officer who arrested the defendant for reckless driving testified that he last saw the defendant around 9:15 p.m., and that as far as he could tell, the defendant was not under the influence of any intoxicating beverage at this time. The plaintiff testified that at no time while he was riding with the defendant, did he show any indication of being under the influence, although he did smell something on the defendant's breath at one time. There was evidence that the plaintiff had seen the defendant coming from the direction of the liquor store with a brown bag in his hand, and that defendant placed this bag under the seat of the car. However, plaintiff stated that he did not see this brown bag again. This evidence is not sufficient to compel a nonsuit on the ground of *Atwood v. Holland, supra; Bank v. Lindsey, supra;* and *Davis v. Rigsby, supra.*

The present case is also distinguishable from *Bogen v. Bogen, supra,* because the evidence, when taken in the light most favorable to the plaintiff, does not compel the conclusion that the plaintiff knew beforehand that the defendant was a reckless driver. The plaintiff testified that he allowed the defendant to drive the car shortly after they left Shelton Butler's house because it appeared that the defendant "had cooled off and wasn't mad any longer." Plaintiff also stated that the defendant drove in a prudent manner for approximately the first mile.

We also note that there is some evidence which would tend to show that the defendant's conduct was willful and wanton. Plain-

tiff testified: "That, as a result of the plaintiff telling the defendant to slow down, the defendant looked at the plaintiff and laughed; that he slapped the gas to it just before he got to the curve; that he was running so fast that the car went off the road, and the plaintiff was thrown out and knocked unconscious." In *Nettles v. Rea, supra,* the Court in holding that the question of contributory negligence on the part of the plaintiff passenger was a question for the jury, stated, "Conceding, without deciding, that plaintiff may have been negligent in entering defendant's car under the circumstances disclosed by the record, nevertheless there is evidence of wilful or wanton conduct on the part of the defendant in persisting in his reckless driving over the protests of his guests which resulted in plaintiff's injury. This, if nothing else, saves the case from a nonsuit." "If the defendant's conduct was wilful and wanton, the plea of contributory negligence could not avail him, and he would not, under such circumstances, be entitled to a nonsuit." *King v. Pope, supra.*

[3] We hold that the present case is governed by those North Carolina cases which have held that the question of contributory negligence on the part of a passenger is a matter for the jury to determine. We have considered the evidence in the light most favorable to the plaintiff, and in doing so, we find that there is some evidence from which the jury could infer that the plaintiff acted as a reasonable and prudent person under the same or similar circumstances would have acted; therefore, it may not be found as a matter of law that the plaintiff was contributorily negligent. However, we do not wish to be understood as intimating any opinion at all as to the evidence. We leave it entirely to the jury to determine under proper instructions from the court whether the evidence is sufficient to establish the contentions of the plaintiff; or sufficient to establish the contentions of the defendant. The judgment below is

Reversed.

New trial.

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

JUDY GRACE NEWSOME, ADMINISTRATRIX OF THE ESTATE OF FRANCIS RUDOLPH NEWSOME v. PRUDENTIAL INSURANCE COMPANY OF AMERICA

No. 68SC226

(Filed 2 April 1969)

1. Insurance §§ 12, 27.5— credit life insurance — repossession of chattel after debtor's death

Creditor relinquished its rights in the proceeds of a credit life insurance policy when, following the death of the insured debtor, it effected payment of its indebtedness by repossession of the chattel purchased by debtor under a conditional sales contract, and the creditor could not thereafter collect and retain for its own account the proceeds of the credit life insurance policy since it no longer had an insurable interest in the life of the debtor.

2. Insurance § 27.5— credit life insurance — when liability is established

Liability of the insurer under a credit life insurance policy is established at the moment of the insured debtor's death, and payment thereafter of the debt to the creditor, thereby terminating the creditor's insurable interest in the life of the debtor, does not terminate the insurer's liability under its policy of insurance.

3. Insurance § 27.5— credit life insurance — payment of indebtedness after debtor's death

When a creditor named as beneficiary of a credit life insurance policy effects payment of its indebtedness after the death of the insured debtor by repossessing the chattel purchased by the debtor under a conditional sales contract, thereby giving up its rights in the proceeds of the policy, the credit life insurance policy becomes one for the benefit of the insured collectible by his executors or administrators.

4. Insurance § 27.5— credit life insurance — collateral security — type of liability

Credit life insurance, as between the creditor and the insured debtor, is collateral security, but this does not place the insurance company in the position of a surety or in any sense render it secondarily liable on the debt, the insurance company becoming liable solely because, for a premium paid to it, it assumed the risk of the debtor's continued life and his death occurs while the insurance policy is in effect.

5. Insurance § 27.5— credit life insurance — repossession of chattel subsequent to debtor's death — action by debtor's administratrix to recover policy proceeds

When the debt to the creditor is satisfied subsequent to the insured debtor's death by repossession of the mortgaged chattel, the debtor's estate becomes subrogated to the rights of the creditor as beneficiary under the credit life insurance policy as against the insurer, and the debtor's administratrix may maintain an action against the insurer to recover the proceeds of the policy.

6. Insurance § 27.5— credit life insurance — action by debtor's administratrix to recover policy proceeds

The fact that the insured debtor's estate is not named directly as beneficiary in a credit life insurance policy is no bar to the right of the insured's administratrix to maintain an action upon the policy, since one for whose benefit a contract has been made may sue to enforce its terms even though he is not directly a party to the contract, the credit life insurance being for the benefit of insured's estate in that the proceeds of the policy are, by contractual and statutory provision, to be applied to discharge an indebtedness of the estate.

7. Insurance § 27.5— credit life insurance — repossession of chattel subsequent to debtor's death — insurer's liability

Insurer is liable upon its policy of credit life insurance where the creditor repossesses the mortgaged chattel subsequent to the insured debtor's death notwithstanding the policy provided that it should terminate automatically upon repossession of the chattel, since insurer's liability under the policy became fixed when the debtor died before repossession of the chattel occurred.

APPEAL by plaintiff from *Peel, J.*, 1 March 1968 Session of PITT Superior Court.

This is a civil action in which plaintiff administratrix seeks to recover $1,236.96, with interest, from defendant insurance company by reason of a Group Creditors Insurance Policy issued by defendant under which the life of plaintiff's intestate had been insured. Plaintiff's complaint, as amended and as supplemented by the exhibits attached thereto, alleged: On 23 June 1964 her intestate, Francis R. Newsome, purchased a 1961 Ford automobile from S & E Motor Service, Inc., under a written conditional sale contract by which the seller retained title for security purposes. Plaintiff's intestate made a down payment of $400.00 in cash and agreed to pay a time balance of $1,236.96 in monthly installments. The conditional sale contract expressly provided in line 4b that the time balance included a charge in the amount of $6.48 for creditor insurance on the life of the purchaser "(a)ccording to terms and conditions set forth in policy or certificate of insurance issued by the Prudential Insurance Company of America, Newark, New Jersey, under its Group Policy No. GL-360." The conditional sale contract further provided:

> "9. CREDITOR INSURANCE ON LIFE OF PURCHASER — If a charge for Creditor Insurance on the life of the purchaser is included in item 4b on the face of this contract, (a) the purchaser acknowledges that said charge is included therein pursuant to his authorization that such insurance be procured, by and in the name of the seller or of the assignee of this contract, under a policy of the insurer designated in said item 4b, against

the contingency of the purchaser's death occurring while the insurance is in force, such insurance to be for an amount equal to, and the proceeds thereof to be payable to and applied by the seller or assignee in payment of so much of the unpaid balance of the obligation hereunder as does not exceed the maximum amount of insurance applicable to an instalment obligation in accordance with the terms and conditions of the policy designated in said item 4d. . . ."

The purchaser was given a certificate containing the following:

"MR. FRANCIS R. NEWSOME

112 West Lane St.
Farmville, N. C.
6-23-64 No. S-8-52039
Life Insurance Charge
(included in instalment obligation) $6.78

"THIS CERTIFIES that the life of the person named above, debtor under a certain instalment obligation as dated above, has become insured under the provisions of Group Creditors Insurance Policy No. GL-360 issued by The Prudential Insurance Company of America, Newark, New Jersey, herein called the Prudential, to

"GENERAL MOTORS ACCEPTANCE CORPORATION

(Herein called the Policyholder)

"If the debtor dies prior to the termination of insurance on his life as described below, the Prudential will, upon receipt of written proof, pay the insurance to the Policyholder to reduce or extinguish the balance remaining to be paid under said instalment obligation. The amount of insurance shall be an amount equal to the balance remaining to be paid under said instalment obligation. . . ."

The Group Creditors Insurance Policy No. GL-360, under which the certificate to plaintiff's intestate was issued, contained the following:

"THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

a mutial life insurance company

(Herein called the Insurance Company)

"In Consideration of the Application for this Policy and of the payment of premiums as stated herein, hereby insures the lives of certain debtors of GENERAL MOTORS ACCEPTANCE COR-

PORATION (Herein called the Creditor) and agrees, subject to the terms and conditions of this Policy, that immediately upon receipt of due proof in writing of the death of any insured debtor, the Insurance Company will pay to the Creditor the amount for which the debtor is insured. Such amount shall be applied by the Creditor towards the discharge of the indebtedness of the debtor to the Creditor remaining unpaid at the death of the debtor.

* * *

"PLAN OF INSURANCE

"Each debtor who, on or after the effective date of this Policy, becomes obligated under the terms of one of the classes of obligations set forth below shall be eligible for insurance hereunder from the date such obligation is incurred.

* * *

"Classes of obligations referred to above:

"(a) Individual purchases of any personal property sold by any dealers under instalment sale agreements purchased by the Creditor from said dealers.

* * *

"The amount of insurance on the life of each debtor insured hereunder shall be the amount of unpaid balance remaining, from time to time while the insurance is in force, to be paid by the debtor under the terms of such instalment sale agreements or obligations purchased by the Creditor, provided, however, that the amount of insurance on the life of any one debtor shall not at any time exceed $2,500.

"DEBTORS INSURED

"The life of each debtor who becomes eligible hereunder by executing an obligation which contains his express authorization for the insurance and the terms of which include an identifiable charge therefor, shall be insured hereunder from the date he becomes eligible. . . ."

Plaintiff's complaint as amended further alleged that Francis R. Newsome died on 12 August 1964; that on the date of his death defendant's policy was in full force and effect; that defendant insurance company, though duly notified of the death, refused to pay the balance owing under the conditional sale contract; that in September 1964 the automobile was repossessed by General Motors Acceptance Corporation due to defendant's failure to pay the out-

standing balance under the conditional sale contract; that the amount due and owing under the conditional sale contract in the sum of $1,236.96 with interest from 12 August 1964 is now due from the defendant to the plaintiff as administratrix of the estate of Francis R. Newsome.

Defendant demurred to the amended complaint on the grounds that General Motors Acceptance Corporation, and not the plaintiff, is the real party in interest. From judgment sustaining the demurrer, plaintiff appealed.

Lewis & Rouse, by John B. Lewis, Jr., for plaintiff appellant.

Emanuel & Emanuel, by Robert L. Emanuel, for defendant appellee.

PARKER, J.

The question presented by this appeal is whether plaintiff is the real party in interest within the meaning of G.S. 1-57, and as such has the right to maintain this action.

Defendant insurance company contends that since both its insurance policy and the certificate which was issued thereunder expressly provide that payment of the insurance proceeds shall be made to GMAC, referred to as "Creditor" in the policy and as "Policyholder" in the certificate, GMAC is the sole and only party entitled to maintain any action against the defendant on account of the insurance policy involved in this action. We do not agree.

The only insurable interest which GMAC had in the life of plaintiff's intestate was as a creditor. G.S. 58-195.2 declares credit life insurance to be "insurance on the life of a debtor who may be indebted to any person, firm, or corporation extending credit to said debtor." In this case the insurance was provided under a policy of group life insurance. G.S. 58-210 provides that no policy of group life insurance shall be delivered in this State unless it conforms to one of the descriptions set forth in that section. G.S. 58-210(2) provides for issuance of:

> "(2) A policy issued to a creditor, who shall be deemed the policyholder, to insure debtors of the creditor, subject to the following requirements:
>
> * * *
>
> "d. The amount of insurance on the life of any debtor shall at no time exceed the amount owed by him which is repayable in installments to the creditor, or $5,000, whichever is less.

"e. The insurance shall be payable to the policyholder. Such payment shall reduce or extinguish the unpaid indebtedness of the debtor to the extent of such payment."

The Group Creditors Insurance Policy No. GL-360 issued by defendant with which we are concerned in this case conformed to the above statutory requirements. Under its provisions the amount of the insurance on the life of plaintiff's intestate was the amount of the unpaid balance remaining to be paid by him at the time of his death under the installment sale agreement which had been purchased by GMAC.

[1] When, following the death of the insured, GMAC elected to effect payment of its debt by repossession of the automobile under the retained title provisions of the conditional sale contract, GMAC thereby relinquished its rights in the proceeds of the policy, at least to the extent its indebtedness had been paid by the repossession. GMAC could not thereafter collect and retain for its own account the proceeds of the life insurance policy here in question. To permit it to do so would violate the long established public policy of this State which prevents one who lacks a legally recognized insurable interest in the life of another from taking out and enforcing for his own benefit a policy of insurance on such other person's life. *Wharton v. Insurance Co.*, 206 N.C. 254, 173 S.E. 338; *Slade v. Insurance Co.*, 202 N.C. 315, 162 S.E. 734.

[2, 3] Payment of the debt to GMAC and the termination of its insurable interest in the life of its debtor effected thereby did not, however, terminate defendant insurance company's liability under its policy of insurance. That liability had become established at the moment of the insured's death. When, subsequent to that time, GMAC effected payment of its indebtedness by repossessing the automobile and thereby gave up its rights in the proceeds of the policy to the extent of such payment, that policy became one for the benefit of the insured, collectible by his executors or administrators. "The creditor who is named as beneficiary loses all interest in the proceeds of the policy upon payment of the indebtedness and the policy then becomes one for the benefit of the insured, collectible by his executors or administrators." 5 Couch on Insurance 2d, § 29:114, p. 405, citing *Insurance Co. v. Whiteside,* 94 F. 2d 409. That this is the view followed by most of the jurisdictions in which the point has arisen, see cases collected in Annotation, 115 A.L.R. 741, at page 745.

In *GMAC v. Kendrick,* 270 Ala. 25, 115 So. 2d 487, the Alabama Supreme Court was concerned with a problem very similar to that

presented in the case presently before this Court. In that case the deceased had purchased an automobile under a conditional sale contract and had paid premiums for both life insurance and collision insurance. He was killed by a collision which demolished the automobile. GMAC collected from the life insurance company the full amount of the debt. The purchaser's estate then brought suit in equity against GMAC and against the collision insurer to compel GMAC to pay over to the plaintiff the amount it had received from the collision insurer, or, if it had received nothing under the collision policy, to require GMAC either to enforce the policy or to transfer it to the plaintiff. Both GMAC and the collision insurer demurred. On appeal the Alabama Supreme Court held that the demurrers were properly overruled, the Court stating: "(W)here a creditor on a life insurance policy claims the amount due after the death of the insured, the creditor may retain for himself only the amount of the debt due at the time of the death of the insured, together with any such amounts as he may have paid to preserve the policy, holding the proceeds in excess thereof as trustee of the estate of the insured."

In *Hatley v. Johnston,* 265 N.C. 73, 143 S.E. 2d 260, the North Carolina Supreme Court dealt with the identical group life insurance policy with which we are here concerned. In that case Parker, J. (now C.J.) said: "Credit life insurance, *as between the creditor and insured debtor,* is collateral security. Consequently, payment of the debt with credit life insurance, when the insured authorizes the creditor to procure the policy and pays the premium himself, is payment by the insured debtor, *just as payment with any collateral security is payment by the owner thereof.*" (Emphasis added.) In that case the Court was concerned with the right of the estate of the deceased debtor, who had been the initial purchaser of a truck under a conditional sale contract and whose life had been insured for the benefit of the creditor, to recover from a subsequent purchaser of the truck who had assumed the debt. The debt had been paid from proceeds of the life insurance policy. The Court held that the grantee, by assuming the debt, had become primarily liable for its payment, and that by payment of the debt from proceeds of insurance on the life of the original purchaser, the insured's estate became subrogated to obtain payment from the assuming grantee of the amount so paid. The Court distinguished the holding in *Miller v. Potter,* 210 N.C. 268, 186 S.E. 350, by pointing out that in that case the creditor, and not the insured debtor, had paid the premium for the life insurance coverage.

[4] In the present case, as in *Hatley v. Johnston, supra,* the insured debtor paid the premium. As between the creditor and the

insured debtor the credit life insurance was collateral security, but this did not place the defendant insurance company in the position of a surety or in any sense render it secondarily liable on the debt. Indeed, the defendant insurance company did not become liable, either primarily or secondarily, on any debt of the debtor or by reason of any default of the debtor or of his estate in making payments to the creditor. Rather, it became liable solely because, for a premium paid to it, it had assumed the risk of the debtor's continued life and his death had occurred at a time the insurance policy was in effect.

[5] The Certificate of Insurance issued to the debtor as required by G.S. 58-211(7) provided:

> "If the debtor dies prior to the termination of insurance on his life as described below, the Prudential will, upon receipt of written proof, pay the insurance to the Policyholder to reduce or extinguish the balance remaining to be paid under said instalment obligation. . . ."

This agreement to pay the balance was in no way contingent upon whether the balance owed to the creditor might be otherwise satisfied subsequent to the time of death, either by repossession of the car by the creditor or by payment by the insured's estate. The insurer's obligation to pay arose immediately upon death of the insured. Therefore, when subsequent to that time the debt was satisfied by repossession of the car, the debtor's estate became subrogated to the rights of the creditor as beneficiary under the credit life insurance policy as against the insurer and became entitled to the proceeds of the policy. This is the risk for which the debtor paid "an identifiable charge" for the insurer to assume and this is the risk which the insurer agreed to assume.

[6] The fact that the insured's estate, plaintiff herein, is not named directly as beneficiary in the insurance policy issued by the defendant company, is no bar to plaintiff's right to maintain this suit. North Carolina has long recognized the right of one for whose benefit a contract has been made to sue to enforce its terms, even though he is not directly a party to the contract. *Lammonds v. Manufacturing Co.*, 243 N.C. 749, 92 S.E. 2d 143. Here, the creditor life insurance was clearly for the benefit of the insured's estate in that the proceeds of the policy were, by contractual and statutory provision, to be applied to discharge an indebtedness of the estate. If defendant insurance company fears it might incur double liability, both to the named beneficiary and to the insured's estate, it can protect itself

by way of interpleader. G.S. 1-73; 1 McIntosh, N. C. Practice and Procedure, § 728.

[7] Defendant contends, nevertheless, its demurrer should be sustained since, so defendant argues, it appears from the face of the complaint that the insurance policy sued on automatically terminated upon repossession of the chattel. In this connection the policy provided:

> "The insurance on any debtor shall automatically terminate at the earliest of the following dates:
>
> * * *
>
> "(c) in the event of repossession of the property under the instalment contract on or before said sixtieth day after default, then on the fifteenth day after such repossession, unless during such fifteen day period the debtor redeems the repossessed property and the Creditor reinstates the instalment contract."

Defendant's argument ignores the fact that its liability in the present case had already become fixed *before* repossession of the chattel occurred. Defendant became liable under its policy at the instant the insured died. At that moment the policy was in full force and defendant's liability to make payments under its terms then accrued.

The judgment sustaining defendant's demurrer was in error and is

Reversed.

MALLARD, C.J., and BROCK, J., concur.

ROLAND J. BROWN, ADMINISTRATOR OF THE ESTATE OF OSSIE D. BROWN, DECEASED v. ATLANTIC COAST LINE RAILROAD COMPANY

— AND —

WILLIAM E. PHILLIPS, SR., ADMINISTRATOR OF THE ESTATE OF WILLIAM E. PHILLIPS, JR., DECEASED v. ATLANTIC COAST LINE RAILROAD COMPANY

No. 6911SC98

(Filed 2 April 1969)

1. Railroads § 5— crossing accidents — duty of motorists

Where a driver knows about a railroad crossing, he has a duty to approach such crossing with care and at a speed which would permit him to stop the vehicle if necessary to avoid a collision with an oncoming train.

2. Railroads § 5— crossing accidents — obstructed view of crossing — intervening negligence of motorist

In an action by plaintiff administrators to recover for the wrongful death of their intestates, evidence disclosing that the truck in which intestates were riding as passengers approached a railroad crossing over a city street, that the driver's view of the crossing was obstructed on the right by several buildings and oil storage tanks, that the driver of the truck, who was familiar with the crossing, traveled at a rate of speed which did not permit her to stop after passing the buildings and before reaching the tracks, and that upon discovering defendant's oncoming train the driver accelerated her speed in order to go around the front of the train and that a collision resulted, *is held* to show that the negligence of the driver was the sole proximate cause of the collision, notwithstanding evidence of negligence on the part of defendant in failing to give warning of the train's approach by horn or whistle.

APPEAL by plaintiffs from *Godwin, S.J.*, 16 September 1968 Civil Session, LEE County Superior Court.

On 6 January 1967 Roland J. Brown, Sr., the administrator of the estate of Ossie D. Brown (Brown), instituted this civil action in his representative capacity against Atlantic Coast Line Railroad Company (defendant) to recover for Brown's wrongful death. On 11 April 1967 William E. Phillips, Sr., (Phillips, Sr.) the administrator of the estate of William E. Phillips, Jr., (Phillips, Jr.) instituted this civil action in his representative capacity against defendant to recover for the wrongful death of his twelve year old son. During the pendency of these actions, the defendant merged with Seaboard Air Line Railroad Company, and the correct corporate name of the defendant is now Seaboard Coast Line Railroad Company. The two cases were consolidated for trial.

At approximately 10:30 p.m. on 12 November 1966 Jean Brown Phillips (driver) was operating a 1966 Ford pickup truck in a westerly direction on Rose Street in the City of Sanford, North Carolina. Brown, the sixty-three year old mother of the driver, was seated to the right of driver in the truck's cab. Phillips, Sr., the driver's husband and the owner of the truck, was seated in the open bed of the truck immediately to the rear of the driver. Gordon Brown (Gordon), the driver's brother and Brown's son, was seated in the open bed immediately to the rear of Brown. Phillips, Jr., was seated between Phillips, Sr., and Gordon.

Rose Street is a four-lane paved road, which is forty-eight feet wide and runs in a generally east-west direction. It is a major thoroughfare in Sanford and has a speed limit of thirty-five miles per hour for vehicular traffic. Chatham Street is a two-lane public road, which is approximately twenty feet wide and runs in a north-

erly direction from the north side of Rose Street forming a "T" intersection. Two lines of railroad tracks are located to the west of Chatham Street. The railroad tracks, which run in a generally north-south direction and which parallel Chatham Street, cross Rose Street at a grade. From the "T" intersection, Chatham Street goes downgrade in a northerly direction, while the railroad tracks are elevated above the grade of Chatham Street. Rose Street is upgrade in a westerly direction toward the railroad tracks. It is approximately twenty-eight feet from the eastern margin of Chatham Street at the "T" intersection to the easternmost railroad track. There are no buildings or other obstructions from the western margin of Chatham Street to the railroad tracks. However, in the corner formed by the eastern margin of Chatham Street and the northern margin of Rose Street, there are three buildings and two tanks for the bulk storage of petroleum products. Since these buildings and tanks effectively block the vision of a motorist who is traveling from east to west on Rose Street, the motorist must reach the eastern margin of Chatham Street before a clear vision of the railroad tracks can be obtained. From that point, the vision is clear for some six hundred feet to the north.

The driver, who stated that at the time in question she was traveling at a speed of thirty to thirty-five miles per hour, testified as follows on direct examination:

> "When I got to the edge of Chatham Street, I looked to the right. I looked to the right when I got to the edge of Chatham Street because I could not see to my right until I got to Chatham Street. I could not see to my right until I got to Chatham Street because there were buildings to my right.
>
> When I passed Chatham Street, between Chatham Street and the railroad, I saw this light and then it dawned on me that the light was swirling and I knew then that it was a train. The light was down the track to my right. I did not hear a bell sound nor a whistle blowing; I did not hear a bell sound. I knew then that I could not stop; I was too close, and I swerved to the left and speeded up. Then the train hit the right door where my mother was sitting. I did not hear any signal, bell, or whistle after the collision; I don't remember anything after the collision until I woke up in the hospital. I don't recall when that was, it was that night."

The driver testified as follows on cross-examination:

> "When I first realized that the train was coming, I was too close to stop. When I saw that I couldn't stop, I did all I could do,

all I knew what to do; I swerved to the left and speeded up, trying to get across before the train hit. I was probably twenty feet from the train when I seen it. I then drove twenty feet before the collision by my best estimate of the distance. When I realized that I could not stop, I picked up speed in an effort to go around the front of the train."

After the collision the truck and its passengers were on the west side of the railroad tracks.

Phillips, Sr., who stated that the driver was traveling at a speed of about thirty miles per hour, testified as follows on direct examination:

". . . [A]nd we came up close to the intersection of the railroad and Rose Street there, and she swerved suddenly to the left, and when she did it, I turned and looked through the back window to see what caused her to do it. We were past Chatham Street at the time she did that, right at the intersection of Chatham, right about the center of Chatham, when she swerved, on the railroad side of Chatham Street, because we had already passed the corner, right about the edge of the west side of Chatham when she swerved, about twenty feet from the railroad track because I looked in front and didn't see anything.

When I first looked, I was looking at an angle towards Chatham Street and turned to my left, which turned me around across the railroad, to the north. I didn't see anything in front and I turned and when I turned back, I saw the diesel engine light swirling right about five feet from the pickup truck. Before I saw the diesel engine, I did not hear anything. As the truck was proceeding in a westwardly direction along Rose Street toward the grade crossing, I did not hear a train horn nor a train bell ring; I did not hear a train horn sound. From the moment I felt the truck swerve until the truck and train collided, approximately a second or two elapsed, I don't know which. It seemed so fast."

The crossing in question was well marked with signs, both at the crossing itself and on the Rost Street approach. Since the driver and Phillips, Sr., went over the crossing almost daily, they were very familiar with it.

Gordon testified as follows on direct examination:

". . . As we proceeded west on Rose Street, the first thing that was called to my attention just prior to the accident was

— I can't keep it straight, which comes first, either the light flashing or the motor. . . .

Just prior to the time of the collision, when I looked up, I saw a headlight of the train. . . . I did not hear the sound of a bell ringing from that train prior to the collision. Prior to the collision, I did not hear the sound of a horn blown by the train nor a whistle from the train."

Raymond Holt, a witness for the plaintiffs, testified on direct examination that he lived forty yards from the crossing and that he was in the front part of his house at about 10:30 p.m. on 12 November 1967. He further testified as follows:

". . . The first thing that I heard that night, with respect to this accident, was a crash. Prior to the crash, I did not hear a whistle blow nor did I hear the sound of a bell; prior to the crash I did not hear a horn. Immediately after the crash, I heard a long whistle; that whistle was, I would say, at least a half minute or more."

At the conclusion of the plaintiffs' testimony, a motion for judgment as of nonsuit was allowed, and the actions were dismissed as of nonsuit. From a judgment of nonsuit, the plaintiffs appealed to this Court.

Pittman, Staton and Betts by William W. Staton and Ronald T. Penny for plaintiff appellants.

Harrington, Cameron & Love; Henry & Henry by Ozmer L. Henry for defendant appellee.

CAMPBELL, J.

As Higgins, J., so appropriately stated in *Faircloth v. R. R.*, 247 N.C. 190, 100 S.E. 2d 328, "[f]or reasons readily apparent, the Court has encountered difficulty in laying down hard and fast rules governing liability in train-automobile grade crossing accidents. '. . . [E]ach case must stand upon its own bottom, and be governed by the controlling facts there appearing.' . . . It is a matter of common knowledge that a train cannot leave the track. . . ."

In *Cox v. Gallamore*, 267 N.C. 537, 148 S.E. 2d 616, the Supreme Court stated that:

". . . [T]he driver of an automobile, who knows, or, by the exercise of a reasonable lookout in the direction of his travel, should know, that he is approaching a railroad crossing, may

not proceed to and upon it without looking in both directions along the track merely because he has heard no signal of an approaching train. The driver, who knows, or should know, that he is approaching a crossing at which his view of the track is obstructed, owes to the passengers in his vehicle the duty to reduce his speed so that he can stop the vehicle, if necessary, in order to avoid a collision with an approaching train. The train has the right of way at the crossing and it is the duty of the driver of the automobile who sees, or should see, the approaching train in time to stop, to do so." (Citations omitted)

[1] Therefore, where a driver knows about a railroad crossing, he has a duty to approach such crossing with care and at a speed which would permit him to stop the vehicle if necessary to avoid a collision with an oncoming train. However, a different rule applies where there is a blind crossing or where there is an unmarked crossing and the driver has no notice or knowledge of the crossing. As to the latter rule, see *Kinlaw v. R. R.*, 269 N.C. 110, 152 S.E. 2d 329; *Cox v. Gallamore, supra; Henderson v. Powell,* 221 N.C. 239, 19 S.E. 2d 876; and *Harper v. R. R.*, 211 N.C. 398, 190 S.E. 750.

In *Hinnant v. R. R.*, 202 N.C. 489, 163 S.E. 555, the plaintiff was a passenger in an automobile which collided with a train at a blind crossing.

"The complaint [painted] the following picture: The driver of an automobile along a public road intersected by a railroad track, [arrived] at the crest of a hill 300 feet from the track. The hill [was] 22-½ feet higher than the track. His vision to the left [was] obstructed by shrubbery growing upon the right of way. There [was] a crossing sign plainly visible, and telegraph poles along the tracks [gave] warning of the presence of a railroad. The road [was] wet and slippery. Notwithstanding, the driver [did] not slacken his speed or attempt to bring his car under control, but [drove] ahead at the rate of 25 or 30 miles an hour. A heavy freight train . . . [was] approaching the crossing, but [gave] no signal. When the driver . . . [reached] a point 69 feet from the track the freight train 'burst into view at the crossing.' . . . He attempted to stop the car, but he was operating it, under the circumstances, in such a manner that he could not control it, and thereupon he leaped from the car, leaving his passenger to his fate. The car [plunged] ahead and [struck] the train. . . ."

The Supreme Court in that case laid down the following four

rules for determining whether or not the acts of the driver constituted the sole proximate cause of the passenger's injury:

> ". . . (1) The negligence of the driver must be such as to bar his recovery if he should sue for any injury sustained by him. [In other words, the driver must have been guilty of contributory negligence as a matter of law.] . . .
>
> (2) The negligence of the driver must be palpable and gross. *Herman v. R. R.*, 197 N.C., 718, 150 S.E., 361. In that case, *Stacy, C.J.*, says: '. . . [T]he defendant [railroad] had a right to operate the train over its track, and the negligence of the driver of the automobile is so palpable and gross . . . as to render [the driver's] negligence the sole proximate cause of the injury.
>
> (3) If the act of the driver is a new, independent, efficient and wrongful cause, intervening between the original wrongful act and the injury, then such act of such driver is deemed to be the proximate cause of the injury, upon the theory that the primary or original negligence was thereby insulated. . . .
>
> (4) The new, independent, efficient intervening cause must begin to operate subsequent to the original act of negligence and continue to operate until the instant of injury.
>
> Foreseeability is the test of whether the intervening act is such a new, independent and efficient cause as to insulate the original negligent act. That is to say, if the original wrongdoer could reasonably foresee the intervening act and resultant injury, then the sequence of events is not broken by a new and independent cause, and in such event the original wrongdoer remains liable." (Citations omitted)

Applying the doctrine of insulating negligence, the Supreme Court there held that the law did not impose upon the defendant's engineer the duty of foreseeing the negligent conduct of the driver.

In *Jones v. R. R.*, 235 N.C. 640, 70 S.E. 2d 669, the defendant railroad had permitted corn to be grown on its right-of-way, and this corn obstructed the view of drivers of oncoming automobiles. However, the driver of the automobile involved in the grade crossing collision with the train in that case "had crossed the tracks at [that] point many times, was familiar with the crossing and surrounding conditions, and knew that trains passed frequently." On the afternoon in question, the driver came up to the railroad tracks and stopped. He then started forward and, as he drove onto the tracks, he did not look anymore. He testified that after driving onto the

tracks the next thing he knew, he had been hit by a train. No signal by whistle or horn had been given by the approaching train. The Supreme Court stated:

> ". . . [I]f it be conceded that the defendant was negligent in allowing the corn to grow upon the edge of its right of way and in failing to give warning signal of the approach of its train to the crossing, nevertheless, it is clear that the active negligence of the driver of the automobile, subsequently operating, was the real, efficient cause of the injury to the [passenger in the automobile]. It is manifest that the negligence of the husband in driving without looking through an area of some 27 to 30 feet in which his vision was unobstructed intervened and insulated the prior negligence of the defendant and became the sole proximate cause of the [passenger's] injury." To like effect, see *Faircloth v. R. R., supra,* and *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137.

In *Jeffries v. Powell,* 221 N.C. 415, 20 S.E. 2d 561, an automobile passenger was killed in a grade crossing collision between a train and automobile. The Supreme Court pointed out that there was no evidence to show whether the train was operating at an unlawful or negligent rate of speed. It was then pointed out that even if the train was required to give a signal of its approach and failed to do so, it was nevertheless clear from the evidence that the negligence of the driver of the automobile was such as to insulate any negligence of the railroad and that the driver's negligence was the sole proximate cause of the collision. It was held that the negligence of the driver was patent because he drove the automobile into a known zone of danger without looking. This negligence of the driver, which began to operate subsequent to any negligent act on the part of the railroad and which continued to operate until the time of impact, intervened between the defendant railroad's failure to give a signal of approach and the passenger's injury.

[2] In the case at bar the driver of the truck was familiar with the railroad crossing. She knew that she could not see down the tracks until reaching the edge of Chatham Street and that she was driving at a speed which would not permit her to stop the truck upon reaching the edge of Chatham Street and before reaching the tracks. If it is conceded that the defendant was negligent in not blowing a horn or sounding a whistle, it is nevertheless clear that the driver's negligence in trying to outrun the train by picking "up speed in an effort to go around the front of the train" could not have been reasonably foreseen by the defendant. This was such an intervening act

of negligence as to be deemed the sole proximate cause of the collision.

Affirmed.

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

BETTY CHURCH McMANUS, MOTHER; ERNEST McMANUS, FATHER; OF NORMAN HAROLD McMANUS, DECEASED v. CHICK HAVEN FARMS AND NATIONWIDE MUTUAL INSURANCE COMPANY

No. 6923IC48

(Filed 2 April 1969)

1. Master and Servant § 62— workmen's compensation — employee riding in private vehicle from work site to employer's plant

In this action for workmen's compensation benefits for the death of an employee in an automobile accident which occurred while the deceased employee was riding in the automobile of a co-employee from the work site to the employer's plant, the evidence *is held* sufficient to support findings of fact by the Industrial Commission to the effect that while it was the policy of defendant employer to transport its workers to and from job sites in company vehicles, the deceased employee had either actual or implied permission of the job foreman to ride in the personal vehicle of his co-employee on the occasion in question, and that under instruction of his supervisor the deceased employee was returning to the employer's plant to punch out and wait to load a truck when the fatal accident occurred.

2. Master and Servant §§ 55, 96— review of finding that accident arose out of employment

Whether an accident arises out of the employment is a mixed question of fact and law, and the findings of the Industrial Commission as to the factual portion is conclusive if supported by any competent evidence.

3. Master and Servant § 96— failure of Industrial Commission to find certain facts

In this action for death benefits under the Workmen's Compensation Act, failure of the Industrial Commission to make certain findings of fact in respect to defenses set up by defendant is not error where such findings would have no effect on the ultimate finding by the Commission that the deceased employee was injured by accident arising out of and in the course of his employment.

4. Master and Servant § 94— findings required of Industrial Commission

In a workmen's compensation proceeding, the Industrial Commission is not required to make a finding as to each detail of the evidence or as to

every inference or shade of meaning to be drawn therefrom, it being sufficient if the Commission finds all the crucial and specific facts upon which the right to compensation depends.

5. Master and Servant § 62— accidental death while traveling in private vehicle between work site and employer's plant

In this action under the Workmen's Compensation Act for the death of an employee in an automobile accident which occurred while deceased employee was riding in the automobile of a co-employee from the work site to the employer's plant, there is some competent evidence to support the facts found by the Commission, and the specific facts found, considered in the light most favorable to plaintiff, support the ultimate finding that the deceased employee was injured by accident arising out of and in the course of his employment.

APPEAL by defendants from Full Industrial Commission order of 10 September 1968.

The testimony at the hearing and the findings of fact tend to show that Norman Harold McManus was an employee of the defendant, Chick Haven Farms, on 13 April 1967. On this date he punched the time clock at the defendant's plant at approximately 7:15 a.m., and was assigned to work at Bobby Shoe's Chicken House located approximately 15 miles from the defendant's plant. It was the policy of the defendant to transport the workers to the job sites in company vehicles. However, on this day James Pennington, another employee, had driven his brother-in-law's car to the defendant's plant, and instead of riding in the company vehicle to the job site, Pennington, accompanied by McManus, drove his brother-in-law's vehicle. (Pennington testified that Davis, the foreman, gave him permission to drive his car to the job site that morning. Davis testified that Pennington told him that he was sick, but that Pennington did not mention driving his car and did not receive permission to do so.) The "debeaking operation" was completed at about 2:00 p.m. At this time the employees got into the panel trucks operated by the defendant in order to go back to the plant and check out. Pennington, Louis Church, and Norman McManus did not ride in the company vehicle, but rode in the car driven by Pennington. Pennington testified that as they were leaving the Bobby Shoe's premises, Davis told the workers to go to the plant, punch out, and wait until 4:00 or 4:30 p.m. to load a trailer. Davis testified that he told Pennington and those riding with him to be back at the plant around 4:00 p.m. in order to load a truck. He says he did not tell them to go to the plant and punch out because their time stopped when they left the job site in a personal car, and he did not know if they were going back to the plant.

Pennington, McManus, and Church had traveled only eight-tenths of a mile from the chicken house, when the car driven by Pennington left the highway and wrecked. McManus died as a result of injuries received in this accident.

The defendant introduced testimony which would tend to show that it was a company policy for the workers to be transported from the main plant to the job sites in company vehicles. The rule followed by the defendant was that if an employee stayed at the job site until the work was completed and rode back in the company vehicle his time would continue until he arrived back at the plant and punched out. If a person did not use company transportation, his time stopped when he left the job site. The time, in this case, is marked on a time card. Davis testified that Norman McManus had been informed of this rule. Pennington, however, testified that he had driven his car on other occasions with the permission of Davis, the foreman. Pennington also testified that when he left the job site he was going back to the plant. The evidence was that the workers were generally paid on Thursday around 4:30 or 5:00 p.m. The accident occurred on a Thursday.

There is evidence which tends to show that Davis had knowledge of the fact that McManus was returning to the plant in the vehicle driven by Pennington. Pennington testified that Davis told them to go to the plant and check out, and then wait to load a truck. Davis testified that he told them to be at the plant around 4:00 or 4:30 p.m. Davis denied giving McManus or Louis Church permission to ride in the vehicle with Pennington.

The hearing examiner made an award to plaintiffs and defendants appealed to the Full Commission. The Full Commission amended finding of fact No. 3 in three particulars, overruled the exceptions filed by defendants and adopted as its own the findings of fact, as amended, the conclusions of law and award of the hearing examiner. Defendants appealed.

Whicker, Whicker & Vannoy by J. Gary Vannoy for plaintiff appellees.

Robert L. Scott for defendant appellants.

Morris, J.

Defendants concede that findings of fact Nos. 5, 6, 7, 8 and 9 are the crucial findings upon which the Commission based its award. These findings are as follows:

"5. It was the policy of the defendant to furnish transportation to and from the plant in Wilkesboro when it was necessary to go from the plant to various chicken houses to work. The employees were paid during the travel time if they used company transportation. Their pay began when they punched in at the plant and ended when they punched out at the plant.

6. It was customary for the foreman to normally punch out the employees if they left the chicken farms early and did not go back to the main plant where the time clock was located. McManus left the Bobby Shoe's Chicken House at approximately 2:12 P.M., and on Monday, following April 13, 1967, Foreman Davis checked McManus out on the time clock as of 2:15 P.M.

7. Pennington had used his personal car to go from the defendant's plant to the place of work and returned on at least one other occasion with the knowledge of Davis, the supervisor. If Pennington and McManus did not have actual permission to ride in the personal car of Pennington, there was implied permission for them to use the personal car of Pennington.

8. Under the instruction of his supervisor, McManus was returning to the defendant employer's plant to check out and wait until 4:00 or 4:30 P.M. to load a trailer, when the fatal accident occurred.

9. The deceased employee, Norman Harold McManus, sustained an injury by accident arising out of and in the course of his employment with the defendant employer resulting in his death on April 13, 1967."

[1] Defendants contend that there is no competent evidence to support these findings. As to finding of fact No. 5, defendants say that there is no finding that employees were required to use company transportation. Both the foreman and the president of Chick Haven testified that it was the company policy to provide transportation. Both also testified that the foreman had authority to give permission for the use of personal vehicles. Defendants made no specific objection in their brief to finding of fact No. 6, but the finding, in our opinion, is in accord with the evidence presented. In finding of fact No. 7 the Commission found that "Pennington and McManus did not have actual permission to ride in the personal car of Pennington, there was implied permission for them to use the personal car of Pennington." Defendants contend that the record is devoid of any evidence that McManus had permission to use Penn-

ington's car. On this question, the evidence is in conflict. Pennington testified that he obtained permission from Davis, the foreman, to drive his car to Shoe's because he was not feeling well and might have to leave before the day's work could be completed. Davis, on the other hand, testified that although Pennington did tell him he didn't feel good, the use of his personal car was not mentioned and he did not give him such permission. He testified that he didn't know that Pennington had driven his own car until he got to Shoe's and did not know of his own knowledge who had ridden with him. He testified that during the day he advised the employees that there would be a truck to load around 4:00 or 4:30, and that when the work was completed at Shoe's and as he was coming out of the chicken house, he saw Pennington about to drive off. In the car with him were McManus and Church. He hollered at them. They pulled back up and stopped, and he told them to be at the plant between 4:00 and 4:30 to load a truck. Pennington, however, testified that Davis gave him permission to drive to Shoe's; that Davis and McManus were talking just prior to leaving Chick Haven; that Davis also told him he could take his car back to Chick Haven. He also testified that he, McManus and Church were leaving Shoe's when Davis told them to go to the plant, punch out and wait for a truck to be loaded. Pennington further testified that at that time he told Davis that he was going to the plant. It is true that there is no evidence of direct permission to McManus. However, it appears to us that the evidence raises a permissible inference that the direction given to go back to the plant, punch out, and wait to load a truck included the passengers in Pennington's car and was understood by them as instructions to them by the foreman.

[2] Finding of fact No. 9, that the employee "sustained an injury by accident arising out of and in the course of his employment with the defendant employer resulting in his death on April 13, 1967" is a mixed question of law and fact, *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476, and the finding of the Commission as to the factual portion is conclusive if supported by any competent evidence. *Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308. Since there is some competent evidence to support the facts found by the Commission, we are bound by them.

Although the evidence was sharply conflicting, there was some evidence that employees riding in Pennington's car were to punch the time clock when they returned to the plant and would be paid for that time. All of the evidence was to the effect that the employees in Pennington's car were on the route back to the plant and that the accident occurred less than one mile from Shoe's.

Defendants argue that the Industrial Commission failed to find facts material to the defenses they asserted. The defendants rely on *Taylor v. Dixon,* 251 N.C. 304, 111 S.E. 2d 181, for this argument. In that case the employee was hired to operate a chain saw, and he was expressly forbidden to operate the tractor. Despite these orders by his employer he operated the tractor and was injured. The hearing officer found that the plaintiff was employed by the defendant; that on the occasion in question he was operating a tractor pulling logs when the tractor turned over on him; and that the accident arose out of and in the course of his employment. As a defense against this claim the employer had argued and introduced evidence that the employee had stepped outside the boundaries defining the work he was employed to do; that he had no duties concerning the tractor; and that the accident was not the result of a risk incident to the employment. The Court held that the Industrial Commission could not fail or refuse to make specific findings of fact in respect to specific defenses set up by the defendant.

Did the Industrial Commission fail to make specific findings of fact in respect to certain defenses set up by the defendant? This question is raised in assignment of error No. 13. Defendants say that the hearing commissioner failed to find as a fact that the defendant divided its labor force into crews; that Harold McManus was a member of a crew and on the day in question his crew was assigned to work at Bobby Shoe's Chicken House. These facts would appear to be sufficiently stated in findings of fact Nos. 2 and 5, although not stated in the exact language suggested by the defendants.

[3] Defendants argue that it should have been found that the employer furnished transportation from the plant to the job sites; that the crew members were required to ride in the company transportation; and that this policy had been communicated to Norman McManus. In finding of fact No. 2 it is stated: "It was a company policy that all employees of the defendant employer ride to and from the defendant's plant to places of work assigned them in the company vehicles. The defendant employer furnishes transportation for the employees as an incident of contract of employment." This policy of the employer was again set out in finding of fact No. 5. There was no specific finding that this policy had been communicated to McManus. However, the hearing officer did not base his decision on McManus' lack of knowledge of this policy. Therefore, since such a finding would have no effect on the ultimate finding, it would appear that this omission was not material or prejudicial.

Defendants argue that the hearing officer failed to find as a fact that if a crew member traveled in company transportation, he was paid until he returned to the plant and punched out; but if he did not leave the job site in company transportation, his time was stopped as of the time he left the job site. This contention is included in finding of fact No. 5. There it is stated: "The employees were paid during the travel time *if* they used company transportation. Their pay began when they punched in at the plant and ended when they punched out at the plant." (Emphasis added.) Here, too, the defendants argue that there should have been a specific finding of fact that McManus had actual knowledge of this rule. Again, this would not appear to be prejudicial or material.

Defendants argue that it should have been found as a fact that company transportation was available on the afternoon Church and McManus left the job site in Pennington's car, and that in electing to ride in Pennington's car McManus exposed himself to the same hazard of injury on the public highway as any other person. In finding of fact No. 3 the hearing officer did find that "There was room in the truck to transport Pennington and McManus *to* the chicken farm." (Emphasis added.)

[4] Defendants argue that the hearing officer should have found that Pennington was sick on 13 April and did not plan to load the truck, and when he left the job site he was planning to go to the doctor. He says that it should have been found that no special permission was given by Davis to McManus allowing him to ride in Pennington's personal car; that in waiting until the following Monday to mark the time cards, the employer was following the usual customary practice; that McManus had no duties to perform for the employer between 2:15 p.m. and 4:30 p.m. in that he was not obligated to load the truck; that Davis had authority to permit an employee to ride in personal transportation only in cases of emergencies, and that there was no emergency in this situation; and, that at the time of the accident, McManus was engaged in a personal mission. On each of these contentions there was conflicting testimony.

> "The Commission is not required to make a finding as to each detail of the evidence or as to every inference or shade of meaning to be drawn therefrom. When the specific, crucial findings of fact are made, and the Commission thereupon finds that plaintiff was injured by accident arising out of and in the course of his employment, we consider such specific findings of fact, together with every reasonable inference that may be drawn therefrom, in plaintiff's favor in determining whether there is a

factual basis for such ultimate finding." *Guest v. Iron and Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596.

[5] We find that there is some competent evidence to support the facts found by the Commission and that the specific facts found, considered in the light most favorable to plaintiff, support the factual element in the ultimate finding. The ultimate finding — that Norman McManus was injured by accident arising out of and in the course of his employment — is upheld.

Affirmed.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT LINDSEY STALLINGS

No. 6910SC145

(Filed 2 April 1969)

1. Indictment and Warrant § 6— issuance of warrants — the oath

Warrants may not be issued without examination of the complainant under oath. G.S. 15-19.

2. Indictment and Warrant § 6— issuance of warrant under oath

Evidence *is held* sufficient to support a finding that warrant, which was valid and regular on its face, was sworn to by the complaining witness at the time he signed it.

3. Indictment and Warrant § 15— motion to quash — time of motion — review

A motion to quash, made in the superior court after pleading to the warrant in the recorder's court, is addressed to the discretion of the trial court, and the exercise of such discretion in the absence of abuse thereof is not reviewable on appeal.

4. Indictment and Warrant § 15— waiver of irregularity in warrant

Mere irregularities in a warrant regular and valid on its face are waived unless motion to quash is made before plea.

5. Indictment and Warrant § 15— waiver of defect in warrant relating to authority of issuing officer

By pleading to a warrant in an inferior court having jurisdiction of the offense charged before moving to quash the warrant in the superior court on grounds that the issuing officer was a police officer, defendant waives defects, if any, incident to the authority of the person who issued the

warrant, and the waiver applies both in a motion to quash and in a motion in arrest of judgment on the same grounds.

6. Criminal Law § 169— harmless or prejudicial error in admission of evidence — failure to object — admission of similar evidence

In a prosecution upon warrant charging defendant with the unlawful operation of a motor vehicle on the highways of the state while under the influence of intoxicating beverages, defendant was not prejudiced by testimony of a police officer on direct examination relating to his investigation of a cross burning in addition to investigation of the offense charged, since (1) the defendant did not object or move to strike the reference to the cross burning and (2) the defendant himself, on cross-examination of the officer, brought out the fact that defendant was charged with the offense of "cross burning."

7. Criminal Law § 86— impeachment of defendant — evidence of other crimes

Where defendant took the stand in his own behalf in a prosecution for driving on the highways of the state while under the influence of intoxicating beverages, it was competent for the solicitor to cross-examine defendant about his conviction of the crime of "cross burning," as well as any other crimes of which defendant may have been convicted, for the purpose of impeaching him as a witness.

8. Criminal Law § 88— cross-examination of witnesses — latitude of solicitor

In a prosecution upon warrant charging defendant with the unlawful operation of a motor vehicle on the highways of the state while under the influence of intoxicating liquor, where defendant's own witness testified on direct examination as to "cross burning" and used the term several times, the solicitor has wide latitude to cross-examine the witness for purposes of impeachment as to whether the witness was involved in a "cross burning."

9. Criminal Law § 138— determination of sentence — observation of defendant's trial conduct

In determining sentence of imprisonment on defendant's first conviction of operating a motor vehicle while under the influence of intoxicating beverages, trial court did not err in considering the conduct and appearance of the defendant in court.

APPEAL by defendant from *McKinnon, J.*, Regular October 1968 Criminal Session of Superior Court of WAKE County.

Defendant was charged in a warrant with unlawfully and wilfully operating a motor vehicle on the state highways of North Carolina while under the influence of intoxicating beverages. The warrant is signed by "W. B. HOPKINS, Clerk of the Recorder's Court" and was issued, according to the title thereof, "in the Recorder's Court of Zebulon and Little River Township." The record shows that at his trial in the Recorder's Court of Zebulon and Little River

Township the defendant was found guilty and from sentence imposed, appealed to the Superior Court.

Prior to entering a plea of not guilty in the Superior Court, the defendant for the first time moved the court to quash the warrant, which motion was denied. Upon the trial, the jury returned a verdict of guilty as charged. After judgment of imprisonment for a term of six months was imposed, the defendant moved in arrest of judgment, which motion was denied. The defendant excepted and, assigning error, appealed to the Court of Appeals.

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

Hubert H. Senter for defendant appellant.

MALLARD, C.J.

Defendant contends, among other things, that the warrant of arrest was obtained by the witness Hilliard in a manner which violated the provisions of G.S. 15-19, in that, he was never examined under oath by the issuing officer; that the warrant was void from the beginning, therefore, the trial in the Zebulon recorder's court was based on a void warrant; and that on an appeal the superior court did not have jurisdiction to try the defendant on this purported warrant.

[1] Warrants may not be issued without examination of the complainant under oath. *State v. Higgins*, 266 N.C. 589, 146 S.E. 2d 681; G.S. 15-19. In this case the record shows that the affidavit constituting a part of the warrant herein was subscribed and sworn to before W. B. Hopkins, clerk of the recorder's court.

[2] Although the testimony of the officer regarding the warrant appears to be contradictory with respect to whether he was sworn and examined by the issuing official prior to the issuance of the warrant, the record reveals that the following question was propounded to and answered by the officer:

"Q. Did you ever swear to this warrant at the time you signed it; did you swear to the content?

A. The best I recall, I did."

This is affirmative testimony that the warrant was sworn to by the complainant. Since the warrant is valid and regular on its face, and the evidence does not clearly establish its invalidity, we are of the opinion and so hold that the warrant in this case is not void.

Defendant also contends that the court committed error in denying his motion to quash the warrant and in denying his motion in arrest of judgment on the grounds that the issuing officer was a police officer and also the clerk of the recorder's court.

> "A motion in arrest of judgment can be based only on matters which appear on the face of the record proper, or on matters which should, but do not, appear on the face of the record proper. (citations omitted) The record proper in any action includes only those essential proceedings which are made of record by the law itself, and as such are self-preserving. (citations omitted) The evidence in a case is no part of the record proper. (citations omitted) In consequence, defects which appear only by the aid of evidence cannot be the subject of a motion in arrest of judgment." *State v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311.

[3, 4] The motion to quash, which was made in the superior court after pleading to the warrant in the recorder's court, is addressed to the discretion of the trial court. The exercise of such discretion in the absence of abuse thereof is not reviewable on appeal. "Mere irregularities in a warrant regular and valid on its face are waived unless motion to quash is made before plea." 4 Strong, N. C. Index 2d, Indictment and Warrant, § 15. With respect to defendant's motion in arrest of judgment after pleading in the recorder's court, such plea is held to have waived defects, if any, incident to the authority of the person who issued the warrant. *State v. Matthews,* 270 N.C. 35, 153 S.E. 2d 791; *State v. Blacknell,* 270 N.C. 103, 153 S.E. 2d 789.

[5] The Recorder's Court of Zebulon and Little River Township had jurisdiction of the offense charged in the warrant, and by entering his plea in that court without moving to quash the warrant, the defendant waives defects, if any, incident to the authority of the person who issued the warrant, and this waiver applies both in a motion to quash and in a motion in arrest of judgment on the same grounds. *State v. Wiggs,* 269 N.C. 507, 153 S.E. 2d 84; *State v. Whaley,* 269 N.C. 761, 153 S.E. 2d 493.

[6] Defendant contends that the trial court committed error in admission of certain evidence and in its ruling on certain questions. These questions relate, in the main, to references to cross burning. The first time cross burning is mentioned in the record is when the witness Hilliard responded to the following question in the following manner:

"Q. Tell us what happened?

A. Well, I had a call to go out to the residence of James Neill in reference to a cross burning."

The defendant objected, moved to strike which motion was denied, and the defendant excepted.

The next reference to cross burning in the record is when the following question was propounded and answer made thereto by the witness Hilliard:

"Q. Of what?

A. Some liquor. Inside the car were several empty beer cans.

MR. SENTER: Objection.

COURT: Overruled.

A. Several beer cans, three full beers and a fifth of vodka half gone. We took it and carried Mr. Stallings on to the police station and locked him up after questioning him some first in reference to this cross burning, which he was later involved in."

There was no motion to strike the above reference to cross burning by the defendant. However, the court instructed the witness as follows: "Don't comment on that, sir."

The next occasion in the record in which cross burning is referred to is while the same witness Hilliard was being questioned, when the following question and answer appear in the record:

"Q. What were you doing when you first saw the defendant drive by?

MR. SENTER: Objection.

COURT: Overruled.

Exception No. 2.

A. I was talking to the residents of this home in regard to this cross burning."

The defendant objected and moved to strike which objection was overruled and motion was denied.

The defendant did not object or move to strike the reference of the officer to the cross burning in which the defendant was later involved. In addition to this failure, after the witness Hilliard was taken on cross-examination by the defendant, the following question and answer were propounded by the *defendant,* not by the State:

"Q. Mr. Hilliard, do you have notes on this; did you or did you not make a statement to Robert Lindsey Stallings that if he would plead guilty and pay-off a charge of cross burning that you would request the lower court to accept a plea of careless and reckless driving to this charge?

A. No, sir."

The defendant, therefore, cannot complain inasmuch as he is the one who brought out the fact that the defendant was charged with "cross burning."

The next reference in the record with respect to cross burning is when the defendant himself was testifying and in response to questions asked by the defendant's lawyer, the defendant, without objection on the part of the State or the defendant, answered the following questions as follows:

"Q. What did he tell you when you went back to the car?

A. He asked me what we were doing burning the cross.

Q. What did you tell him?

A. I told him we haven't burn no cross."

The evidence for the State tends to show that the defendant was operating an automobile on the public highways of North Carolina on the night of 25 May 1968 while under the influence of intoxicating beverages. The evidence of the defendant tends to show that he was not under the influence of intoxicating beverages but that he had "a couple of beers and a drank (sic) of liquor." The defendant was asked by his attorney on direct examination, without objection, if he had ever been charged with driving under the influence and answered in the negative. He was then asked what motor vehicle laws he had ever been convicted of and replied none. All of this was without objection. The defendant was then asked by his counsel if he had any criminal record. The record is silent as to the purpose for which this question was asked by counsel for the defendant. Surely the defendant did not intend to attack his own credibility. Perhaps defendant felt that if he brought out his criminal record, it would make him appear in a better light to the jury. However, in response to the question as to what criminal record the defendant had, the defendant, again without objection, replied, "Well, I paid off a public drunkenness ticket one time." His counsel asked him how long ago that had been, the witness replied, and counsel for defendant asked no further questions. Thereupon, the solicitor for the State asked the defendant if he had not been convicted of cross burning, and the witness replied that he had. The solicitor then asked

the defendant why he did not inform the court of this when his attorney, Mr. Senter, asked him what he had been convicted of, and the defendant replied that he did not think about it. Thereupon, the witness was asked if he did not see a cross burning as he was driving his vehicle that night, and he said he did not see it at all, and then he was asked if the cross burning charge on which he was convicted did not occur on 25 May. The defendant's counsel objected, and the court sustained the objection. This was not error. The defendant was asked if he did not appeal his cross burning conviction to the Wake County Superior Court, and the defendant replied that he did and that the reason that the case is not pending now is that, "I paid it off." The defendant gave as his reason for paying it off that he did not have money to hire a lawyer and, without objection, replied to the question that he complied with the judgment of the lower court in the cross burning case. Later in the examination, the solicitor asked the defendant if he did not testify for another person who was there in the courtroom "who is charged with cross burning." The objection of the defendant was sustained, and the witness was not permitted to answer. This was not error.

[7] The defendant had not divulged to the court his conviction of the crime of "cross burning." It was competent, therefore, for the solicitor to cross-examine the defendant about this and any other crimes of which the defendant may have been convicted for the purpose of impeaching him as a witness. *State v. Robinson,* 272 N.C. 271, 158 S.E. 2d 23.

[8] The next reference in the record to burning a cross is when defendant's own witness, Billy Zester Horton, testified as to cross burning and used the term several times, none of which were objected to by the defendant. The solicitor was permitted, over objection, to question defendant's witness as to whether he was involved in burning a cross.

In 7 Strong, N. C. Index 2d, Witnesses, § 8, we find the following:

> "The latitude of cross-examination for the purpose of impeachment is wide. A witness may be asked questions on cross-examination which tend to test his accuracy, to show his interest or bias, or impeach his credibility. The mentality of the witness is a subject of cross-examination, and a witness may be asked if he had not been an inmate of a mental institution. Questions relating to crime and antisocial conduct are allowed. Nevertheless, the bounds of the cross-examination must be confined within reason to questions rationally tending to affect the credibility of the witness, and which relate to matters testified to in the exam-

> ination-in-chief which are germane to the controversy. And the extent to which cross-examination for the purpose of impeachment will be permitted rests largely in the discretion of the trial court."

We have carefully examined all of the defendant's exceptions and assignments of error in respect to the references to and questions asked relating to cross burning, and all are overruled.

[9] The defendant contends that the court committed error when it stated in sentencing the defendant:

> "You may stand, Mr. Stallings. Let the record show that from the observations of the defendant's demeanor and his testimony in a case heard during this week in which he testified as well as in this case, the Court finds that he is not a proper subject for consideration upon a fine and suspended sentence. In the present case, Mr. Stallings, you are not being punished for the offense of cross burning, you have been punished for that and met the judgment of that; but your conduct and appearance here in court on whatever advice it may have been or on what motive it may have been makes me think you are not deserving of lenience that's given to first offenders of driving under the influence."

Although the defendant contends that the statement of the court in sentencing the defendant is error, the defendant does not cite any authority for this position. This contention is without merit. We find in the case of *State v. Thompson,* 267 N.C. 653, 148 S.E. 2d 613, the following:

> "Nevertheless, we point out that in determining what punishment should be imposed upon a defendant, 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, character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced.' *State v. Cooper,* 238 N.C. 241, 244, 77 S.E. 2d 695, 698."

The able judge who presided in this case did not commit error when he stated in passing judgment that he was considering the conduct and appearance of the defendant in court. The sentence imposed herein was well within the limits allowed by law. It is noted that the trial judge informed the defendant that he had been punished for the other crime that he admitted he had been convicted of

but that the judge did take into consideration his conduct, appearance and demeanor as he appeared in court. This was not error.

We have carefully examined all of the assignments of error brought forward by the defendant and find no error prejudicial to the defendant.

No error.

BRITT and PARKER, JJ., concur.

ARLENE C. ELMORE v. CHARLES T. ELMORE

No. 6918SC22

(Filed 2 April 1969)

1. Appeal and Error §§ 16, 36— service of case on appeal — extension of time

Where the trial judge has fixed the time for serving the case on appeal, he has no authority to enter a subsequent order enlarging the time for serving the case on appeal, the appeal having been removed to the Court of Appeals.

2. Appeal and Error § 36— belated service of case on appeal — scope of review

Where the case on appeal was not served within the time fixed by statute or by valid enlargement, the appellate court will review only the record proper and determine whether error appears on the face of the record.

3. Divorce and Alimony §§ 19, 21, 24; Infants § 3— enforcement and modification of consent judgment

Where the court not only approves a consent judgment relating to the custody of minor children and support for the wife and children, but orders that the terms of the consent agreement be performed by the parties, the consent judgment is enforceable by contempt proceedings and may be modified upon a showing of changed circumstances.

4. Divorce and Alimony §§ 19, 24; Infants § 9— modification of custody or support order — alleging change of circumstances

While a change in circumstances must be shown in order to modify an order relating to custody, support or alimony, G.S. 50-13.7, G.S. 50-16.9, it is not required that the change of circumstances be alleged, either specifically or in general terms, in the motion in the cause for modification of the court's order.

5. Divorce and Alimony § 24; Infants § 9— modification of custody decree

An order of court modifying a decree of custody must be supported by a finding of changed circumstances affecting the welfare of the child.

6. Divorce and Alimony § 24; Infants § 9— order modifying consent judgment awarding custody — changed circumstances

Trial court's order concluding that sufficient change of circumstances has been shown to permit modification of a consent judgment, which awarded custody of a child to the mother, and granting custody to the father *is held* supported by findings that the sixteen year old child is unhappy in her mother's home and desires to reside with her father, and that the father has remarried and has established a stable home and marriage.

7. Divorce and Alimony § 24; Infants § 9— determination of custody — wishes of the child

The wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between parents.

APPEAL by plaintiff from *Exum, J.*, in chambers at GREENSBORO, 3 June 1968 and 4 September 1968.

This action was instituted by plaintiff wife on 13 October 1958 asking for divorce from bed and board, exclusive custody of the three minor children, temporary and permanent support for herself and the children, and counsel fees.

On 14 June 1960, a consent judgment was entered by Gwyn, J. The court found that the plaintiff was a proper person to have the care and training of the children, that it was in the best interest of the children that they remain in her custody and control, and that $75.00 per week was a reasonable amount for the defendant to provide for the support of plaintiff and the three children. The judgment stated: "* * * [B]oth parties have agreed and consented to be bound by the terms of this judgment, waiving any trial by jury or further findings of fact by the Court; IT IS NOW, THEREFORE, BY CONSENT, ORDERED, ADJUDGED AND DECREED that: * * *." The judgment then provided, among other things, that the plaintiff have custody of the children, visitation rights for the father, that the defendant pay $75.00 per week for the support of the plaintiff and the children, and that the defendant pay all medical and hospital bills of the plaintiff and the children.

On 7 August 1967, the defendant husband filed a motion in the cause, asking that he and his present wife be granted custody of Linda Revell Elmore (Linda), eldest of his children by the plaintiff, that inquiry be made into the care and custody of Charles

Thomas Elmore and Susan Arlene Elmore, the remaining two children, that the support payments under the consent judgment be reduced or eliminated because of changed circumstances, that the order of support payments be construed as being for child support and not alimony, or that the sum be apportioned between support for the children and alimony, and that the provision relating to medical bills be construed as not including unreasonable drug and psychiatric bills incurred by the plaintiff.

Plaintiff demurred to this motion 25 September 1967, contending that the consent judgment was in the nature of a contract, which could be altered only in an independent action for mutual mistake. She further contended that defendant must allege a change in circumstances in order to justify a change in custody and that the defendant had failed to do so. On the same date, plaintiff answered defendant's motion in the cause, denying defendant's contentions and pleading numerous defenses.

On 9 October 1967, the demurrer was overruled by Judge Exum, and on 3 June 1968, following hearing in which oral testimony and affidavits were introduced, the judgment from which plaintiff appeals was entered. After making detailed findings of fact, the judgment provided that defendant have custody of Linda, that the visitation rights of the defendant to the other children be expanded, that support payments be limited to $60.00 per week, that this amount be construed to be for support of the children only, that the responsibility of defendant for medical bills be eliminated, and that liability for drug and medical services in the past be construed as limited to payment of bills incurred for services, treatment or medication actually prescribed or ordered by a licensed physician.

Plaintiff gave notice of appeal and was allowed fifty days to prepare and serve the case on appeal, defendant to have twenty days thereafter to serve his countercase or exceptions. On 23 July 1968, the court, in its discretion and *ex parte,* allowed an extension of ten days to serve the case on appeal, including 1 August 1968.

The case on appeal was served on defendant on 1 August 1968. At that time, defendant excepted to the order of Judge Exum extending the time for service of the case on appeal. On 20 August 1968, defendant filed a motion to dismiss the appeal for failure to serve the case on appeal within the required time. Notice of the motion was duly given to the opposing party. On 4 September 1968, Judge Exum ordered the appeal dismissed under the provisions of G.S. 1-287.1. From this order, plaintiff appeals.

Comer & Harrelson by Wallace C. Harrelson for plaintiff appellant.

David M. Clark for defendant appellee.

BRITT, J.

The first question raised by this appeal is whether the original appeal was properly dismissed.

[1, 2] Procedurally, this appeal is governed by *Roberts v. Stewart and Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58. That case clearly states that an order enlarging the time to serve the case on appeal, made subsequent to the order at the time of appeal, is entered without authority, the appeal having been removed to the Court of Appeals at that point. As in the *Roberts* case, this appeal is limited to a consideration of the record proper and a determination as to whether error appears on the face of the record.

It should be noted that this problem will be alleviated in the future by the newly enacted Rule 50 of the Court of Appeals, effective 18 February 1969, which provides:

> "If it appears that the case on appeal cannot be served within the time provided by statute, rule, or order, the trial judge (or the Chairman of the Industrial Commission or the Chairman of the Utilities Commission as the case may be) may, for good cause and after reasonable notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal and countercase or exceptions to the case on appeal, provided this does not alter the provisions of Rule 5 relating to the docketing of the record on appeal."

[3] The record presents the question whether the trial court had the power to modify the consent judgment entered 13 June 1960. We think the court possessed that power. The terms worked out by the parties were incorporated in the judgment, and the court not only approved the terms but *ordered* them performed. This made the agreement a judgment of the court, subject to enforcement by contempt proceedings or to modification upon a showing of changed circumstances. *Mitchell v. Mitchell,* 270 N.C. 253, 154 S.E. 2d 71; *Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218; *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240; 2 Lee, N.C. Family Law, § 152, p. 222 (Supplement).

[4] The next question presented by the record is whether plaintiff's demurrer to the motion in the cause should have been sustained

for failure to allege, in the motion, a change in circumstances as the basis for modification of the consent judgment.

In his motion, in the matter of custody, the defendant prayed that he and his present wife be granted absolute custody and control of Linda and, as to the other two children, that the court inquire into their custody and control. In the matter of support, the defendant prayed "[t]hat by reason of changed circumstances the order entered * * * be adjusted downward, eliminated, or substantially eliminated."

It is well established that a change in circumstances must be shown in order to modify an order relating to custody, support or alimony. G.S. 50-13.7; G.S. 50-16.9; *Kinross-Wright v. Kinross-Wright,* 248 N.C. 1, 102 S.E. 2d 469; *Rayfield v. Rayfield,* 242 N.C. 691, 89 S.E. 2d 399; *Barber v. Barber,* 216 N.C. 232, 4 S.E. 2d 447; 2 Lee, N.C. Family Law, § 153, pp. 227, 228. However, we find no authority requiring that the change of circumstances be alleged, either specifically or in general terms, in the motion in the cause. While this would appear to be the better procedure, to require it is not necessarily desirable, at least where the party opposing the motion does not contend that he has been surprised or prejudiced and has not requested that the motion be made more definite. The findings of fact adequately support the conclusion of a change in circumstances. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77.

[5-7] Plaintiff appellant contends that the trial court erred in modifying the consent judgment pertaining to the custody of Linda without a finding of fact of any change of circumstances affecting the welfare of the child. In support of this contention, plaintiff cites *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357, which holds that there must be a finding of changed circumstances affecting the child in order to alter custody of the child. A careful review of Judge Exum's judgment leads us to conclude that the requirements set forth in *Shepherd* were complied with. Judge Exum found that in response to a letter from Linda stating her general unhappiness, defendant brought Linda to live in his home during the summer to see how well she would adjust, and found that she was happy in her father's home and wished to remain there. He further found that after plaintiff and defendant were divorced, defendant married Miss Mary Jo Whitted with whom he established a stable home and marriage in Greensboro; that defendant's present wife is employed by the Guilford County Welfare Department as a caseworker in adoptions and prior to that employment was engaged in Christian education work. Furthermore, Judge Exum could also take into con-

sideration the change in Linda's age between 1960 and 1968, from eight to sixteen, and her expressed desire to reside with her father; in *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759, the court said: "The wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between parents, but is not controlling." Although the findings do not expressly state that they affect the welfare of the child, certainly it can be inferred that they relate to the welfare of the child, and we think they were sufficient to support the trial judge's conclusion that sufficient change in circumstances had been shown to permit the court to modify the consent judgment.

After this case was docketed in this court, three motions were filed by the defendant. He moved under Rule 20(c) to be allowed to amend his motion in the cause; for the reasons above-stated the amendment is not necessary, therefore, the motion is denied. Defendant also moved in this court that plaintiff's appeal be dismissed or, in the alternative, that the judgment below be affirmed. The motion to dismiss the appeal is overruled. Defendant appellee also moved under Rules 19(h) and 26 that certain costs be taxed against plaintiff appellant; in view of our disposition of this case, it is unnecessary to rule on this motion.

We have considered all motions filed in this court and have considered the record proper to determine if error appears upon its face. We find that no prejudicial error appears, therefore, the 3 June 1968 judgment of Judge Exum is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

ROBERT BRUCE (BRICE) PARKS, PETITIONER, v. RALPH L. HOWLAND, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA, RESPONDENT

No. 6910SC160

(Filed 2 April 1969)

1. Automobiles § 2— revocation of driver's license — scope of review in superior court

In a hearing in the superior court upon petition of a person whose license has been cancelled under G.S. 20-9(f) on the ground that his out-of-state operator's license was revoked in the other state, the court is not bound by the allegations of the petition but may also consider evidence

and make findings thereon that the petitioner, in applying for an operator's license in this State, falsely affirmed that his out-of-state license was not suspended. G.S. 20-25.

2. Automobiles § 2— revocation of license — out-of-state suspension as basis for revocation — forfeiture of bond

Where petitioner's operator's license issued by the State of Florida was revoked by that state upon forfeiture of bond for the offense of driving while under the influence of intoxicants, the North Carolina Department of Motor Vehicles is authorized under G.S. 20-9(f) to cancel petitioner's operator's license issued in this State, since (1) the Florida revocation was based upon an offense which constitutes lawful grounds for revocation had the offense been committed in this State, and (2) the Florida order of forfeiture upon which the revocation was based complied with due process under the laws of that state.

3. Automobiles § 2— grounds for revocation of license

In this State the revocation of a driver's license is mandatory whenever it is made to appear that the licensee has been found guilty of driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug. G.S. 20-17(2).

4. Automobiles § 2— out-of-state suspension as basis for revocation — duration of revocation

Under statute providing that Department of Motor Vehicles shall not issue operator's license to any person whose license is suspended or revoked in another jurisdiction for acts which would constitute lawful grounds for suspension or revocation in this State had the acts been committed in this State, the Department of Motor Vehicles must apply the period of revocation of the other state, since the person was a resident of the other state and was subject to and controlled by the laws of that state at the time the offense was committed. G.S. 20-9(f).

APPEAL by petitioner from *Canaday, J.*, at the 11 November 1968 Session, WAKE County Superior Court.

On 26 September 1968 Robert Bruce (Brice) Parks (petitioner) filed a petition in Wake County Superior Court under G.S. 20-25 seeking a review of the action of the Department of Motor Vehicles of North Carolina (Department) in refusing to issue to him an operator's license.

While a resident of the State of Florida, the petitioner was convicted by a Florida court in November 1958 and again in October 1959 for driving a motor vehicle while under the influence of alcoholic beverages. On each occasion his operator's license was revoked. On 15 July 1966 the petitioner was stopped in Manatee County, Florida, by Highway Patrolman Patterson, who charged him with operating a motor vehicle while under the influence of intoxicating liquor. Petitioner was given a traffic ticket to that effect and taken to jail. After remaining in jail for approximately eight

hours, he was released after bail bond in the amount of three hundred dollars was posted by the petitioner and the "Florida Insurance Exchange", his bail bond company. After the petitioner was released, no papers were served upon or delivered to him.

R. J. Marshall, prosecuting attorney in and for the County of Manatee and State of Florida, issued an information in the County Court of Manatee County, in which the petitioner was charged with unlawfully driving a motor vehicle on 15 July 1966 while under the influence of alcoholic beverages, as defined in the Florida statutes. On 27 July 1966 this information was filed for record with the Clerk of Circuit Court, Manatee County. On 1 August 1966 the petitioner and his bail bond company, "Florida Insurance Exchange", were called out thrice by the sheriff in the County Court of Manatee County, but did not answer. The county court judge then ordered that the bail bond be forfeited to the State of Florida for the use and benefit of Manatee County and that the sheriff pay the same unto the depository for Manatee County, upon collection thereof. On 19 September 1966 the Department of Public Safety of the State of Florida issued an order of license revocation for a period of five years, effective 1 August 1966. The reason recited in the order for this revocation was "Estreature of bond in the County Court, Manatee County, Florida, for the offense of driving while under the influence of intoxicants. (Third offense within ten years)". On 21 October 1966 the order of revocation was delivered to a sergeant for service. However, it was returned on 4 November 1966 marked "unable to locate, believed to have left the state."

On 14 February 1967 the petitioner applied for a North Carolina operator's license. In his application he stated that on 17 November 1965 he had been licensed as an operator in the State of Florida and that he had never had an operator's license cancelled, denied, revoked or suspended. On the basis of this application, the petitioner was issued Operator's License #2706086, and he surrendered his Florida Operator's License #236319 to Department. This Florida license was forwarded by Department to the State of Florida. Department was thereafter notified by the State of Florida that, effective 1 August 1966, the petitioner's Florida operator's license was in a state of revocation for a period of five years as a result of a third conviction for driving while under the influence of intoxicants. Upon receipt of this notification, Department cancelled Operator's License #2706086 and recalled same. The petitioner then requested a hearing before Department.

On 20 August 1968 a hearing was held before Department, at

which time the petitioner was refused a license until the Florida revocation was cleared. On 26 September 1968 the petitioner filed a petition in Wake County Superior Court under G.S. 20-25 seeking a review of Department's action. On 14 November 1968 a hearing was held before Judge Canaday, who heard testimony and examined into the facts of the case. Judge Canaday found as a fact that the petitioner had answered one of the questions in his application falsely by stating that he had never had an operator's license cancelled, denied, revoked or suspended. It was, therefore, concluded by Judge Canaday that Operator's License #2706086 was properly cancelled under the provisions of G.S. 20-15. It was further concluded that Department was "precluded from issuing to petitioner a motor vehicle operator's license by the provisions of N.C.G.S. 20-9(f), his driving privileges being revoked in the State of Florida for a period of five years for a third conviction of operating a motor vehicle while under the influence of intoxicating beverage effective as of 1 August 1966." Judge Canaday then denied the petition, affirmed the action of Department and refused to issue an operator's license. The petitioner excepted and appealed to the Court of Appeals.

Attorney General Robert B. Morgan by Assistant Attorney General William W. Melvin and Staff Attorney T. Buie Costen for defendant appellee.

Vaughan S. Winborne and Gilbert B. Swindell by Vaughan S. Winborne for petitioner appellant.

CAMPBELL, J.

The petitioner raises three questions on this appeal: (1) Was it proper for the trial court to admit and consider evidence pertaining to the false statement which was made in the application for a North Carolina operator's license? (2) Did the trial court err in sustaining the action of Department which had cancelled Operator's License #2706086 until the Florida revocation was cleared? (3) Was it error for Department to apply the Florida period of revocation for the offense of operating a motor vehicle while under the influence of intoxicating beverages instead of the North Carolina period of revocation?

[1] The petitioner's first contention is that it was improper for the trial court to consider any false statement in the application since his petition contained no allegation pertaining to such a statement. Under G.S. 20-25 it is proper for the trial judge "to take testimony and examine into the facts of the case, and to determine

whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of [G.S. 20-15]." In the case of *In re Revocation of License of Wright,* 228 N.C. 301, 45 S.E. 2d 370, *aff'd on rehearing,* 228 N.C. 584, 46 S.E. 2d 696, Justice Barnhill (later Chief Justice) stated:

> "Upon the filing of a petition for review, it is the duty of the judge, after notice to the department, 'to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license under the provisions of this article.' G.S. 20-25. This is more than a review as upon a writ of *certiorari.* It is a rehearing *de novo,* and the judge is not bound by the findings of fact or the conclusions of law made by the department. Else why 'take testimony,' 'examine into the facts,' and 'determine' the question at issue?"

In the instant case the trial judge found that the petitioner answered the second question of the application falsely and that the operator's license issued by Department pursuant to such application was, therefore, properly cancelled under the provisions of G.S. 20-15. That statute provides:

> "The Department shall have authority to cancel any operator's or chauffeur's license upon determining that the licensee was not entitled to the issuance thereof hereunder, or that said licensee failed to give the required or correct information in his application, or committed fraud in making such application."

The first contention is without merit and the first question is answered in the affirmative.

[2] The petitioner's second contention is that it was error for the trial court to sustain the action of Department in cancelling his North Carolina operator's license until the Florida revocation was cleared, because the State of Florida had not properly revoked his Florida operator's license. In support of this argument, the petitioner relies upon *In re Donnelly,* 260 N.C. 375, 132 S.E. 2d 904, and *In re Revocation of License of Wright, supra.* However, these cases are readily distinguishable from the instant case, which involves a resident of Florida whose Florida operator's license was revoked by the State of Florida as a result of an offense committed in Florida. Both *Donnelly* and *Wright* involved North Carolina residents who were licensed by North Carolina and who had been charged with criminal offenses in South Carolina. The Supreme Court held that since no notice of any hearing in South Carolina was given and since the

monetary deposits were forfeited without due process of law, there were no convictions sufficient to justify the suspensions of the North Carolina operator's licenses. Justice Barnhill pointed out that:

> "The judgment that the bond or bail has been forfeited must be entered in the court and in the cause in which it was filed. . . .
>
> In the ordinary case the condition is not broken by nonappearance generally, to be proved by any evidence, but only by nonappearance in answer to a call, to be proved by an entry made on the minutes of the court and returned as a part of the proceeding. . . . The call can only be made and a judgment of forfeiture entered in a pending cause and by the judicial officer having jurisdiction thereof." *In re Revocation of License of Wright, supra.*

In the instant case, the record reveals that the petitioner and his bail bond company were called in open court and that a court order was entered forfeiting the bond.

In *Donnelly* it was pointed out that North Carolina and South Carolina have different views in respect to the suspension of an operator's license upon the forfeiture of a bond. The Supreme Court there stated:

> "[The North Carolina Commissioner of Motor Vehicles] implies that the opinion of the South Carolina Court in *Langford* [223 S.C. 20, 73 S.E. 2d 854], as to the validity of the forfeiture of bail when no warrant has been served, is binding on this Court in the case at bar. We are not dealing here with the South Carolina statute authorizing the suspension of driver's license upon forfeiture of bail. We are concerned only with the force and effect of the North Carolina statute. . . ."

However, in the instant case, we are not concerned with the suspension of a North Carolina operator's license resulting from an offense committed in another state. We are concerned with a Florida resident whose Florida operator's license was revoked by the State of Florida as a result of an offense committed in Florida. Even if it should be conceded that the order of forfeiture in the Florida court did not comply with due process under the laws of North Carolina, it nevertheless complied with due process under the laws of Florida. Therefore, the Florida operator's license was in a state of suspension when the petitioner applied for a North Carolina operator's license.

[3] G.S. 20-9(f) provides:

> "The Department shall not issue an operator's or chauffeur's

license to any person whose license or driving privilege is in a state of suspension or revocation in any jurisdiction, if the acts or things upon which the suspension or revocation in such other jurisdiction was based would constitute lawful grounds for suspension or revocation in this State had those acts or things been done or committed in this State."

In this State the revocation of a driver's license is mandatory whenever it is made to appear that the licensee has been found guilty of "[d]riving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug." G.S. 20-17(2). It follows that Judge Canaday was correct in holding that Department is precluded from issuing an operator's license to the petitioner by the provisions of G.S. 20-9(f).

This contention is without merit and the second question is answered in the negative.

[4] The petitioner's third contention is that Department must apply the North Carolina period of revocation for the offense of operating a motor vehicle while under the influence of intoxicating beverages instead of the Florida period of revocation. There is no merit in this position since the petitioner was a resident of Florida and, therefore, subject to and controlled by the laws of that State at the time the offense was committed. Under these circumstances, G.S. 20-9(f) is the correct statute to apply.

This contention is without merit and the third question is answered in the negative.

The judgment below is

Affirmed.

PARKER and MORRIS, JJ., concur.

ELECTRO LIFT, INCORPORATED v. MILLER EQUIPMENT COMPANY
No. 6SSC170

(Filed 2 April 1969)

1. Contracts § 18— modification of a contract

Parties to a contract may, by mutual consent, agree to change its terms, but to be effective as a modification, the new agreement must possess all the elements necessary to form a contract.

2. Contracts § 18— parol modification of a contract

A written contract may ordinarily be modified by a subsequent parol agreement which may be express or implied by conduct of the parties.

3. Contracts § 18— modification of a contract — mutual consent

Mutual consent is as much a requisite in effecting a contractual modification as it is in the initial creation of the contract.

4. Contracts § 18— modification of a contract — burden of proof

In an action upon a contract, where the parties by stipulation establish the terms of the original contract, defendant who contends the contract has been modified has the burden to show such modification.

5. Contracts § 18— modification of a contract — sufficiency of evidence

In this action upon a contract for the sale of a hoist and trolley which the contract specified should operate on a monorail with an eight-foot radius curve, defendant's evidence *is held* insufficient to permit submission to the jury of any issue as to whether the contract had been modified to change the specifications of the trolley so that it would operate on a monorail with a four-foot radius curve where it shows only that a drawing of a monorail with a four-foot radius curve was sent to plaintiff by the monorail company for the purpose of giving plaintiff information as to the electrical connections needed on the trolley, and that the monorail company catalog showed the company's standard monorail to have a four-foot radius curve, the evidence failing to show that defendant had requested such a change in the trolley specifications or that plaintiff had assented thereto.

6. Contracts § 25; Trial § 41— issues submitted to jury — pleadings and evidence

In this action upon a contract, the trial court did not err in refusing to submit the issues stipulated by the parties as arising on their pleadings where such issues were not supported by competent evidence.

7. Contracts § 25— issues submitted to jury

Where the parties stipulated the price and terms of the contract sued upon and there was insufficient evidence that the contract had been modified as contended by defendant, the trial court properly submitted only one issue as to what amount, if any, plaintiff was entitled to recover from the defendant.

8. Contracts § 28— peremptory instruction

In this action upon a contract, the trial court was correct in giving the jury a peremptory instruction in plaintiff's favor where all the evidence tended to establish performance of the contract by plaintiff in accordance with its terms and breach by defendant.

9. Contracts § 28— form of peremptory instruction

In this action for the balance allegedly due under the terms of a contract, the court correctly instructed the jury that if they believed the evidence and found by its greater weight the facts to be as all the evidence tended to show, the issue of damages should be answered in the amount

claimed by plaintiff to be due under the contract, but if the jury did not believe the evidence, it would be their duty "to answer the issue in some lesser amount or nothing," since even if the jury believed the evidence tending to show plaintiff's performance of the contract and defendant's breach thereof, the amount of plaintiff's damages was for jury determination from the evidence.

10. Contracts § 28; Trial § 36— expression of opinion in instruction

In this action upon a contract, the trial judge did not express an opinion in violation of G.S. 1-180 when he asked plaintiff's attorney: "What about demand of payment on this? You'd better ask him a question on that."

APPEAL by defendant from *Exum, J.*, January 1968 Session of ROWAN Superior Court.

Plaintiff's complaint alleged: Plaintiff sold and delivered to defendant a hoist and a motor driven trolley for an agreed price of $4,950.00; thereafter by agreement plaintiff credited defendant $1,400.00 for return of the trolley; plaintiff has demanded payment of the balance of $3,550.00 but defendant has refused to pay the same. Defendant answered, admitting the purchase contract, but denied that plaintiff had supplied defendant the type of hoist and trolley agreed upon. As a counterclaim, defendant alleged: Defendant ordered the hoist and trolley custom-built according to specifications supplied to plaintiff by defendant from American Monorail Company, for use in construction of a kiln which defendant was constructing for a customer in Ohio; the trolley was to operate on an elevated monorail and was to be so constructed that, in moving back and forth along the track, it could turn two curves around the kiln structure, each curve having a radius of four feet; the trolley delivered by the defendant did not conform to these specifications in that it would not turn such curves on the monorail; as result of plaintiff's failure to supply defendant with the equipment as specified, plaintiff had caused defendant to breach its contract with its Ohio customer, thereby causing loses to defendant of $33,384.06, for which amount defendant prayed judgment against plaintiff. Plaintiff replied to the counterclaim, alleging that the original order placed by defendant with plaintiff had expressly specified that the hoist and trolley should operate on a track with an eight-foot radius curve and that defendant had at no time advised plaintiff of any change in the curvature of the track.

The first trial of this action resulted in verdict and judgment for plaintiff. On appeal to the Supreme Court, judgment was reversed and defendant was awarded a new trial for error in the form of the

peremptory instruction given by the trial judge. *Electro Lift v. Equipment Co.*, 270 N.C. 433, 154 S.E. 2d 465.

On the second trial the parties stipulated: The equipment originally agreed to be bought and sold between the parties was as described in a written purchase order, dated 4 August 1962, issued by defendant to plaintiff, which specified that the trolley was to travel upon a track "and to turn approximately 8' radius;" thereafter certain specified changes in the contract were made by mutual agreement; (the specified contract changes which the parties agreed in the stipulation had been made did not include any change in the curvature of the track, though it was stipulated that defendant contended other changes were made in the contract); the trolley as delivered by plaintiff to defendant had been designed to operate on curves with a radius of not less than eight feet and would not negotiate curves with a four-foot radius.

Upon the second trial plaintiff offered in evidence the original written purchase order signed by defendant and evidence tending to show: That while plaintiff had received from defendant and had agreed to certain other changes in specifications for the equipment, plaintiff had never received from defendant any change in specifications as to curvature of the track that the trolley was to be designed to negotiate; that plaintiff company did not manufacture a trolley that would negotiate a curve with a four-foot radius; that after the hoist and trolley had been delivered by plaintiff and it had been discovered that the track upon which they were to operate actually had four-foot, rather than eight-foot, radius curves, plaintiff had authorized and had accepted return of the trolley and had given defendant full credit therefor, but defendant had retained the hoist and had never made any payment, though demand for such payment had been made.

Defendant, in support of its position that the parties had agreed upon a change in specifications of the trolley requiring that it be designed to negotiate a curve with a four-foot, rather than with an eight-foot, radius, introduced in evidence a copy of a drawing which had been sent to plaintiff by American Monorail Company at the request of the plaintiff for information concerning location of electrification on the monorail. This drawing at two places showed curves in the track with a radius of four feet. Defendant also introduced in evidence a page from the American Monorail Company catalog showing the standard track curve as used by American Monorail to have a radius of four feet.

At the close of all evidence, the trial court allowed plaintiff's mo-

tion of nonsuit as to defendant's counterclaim, and submitted to the jury one issue: "What amount, if any, is the plaintiff entitled to recover from the defendant?" Upon peremptory instructions the jury answered the issue in the amount of $3,550.00 with interest, and from judgment thereon in plaintiff's favor, defendant appealed.

Benjamin D. McCubbins, and George L. Burke, Jr., for plaintiff appellee.

Graham M. Carlton for defendant appellant.

PARKER, J.

The parties at the trial stipulated execution of their original contract by which plaintiff had agreed to sell and defendant to buy certain specified equipment. They stipulated that the equipment originally agreed on between them was to be as described in defendant's written purchase order dated 4 August 1962. This writing described a motor driven trolley designed to travel at a specified speed upon a track "and to turn approximately 8' radius." The present controversy centers on whether this particular original contract specification was thereafter effectively modified.

[1-3] Parties to a contract may, by mutual consent, agree to change its terms. Furthermore, a written contract may ordinarily be modified by a subsequent parol agreement and such subsequent agreement may be either express or implied by conduct of the parties. *Whitehurst v. FCX Fruit and Vegetable Service,* 224 N.C. 628, 32 S.E. 2d 34. However, to be effective as a modification, the new agreement, whatever its form and however evidenced, must possess all elements necessary to form a contract. Mutual consent is as much a requisite in effecting a contractual modification as it is in the initial creation of the contract. 17 Am. Jur. 2d, Contracts, § 465, p. 934.

[4, 5] In the present case, the terms of the original contract between the parties having been established by their stipulation, the burden was on the defendant to show the modification which it contended had been made. *Russell v. Hardwood Co.,* 200 N.C. 210, 156 S.E. 492. In this connection, the evidence, even when viewed in the light most favorable to defendant's contention and resolving all conflicts therein in defendant's favor, was in our opinion insufficient to permit submission to the jury of any issue as to whether the contract had been modified in the manner contended for by defendant. The American Monorail Company catalog, while indicating the "standard curve" of its track as having a radius of four feet, itself

referred to the possibility of tracks with curves varying from those shown in the catalog. The drawing which was supplied by American Monorail Company to the plaintiff was furnished by that company solely for the purpose of giving plaintiff information as to the electrical connections to be installed on the trolley. While a very careful examination of other details of the drawing would have indicated a track curve with a four-foot radius, this drawing, supplied to plaintiff by a third party for a totally different purpose, was wholly insufficient to evidence a request by the defendant for a change in specifications of the trolley, which specifications had been clearly and expressly agreed upon between the parties in writing. Still less was it any evidence of consent by the plaintiff to such a change. There being no other evidence to support defendant's contention that the contract had been modified by mutual consent in the manner contended for, plaintiff's motion of nonsuit of defendant's counterclaim was properly allowed.

While, in considering the question raised by plaintiff's motion to nonsuit the defendant's counterclaim, we have ignored conflicts in defendant's testimony, it is of interest to note that defendant itself apparently never considered American Monorail Company as having been authorized to act for defendant to give instructions to plaintiff as to any changes in the contract between plaintiff and defendant. Defendant admitted that on 25 April 1963, more than five months after plaintiff had manufactured and delivered the hoist and trolley to defendant, the defendant had written to American Monorail Company a letter stating: "In our original discussion we ordered eight foot radius tracks. You supplied four foot radius tracks which was an error on your part." Furthermore, on 5 August 1965, approximately three years after defendant had issued its original written purchase order to the plaintiff, the president of defendant company verified a complaint in a civil action which defendant brought against American Monorail Company in which it was alleged that the Monorail Company had agreed to supply rails "custom built with turns having a 8-foot radius . . ." In view of these statements, it is difficult to see how the defendant can now contend that it had ever requested the change in its contract with plaintiff in the manner now contended for or that plaintiff had ever assented thereto.

[6-9] At the trial the parties stipulated as to the issues arising on their pleadings. At the conclusion of the evidence the trial court declined to submit these issues, but submitted only one issue as to what amount of damages, if any, plaintiff was entitled to recover from the defendant. In this there was no error. To justify submission of an

issue it must not only arise on the pleadings, but must be supported by competent evidence. *Gunter v. Winders,* 256 N.C. 263, 123 S.E. 2d 475. In the present case the price and terms of the contract having been stipulated and there being no sufficient evidence that the contract had been modified as contended by defendant, the sole issue remaining was as to the amount which plaintiff was entitled to recover of defendant. Furthermore, since all of the evidence tended to establish performance of the contract by plaintiff in accordance with its terms and breach by defendant, the trial court was correct in giving the jury a peremptory instruction in plaintiff's favor. In so doing the court correctly instructed the jury that if they believed the evidence and found by its greater weight the facts to be as all the evidence tended to show, it would be their duty to answer the issue submitted in the amount of $3,550.00, with interest, but if they did not believe the evidence it would be their duty "to answer the issue in some lesser amount or nothing, depending on how you find it." Appellant contends this form of instruction was error, in that if a peremptory instruction was proper at all, the trial court could only confine the jury to two possible alternatives, either to answer the issue $3,550.00 or nothing. This contention is without merit. If the jury believed the evidence tending to show plaintiff's performance of the contract and defendant's breach thereof, the amount of plaintiff's damages was still for jury determination from the evidence. For instance, the evidence showed plaintiff had allowed defendant a $1,400.00 credit for return of the trolley, but it was still for the jury to determine if this was the proper amount.

[10] Defendant also contends that the trial judge committed error when he asked plaintiff's attorney: "What about demand of payment on this? You'd better ask him a question on that." Defendant contends this amounted to an expression of the court's opinion in violation of G.S. 1-180. We fail to see how it could be inferred from the question asked that the trial judge was thereby expressing any opinion to the jury and find no prejudicial error in the asking of this question. We have examined all remaining assignments of error and find the trial was free from any error prejudicial to defendant.

The judgment appealed from is

Affirmed.

MALLARD, C.J., and BROCK, J., concur.

STATE OF NORTH CAROLINA v. F. R. COOPER

No. 6916SC79

(Filed 2 April 1969)

1. Criminal Law § 155— time of docketing record on appeal

In the absence of an order extending the time for docketing, the record on appeal must be docketed in the Court of Appeals within ninety days after the date of the judgment appealed from. Rule of Practice in the Court of Appeals No. 5.

2. Criminal Law § 146— nature of appellate jurisdiction — failure to comply with rules

An appeal may be dismissed if the Rules of the Court of Appeals are not complied with. Rule of Practice in the Court of Appeals No. 48.

3. Criminal Law § 156— belated appeal treated as petition for certiorari

Although appeal did not comply with rule relating to time of docketing case on appeal, the Court of Appeals, in the interest of justice to the defendant, treats the record and defendant's brief as a petition for writ of certiorari, allows it and considers the case on its merits where there appears to be error in the trial.

4. Criminal Law § 161— appeal as exception to the judgment

The appeal itself is an exception to the judgment.

5. Arrest and Bail § 6— resisting arrest — sufficiency of evidence

Evidence *held* sufficient to be submitted to the jury as to defendant's guilt of resisting an officer in making an arrest.

6. Arrest and Bail § 6— duty of person arrested

When a person has been lawfully arrested by a lawful officer and understands that he is under arrest, it is his duty to submit peaceably to the arrest.

7. Arrest and Bail § 4— Town of Maxton — authority of officers to serve warrants

The Chief of Police of the Town of Maxton and a deputy sheriff of Robeson County are lawful officers and as such are authorized to serve warrants in the Town of Maxton issued by a magistrate. G.S. 160-21.

8. Criminal Law § 113— instructions — statement constituting expression of opinion

In prosecution charging resisting lawful arrest in violation of G.S. 14-223, statement of the trial court during the instructions that "the offense charged here was committed in violation of General Statute 14-223" *is held* to constitute an expression of opinion. G.S. 1-180.

APPEAL by defendant from *Bailey, J.*, 15 July 1968 Session of Superior Court of ROBESON County.

In case #68 CrD 7154 the defendant was charged in a warrant with the crime of simple assault upon O. W. Altman on 27 June 1968. The defendant pleaded guilty in the District Court and from the judgment of imprisonment for a term of thirty days, appealed to the Superior Court.

In case #68 CrD 7155 the defendant was charged in a warrant with the crime of resisting arrest in violation of G.S. 14-223 on 27 June 1968. The defendant pleaded not guilty in the District Court, was found guilty, and from the judgment of imprisonment for a term of six months, appealed to the Superior Court.

The plea, verdict and judgment in the Superior Court appear in the record as follows:

> "The defendant appeared in Court with his privately employed counsel and through his attorney entered a plea of guilty to the charge of simple assault.
>
> To the charge of resisting arrest the defendant, through his counsel, entered a plea of not guilty.
>
> The jury returned a verdict of guilty of resisting arrest as charged in the warrant and the judgment of the court is that the defendant be confined in the common jail of Robeson County for a period of seven months, (EXCEPTION #1), to run at the expiration of the sentence imposed in 68 CrD 7154, which sentence states that the defendant be confined in the common jail of Robeson County for 30 days and assigned to work under the State Department of Correction.
>
> It is the recommendation of the court that the defendant be granted the option of serving the sentence imposed herein under the Work Release Program as provided by law.
>
> Commitment not to issue until Thursday, July 18, 1968, noon.
>
> This 15th day of July, 1968.
>
> /s/ JAMES H. POU BAILEY
> Judge Presiding"

Immediately following the above plea, verdict and judgment, the following appeal entries appear:

> "The defendant in open court gives notice of appeal to the Court of Appeals. Defendant is allowed fifty days within which to make up and serve statement of case on appeal. The Solicitor is allowed 20 days thereafter in which to make up and serve his countercase. Appeal bond fixed in the amount of $200.00; ap-

pearance bond fixed in the amount of $1,000., the defendant to be permitted to make his own appearance bond.

Execution not to issue the Monday following the determination of his appeal in case #68 CrD 7155, Monday following an appeal he may perfect and not prosecute.

This 16 July, 1968.

/s/ JAMES H. POU BAILEY
Judge Presiding"

In the record under the title organization of the court there appears the following:

"Be it remembered that on July 15, 1968, there was begun and held at the court house in Lumberton, North Carolina, a regular term of the Superior Court for the aforesaid County, it being a two (2) week term for the trial of Criminal cases.

Court opened at 10:00 o'clock with the Honorable W. H. S. Burgwyn, one of the (Emergency) Judges of North Carolina, present and presiding to hold the first week of said two (2) week session by virtue of a commission duly issued to him by R. Hunt Parker, Chief Justice of the Supreme Court of North Carolina, which is on file in this office.

John B. Regan, Solicitor of Solicitoral (sic) District 9-A of North Carolina, and Joe Freeman Britt, Assistant Solicitor, is present and representing the State.

Thereafter, on the afternoon of July 15, 1968, the case of F. R. Cooper came on for trial before the Honorable J. H. Pou Bailey, Judge Presiding."

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

Chambers, Stein, Ferguson & Lanning by James E. Ferguson, II, for defendant appellant.

MALLARD, C.J.

It is not clear from the above what judge was assigned to hold the session of Superior Court of Robeson County on 15 July 1968. We have accordingly directed the Clerk of the Superior Court of Robeson County to certify what judge was assigned to hold the session of Superior Court of Robeson County on 15 July 1968. From the Certificate of the Clerk of Superior Court of Robeson County,

it is ascertained that Judge W. H. S. Burgwyn held the first week of the two-week session of Superior Court beginning on 8 July 1968. Judge James H. Pou Bailey held the second week which began on 15 July 1968.

[1-3] Notice of appeal was given on 16 July 1968 from the judgment imposed on 15 July 1968. The record on appeal was not docketed until 9 December 1968. There is no order extending the time for docketing the record on appeal. Rule 5 of the Rules of Practice in the Court of Appeals requires, in the absence of an order extending the time for docketing, that the record on appeal be docketed within ninety days after the date of the judgment appealed from. Rule 48 of the Rules of Practice in the Court of Appeals permits an appeal to be dismissed if the Rules are not complied with. Counsel practicing in the appellate courts, in order to protect the rights of their clients and to avoid embarrassment to themselves, should familiarize themselves with and comply with the Rules. *State v. Farrell,* 3 N.C. App. 196, 164 S.E. 2d 388. In this case there appears to be error in the trial of one of the cases. We have, therefore, in the interest of justice to the defendant, treated the record and defendant's brief as a petition for writ of *certiorari,* allowed it, and considered the case on its merits. Separate consideration of each case is necessary for decision in this case.

SIMPLE ASSAULT CASE #68 CrD 7154

[4] The warrant, the plea and the judgment in this case charging simple assault are all in the record. There is no assignment of error or exception with respect to this case charging simple assault other than the exception provided by law to the judgment upon the giving of notice of appeal. The appeal itself is an exception to the judgment. *State v. Ayscue,* 240 N.C. 196, 81 S.E. 2d 403; *London v. London,* 271 N.C. 568, 157 S.E. 2d 90. In fact, defendant's counsel, upon the oral argument, admits that the defendant has abandoned the appeal as to the simple assault case. The record reveals that the warrant properly charges the offense of simple assault. The defendant pleaded guilty to the charge of simple assault. The sentence of thirty days imprisonment is permitted by statute. G.S. 14-33. We find no error in the trial of the defendant on the charge of simple assault.

RESISTING ARREST CASE #68 CrD 7155

The defendant argues that the trial court committed error in the trial of the resisting arrest case as follows:

1. By imposing a greater sentence in the Superior Court than was imposed in the District Court.

2. By admitting into evidence, over defendant's objections, evidence which defendant contends was "conclusionary, prejudicial and inflammatory."

3. By denying defendant's motion for nonsuit.

4. By stating an opinion in the charge to the jury and by failing to define the law as required by G.S. 1-180.

It is not necessary for decision in this case to rule on the first contention of the defendant that upon an appeal it is error to impose a greater sentence in Superior Court than was imposed in District Court. Defendant admits that the Supreme Court of North Carolina and this Court have consistently held against this contention. See *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371, and the cases cited therein.

Since the questions relating to the admissibility of the evidence may not recur on a new trial, we do not rule on the second contention of the defendant with respect to the admission of evidence.

[5] The evidence of the State taken in the light most favorable to it tends to show that R. W. Fisher was Chief of Police of the Town of Maxton on 15 June 1968. Defendant lived in Maxton and had a place of business there. The police officer, accompanied by a deputy sheriff, had a warrant for the arrest of the defendant and went to the defendant's place of business on this occasion. In the warrant the defendant was charged with an assault on a Mr. Altman. The defendant was given a copy of the warrant. After reading the warrant to him, the defendant was told by the officer that he was under arrest and that it would be necessary for the defendant to go with him to the magistrate to post bond. The defendant said, "I am not going any damn place." The defendant repeatedly refused to go with the officers. After the officers had placed their hands on the defendant in order to take the defendant with them, he said to the deputy sheriff, "You big black son of a bitch, take your hand off me." The defendant hit the officers with his fist, his elbows and kicked them with his feet. One of the defendant's own witnesses testified he saw the defendant "assault the other officer in the face and chest, after he had kicked officer Fisher."

[6] When a person has been lawfully arrested by a lawful officer and understands that he is under arrest, it is his duty to submit peaceably to the arrest. *State v. Horner,* 139 N.C. 603, 52 S.E. 136.

The words "submit peaceably to arrest" imply the yielding to the authority of a lawful officer, after being lawfully arrested.

[7] The Chief of Police of the Town of Maxton and a deputy sheriff of Robeson County are lawful officers and as such are authorized to serve warrants in the Town of Maxton issued by a magistrate. G.S. 160-21.

[5] There was ample evidence of the defendant's guilt to require the submission of this case to the jury, and the defendant's motion for judgment of nonsuit was properly overruled.

[8] The defendant contends and we agree that the trial judge committed error and expressed an opinion when, as the record reveals, he stated in the charge, "The offense charged here was committed in violation of General Statute 14-223." G.S. 1-180 forbids the expression of an opinion by the trial judge. The remainder of the charge clearly reveals that the trial judge did not intend to state such an opinion; however, we are bound by the record which the solicitor stipulated "is a true and correct copy of the transcript of the record and evidence in this case."

In the trial on the charge of simple assault, we find

No error.

In the trial on the charge of resisting arrest, for the error pointed out, there must be a

New trial.

BRITT and PARKER, JJ., concur.

STATE HIGHWAY COMMISSION v. NORTH CAROLINA REALTY CORPORATION; JOHN B. PITTMAN, TRUSTEE; AND SOUTHERN NATIONAL BANK OF NORTH CAROLINA

No. 6920SC92

(Filed 2 April 1969)

1. Appeal and Error § 26— exception to signing of the judgment

An exception to the signing of the judgment presents the face of the record proper for review.

2. Eminent Domain § 7— highway condemnation

In this highway condemnation proceeding, use of the terms "access is partially controlled" in the pleadings, "control of access over a portion"

in the consent order by which it was agreed that only the issue of damages would be submitted to the jury, and "Controlled-Access facility" in the judge's charge, without distinguishing them, may have confused the jury as to what access rights were being denied.

3. Eminent Domain § 2— right of access

The owner of land abutting a highway has a special right of easement in the public road for access purposes, this being a property right which cannot be damaged or taken from him without due compensation.

4. Eminent Domain § 2— right of access

The statute providing that abutting landowners are not entitled to access to new highway locations recognizes that the denial of such access constitutes the taking of a property right. G.S. 136-89.52.

5. Eminent Domain § 7— instructions — compensation for denial of access to new highway

In a highway condemnation action, the court erred in instructing the jury that the denial of rights of access to a new highway location should be considered in determining general damages, but that "the owners of property abutting new highway locations are not entitled, as a matter of right, to access to such new highway and are not entitled to compensation for a taking of access rights, as such, to the new highway since no such rights ever existed," the denial of such access constituting the taking of a property right for which the owner is entitled to compensation.

APPEAL by defendant North Carolina Realty Corporation from *Seay, J.*, October 1968 Civil Session of Superior Court of RICHMOND County.

Plaintiff instituted this action on 6 November 1967 for the appropriation for highway purposes of the fee simple title to 13.36 acres of a 117.19-acre tract of land located near the City of Rockingham and owned by defendant North Carolina Realty Corporation (Realty Corporation).

The appropriation was for the purpose of a right of way for State Highway Project 8.1666501, Richmond County; known generally as U. S. Highway #220 By-Pass around Rockingham.

The parties consented to an order dated 30 October 1968 in which it is found, among other things, that "all issues raised by the pleadings are herein determined, except the issue of just compensation."

The court submitted and the jury answered the issue as follows:

"What sum are the defendants entitled to recover of the plaintiff, State Highway Commission, for the appropriation of a portion of their property for highway purposes?

ANSWER: $7,348.00."

Upon the entry of judgment in accordance with the verdict, defendant Realty Corporation excepted and appealed.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Trial Attorney Claude W. Harris for plaintiff appellee.

Jones and Deane by W. R. Jones for defendant North Carolina Realty Corporation appellant.

MALLARD, C.J.

[1] Defendant excepted to the signing of the judgment. In 1 Strong, N. C. Index 2d, Appeal and Error, § 26, the rule is stated as follows: "An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper. A sole exception to the judgment or to the signing of the judgment likewise presents the face of the record proper for review."

In an attachment to the complaint stating the interest or estate taken as required by G.S. 136-103, with respect to control of access, it is alleged:

> "Access is partially controlled under the police power of the Highway Commission as is indicated by control-of-access (C/A) lines on the plan sheet attached hereto and there will be no access to, from, or across the areas within the control-of-access (C/A) lines to the main traffic lanes, ramps, or approaches from the property abutting said highway right of way except by way of the reasonable and adequate access provided at those points within the control-of-access lines as indicated on the plan sheet attached hereto."

It is noted that the allegation is that access is *partially controlled* as shown on a "plan sheet" attached, but upon an examination of the record, there is no "plan sheet" included. The allegation is therefore, on this record, indefinite and uncertain as to what is meant by the term "access is partially controlled."

In the consent order of 30 October 1968 there is a reference in paragraph two as to the control of access, in which it is stated:

> "That the plaintiff is an agency of the State of North Carolina, and, on the 6th day of November, 1967, appropriated fee simple title to right of way for all purposes for which the plaintiff is authorized by law to subject the same with control of access over a portion of the above-referred to property of defendants for the construction of State Highway Project 8.1666501, said

property appropriated being described on a map filed in this action."

This order states that the control of access is over a portion of the property referred to, but it does not state on what portion of the property; however, it does state that the property appropriated is being described on a "map filed in this action." This "map filed in this action" was not identified as such in the record.

Then in paragraph three of this same order it is stated that "the plat filed by the plaintiff in this action" is a correct portrayal of what it purports to show and is a fair and accurate representation of the property affected by the appropriation and the property and property rights appropriated. "The plat filed by the plaintiff in this action" was not identified as such in the record.

In the introduction of evidence the plaintiff, after all the witnesses had testified without objection and without other identification, offered in evidence the "Court Map marked Court's Exhibit 'A' ", and this is the only plan, map, or plat appearing as an exhibit in the record in this Court. This appears to be a map of the entire property, including that portion which was taken. All three of the copies of the exhibit filed also fit the description of the "plat" described in paragraph three of the consent order above mentioned.

[2] The pleadings referred to a "plan sheet." In paragraph two the consent order refers to "a map filed in this action," and paragraph three of the consent order refers to "the plat filed by the plaintiff." The judgment states that a copy of the plat showing the right of way and control of access appropriated has been filed as a part of the pleadings in this action. On some of the exhibits filed here, there appear in several places the letters "C/A" within a circle on or near the boundary lines of the portion shown to be taken, and at one place there appears "BEGIN C/A"; however, this does not appear on one of the copies of the exhibit filed here. There were three copies of a map filed as an exhibit in this Court — two of them are certified to be "a true copy." The legend on these two reads in part "Surveyed 12/27/67" and on the bottom right-hand corner they are marked "Revision 9/10/68." These two are identical. One of the copies of a map filed as an exhibit here is not certified to be a true copy. The legend on it reads in part "Surveyed 12/27/67" and on the bottom right-hand corner it is marked "Revision 1/31/68," and on this map the C/A symbols are located at different points along Midway Road than are the C/A symbols on the other two maps. The record reveals that the complaint was filed 6 November 1967, which was over a month before the survey on 27 December 1967.

There is also no legend on these copies of exhibits or maps indicating what the encircled letters C/A mean. We assume, however, that they indicate control-of-access as is indicated on the attachment to the complaint relating to a "plan sheet." If so, this control of access extends for some unknown distance on Midway Road, the actual distance depending upon which copy of the exhibit filed here is being used. The record is not clear as to what map the witnesses were referring in their testimony. The "Court map marked Court's Exhibit 'A'" was not offered in evidence until after all of the witnesses had testified. We think that the use of the terms "access is partially controlled" in the pleadings, "control of access over a portion" in the consent order, and "Controlled-Access facility" in the judge's charge, without distinguishing them, may have confused the jury as to what access rights were being denied.

[5] Appellant's exception no. 20 is directed to a portion of the charge. In order to understand this objection and exception, it is necessary to state a portion of the charge given before and after the portion excepted to. The portion excepted to is between the letters (A) and (B) in the following excerpt from the charge:

> "In this action the appropriation is for the construction of a controlled-access highway along a new route or location through defendants' property. I charge you that you shall consider the effect that the appropriation of the property for use as a controlled-access highway may have on the fair market value of the defendants' remaining property immediately after the taking, and, in so doing, the denial of rights of access to the new highway location shall be considered in determining general damages. (A) However, in so doing, I charge you that the owners of property abutting new highway locations are not entitled, as a matter of right, to access to such new highway and are not entitled to compensation for a taking of access rights, as such, to the new highway since no such rights ever existed. (B) As I have said, you shall take into consideration in arriving at the fair market value of the remaining land immediately after the taking in effect (sic) which denial of access to the new highway has upon the fair market value of the remainder immediately after the taking."

G.S. 136-89.52, enacted in 1957, reads in part as follows: "Along new highway locations abutting property owners shall not be entitled, as a matter of right, to access to such new locations; however, the denial of such rights of access shall be considered in determining general damages."

In the first two sentences in the above-quoted portion of the charge the judge instructed the jury that they were to consider the denial of access rights as provided by this statute, and then added, "(h)owever, in so doing . . . the owners of property abutting new highway locations . . . are not entitled to compensation for a taking of access rights, as such, to the new highway since no such rights ever existed." The defendant contends that this was error.

[3-5] In the case of *Abdalla v. Highway Commission,* 261 N.C. 114, 134 S.E. 2d 81, the Supreme Court said:

> "It is generally recognized that the owner of land abutting a highway has a right beyond that which is enjoyed by the general public, a special right of easement in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation."

In the instant case, except for the provisions of G.S. 136-89.52, the defendant as the owner of the land abutting the new highway location had a special right of easement for access thereto beyond that enjoyed by the general public. Such special right has been held to be a property right, and this right is recognized in the statute which requires that the denial of such rights of access shall be considered in determining general damages. *Highway Commission v. Nuckles,* 271 N.C. 1, 155 S.E. 2d 772. The legislature in using the term "denial of such rights of access" recognized that there were such rights to be denied. Since the abutting landowner had such rights of access, a denial thereof is the equivalent of the taking thereof. We think that the instruction complained of and excepted to was prejudicial in that it tended to confuse the jury.

Defendant has other exceptions, but we do not deem it necessary to discuss them as they probably will not occur in a new trial.

New trial.

BRITT and PARKER, JJ., concur.

ARLENE N. ZACHARY v. SECURITY LIFE AND TRUST COMPANY AND QUENTIN R. ZACHARY, ADMINISTRATOR OF THE ESTATE OF JIMMY DARRELL ZACHARY, DECEASED

No. 6915SC182

(Filed 2 April 1969)

Insurance § 29— life insurance beneficiary — "surviving widow" — husband and wife separated under deed of separation

Plaintiff is entitled as "surviving widow" to the proceeds of a policy of life insurance taken out on the life of deceased to secure payment of a home mortgage loan, notwithstanding plaintiff and deceased had executed a deed of separation in which plaintiff released all her right, title and interest in the property and estate of deceased, where the deed of separation provided that deceased would convey to plaintiff his interest in the home and plaintiff would assume payment of the loan, deceased delivered to plaintiff a quitclaim deed to the home, the passbook in which the loan payments were recorded and the life insurance policy, and plaintiff made the monthly payment on the loan and paid the monthly premium on the insurance policy, the evidence showing that plaintiff was to have possession and ownership of the life insurance policy.

APPEAL by defendant Quentin R. Zachary (administrator), administrator of the estate of Jimmy Darrell Zachary (deceased), from *Hall, J.*, November 1968 Civil Session, ALAMANCE County Superior Court.

This civil action was instituted by Arlene N. Zachary (plaintiff) against Security Life and Trust Company (Security) and the administrator to recover the proceeds of a certain life insurance policy issued by Security on the life of deceased.

On 24 July 1964 the plaintiff and deceased were married in Alamance County, North Carolina. In July 1966 they purchased a house in Burlington, North Carolina, in connection with which they borrowed $16,500 from First Federal Savings & Loan Association of Burlington (First Federal). To represent this loan and to secure its repayment, the plaintiff and deceased executed a note and deed of trust upon their house. As additional security, First Federal was made beneficiary under a term life insurance policy in the amount of $16,500 which was taken out with Security on the life of deceased. This policy provided:

> "The amount payable upon the death of the Insured shall be payable to the beneficiary designated in Schedule I, to be applied by such beneficiary first toward payment of the loan referred to in the schedule, any balance to be paid by such beneficiary to the surviving widow or widower of the Insured if any, and if not, to the estate of the Insured. The payment of

> the proceeds of this contract to the beneficiary shall release the Company of any and all further liability hereunder."

The policy also provided for monthly insurance premium payments and for a monthly declining balance of insurance over a period of three hundred months as the amount of the loan from First Federal declined.

On 25 August 1967 the plaintiff and deceased separated, and on 31 August 1967 they entered into a deed of separation. This deed of separation provided, among other things, that deceased would execute and deliver to the plaintiff a deed conveying to her all of his right, title and interest in and to the house, and that she would assume the payment of the unpaid balance on the loan due First Federal. In compliance with this deed of separation, deceased executed and delivered a quitclaim deed to the plaintiff on 31 August 1967. This quitclaim deed conveyed to her all of his right, title and interest in and to the house. Deceased also delivered a passbook and the insurance policy to the plaintiff on the same date. In response to a question asked by counsel for the administrator, the plaintiff stated:

> "Yes, he signed over the house to me the day that the separation papers were signed and then I started over to the courthouse to file it, to have it registered, and he gave me the passbook and the insurance policy and told me that I would need those."

The monthly payments on the loan were recorded in this passbook, which had been issued by First Federal to the plaintiff and deceased. The passbook showed that the monthly payments of principal and interest would be $106, while the monthly life insurance premium would be $7, a total of $113 per month.

In compliance with the deed of separation, the plaintiff paid First Federal $113 on 1 September 1967. This amount represented the $106 monthly payment of principal and interest plus the $7 monthly premium on the life insurance policy.

During the first week of October 1967 the plaintiff sold the house, and in connection with this sale, she paid the entire balance of the loan due First Federal. After 5 November 1967 First Federal released and waived any and all rights to the policy since the balance had been paid in full.

Although deceased changed the beneficiaries in a life insurance policy other than the one involved in this litigation after the separation, no change was made in the policy in question from 25

August 1967 to 5 November 1967 when deceased was killed in an automobile accident. During this period of time, the plaintiff retained possession of this policy.

Subsequent to the institution of this civil action, Security deposited in the office of the Clerk of Superior Court of Alamance County the sum of $16,522.38, which represented the balance due on the policy as of 5 November 1967, plus the interest accruing to the date of deposit. Upon receipt of this deposit, an order was entered dismissing the plaintiff's action against Security. Therefore, the question for determination at the trial was whether the plaintiff or the estate of deceased was entitled to the insurance proceeds. The plaintiff and the administrator agreed that Judge Hall would hear the evidence, find the facts, make conclusions of law upon said facts and render a judgment accordingly.

Judge Hall found the facts to be as stated, *supra*. Upon such findings of fact, he concluded that the plaintiff was the surviving widow of deceased within the meaning of the insurance policy and that she was, therefore, entitled to the proceeds which Security had deposited with the Clerk of Superior Court. To these findings of fact and conclusions of law, the administrator excepted and appealed to this Court.

Ross, Wood & Dodge by Harold T. Dodge for plaintiff appellee.

Walker, Harris & Pierce by Herbert F. Pierce for Quentin R. Zachary, Administrator, defendant appellant.

CAMPBELL, J.

The administrator contends that the trial judge committed reversible error in failing to sustain his motion for judgment as of nonsuit because the evidence on behalf of the plaintiff did not establish that she was the surviving widow within the meaning of the insurance policy. He argues that the deed of separation is controlling and that the following language of the deed of separation conclusively establishes that the plaintiff was not the surviving widow within the terms and provisions of the insurance policy:

> "FIRST: That it shall be lawful at all times from and after the date of this Deed of Separation for the said husband and wife to live separate and apart from each other, and each of said parties shall be at full liberty to be employed by, live and associate with such persons as each may deem for his or her best interest and welfare, free from any and all authority, con-

> trol, interference or molestation of the other party, and to the same extent and in the same manner as if they had never been married."

He also relies upon the following provision of the deed of separation:

> "And for the consideration aforesaid, the said wife does hereby release and forever quitclaim unto the said husband all right, title, interest and estate which she now has or could hereafter acquire in and over the property and estate of her said husband, whether now owned or hereafter acquired, and contracts to well and truly abide by and perform this Deed of Separation on her part."

The insurance policy specifically provided:

> "The amount payable upon the death of the Insured shall be payable to the beneficiary designated in Schedule I, to be applied by such beneficiary first toward payment of the loan referred to in the schedule, any balance to be paid by such beneficiary to the surviving widow or widower of the Insured if any, and if not, to the estate of the Insured."

Since the loan had been paid in full and First Federal had relinquished any and all rights to the policy, the balance was to go "to the surviving widow" under this provision.

"Widow" is defined in Black's Law Dictionary, 4th Edition, as "A woman whose husband is dead, and who has not remarried." "Widow" is defined in Webster's Third New International Dictionary (1968) as "a woman who has lost her husband by death and has not since remarried." Although the plaintiff had separated from deceased, she was not divorced from him. Therefore, she clearly complies with these definitions of "widow". See *Supreme Council American Legion of Honor v. Smith,* 45 N.J.Eq. 466, 17 A. 770.

> "General expressions or clauses in a property settlement agreement between a husband and wife, however, are not to be construed as including an assignment or renunciation of expectancies, and a beneficiary therefore retains his status under an insurance policy if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take under an insurance contract of the other, and while the failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he does not wish to effect such a change, each case must be decided upon its own facts. . . .

> . . . A contract between husband and wife entered into in contemplation of divorce proceedings for the purpose of settling the question of alimony, according to which a stipulated sum was agreed to in consideration of which the wife released the husband from all claims set forth therein, and all other claims, real or imaginary, being solely for the purpose of settling the question of alimony, did not affect a contingent claim of the right of the wife as beneficiary under a life insurance policy, especially where it appeared that the husband eliminated his divorced wife as the beneficiary on certain policies but at the time such change was made did not change the beneficiary on the specific policy involved in the suit." 4 Couch on Insurance 2d, § 27:114, pp. 655, 656.

The plaintiff and deceased clearly demonstrated by their actions and conduct that deceased retained no interest in the insurance policy after 31 August 1967. As indicated, *supra,* the deed of separation provided that deceased would execute and deliver to the plaintiff a deed conveying to her all of his right, title and interest in and to the house and that the plaintiff would assume the payment of the unpaid balance on the loan due First Federal. Simultaneous with the execution of this deed of separation, deceased delivered his quit-claim deed, the passbook and the insurance policy to the plaintiff. In compliance with their separation agreement, the plaintiff paid First Federal $113 on 1 September 1967, which represented the monthly payment on the indebtedness and the monthly premium on the insurance policy. Therefore, the facts clearly reveal that the plaintiff was to have the possession and ownership of the insurance policy.

The findings of fact are clearly supported by the evidence and the conclusions of law are clearly supported by the findings of fact.

Affirmed.

MORRIS and PARKER, JJ., concur.

BOBBY ALLEN MENDENHALL, ORIGINAL PLAINTIFF, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, ADDITIONAL PLAINTIFF, v. CAROLINA GARAGE, INC., ORIGINAL DEFENDANT, AND MACK TRUCKS, INC., AND GENERAL TIRE & RUBBER COMPANY, ADDITIONAL DEFENDANTS

No. 6923SC93

(Filed 2 April 1969)

Sales § 14— counterclaim for breach of implied warranty — sufficiency of allegations

In plaintiff consumer's action for breach of an implied warranty against retailer for damages resulting from the failure of an allegedly defective tractor tire purchased from the retailer, defendant retailer's cross-action against the manufacturers of the tire and the tractor seeking indemnification for any damages which it may be obligated to pay *is held* subject to demurrer for failure to state a cause of action in that retailer did not allege a sale of the tire by either additional defendant with an implied warranty or a warranty of any kind.

APPEAL by Carolina Garage, Inc., original defendant, from *Collier, J.*, 18 November 1968, Civil Session, YADKIN County Superior Court.

Bobby Allen Mendenhall (Mendenhall), the original plaintiff, instituted this action on 27 October 1967 against Carolina Garage, Inc., (Garage) the original defendant. In his complaint Mendenhall alleged that in November 1964 he purchased from Garage a new 1965 Mack tractor, which was delivered to him with a General Jet Cargo tire on the left front wheel; the tire was defective in its construction at the time of purchase; while Mendenhall was driving the Mack tractor in Virginia on 16 May 1965, the tire failed, causing the vehicle to veer to the left and collide with a Ford automobile; and the tire failure was caused by this defect. It was further alleged that Garage knew the purpose for which the tractor was purchased, namely, pulling heavy loads on varying road conditions; the tire was not reasonably fit for the purpose of its intended use; and "[i]n the sale of the tractor by the defendant to the plaintiff, the plaintiff [sic] impliedly warranted that the left front tire was reasonably fit for the purpose for which it was intended to be used." Mendenhall sought to recover $7,000 for damage done to the tractor and trailer and $10,000 for loss of income during the period the tractor was being repaired.

Garage filed an answer under date of 28 December 1967 admitting the sale of the Mack tractor equipped with General Jet Cargo tires, as ordered by Mendenhall, and the accident on 16 May 1965 in Virginia between the tractor and an automobile. All other allega-

tions in the complaint were denied. Garage then set forth six separate further answers and defenses, and by an additional further answer and reply, American Mutual Liability Insurance Company (Insurance Company) was made a party plaintiff as the real party in interest. Mack Trucks, Inc., (Mack) and General Tire and Rubber Company (General) were made additional defendants by further answer and cross-action.

On this appeal we are concerned with the answer and cross-action against Mack and General. In this portion of its pleading Garage alleged that in November 1964 it purchased the tractor in question from Mack; the tractor was equipped with General Jet Cargo tires manufactured by General; it did nothing to alter the condition of the tires; the tractor and tires were delivered to Mendenhall in the same condition as Garage had received them; Mendenhall sued Garage alleging that the left front tire was defectively constructed and that the tire was not reasonably fit for the purpose for which it was intended; and Mendenhall sought $17,000 for damage to the tractor and trailer and for loss of income. Garage further alleged that if it was negligent toward Mendenhall or if it breached any warranty, such negligence or breach of warranty on its part was merely passive and secondary to the active and primary negligence or breach of warranty on the part of the additional defendants; that since General manufactured the tire and knew, or should have known, of any defect at the time of manufacture, General was primarily responsible for any damage resulting from the defective tire and was obligated to indemnify Garage for any amount which Garage might become obligated to pay Mendenhall; and that since Mack knew, or should have known, of any defect in the manufacture of the tires at the time it sold the tractor to Garage, Mack was primarily responsible for any damage resulting from the defective tire and was obligated to indemnify Garage for any amount which Garage might become obligated to pay Mendenhall. Garage asked that Mack and General be made additional party defendants in order that Garage might recover judgment over against them for any amount which Mendenhall might recover against Garage.

General filed an answer in which all material allegations of the cross-action were denied. It further denied that it was in any way negligent in the manufacture of the tire or that it warranted anything, either expressly or impliedly, to Mendenhall or Garage.

Mack filed an answer in which all material allegations of the cross-action were denied and in which further answers and defenses and a cross-action against General were set out. In its cross-action

Mack asked that if Mendenhall recovered against Garage and if Garage in turn recovered against Mack, General, as manufacturer of the tires, should be held primarily responsible and should indemnify Mack against any loss.

Mack then filed a written demurrer to Garage's cross-action and General made a demurrer *ore tenus* to it. The demurrers were sustained by Judge Collier on the ground that the cross-action filed by Garage failed to state a cause of action. Garage excepted to the order sustaining the demurrers and appealed to this Court.

Hudson, Petree, Stockton, Stockton & Robinson by Norwood Robinson and Thomas E. Capps for original defendant Carolina Garage, Inc., appellant.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and Jimmy H. Barnhill for additional defendant Mack Trucks, Inc., appellee.

Smith, Moore, Smith, Schell & Hunter by Beverly C. Moore and Larry Sitton for additional defendant General Tire and Rubber Company, appellee.

CAMPBELL, J.

Garage asserted that it was necessary to discuss both negligence and implied warranty because of ambiguity in the complaint, which, it was argued, alleged both causes of action. Therefore, much of its excellent brief was devoted to a tort theory and the doctrine of active and passive negligence. However, the complaint is based upon an implied warranty under a contractual doctrine and not upon an action in tort.

It is also to be noted that since this action was instituted on 27 October 1967, we are concerned with the law as it existed at that time and not with statutes regarding procedure which have become effective subsequent thereto and which pertain to litigation commenced after the instant case.

On this appeal we are concerned with Garage's answer and cross-action against Mack and General.

> "In determining the effects of its allegations, G.S. 1-151 requires 'for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties.' Defendants' demurrer admits, for the purpose of testing the sufficiency of the pleadings, the truth of factual averments well stated and all relevant inferences of fact rea-

> sonably deducible therefrom. It admits facts stated on information and belief as well as facts alleged on personal knowledge. . . . A demurrer does not admit inferences or conclusions of law. . . . A complaint must be fatally and wholly defective before it will be rejected as insufficient." *Corprew v. Chemical Corp.,* 271 N.C. 485, 157 S.E. 2d 98.

Construing this cross-action liberally with a view to substantial justice between the parties, it is manifest that the cross-action does not allege facts sufficient to constitute a cause of action for liability based upon breach of warranty.

In *Davis v. Radford,* 233 N.C. 283, 63 S.E. 2d 822, the original defendant specifically alleged that ". . . he had purchased the patented bottled product known as Westsal, a salt substitute, from [the additional defendant], wholesale druggists in Asheville handling this product, with implied warranty that it was suitable for human consumption and manufactured and sold in compliance with the laws . . . and that [the additional defendant] was primarily liable for any damages plaintiff might recover from [the original defendant]. . . ." In the instant case the cross-action alleged that in November 1964 Garage purchased from Mack the tractor in question, which was equipped with General Jet Cargo tires, as ordered by Mendenhall, and that the tires were manufactured by General. In Paragraph IV of the further answer and cross-action, Garage alleged that "[t]he original defendant did nothing to alter the condition of the tires or their mounting on the tractor from the condition that they were in when received from the additional defendant." In Paragraph V it was further alleged that:

> "The plaintiff alleges that the left front tire of said tractor . . . was defective in that adhesion between the tread and the carcass on the shoulder opposite the serial number was defective; and that said defect caused the tread to separate from the carcass, causing the carcass to become overheated and to fail, resulting in an accident and damage to the 1965 Mack tractor. The plaintiff alleges a breach of duty on the part of the original defendant delivering the 1965 Mack tractor to the plaintiff with a defective tire which allegedly was not reasonably fit for the purpose for which it was intended to be used."

Garage then alleged in separate paragraphs that General and Mack were primarily responsible for any damage resulting from the defect and that they were ". . . obligated to indemnify the original defendant for any amount which the original defendant may become obligated to pay to the plaintiff by virtue of damage resulting from

said defect." However, Garage has not alleged a sale of the tire by either additional defendant with an implied warranty or a warranty of any kind. In its cross-action Garage has failed to allege any facts constituting a cause of action. At most, it has alleged a conclusion of law without supporting or substantiating facts.

We are not confronted with and do not decide the question of whether the lack of privity would have been a bar to the cross-action had the implied warranty been properly pleaded.

It is noted that the order of Judge Collier under date of 20 November 1968 sustained the written demurrer of Mack and the demurrer *ore tenus* of General but did not dismiss the action. In so doing, the trial judge acted properly.

Affirmed.

BROCK and MORRIS, JJ., concur.

VIVIAN W. COBB v. JERRY A. CLARK AND REBECCA C. CLARK

No. 6915SC20

(Filed 2 April 1969)

1. Limitation of Actions § 12; Trial § 30— reinstatement of suit dismissed in another jurisdiction — G.S. 1-25

The statute permitting a suit to be reinstituted within one year after dismissal of the original action by nonsuit does not apply when the original suit is brought in another jurisdiction. G.S. 1-25.

2. Limitation of Actions § 12; Negligence § 20— action for personal injuries — original suit dismissed in Federal Court — new suit in superior court — G.S. 1-25

An action for personal injuries instituted in the superior court more than three years after the accident occurred is barred by the statute of limitations, G.S. 1-52(5), notwithstanding such action was begun within a year after dismissal by summary judgment of plaintiff's original suit brought in apt time in a Federal District Court in this State, G.S. 1-25 being inapplicable where the original suit was brought in another jurisdiction.

3. Pleadings § 29; Judgments § 42— judgment sustaining demurrer — res judicata

A judgment affirmed by the Supreme Court sustaining a demurrer for failure of the complaint to state a cause of action is *res judicata* and bars a subsequent action upon substantially identical allegations; however,

such judgment is not *res judicata* where the complaint in the subsequent action supplies the essential allegations lacking in the former complaint.

4. Pleadings § 29; Judgments § 42— judgment sustaining demurrer — res judicata

In this action for personal injuries, the trial court properly sustained defendants' pleas of *res judicata* where the complaint contains substantially identical allegations as the complaint in a prior action which was dismissed for failure of the complaint to state a cause of action.

APPEAL by plaintiff and defendants from *Hall, J.*, at the 29 July 1968 Session of ALAMANCE Superior Court.

This is an action to recover for personal injuries allegedly sustained by plaintiff on 24 December 1963 when she fell down a stairway in defendants' home where she was visiting. The original action between the parties was instituted on 6 July 1964. A demurrer for failure of the complaint to state a cause of action was sustained 24 November 1964, and on appeal to the North Carolina Supreme Court, the superior court was affirmed. See *Cobb v. Clark*, 265 N.C. 194, 143 S.E. 2d 103, for statement of facts and contentions and opinion of Supreme Court.

As plaintiff did not seek leave to amend her complaint, the action was dismissed 22 September 1965. Thereafter, on 23 December 1965, plaintiff filed her complaint, based on the same occurrence, in the United States District Court for the Middle District of North Carolina, Greensboro Division. The defendants answered 20 May 1966 denying all liability and, on 2 August 1966, made a motion for summary judgment. The motion was allowed and the action was dismissed 29 August 1966. Appeal was taken to the Circuit Court of Appeals where the district court was affirmed on 3 April 1967 and petition to rehear denied 11 May 1967.

On 19 February 1968, plaintiff filed complaint in the present case. The defendants demurred 12 April 1968, and on 15 May 1968, the demurrer was overruled by Bailey, J. On 21 June 1968, defendants filed their answer denying liability and pleading the statute of limitations and *res judicata;* in addition, they prayed for a bill of peace.

The pleas in bar were heard by Hall, J., pursuant to a waiver of jury trial. Judge Hall made findings of fact, including a finding that there is no substantial difference between the complaint filed in the present action on 19 February 1968 and the complaint filed in Alamance Superior Court on 6 July 1964 and the complaint filed in the United States District Court on 23 December 1965. He con-

cluded that the present action is not barred by the statute of limitations but that the plea of *res judicata* should be sustained; he further concluded that defendants' prayer for a bill of peace should be denied. From an order embodying said conclusions, dismissing the action, and taxing plaintiff with the costs, both plaintiff and defendants appealed.

Jordan, Wright, Nichols, Caffrey & Hill by Luke Wright and Edward L. Murrelle for plaintiff appellee-appellant.

Sanders & Holt by Emerson T. Sanders for defendant appellees-appellants.

BRITT, J.

The first question presented by this appeal is whether the superior court should have sustained defendants' plea of the statute of limitations. The action is clearly barred by subsection 5 of G.S. 1-52 unless saved by the operation of G.S. 1-25 which provides as follows:

> "§ 1-25. *New action within one year after nonsuit, etc.* — If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in forma pauperis."

G.S. 1-131 does not apply to this action.

[1] The most recent discussion of the application of G.S. 1-25 is found in the case of *High v. Broadnax,* 271 N.C. 313, 156 S.E. 2d 282, in an opinion by Sharp, J. That case involved an action for wrongful death arising out of an automobile collision in Rockingham County, North Carolina, and the suit was first brought in the United States District Court sitting in Danville, Virginia. The action in federal court was dismissed "without prejudice." Within one year thereafter but more than two years after intestate's death, plaintiff instituted suit in Rockingham Superior Court. The Supreme Court held that the action did not fall within the grace of G.S. 1-25. We quote from the opinion as follows:

> "We adhere to the general rule that a statute of the forum which permits a suit to be reinstituted within a specified time after

> dismissal of the original action otherwise than upon its merits has no application *when the original suit was brought in another jurisdiction.* This rule, however, has no application to an action which was originally instituted in the Superior Court of this State and was thereafter transferred to a United States District Court, where it was later terminated by a nonsuit, or 'dismissed without prejudice.' * * *"

Our State Supreme Court has held in several cases that G.S. 1-25 would apply where an action was instituted in a superior court of this State and thereafter removed to a federal court sitting in this State and there nonsuited. See *Motor Co. v. Credit Co.,* 219 N.C. 199; 13 S.E. 2d 230; *Brooks v. Lumber Co.,* 194 N.C. 141, 138 S.E. 532; *Fleming v. R. R.,* 128 N.C. 80, 38 S.E. 253.

It appears that the majority of the states do not agree with the holding in *High v. Broadnax, supra.* See Annot., 156 A.L.R. 1097, 1103, 1106; also 34 Am. Jur., Limitation of Actions, § 283, p. 230. Nevertheless, the *High* case is binding on this court.

[2] Although in the case before us the action was instituted in a United States District Court sitting in North Carolina, as contrasted to *High v. Broadnax, supra,* where the suit was instituted in a United States District Court sitting in Virginia, we perceive no distinction as far as the principle of law declared in *High* is concerned; the United States District Court is "another jurisdiction" irrespective of whether it sits in Greensboro, N. C., or Danville, Va. Hence, we hold that the present action was barred by the statute of limitations as G.S. 1-25 is not applicable, and the order of Judge Hall concluding otherwise was error.

The next question is whether the plea of *res judicata* was properly sustained.

[3] The law is clear that if the allegations of the first complaint and of this complaint are substantially identical, then the plea must be sustained. *Davis v. Anderson Industries,* 266 N.C. 610, 146 S.E. 2d 817. The plaintiff is correct in arguing that if the essential allegations lacking in the former complaint are supplied in the present case, then the plea of *res judicata* will not be sustained. *Jones v. Mathis,* 254 N.C. 421, 119 S.E. 2d 200; *Halcombe v. Commissioners,* 89 N.C. 346. However, the plaintiff has failed to supply all the allegations needed.

[4] It is true that in her complaint filed in the present action plaintiff has enlarged upon the allegations contained in the former complaints, but we think the complaints are "substantially identical."

The opinion by Rodman, J., in the former appeal (*Cobb v. Clark*, 265 N.C. 194, 143 S.E. 2d 103) contains the following statements: "What plaintiff complains of is defendants' failure to guard against the conduct and mistakes of plaintiff. * * * Plaintiff's injuries were the consequence of her conduct. She now seeks to impose liability on defendants because of their failure to anticipate the mistakes which she made, which mistakes resulted in her unfortunate fall and injuries." In our opinion, the conclusions stated apply to the complaint in the present action also.

We hold that the trial court properly sustained the plea of *res judicata*.

Defendants assign as error the failure of Judge Bailey to sustain their demurrer to plaintiff's complaint. In view of our holdings on the other questions presented, we deem it unnecessary to pass upon this assignment of error.

Defendants also assign as error the failure of Judge Hall to grant their prayer for injunctive relief in the nature of a bill of peace. We construe defendants' brief to say that they abandoned this assignment of error, therefore, it will not be discussed.

This action is remanded to the Superior Court of Alamance County for entry of judgment not inconsistent with this opinion.

Plaintiff's appeal — Affirmed.

Defendants' appeal — Error and remanded.

MORRIS and PARKER, JJ., concur.

MOREHEAD *v.* HARRIS

CLARENCE L. MOREHEAD, ADMINISTRATOR ESTATE OF SYLVIA HARRIS MOREHEAD, DECEASED, AND C. L. MOREHEAD, GEORGE WAYMAN MOREHEAD, ALMETTA MOREHEAD TENNIE, HERMAN MOREHEAD, AND WILEY LEROY MOREHEAD, THE ONLY HEIRS OF SYLVIA HARRIS MOREHEAD, DECEASED, AND CHARLES M. IVEY, JR., RECEIVER, ESTATE OF AND W. SAM SHAFFER, II, GUARDIAN AD LITEM OF WILEY LEROY MOREHEAD, SUBSTITUTED AS PARTIES PLAINTIFF IN LIEU OF SYLVIA HARRIS MOREHEAD, DECEASED, AN ORIGINAL PLAINTIFF, AND C. L. MOREHEAD, ADMINISTRATOR D.B.N.-D.B.N. ESTATE OF JOHN WESLEY HARRIS, DECEASED, AND CLEASE HARRIS AND EARLINGTON HARRIS, THE ONLY HEIRS OF JOHN WESLEY HARRIS, DECEASED, SUBSTITUTED AS PARTIES PLAINTIFF IN LIEU OF JOHN WESLEY HARRIS, AN ORIGINAL PLAINTIFF v. DAISY HARRIS, MARY LOUISE PRICE, NOW MARY LOUISE PRICE BOQUIST, AND HER HUSBAND, RICHARD E. BOQUIST, HELEN MOORE PRICE, NOW HELEN MOORE PRICE HOOPER, AND HER HUSBAND, PHILLIP M. HOOPER

No. 6918SC15

(Filed 2 April 1969)

Registration § 3— registration as notice — collateral instrument — deed of trust

Where plaintiffs were heirs to a remainder interest in property subject only to a widow's dower right, which was never allotted, and where the widow, acting as administratrix of her husband's estate, purchases the property at a foreclosure sale and executes a deed of trust securing the purchase price thereof, the recording of the deed of trust wherein the word "widow" appears in parentheses after the name of the widow-trustor in the granting clause and in the acknowledgment *is held* insufficient to constitute notice as a matter of law to subsequent purchasers from the widow of the plaintiffs' equitable interest in the property, the deed of trust not being a muniment of title through which the purchasers derived legal title but being merely a recorded collateral instrument which created a lien on the property; consequently, the purchasers take title free of equities as innocent purchasers for value.

APPEAL by plaintiffs from *Crissman, J.*, 12 February 1968 Civil Session of GUILFORD Superior Court (Greensboro Division).

This is a civil action to have fee simple title and right of possession to two parcels of real property declared to be in plaintiffs. This case has been twice previously appealed to the North Carolina Supreme Court; see opinions reported in 255 N.C. 130, 120 S.E. 2d 425, and in 262 N.C. 330, 137 S.E. 2d 174. At the conclusion of the second appeal all issues had been determined in favor of plaintiffs excepting only the issue relative to the claim asserted by defendants Boquist and Hooper (who are referred to in the opinion of the Supreme Court rendered on the second appeal as "defendants Price") that they were innocent purchasers for value and owners of a 5/6 undivided interest in a portion of one of the tracts. The Supreme

Court remanded the case to the superior court for a new trial upon that single issue.

Upon remand to the superior court, the parties waived jury trial, agreed that the judge might hear and determine the one remaining issue, and stipulated that the evidence should consist of (1) the entire record as presented on the second appeal to the Supreme Court, and (2) certain additional stipulated evidence. The only additional evidence for the plaintiffs was the record of an uncanceled deed of trust dated 8 September 1933 executed and acknowledged by Daisy Harris (widow) to T. C. Hoyle, trustee, to secure an indebtedness to Wachovia Bank & Trust Company, successor trustee to C. W. Bradshaw, for C. W. Bradshaw, Jr. This deed of trust was acknowledged and probated on 9 September 1933 and was filed for recording, and recorded and properly indexed in the office of the Register of Deeds of Guilford County at 5:00 p.m. on 14 September 1933. After hearing, the trial judge entered judgment finding that the recording and indexing of this uncanceled deed of trust "do not as a matter of fact or law constitute notice to the defendants Boquist and Hooper as to any matters other than what appears on those records, and that notice of such matters is not sufficient as a matter of fact or law to constitute notice so as to declare the defendants Boquist and Hooper not innocent purchasers for value of the property at issue." The judge thereupon answered the issue as to whether defendants Boquist and Hooper were bona fide purchasers for value of a 5/6 undivided interest in the portion of the property claimed by them in the affirmative. From judgment in conformity with this finding, plaintiffs appealed.

Shuping & Shuping, by C. Leroy Shuping, Jr., for plaintiff appellants.

Hoyle, Boone, Dees & Johnson, by J. Sam Johnson, Jr., for defendant appellees.

PARKER, J.

For a full statement of the facts giving rise to this case, reference is made to the opinions of the Supreme Court rendered on the previous appeals and reported in 255 N.C. 130, 120 S.E. 2d 425, and in 262 N.C. 330, 137 S.E. 2d 174. Insofar as pertinent to the present appeal, the facts may be succinctly stated as follows: In 1927 Wiley Harris, the owner of an 11/12 undivided interest in a tract of land in Guilford County, N. C., executed a deed of trust conveying a 5/6 undivided interest in said land to a trustee to secure a debt. He

died intestate on 3 May 1933 and his widow, Daisy Harris, qualified as administratrix of his estate on 31 May 1933 in the office of the clerk of Superior Court of Guilford County, and thereafter she acted in that capacity. The debt being unpaid, the trustee foreclosed under the power of sale contained in the deed of trust. At the foreclosure sale on 26 August 1933 the widow, Daisy Harris, who had only a dower interest in the property, was the last and highest bidder. As a result of this foreclosure sale the trustee conveyed the 5/6 undivided interest in the land to Daisy Harris by deed dated 8 September 1933, acknowledged 12 September 1933, filed for registration at 4:55 p.m. on 14 September 1933, and duly recorded in the office of the Register of Deeds of Guilford County. On 1 June 1946 Daisy Harris deeded a portion of the land to Grace Construction Company, purporting to convey the fee clear of any outstanding interest. On 5 May 1947 Grace Construction Company deeded this portion of the land to defendants Boquist and Hooper, who thereafter through their agent had it drained and graded and occasionally had it mowed and cleared of rubbish. Defendants leased to Greensboro Broadcasting Company an unpaved road or right of way over the land for ingress and egress to and from a radio tower situated on adjacent property, collected the rents, and paid taxes. Daisy Harris died in 1960, after the commencement of this action, without any allotment of her dower ever having been made. The plaintiffs are heirs at law of Wiley Harris, being his children or descendants of his children by his first marriage.

On the foregoing facts, which were established by the record on appeal upon the second appeal to the Supreme Court, the Supreme Court held that when the widow, having only a life interest in the form of her dower right in the property, purchased at the foreclosure sale, she could not hold the property to her exclusive benefit but was deemed to have purchased for the benefit of herself and the plaintiffs, who had inherited the remainder interest in the property subject to her dower right. The Supreme Court held, however, that it had been error for the trial court on the second trial of this case to rule as a matter of law that the defendants Boquist and Hooper were not innocent purchasers for value without notice of plaintiffs' equities in the portion of the property described in the deed to said defendants from Grace Construction Company. The Court stated that the evidence in the record then before it permitted the inference that at the time of the purchase by defendants Boquist and Hooper, neither said defendants nor their agent had any actual notice of plaintiffs' equities, that such defendants had paid a valuable consideration, and had purchased in good faith. The Court further held

that the record of administration of the Wiley Harris estate in the office of the clerk of Superior Court was not constructive notice to Grace Construction Company or to defendants Boquist and Hooper of the fact that at the time of the foreclosure sale Wiley Harris had died intestate survived by children, who were his heirs at law, and that the purchaser at the foreclosure sale was his widow and administratrix of his estate. In this connection the Court, speaking through Moore, J., said, 262 N.C. 330, 342, 137 S.E. 2d 174, 195:

> "(W)here the defense of 'innocent purchaser' is interposed and there has been a bona fide purchase for a valuable consideration, the matter which debases the apparent fee must have been expressly or by reference set out in the muniments of record title or brought to the notice of the purchaser in such a manner as to put him upon inquiry. An innocent purchaser takes title free of equities of which he had no actual or constructive notice."

The Supreme Court then held that on the record then before them the defendants Boquist and Hooper were entitled to a peremptory instruction on the "innocent purchaser" issue and remanded the case for a new trial on that issue. On such new trial the parties waived jury trial, agreed that the trial judge might hear and determine the matter upon the sole issue remaining, and that the evidence should consist of the entire record on appeal on the second appeal to the Supreme Court and the court reporter's transcript from which the narrative statement of testimony had been taken. The only additional evidence submitted by the plaintiffs was the record of the deed of trust which had been executed by "Daisy Harris, (widow)," and which had been recorded on the same date and only five minutes after the deed given to her by the trustee as result of the foreclosure sale. On this evidence the trial judge made a finding, on the sole issue presented to him for decision, in favor of defendants Boquist and Hooper, that they were bona fide purchasers for value. This finding is clearly supported by the evidence and is conclusive on this appeal unless, as a matter of law, the recording of the deed of trust dated 8 September 1933 in which the word "widow" appears in parenthesis after the name of Daisy Harris in the granting clause and in the acknowledgment, constituted notice to her grantee, Grace Construction Company, when it purchased from her in 1946, of the existence of plaintiffs' equitable interests in the property. We agree with the trial judge that it did not.

In the first place it should be observed that even had the deed of trust in question been examined by defendants at the time they purchased in 1947, the only matter of which they would have thereby

been put on notice would have been the possible continued existence of its lien and that on 8 September 1933 Daisy Harris had been a widow. It would not have given any notice that her husband had died intestate, that Daisy was administratrix of his estate, or that he had left surviving children as his heirs at law. These were the critical facts which gave rise to plaintiffs' equitable claims when Daisy purchased at the foreclosure sale. It is true that "(i)f the facts disclosed in an instrument appearing in a purchaser's chain of title would naturally lead an honest and prudent person to make inquiry concerning the rights of others, these facts constitute notice of everything which such inquiry, pursued in good faith and with reasonable diligence, would have disclosed." *Jones v. Warren,* 274 N.C. 166, 173, 161 S.E. 2d 467, 472.

However, the deed of trust in question by Daisy Harris (widow) was not a muniment of title through which defendants derived legal title to the 5/6 undivided interest in the property conveyed to them in 1947 by Grace Construction Company. It was not a link in their chain of title, and it could not become a link in any chain of title unless and until it was properly foreclosed. Until such time it was merely a recorded collateral instrument which created a lien on the property, subject to be extinguished by payment of the debt which it secured and proper cancellation of record or by the conclusive presumption of payment provided for in G.S. 45-37(5). Moore, J., speaking for the Court in the opinion rendered on the second appeal of this very case, said, 262 N.C. 330, 340, 137 S.E. 2d 174, 184:

> "A purchaser is presumed to have examined each recorded deed or instrument in his line of title and to know its contents. *He is not required to take notice of and examine recorded collateral instruments and documents which are not muniments of his title and are not referred to by the instruments in his chain of title. Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197. *One need only to look to the muniments of title. Vitiating facts must appear in deraigning title, on the face of deeds in the chain of title, and in one of the muniments of title.*" (Emphasis added.)

Since the deed of trust dated 8 September 1933 which was executed by "Daisy Harris (widow)" was not in defendants' chain of title, and since nothing appeared in any instrument which was in that chain to put defendants or their grantor, Grace Construction Company, on notice of the plaintiffs' equitable claims against the prop-

erty, the trial court was correct in holding Boquist and Hooper were bona fide purchasers for value.

The judgment appealed from is

Affirmed.

MALLARD, C.J., and BRITT, J., concur.

ROLAND RECTOR v. HILDA RECTOR

No. 6912DC53

(Filed 2 April 1969)

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

Assignments of error for which no reason or argument is stated and no authority is cited are deemed abandoned.

2. Divorce and Alimony § 1; Domicil § 2— domicile of wife in divorce action

A jury finding in an action for absolute divorce that plaintiff husband is not a resident of North Carolina does not preclude the jury from further finding that the defendant wife is a resident of this State, the legal fiction that the domicile of the wife follows that of the husband not being applicable in divorce proceedings.

3. Divorce and Alimony § 1; Domicil § 2— absolute divorce — residence or domicile of wife — sufficiency of evidence

In an action for absolute divorce, the issue of whether defendant has been a resident of this State for more than six months next preceding the institution of the action is properly submitted to the jury where plaintiff's evidence tends to show that plaintiff is in the military service at Fort Bragg, that defendant is a German national who has no United States citizenship, that since the parties separated defendant has continued to reside for more than six months in a home which plaintiff and defendant had purchased in Fayetteville, and that defendant intends to remain in Fayetteville and has expressed no desire or intent to return to Germany to live.

4. Divorce and Alimony § 1; Domicil § 1— domicile — citizen of another country

One need not be a citizen of the United States in order to establish residence or domicile within the state for purposes of divorce actions.

5. Divorce and Alimony § 1; Domicil § 1 — residency requirement for divorce action — domicile defined

A bona fide residence necessary under statutes in order to confer jurisdiction in divorce proceedings is within the legal meaning of the word

"domicile," which is a place where a person lives or has his home to which, when absent, he intends to return, and from which he has no present purpose to depart.

6. Divorce and Alimony § 1; Domicil § 2— domicile of the wife — divorce actions

The common law rule that a woman, upon marriage, loses her own domicile and by operation of law acquires and follows that of her husband does not apply in a situation in which the interests of the spouses are not identical, such as for the purpose of dissolution of the marriage.

7. Divorce and Alimony § 1; Domicil § 2— divorce actions — domicile of wife

The divorce statutes recognize the legality of a separate domicile, or residence, for the wife. G.S. 50-6; G.S. 50-8.

8. Appeal and Error § 39— docketing record on appeal

The case on appeal, the countercase or exceptions, and the settlement of the 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.

APPEAL by defendant from *Herring, District Judge,* 22 August 1968 Session, CUMBERLAND District Court.

Plaintiff instituted this action for absolute divorce on the grounds of adultery. From a verdict and judgment in favor of plaintiff, defendant appealed.

A. Maxwell Ruppe for plaintiff appellee.

Downing, Downing & David, by Edward J. David, for defendant appellant.

BROCK, J.

The only question raised on this appeal is by defendant's assignment of error to the failure of the trial court "to set aside the verdict as contrary to the weight of the evidence, particularly as to the second issue for the reason that there is insufficient evidence to sustain an affirmative answer to the second issue submitted to the jury."

The first and second issues were submitted to, and answered by, the jury as follows:

"1. Has the plaintiff been a resident of North Carolina for more than six months next preceding the institution of this action as alleged in the complaint?

ANSWER: No.

"2. Has the defendant been a resident of North Carolina for more than six months next preceding the institution of this action as alleged in the complaint?

ANSWER: Yes."

[1] The next three issues, (1) as to the marriage of the parties, (2) as to the act of adultery by defendant, and (3) as to plaintiff's knowledge thereof for at least six months before institution of the action, were each answered in the affirmative. No reason or argument is stated, and no authority is cited, by defendant in support of her assignment of error to the failure of the court to set aside the answers to issues 1, 3, 4 and 5, and her assignment of error with respect to those issues is deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[2] With respect to the second issue (defendant's residence), defendant's primary argument is that since she was plaintiff's wife, and since plaintiff was found not to be a resident of North Carolina, it follows as a matter of law that she is not a resident of North Carolina.

[3] The evidence with respect to residence tends to show that plaintiff and defendant were married in Germany on 23 April 1964; plaintiff is presently in the active military service stationed at Fort Bragg, North Carolina; at some time prior to 4 November 1967 the parties moved to Fayetteville and purchased a home; that on 4 November 1967 the parties separated and have not lived together since; that defendant continued to reside in the home, and in March 1968 plaintiff transferred his interest in the home to defendant, and she has lived in the home continuously since that time. The evidence further tended to show that defendant is a German national and has not become a citizen of the United States. However, plaintiff testified, without objection, that he knew that defendant intends her residence to be in Fayetteville, and that she had never expressed any desire or intent to return to Germany to live.

[4] One need not be a citizen of the United States in order to establish residence or domicile within the state for purposes of divorce actions. 27A C.J.S., Divorce, § 12, p. 42; 27A C.J.S., Divorce, § 76c, p. 275; 1 Lee, N. C. Family Law, § 42, p. 196.

[5] "The weight of authority continues to be that a bona fide 'residence,' necessary under statutes in order to confer jurisdiction in divorce proceedings, is within the legal meaning of the word 'domicile,' that is, an abode animo manendi, a place where a person lives or has his home, to which, when absent, he intends to return,

and from which he has no present purpose to depart." Annot., 159 A.L.R. 496, 499 (1945). Whether defendant is a resident, within the meaning of the statute, was a question for determination, from the evidence, by the jury, under proper instructions by the court. Defendant takes no exception to the charge of the court, and it is not contained in the record on appeal; therefore, it is presumed to be correct.

[3] Since the separation of the parties on 4 November 1967 defendant has continued to live in the home in Fayetteville, and since March 1968 has been the sole owner of the home in Fayetteville. Her conduct in continuing to reside in Fayetteville, coupled with the testimony of plaintiff, was sufficient evidence to be submitted to the jury for its determination of whether defendant had been a resident of the State of North Carolina for more than six months next preceding the institution of the action.

[2, 6] "The common-law rule is that a woman, upon marriage, loses her own domicile and by operation of law acquires that of her husband; and that when the husband changes his domicile, hers follows and is drawn to his. Exceptions are made to the rule where a situation arises in which the interests of the spouses are not identical. Obviously, the interests of the spouses are not identical for the purposes of the dissolution of the marriage. . . ." 24 Am. Jur. 2d, Divorce and Separation, § 257, p. 411. This rule has been very generally applied in allowing the wife to acquire a separate domicile for the purpose of her maintaining an action for divorce or custody where there is no fault on her part. *In re Means,* 176 N.C. 307, 97 S.E. 39; 25 Am. Jur. 2d, Domicil, § 53, p. 40. In view of this rule, we see no logical, legal or equitable reason for allowing the wife, whose misconduct has brought about the separation, to insist upon the legal fiction that her domicile follows that of her husband, and thereby to defeat his action for divorce brought in the jurisdiction in which she actually resides.

[7] Also, it seems clear that our divorce statutes recognize the legality of a separate domicile, or residence, for the wife. G.S. 50-8 provides: "The plaintiff shall set forth in *his or her* complaint that the *complainant or defendant* has been a resident of the State of North Carolina for at least six months. . . ." (Emphasis added.) G.S. 50-6 provides: "Marriages may be dissolved . . . on the application of *either party,* if and when . . . the *plaintiff or defendant* in the suit for divorce has resided in the State for a period of six months." (Emphasis added.)

Defendant's assignment of error is overruled.

Ordinarily, when a party conceives, as is contended here by defendant, that there is insufficient evidence to support an answer to an issue, the proper procedure is to move for nonsuit, or object to the submission of the issue. Defendant did neither of these. However, because the question of jurisdiction has been argued, we have considered defendant's appeal as though defendant had made a motion in the cause to vacate the judgment for lack of jurisdiction, and that the motion had been denied by the trial court, and defendant had appealed from such denial.

[8] We wish to point out that when notice of appeal was given, the trial judge allowed appellant sixty days to serve case on appeal, and allowed appellee thirty days to serve countercase or exception. It seems necessary to reiterate for the benefit of counsel what we said in *Smith v. Starnes,* 1 N.C. App. 192, 160 S.E. 2d 547. "The case on appeal, and the countercase or exceptions, and the settlement of the 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." Where sixty days and thirty days are allowed, as was done in this case, if the parties use all of the time allowed, the record on appeal could not reasonably be docketed in the Court of Appeals within the ninety days allowed by Rule 5; and this is particularly so if it should become necessary for the trial tribunal to settle the case on appeal. However, in this case the full time allowed by the order was not actually used, and the record on appeal was docketed in ample time.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

BLUE JEANS CORPORATION AND WHITEVILLE MANUFACTURING COMPANY v. AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, AND CHARLES ENGLISH, EDDIE GEE, JAMES DUNCAN, BILL WILLIAMS, EULA McGILL, VERA WARD, MACY KING, FRANK TYLER, ROGER STEVENS, MAXINE KELLIHAN, HAZEL LARAY GIBSON, RUBY FISHER, MILDRED NYE, BETTY JO HAYES, GLENDORA TANNER, ELIZABETH WELLS, HUBBARD WELLS, KATHLEEN MINCEY, EARLIE WARD, LEONA WARD, VERA JONES, RHOLETTA FAIRCLOTH, RUBY McPHERSON, LEONA SELLERS, JAXIE WILLIAMSON, HILDA POPE, JAMES H. MARTIN, SOLOMON TOON, JO ANN CUNNINGHAM, VAUGHN CHERRY, EMLLOUISE STEELE, QUEEN ESTHER BELLAMY, MARVA BEARD, GERALDINE KELLY, QUEEN ESTHER WEBB, FRED LYONS (ISHMEL), JERRY MARTIN, BLANCHIE FRINK, HATTIE D. McKENZIE, JOYCE FOXWORTH, DANIEL GODWIN, ROSCOE SHAW, JR., AND JOHN BRYANT

No. 6913SC42

(Filed 2 April 1969)

1. Contempt of Court § 7— punishment for criminal contempt

Punishment for criminal contempt is based on an act already accomplished which tends to interfere with the administration of justice.

2. Contempt of Court § 7— punishment — violation of order restraining picketing

Punishment imposed in contempt proceeding for violation of a court order restraining picketing activities on behalf of striking workers is lawful where it does not exceed $250 fine or thirty days imprisonment, or both. G.S. 5-4.

3. Contempt of Court § 6— hearing on show cause order — jury trial

In a contempt proceeding in this state, the contemnor is not entitled to a jury trial.

APPEAL by defendant appellants, Maxine Kellihan, Frank Tyler and James Martin, from *Clark, J.*, 3 August 1968 Session, COLUMBUS County Superior Court.

This case was instituted on 1 April 1968 for the purpose of restraining the Amalgamated Clothing Workers of America, AFL-CIO, the defendant appellants and other named individuals from committing certain allegedly unlawful acts arising out of a strike against Blue Jeans Corporation and Whiteville Manufacturing Company (plaintiffs). These acts consisted of picketing and interfering with the business activities of the plaintiffs and plaintiffs' employees. On 1 April 1968 Judge Clark entered a temporary restraining order enjoining and restraining the defendants from certain actions and conduct. On 8 April 1968 and again on 23 April 1968 this order was amended by supplementary orders. In the latter order, James Martin

was adjudicated in contempt of court and fined twenty-five dollars. No appeal was taken from that order.

On 13 July 1968 Judge Clark cited the defendant appellants and other named individuals to appear before him and to show cause as to why they should not be adjudged in contempt of court. Pursuant to this citation, a hearing was held on 3 August 1968, at the commencement of which the defendant appellants in apt time moved for a jury trial. This motion was denied, and an exception was duly taken. The defendant appellants were then adjudged in contempt, and Maxine Kellihan and Frank Tyler were fined ten dollars each. James Martin was sentenced to the Columbus County Jail for a period of five days, and he was restrained from engaging in any further picketing activities at the plaintiffs' premises. From this order, the defendant appellants appealed to this Court.

Powell, Lee and Lee by J. B. Lee for plaintiff appellees.

Rountree & Clark by John Richard Newton for defendant appellants.

CAMPBELL, J.

Since the only exception preserved and argued in this Court by the defendant appellants was the refusal of the superior court judge to grant the motion for a jury trial, the question presented for decision is: "In this contempt proceeding, were the defendant appellants entitled to a jury trial?" The answer to this question is "no."

In the case of *In re Gorham,* 129 N.C. 481, 40 S.E. 311, the respondents were cited to show cause why they should not be adjudged in contempt for tampering with a jury in a civil trial. They were adjudged in contempt and two of the respondents were committed to jail for twenty days and fined fifty dollars each. The third respondent was fined fifty dollars. The Supreme Court held: "The respondents were not entitled to a trial by jury, nor to have the findings of fact reviewed in this Court. There was evidence before his Honor to support the findings, and that is all that it required."

In *Manufacturing Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577, a restraining order had been issued restraining and enjoining the defendants from unlawfully interfering with plaintiff's employees in connection with a strike. The defendants were cited to show cause why they should not be adjudged in contempt for violating the restraining order. Upon the hearing the defendants were adjudged in contempt and were imprisoned and fined for varying periods of time and in various amounts, the greatest being for a period of thirty

days and a fine of one hundred fifty dollars. Winborne, J., (later C.J.) stated:

> "It is appropriate to note, in summary, that the contempt proceeding against respondents, appellants in this Court, arises out of a principal action in which Superior Court judges, presiding over Superior Courts of Richmond County, courts of competent jurisdiction, successively issued three injunctive orders for the purpose of protecting persons who desired to work, and who had a right to work, if they so desired, in plaintiff's plant. And while the orders are by their terms temporary and effective only until final trial of the cause, they are lawful orders of a court of competent jurisdiction. Any person guilty of willful disobedience of such order may be punished for contempt of court. G.S., 5-1."

Various errors were urged by the respondents on the appeal, all of which were considered and denied by the Supreme Court, including the following:

> "It is further contended in effect that this contempt proceeding is of criminal nature, and is governed by the rules of procedure and the law applicable to criminal prosecutions, and hence the judgments rendered under the circumstances of this proceeding exceed the jurisdiction of the court. As to this contention, in this State, a contempt proceeding is authorized by statute, G.S., 5-1. This Court has described it as *sui generis*, criminal in its nature, which may be resorted to in civil or criminal actions. *In re Hege*, [205 N.C. 625, 172 S.E. 345]. And it is held that persons charged are not entitled to a jury trial in such proceeding. *In re Gorham*, [*supra*]."

In *Luther v. Luther*, 234 N.C. 429, 67 S.E. 2d 345, Ervin, J., speaking for the Supreme Court, pointed out the difference between a proceeding under G.S. 5-1 "for contempt" and a proceeding under G.S. 5-8 "as for contempt". The difference was again pointed out in *Rose's Stores v. Tarrytown Center*, 270 N.C. 206, 154 S.E. 2d 313, where Branch, J., speaking for the Supreme Court, stated:

> "The punishment as to matters punishable *for contempt* is limited to a fine not to exceed $250 or imprisonment not to exceed thirty days, or both, in the discretion of the court. G.S. 5-4. However, punishment *as for contempt* is not limited by the terms of this statute.
>
> . . .
>
> Criminal contempt or punishment *for contempt* is applied where the judgment is in punishment of an act already accomplished,

tending to interfere with the administration of justice. Civil contempt or punishment *as for contempt* is applied to a continuing act, and the proceeding is had ' "to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties." ' *Dyer v. Dyer,* 213 N.C. 634, 197 S.E. 157.

There are certain instances where contemnors may be punished for both criminal contempt, *i.e., for contempt,* and for civil contempt, *i.e., as for contempt.* . . ."

[1, 2] In the instant case we have punishment for criminal contempt, *i.e.,* "for contempt", because the judgment imposed was for punishment of an already accomplished act which tended to interfere with the administration of justice. Since the maximum penalty under G.S. 5-4 was "a fine not to exceed $250 or imprisonment not to exceed thirty days, or both, in the discretion of the court", the punishment imposed by Judge Clark was well within the statutory limits. *Rose's Stores v. Tarrytown Center, supra.*

[3] In a North Carolina contempt proceeding, the contemnor is not entitled to a jury trial. Since the maximum punishment provides for imprisonment for less than six months and a fine for less than $500, our view is not contrary to the rule enunciated by the Supreme Court of the United States in *Bloom v. Illinois,* 391 U.S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477, and it is in conformity with the view expressed in *Dyke v. Taylor Implement Manufacturing Co.,* 391 U.S. 216, 20 L. Ed. 2d 538, 88 S. Ct. 1472.

In the instant case counsel for the defendant appellants makes the novel contention that they should be entitled to a jury trial because a finding that they are in contempt of court exposes them to a loss of certain benefits under the North Carolina Employment Security Law, G.S., Chap. 96, in addition to a possible fine of $250 or thirty days in jail, or both, in the discretion of the court, under G.S. 5-4. Such a loss of benefits is not presented by the record in this case. It might be said that, in addition to punishment by way of a fine or imprisonment, or both, any law violator forfeits other rights, emoluments and opportunities for gainful employment which are open to those who do not violate the law. Such a contention, while novel, does not raise any constitutional question.

The order of Judge Clark is

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. LEO STEWART, JR., PERCIVAL BARFIELD, DEBOIS SCOTTY GATHERS, FREDERICK DONNELL LOCKAMY AND JESSE JONES

No. 6911SC150

(Filed 2 April 1969)

1. Criminal Law § 155— failure to aptly docket record on appeal

Appeal is subject to dismissal where the record on appeal was docketed more than ninety days after the rendition of the judgment appealed from and no extension of time for docketing was procured.

2. Arson § 6; Criminal Law § 138— statutory arson — penal provisions of G.S. 14-62 — constitutionality

Provision of G.S. 14-62 giving the trial judge the absolute discretion to impose a sentence of imprisonment ranging from two to forty years for the crime of feloniously setting fire to certain buildings in violation of the statute *is held* not violative of the Due Process and Equal Protection Clauses of the Federal Constitution, the statute permitting the trial judge to impose a sentence appropriate to the individual and the specific factual situation.

3. Criminal Law § 138— severity of sentence — factors which may be considered

In determining the sentence to be imposed, the trial judge may inquire into such matters as the age, character, education, environment, habits, mentality, propensities and record of the person about to be sentenced.

4. Criminal Law § 138— review of severity of sentence

Within the limits of the sentence permitted by law, the character and extent of the punishment is committed to the sound discretion of the trial court, and may be reviewed on appeal only in case of manifest and gross abuse.

5. Arson § 6; Constitutional Law § 36— statutory arson — punishment

Sentences of twelve years in the State's prison imposed upon defendants' pleas of guilty of feloniously burning a building in violation of G.S. 14-62 are within the limits fixed by the statute and cannot be considered cruel and unusual punishment in the constitutional sense.

6. Criminal Law § 138— request for reduction of sentence

Request for reduction of a sentence claimed to be excessive should be presented to the Board of Paroles, not the Court of Appeals.

APPEAL by the defendants from *Bickett, J.,* 21 October 1968 Session, JOHNSTON County Superior Court.

Leo Stewart, Jr., Percival Barfield, Debois Scotty Gathers, Frederick Donnell Lockamy and Jesse Jones (defendants) were each charged in separate bills of indictment with the felonious burning of a building in the Town of Benson on 8 April 1968. The bills of in-

dictment alleged that the building and property were in the possession of the United Klans of America, Inc., (United) a corporation, and were used as the meeting house of Unit #116 of United. The five cases were consolidated for the purpose of trial.

Each defendant in open court personally and by and through his privately retained attorney entered a plea of guilty as charged. The presiding judge then questioned them as to the pleas submitted. Each defendant stated that he was not under the influence of any alcohol, drugs, narcotics or other pills; he understood that he was charged with a felonious burning and had a right to plead not guilty and to be tried by a jury; he understood that he could be imprisoned for as much as forty years; he was in fact guilty of the charge; no one had in any way threatened or promised him anything in return for the plea of guilty; he had been given the opportunity to subpœna witnesses and to confer with his attorney; and he freely, understandingly and voluntarily authorized and instructed his attorney to enter a plea of guilty. After this inquiry the presiding judge accepted their pleas of guilty.

Before the imposition of punishment, the State offered testimony as to the facts involved in the burning of the building in question. The defendants then offered evidence of their good character, their education and other mitigating circumstances. Although each defendant was given the opportunity to make a statement in open court, only defendant Lockamy took advantage of this opportunity. He stated: "It was a mistake we made. We ought not to have done that. We will never do it again in our lives."

From the imposition of a prison sentence of twelve years upon each defendant, an appeal was taken by defendants to this Court.

Attorney General Robert Morgan and Staff Attorney Andrew A. Vanore, Jr., for the State.

Chambers, Stein, Ferguson & Lanning by James E. Lanning for defendant appellants.

CAMPBELL, J.

The defendants present two questions for decision: (1) Is G.S. 14-62, which prohibits any person from wantonly and willfully setting fire to churches and certain other buildings, unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States? (2) Is the imposition of a sentence of twelve years in prison cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States?

[1] The record on appeal in these five consolidated cases was docketed more than ninety days after the rendition of the judgment below and no extension of time for docketing was procured. Therefore, this appeal is subject to dismissal for failure to comply with the Rules of Practice in the Court of Appeals. See Rules 5 and 48. However, we have nevertheless reviewed the record and the briefs filed. The attorneys for the defendants did not make an oral argument.

The bills of indictment charged a violation of G.S. 14-62, which provides:

> *"Setting fire to churches and certain other buildings.* — If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any uninhabited house, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or to any building, structure or erection used or intended to be used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than two nor more than forty years."

[2, 3] The defendants' first contention is that this statute violates the rule of law basic to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, because its penal provision permits the trial judge absolute discretion, uncontrolled by standards or directions of any kind, to impose a punishment ranging from two to forty years imprisonment. In support of this contention, they cite a number of cases from the United States Supreme Court. A review of the authorities cited indicates that they are not in point and that they are concerned with matters other than the constitutionality of a penal provision, such as the one now before us. In prescribing punishment for certain criminal offenses, the General Assembly has provided for flexibility by establishing both maximum and minimum limits. This permits a trial judge to impose a sentence appropriate to the individual defendant and to the specific factual situation. As stated in *State v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695, a trial judge "may inquire into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced." This procedure is particularly desirable in respect to G.S. 14-62, which covers the wanton and willful burning of a wide variety of structures. This statute clearly

and specifically defines the prohibited conduct and sets out the possible punishment.

[4] "It is the accepted rule with us that within the limits of the sentence permitted by the law, the character and extent of the punishment is committed to the sound discretion of the trial court, and may be reviewed by this Court only in case of manifest and gross abuse." *State v. Sudderth,* 184 N.C. 753, 114 S.E. 828.

The record in the instant case indicates that there was no abuse of discretion by the trial judge. The defendants, who were at all times represented by competent counsel, had the opportunity to present evidence to the trial court prior to the imposition of the sentences. Character witnesses testified and each defendant was given the opportunity to make a statement to the court.

The first contention is without merit and the answer to the first question is "no."

[5] The defendants' second contention is that the sentences of twelve years in the State's prison constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. In support of this position, the defendants argue that the burning was a spontaneous act carried out during a moment of emotional stress. However, this is not supported by the record which in fact reveals a deliberate act carried out over a period of time which would have permitted reflection. The defendants were obviously above the average in intelligence and they had received educational opportunities above the average. They were individuals from whom society had a right to expect law-abiding tendencies instead of hoodlumism.

"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.

The second contention is without merit and the answer to the second question is "no."

[6] The defendants present to us a request for reduction of a sentence claimed to be excessive. Such a request would be more properly presented to the Board of Paroles. *State v. Hilton,* 271 N.C. 456, 156 S.E. 2d 833.

In law there is

No error.

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

VIRGINIA KING VAUGHAN v. THOMAS BURWELL VAUGHAN, INCOMPETENT, AND JAMES H. LIMER, GUARDIAN FOR THOMAS BURWELL VAUGHAN

No. 699SC156

(Filed 2 April 1969)

1. Divorce and Alimony § 15— incurable insanity—confinement "next preceding" beginning of divorce action

It is not sufficient under G.S. 50-5(6) that the insane spouse was confined to an institution for five consecutive years at some time prior to the commencement of the action, the statute requiring that confinement must be for five consecutive years "next preceding" the bringing of the action, which means the time nearest the bringing of the action.

2. Divorce and Alimony § 15— incurable insanity — five years of continuous confinement — discharge under G.S. 122-67

In an action for divorce on the ground of incurable insanity, defendant husband was not confined in an institution for five years next preceding the bringing of the action as required by G.S. 50-5(6) where, approximately fourteen months prior to the commencement of the action, he was discharged automatically from the State Hospital by the provisions of G.S. 122-67 after he remained away from the hospital on a trial basis for more than a year, notwithstanding defendant was confined in the hospital for more than five years prior to such discharge and was again confined when the divorce action was begun, his confinement having been interrupted by the statutory discharge.

APPEAL by plaintiff from *Carr, J.*, November 1968 Civil Session, Superior Court of VANCE.

This is an action for absolute divorce upon the grounds of incurable insanity brought under the provisions of G.S. 50-5(6). At the close of plaintiff's evidence, defendant's motion for judgment as of involuntary nonsuit was granted. Plaintiff appeals.

Sterling G. Gilliam for plaintiff appellant.

James H. Limer for defendant appellee.

MORRIS, J.

The only question presented on appeal is whether the plaintiff's evidence was sufficient to withstand motion for nonsuit.

The plaintiff and defendant were married on 3 January 1955.

On 4 May 1960 the defendant was first admitted to the John Umstead Hospital for the treatment of mental illness, and was discharged on 16 September 1960. On 16 January 1961, the defendant was again admitted to the John Umstead Hospital for the treatment

of mental illness. During the year of 1961 the defendant was allowed on several different occasions to visit his wife on a trial basis, he was not discharged from the hospital. In April of 1962, while the defendant was released to Hubert Vaughan for a temporary visit, the plaintiff and defendant separated. They have not lived together as man and wife since. The defendant was next returned to the hospital on 4 February 1963. During the period between February 1963 and July 1966, the defendant was released from the hospital to various relatives on a trial basis on several different occasions. However, during this time he was never discharged from the hospital. On 10 July 1966 the defendant was released from the hospital on a trial status and did not return until 20 February 1968. On 7 July 1967 the defendant, by the provisions of G.S. 122-67, was automatically discharged from the hospital. G.S. 122-67, in part, provides:

> "When a person under hospitalization has been released on probation to his own care or to his own family, and when he is no longer under the continued care and supervision of the hospital, as in a boarding home, and when he shall have been able to remain continuously out of the hospital without returning for the period of one year, he shall be regarded as recovered from his mental illness and no longer in need of care in a mental hospital, and shall be discharged from the order of hospitalization at the next succeeding discharge date of the hospital as provided by rules of the North Carolina State Department of Mental Health."

The plaintiff began this action for divorce on 26 August 1968, five months after the defendant had returned to the hospital for the treatment of mental illness following the "statutory" discharge of 7 July 1967.

Plaintiff concedes that this divorce can only be granted under the provisions of G.S. 50-5(6). That statute, in part, provides for divorce by reason of incurable insanity as follows:

> "In all cases where a husband and wife have lived separate and apart for five consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree of absolute divorce upon the petition of the sane spouse: Provided, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined for five consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered. Provided further, that proof of incurable insanity be supported by the tes-

timony of two reputable physicians, one of whom shall be a staff member or the superintendent of the institution where the insane spouse is confined, and one regularly practicing physician in the community wherein such husband and wife reside, who has no connection with the institution in which said insane spouse is confined; and provided further that a sworn statement signed by said staff member or said superintendent of the institution wherein the insane spouse is confined shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse and as to whether or not said insane spouse is suffering from incurable insanity, or the parties according to the laws governing depositions may take the depositions of said staff member or superintendent of the institution wherein the insane spouse is confined.

In lieu of proof of incurable insanity and confinement for five consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered prescribed in the preceding paragraph, it shall be sufficient if the evidence shall show that the allegedly insane spouse was adjudicated to be insane more than five (5) years preceding the institution of the action for divorce, that such insanity has continued without interruption since such adjudication and that such person has not been adjudicated to be sane since such adjudication of insanity; provided, further, proof of incurable insanity existing after the institution of the action for divorce shall be furnished by the testimony of two reputable, regularly practicing physicians, one of whom shall be a psychiatrist."

The plaintiff, as required by the above statute, has offered the testimony of two physicians which tends to show that the defendant is incurably insane. With regard to the question of confinement, the plaintiff's evidence shows that on 21 July 1966, the defendant was released from the hospital on a temporary basis, and did not return until 20 February 1968. On 7 July 1967, according to the provisions of G.S. 122-67, a discharge was entered on the books of the hospital. In *Mabry v. Mabry,* 243 N.C. 126, 90 S.E. 2d 221, our Supreme Court held that releases from the State Hospital on periods of probation did not defeat a party's right to a divorce under G.S. 50-5(6). In discussing the policy of this statute, the Court stated:

"What the State is interested in is simply this: What is the mental condition of this defendant after having been treated for five consecutive years for his mental disorder? Certainly, by the use of the word 'confined' in the statute, the Legislature

did not contemplate such confinement as would require an inmate to be at all times under lock and key. Moreover, this defendant has been at all times, since 14 June, 1949, in the actual or constructive custody of the State Hospital. *He has never been discharged.*" (Emphasis added.)

In the final paragraph of the *Mabry* case, the Court concluded "that the periods of probation were permissible under the above statute as well as under G.S. 122-67, and may be deemed not to have constituted an interruption of the confinement or a discharge from the hospital within the meaning of these statutes."

In *Mabry,* the defendant was released on probation on two different occasions: once for a period of ten days and another for a period of six months. As noted by the Court, these releases were not of a sufficient duration to cause a discharge under G.S. 122-67. In the present case, there has been a recent release for a period exceeding one year; therefore, under G.S. 122-67, the defendant received a discharge approximately fourteen months prior to the bringing of this action.

[1, 2] The plaintiff earnestly contends that the intent of the legislature was to make it possible for a spouse to obtain a divorce when the defendant has been confined to a hospital as an insane person for five years prior to the bringing of the divorce action, and did not intend that such confinement must be for the five years next preceding the institution of the action. She also contends that the discharge provided by G.S. 122-67 is not such a discharge as would so interrupt the confinement in this case as to prevent the maintaining of this action. G.S. 50-5 is not ambiguous. It provides that the confinement must be for "five consecutive years *next preceding* the bringing of the action." (Emphasis added.) The words "next preceding" have been held to mean the time nearest to the bringing of the action. *Winning v. Winning,* 262 Ala. 258, 78 So. 2d 303. G.S. 122-67 provides that when a patient has been "able to remain continuously out of the hospital without returning for the period of one year, he shall be regarded as recovered from his mental illness and no longer in need of care in a mental hospital, and shall be discharged from the order of hospitalization at the next succeeding discharge date of the hospital as provided by rules of North Carolina State Department of Mental Health." Defendant's discharge was under the provisions of this statute. Such a discharge is not the probationary visitation period discussed by the Court in *Mabry, supra.* In our view, defendant's discharge on 7 July 1967 under G.S. 122-67 terminated his confinement and he was, therefore, not confined for

five years next preceding the institution of the action as required by G.S. 50-5(6).

In 1963 the legislature amended G.S. 50-5(6) by adding what is now the second paragraph. This second paragraph supplied an alternative means of proof of defendant's incurable insanity in an action for divorce on the grounds of incurable insanity. It is sufficient if the plaintiff proves an adjudication of insanity "more than five (5) years preceding the institution of the action for divorce," together with evidence that such insanity has continued without interruption since said adjudication and there has been no adjudication of sanity, and provided that two physicians, one a psychiatrist, testify that the incurable insanity exists after the bringing of the action. It may be that in a new action the plaintiff can bring herself within the provisions of this portion of the statute. However, in the record before us we do not have evidence sufficient to show that the defendant has ever been adjudicated insane.

For the reasons stated herein, the judgment below is

Affirmed.

CAMPBELL and BROCK, JJ., concur.

IN THE MATTER OF THE WILL OF ALICE B. GOODSON, DECEASED

No. 6910SC12

(Filed 2 April 1969)

1. Wills § 21— caveat — presumption of fraud — instructions

In a caveat proceeding brought by children of the testator alleging that the purported will was obtained through the undue influence of testator's daughter, the principal beneficiary, at a time when the testator lacked the mental capacity to make a will, trial court did not err in refusing to charge the jury on the presumption of fraud arising from dealings within a fiduciary relationship, where the evidence was to the effect that the beneficiary had moved to the mother's home under an agreement with the other children that she have the income from the homeplace farm in return for looking after the mother, the beneficiary paid all the expense of the farm and kept the income without recourse or explanation to her mother, and there was no evidence of procurement of the will by the beneficiary.

2. Cancellation of Instruments § 2; Wills § 18— caveat proceedings — presumption of fraud

No presumption of fraud arises out of the parent-child relationship standing alone.

3. Wills § 21— caveat proceeding — instruction on undue influence

In caveat proceeding, trial court's instructions on the question of undue influence, which were in substantial compliance with *In re Will of Thompson*, 248 N.C. 588, *held* without error.

4. Wills § 21— caveat proceeding — undue influence — instructions — G.S. 1-180

In caveat proceeding, trial court's instructions, when considered contextually, *are held* in substantial compliance with G.S. 1-180 in relating the law of undue influence to the facts of the case.

APPEAL by caveators from *Hobgood, J.*, at the 12 April 1968 Session of WAKE Superior Court.

This was a caveat proceeding, filed by six of the nine children of Alice B. Goodson on 29 March 1966, alleging that the paper writing which purports to be the last will of Alice B. Goodson (the deceased) was executed at a time when the deceased lacked the mental capacity to make a will and that her signature was obtained through the undue influence of her daughter Martha Goodson High Partin (Mrs. Partin), the principal beneficiary.

Answer to the caveat was filed 28 April 1966 by C. M. Kirk, executor, and Mrs. Partin, denying the allegations in the caveat and asking that the paper writing be declared the Last Will and Testament of the deceased.

At trial, the evidence tended to show that the deceased was born 19 June 1880 and that she was married to A. I. Goodson who died in 1943. The caveators testified that shortly thereafter the deceased asked all the children to meet and agree on the one who should come and stay with her. When the children met, Augustus Goodson, a son, was initially selected. However, when Mrs. Partin asked that she be allowed to move in with her mother, it was agreed that she do so and that she have whatever could be made from the homeplace farm as her compensation. Mrs. Partin moved in and lived in the home from that time until the time of the trial.

Each of the caveators testified that in his opinion on 31 October 1961, the date of the execution of the purported will, the deceased lacked the capacity to understand the extent of her property or the effect to her actions in making the purported will or to know her relatives. They based their opinions on various incidents where the deceased had failed to recognize her children, failed to recall how she acquired title to her property, and failed to understand that she had deeded part of her property to her son Marion, thinking it was only a crop allotment lease.

The caveators introduced medical testimony that deceased suffered from cerebral arteriosclerosis, which condition was apparent from 1964 until her death on 6 January 1966. The doctor also testified that such illness develops over the course of several years. There was testimony that Mrs. Partin often locked the deceased in the house and went out to work on the farm and that certain of the caveators could not get in the house and had to converse with the deceased through the window. There was testimony that the deceased and others had remarked on the ill nature of Mrs. Partin.

The evidence indicated that Mrs. Partin took the deceased to the law office of C. M. Kirk in June of 1961, that Mr. Kirk conferred with the deceased in the car, and that a paper writing was executed at that time. On 31 October 1961, the procedure was repeated, the latter paper writing changing the former by adding a bequest of $10 to each child other than Mrs. Partin. The deceased indicated at that time that she feared efforts to break the will. There was also testimony of a paper writing executed in 1953 which made substantial provision for all the children.

The propounder offered testimony tending to show that Mrs. Partin was not in the car at the time the will was executed and that no attempt had been made to influence the judgment of the deceased. In addition, the propounder testified that the deceased possessed the capacity to make a will well past the time the instrument in question was executed. Mrs. Partin testified that she and her husband had operated the farm without substantial outside help, that the deceased had borne none of the expenses, and that the deceased had not received any of the profits other than the comforts of the home. Mrs. Partin testified that she had received no benefit from any income of the deceased.

The court submitted issues of due execution, mental capacity, and undue influence to the jury. The jury found that the will was in all respects the Last Will and Testament of the deceased. From judgment on this verdict, the caveators appealed.

Yarborough, Blanchard, Tucker & Yarborough by Irvin B. Tucker, Jr., for caveator appellants.

Douglass & Douglass by Clyde A. Douglass, II, for propounder appellee.

BRITT, J.

[1] The first question presented is whether the lower court erred in failing to charge the jury on the presumption of fraud arising

from dealings within a fiduciary relationship. The caveators contend that Mrs. Partin was the general agent of the decedent, that the decedent relied upon Mrs. Partin to handle all her business affairs, and that, therefore, the burden was upon the propounder to show that the transaction was open, fair and honest.

[1, 2] On this point, caveators rely principally on the case of *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615. It is clear that no presumption of fraud arises out of the parent-child relationship standing alone. *Walters v. Bridgers,* 251 N.C. 289, 111 S.E. 2d 176; *Gerringer v. Gerringer,* 223 N.C. 818, 28 S.E. 2d 501. As was stated in *Davis v. Davis,* 236 N.C. 208, 72 S.E. 2d 414, we have here "a family relationship, not a fiduciary one." In the *McNeill* case, the beneficiary was not the child of the testatrix but was a cousin. Moreover, the testatrix had executed a written power of attorney to said cousin, Johnnie L. McNeill, and had also deeded large blocks of her property to him for little or no consideration. Also, there was clear evidence that Johnnie L. McNeill had acted as agent for and in behalf of the testatrix in the operation of her farm. In the case at hand, the evidence was that the beneficiary had moved to the deceased's home under an agreement with the other children that she have the income from the homeplace farm in return for staying with and looking after her mother. The evidence was that the beneficiary paid all expenses of said farm and kept the income, without recourse or explanation to the deceased. There was no evidence of procurement of the will by the beneficiary but only of the service and care which a parent might, in the main, expect and desire from her child.

We hold that the evidence of a fiduciary relationship was insufficient to require a charge on the presumption of fraud arising from such a relationship.

[3] Caveators contend next that the trial court erred in its charge to the jury in defining and explaining undue influence. In their brief, they cite and quote from *In re Will of Thompson,* 248 N.C. 588, 104 S.E. 2d 280. In this opinion by Parker, J. (now C.J.), we find the following:

> "The undue influence which renders a will invalid must be of a kind which operates on the mind of the testator at the very time the will is made, and causes its execution. Page on Wills, Lifetime Ed., Vol. 1, sec. 191, where many cases are cited; 94 C.J.S., Wills, pp. 1071-1073. 'It is not material when the undue influence was exercised, if it was present and operating on the mind of the testator at the time the will was executed.' 57 Am. Jur., Wills, sec. 353.

> Undue influence is frequently employed surreptitiously, and is chiefly shown by its results. When the issue of undue influence is raised, the question presented is usually one of the effect of a long course of conduct upon the mind of the testator at the time the will is made, and the evidence by which it is established is usually circumstantial. *In re Will of Lomax,* 226 N.C. 498, 39 S.E. 2d 388; *In re Stephens' Will,* 189 N.C. 267, 126 S.E. 738; *In re Will of Everett,* 153 N.C. 83, 68 S.E. 924."

Although the trial court in the instant case did not charge the exact words quoted from the *Thompson* opinion, we hold that the charge was in substantial compliance and was not prejudicial to the caveators.

[4] Finally, the caveators contend that the charge was not in compliance with G.S. 1-180 because of the failure to relate the law of undue influence to the facts of the case. The record reveals that after defining undue influence, the court enumerated some of the factors which might be considered by the jury in determining whether undue influence was exercised upon the deceased. In so doing, the court set out the factors in terms matching expressly the facts as the jury might have found them. We hold that the charge, considered contextually, was in substantial compliance with the statute.

We conclude that the caveators had a fair trial, free from prejudicial error.

No error.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. JAMES CHARLES SMITH

No. 6910SC86

(Filed 2 April 1969)

1. Burglary and Unlawful Breakings § 5; Indictment and Warrant § 11 — variance — occupant of building broken and entered — owner of business conducted therein

In this prosecution for breaking and entering, there is no fatal variance where the indictment alleges the building broken and entered was occupied by a named person and the evidence shows that the service station business conducted in the building was managed by another but was owned by the person named in the indictment.

2. Larceny § 7; Indictment and Warrant § 11— variance — ownership of stolen property — owner of building

In this prosecution for larceny of a radio and gloves from a service station, there is no fatal variance where the indictment places ownership of the property in the owner of the service station and his brother who managed the station, and the evidence shows the radio and gloves were the sole property of the brother, since the service station owner had such a special property in the radio and gloves as would sustain the indictment.

3. Burglary and Unlawful Breakings § 5; Larceny § 7— recent possession of property stolen by breaking and entering — presumptions

When it is established that a store has been broken and entered and that merchandise has been stolen therefrom, the recent possession of such stolen merchandise raises presumptions of fact that the possessor is guilty of the larceny and of the breaking and entering.

4. Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence

In this prosecution for breaking and entering and larceny, defendant's motions for nonsuit are properly denied where the evidence tends to show that a service station was broken and entered at nighttime and property stolen therefrom, and that defendant was apprehended shortly thereafter near the crime scene with the stolen property in his possession.

5. Criminal Law §§ 102, 165— argument of solicitor and counsel

Control of the argument of the solicitor and counsel rests largely in the trial court's discretion, and only in extreme cases of abuse where the court fails to intervene or correct an impropriety will a new trial be awarded on appeal.

APPEAL by defendant from *Bickett, J.*, at the September 1968 Regular Criminal Session of WAKE Superior Court.

The indictment, proper in form, charged that on 28 June 1968 defendant did: (summarized) (1) break and enter a certain storehouse and building, etc., "occupied by one Bobby L. Murray t/d/a Murray's Gulf Service, located at 501 Fayetteville St., Raleigh," wherein merchandise and other personal property were being kept, etc.; (2) after having broken into said building occupied by Bobby L. Murray t/d/a Murray's Gulf Service, located at 501 Fayetteville St., Raleigh, steal, take and carry away one G.E. 10 transistor radio and one pair men's gloves of the value of $53.50, the property of the said Bobby L. Murray t/d/a Murray's Gulf Service and Jimmy Murray, etc.; and (3) received said personal property knowing the same to have been feloniously stolen, etc.

Defendant was represented at trial by the same court-appointed attorney who represents him on this appeal. At the conclusion of the State's evidence, defendant's motion for nonsuit as to the re-

ceiving count was allowed, but the motion as to the other two counts was overruled. The jury found the defendant guilty of the charges of breaking and entering and larceny, and from active prison sentences imposed, defendant appealed.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Trial Attorney Robert G. Webb for the State.

R. P. Upchurch for defendant appellant.

BRITT, J.

Defendant first assigns as error the refusal of the trial court to grant his motions for judgment of nonsuit as to the breaking and entering and larceny charges.

[1] On this assignment of error, defendant contends that there was a fatal variance between the allegations in the bill of indictment and the evidence on both the breaking and entering and the larceny charges. Bobby L. Murray, named in the bill of indictment, was not called as a witness for the State. His brother Jimmy Murray testified that he was manager of the Murray Gulf Service located at 501 Fayetteville Street, in the city of Raleigh; that he had been such manager for four years; that the station was owned by his brother Bobby L. Murray and that he did business as Murray's Gulf Service. We think that the evidence, including the testimony of Jimmy Murray, was not at variance with the bill of indictment and was sufficient to show that Bobby L. Murray was the owner of the service station business and as such was the occupant of the building alleged to have been broken into and entered.

[4] The evidence for the State tended to show the following: Jimmy Murray closed Murray's Gulf Service at approximately 8:00 p.m. on 28 June 1968 and locked all doors; pursuant to a call from the police department, he returned to the station around midnight and found the glass in the washpit door had been broken out, the glass in the door separating the lubrication room from the sales office had been broken, and a transistor radio and a pair of gloves had been taken from the service station. Jimmy Murray testified that the radio was his property and was on a desk in the service station when he locked and left the station around 8:00 p.m.; that the gloves were his and he used them regularly to pull down the heavy doors of the station, leaving them in the station on the night in question. J. M. Edwards of the Raleigh Police Department testified that at about 11:25 p.m. on 28 June 1968 he received a call to go to the area of Barnett's Esso Service Station which is located in the northwest inter-

section of Fayetteville Street and Cabarrus Street, diagonally across Fayetteville Street from Murray's Gulf Service. As he approached the Barnett Station, he saw the defendant, almost running, coming across a parking lot adjacent to the station, and as defendant went past the police car headlights he threw some gloves and a screwdriver on the ground. Mr. Edwards apprehended the defendant near the Barnett Station, and the defendant had a transistor radio in his hand. Jimmy Murray identified the radio and gloves as his property and as the same radio and gloves which he had left in the Murray Gulf Service Station at approximately 8:00 p.m. that night.

[2] Defendant insists that there was fatal variance between the allegation of ownership in the larceny count and the evidence; that the indictment alleges that the transistor radio and the gloves belonged to Bobby L. Murray and Jimmy Murray but that the evidence disclosed that the radio and gloves were the sole property of Jimmy Murray. We hold that Bobby L. Murray had such a special property in the radio and the gloves as would sustain the indictment. Our holding is supported by *State v. Allen,* 103 N.C. 433, 9 S.E. 626, in which case the defendant was charged with larceny of some pork, the property of James I. Deloatch; the evidence disclosed that although the pork was in Deloatch's smokehouse, it belonged to his sister and he was keeping the meat for her. The Supreme Court held that Deloatch had such a special property in the meat as would sustain the indictment. See also *State v. Law,* 228 N.C. 443, 45 S.E. 2d 374, in which *State v. Allen, supra,* is cited. The case at bar is made stronger by the fact that the gloves were used in connection with the operation of Bobby L. Murray's business.

[3] We think the principle of law restated by our Supreme Court in *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578, is applicable to the case at bar. The following is quoted from the opinion:

> "* * * These facts are sufficient to invoke the following well-established legal principle: If and when it is established that a store has been broken into and entered and that merchandise has been stolen therefrom, the recent possession of such stolen merchandise raises presumptions of fact that the possessor is guilty of the larceny *and* of the breaking and entering. *S. v. Hullen,* 133 N.C. 656, 45 S.E. 513; *S. v. White,* 196 N.C. 1, 144 S.E. 299; *S. v. Lambert,* 196 N.C. 524, 146 S.E. 139; *S. v. Neill,* 244 N.C. 252, 93 S.E. 2d 155."

[4] We hold that the evidence was sufficient to overcome the motions for nonsuit, and the assignment of error relating thereto is overruled.

[5] Defendant also assigns as prejudicial error certain portions of the solicitor's argument to the jury. In *State v. Burgess,* 1 N.C. App. 104, 160 S.E. 2d 110, this court said:

> "The control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and it is only in extreme cases of abuse and when the trial court does not intervene or correct an impropriety that a new trial may be allowed on appeal. *State v. Barefoot,* 241 N.C. 650, 657, 86 S.E. 2d 424; *State v. Bowen,* 230 N.C. 710, 711, 55 S.E. 2d 466; *State v. Horner,* 139 N.C. 603, 52 S.E. 136."

We hold that there was no prejudicial error in the solicitor's argument and the assignment of error relating thereto is overruled.

Defendant also assigns as error certain portions of the trial court's charge to the jury. We have carefully reviewed the charge and, considering it contextually, we find that it was free from prejudicial error, and the assignments of error relating thereto are overruled.

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

No error.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. JAMES PHILLIP McCLAIN
No. 6910SC169

(Filed 2 April 1969)

1. Criminal Law § 66— *identity of defendant* — sufficiency of evidence

Where there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury, and the court's doubt upon the matter will not justify granting a motion for judgment of nonsuit.

2. Criminal Law § 66— identity of defendant — sufficiency of evidence

Evidence of defendant's identity as the perpetrator of the offense charged is properly submitted to the jury, where the State's witness testified (1) that he had seen defendant approximately 200 times in his life-

time and was familiar with his face and (2) that when he turned on his automobile headlights near the scene of the crime, and first saw defendant, the defendant was approximately 75 to 100 feet away.

3. Criminal Law § 60— fingerprint evidence — testimony of nonexpert — admissibility

Defendant was not prejudiced by testimony of police officer, who had not been qualified as a fingerprint expert, that in his opinion latent fingerprints could not have been lifted from a roof because of dew and dust, since (1) similar testimony was elicited by the State in regard to footprints without objection by defendant and (2) the officer, prior to the questioning, had described the roof as being constructed of tar paper and wet with dew.

4. Criminal Law § 169— harmless error in admission of evdience

The admission of evidence which is not prejudicial to a defendant does not entitle him to a new trial.

5. Criminal Law § 169— admission of technically incompetent evidence — absence of prejudice

Where there is abundant evidence to support the main contentions of the State, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result.

6. Criminal Law § 162— waiver of objection

An objection to testimony not taken in apt time is waived.

7. Criminal Law § 155— time of docketing — dismissal of appeal

Where appeal was docketed in the Court of Appeals considerably beyond the 90-day period provided by the rules, and no extension of time was requested, the appeal will be dismissed. Rule of Practice in the Court of Appeals No. 5.

APPEAL by defendant from *Bickett, J.*, 18 September 1968 Criminal Session, Superior Court of WAKE.

Defendant was charged in the bill of indictment with breaking and entering, larceny, and receiving stolen goods knowing them to have been stolen. At the trial the defendant entered a plea of not guilty.

The evidence tends to show that on 7 July 1968 at approximately 12:55 a.m., Jessie Barbour, employed by the Capital City Guard and Patrol, pulled into the Harmon-Rowland used car lot in order to check the same. When he turned into the lot his headlights were turned off. When he turned them on, he spotted the defendant climbing over a fence with two small portable televisions swung over his shoulder. The televisions were held together by a piece of electrical wire. When the defendant was first seen by Barbour, he appeared to

be startled. He remained on the fence with the lights of Barbour's car shining on him for approximately three or four seconds. He then retreated, set the televisions down, turned, and ran. Barbour shouted to the defendant to halt and shot his pistol into the air, but the defendant continued to run. Barbour then ran to the corner of the building and saw the defendant coming up Blount Street. Barbour then waited at the corner of the building, with the defendant running toward him, until the defendant was nearby, and jumped out with his pistol and apprehended the defendant. Approximately five to seven minutes later the Raleigh Police Department arrived and took control of the defendant. The two televisions which the defendant was carrying were recovered. Two more were recovered in a parking lot near the point where Barbour first saw the defendant. Barbour testified that he had seen the defendant approximately 200 times in his lifetime and that he was familiar with his face but did not know his name.

After the defendant was taken into custody, it was discovered that a skylight on the H & H Tire Company had been opened. At approximately 8:00 a.m. on 7 July 1968, Ed Meadows, the owner of H & H Tire Company, was called by the police and requested to go to the Tire Company and see if anything was missing. Upon arriving at these premises, Meadows discovered that four small black and white television sets were missing. Meadows identified the televisions which the defendant was seen carrying, along with the other two, as being the same as those that were taken from his place of business. Also, the serial numbers on the televisions matched the serial numbers that were on invoices in Meadows' file. The defendant was approximately 300 feet from H & H Tire Company when he was first seen by Jessie Barbour.

The defendant offered no evidence. At the close of the State's evidence, the trial court allowed a judgment as of nonsuit as to the charge of receiving stolen goods. The charges of breaking and entering and larceny were submitted to the jury and the defendant was found guilty on both counts. From judgment of imprisonment the defendant appealed.

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

Howard F. Twiggs for defendant appellant.

MORRIS, J.

The defendant presents two questions to this Court. His first contention is that the evidence of identity was not sufficient to sur-

vive the motion for judgment as of nonsuit. In this regard the defendant cites *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902. In *Miller*, the witness testified that he was never closer than 286 feet from the suspect. The witness had never seen this man before, and that he only observed the suspect run along the side of the building in each direction, stop at the front and "peep" at the witness. The witness described the man he saw to the police as being 6 feet 3 inches tall. The person whom the witness later identified, the defendant, was actually 5 feet 11 inches tall. Our Supreme Court held that under these facts it was not possible ". . . for an observer to note and store in memory features which would enable him, six hours later, to identify a complete stranger with the degree of certainty which would justify the submission of guilt of such person to the jury."

[1, 2] The general rule is, as stated in *State v. Miller, supra*, "Where there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury, and the court's doubt upon the matter will not justify granting a motion for judgment of nonsuit . . ." The facts here show that the witness Barbour had seen the defendant many times before this particular incident occurred. Barbour was approximately 75 to 100 feet from the defendant when he first saw him. Upon these facts, we hold that the present case is distinguishable from *State v. Miller, supra*, and that the evidence of identity was not "inherently incredible because of undisputed facts, clearly established by the State's evidence, as to the physical conditions under which the alleged observation occurred." *State v. Miller, supra*. The Court properly left it to the jury to determine the weight to be given to the testimony of Barbour.

[3] The second question raised by the defendant is in regard to testimony by Officer M. L. Stephenson. He was asked the following on direct examination:

> "Q. Do you have an opinion satisfactory to yourself as to whether or not latent prints could have been lifted from this roof?
>
> MR. TWIGGS (defendant): Objection.
>
> COURT: Overruled.
>
> A. Yes, sir.
>
> Q. What is that opinion?
>
> A. That they could not have been lifted.

Q. Why?

A. The dew and the dust made it impossible to lift a latent print.

MR. TWIGGS: Objection and motion to strike.

COURT: Motion overruled, exception."

The same series of questions were asked by the State in regard to footprints without objection by the defense. Officer Stephenson had not been qualified as a fingerprint expert when these questions were asked, although it was brought out that he had been a detective with the Raleigh Police Department for ten years.

[4, 5] Conceding, *arguendo,* that this testimony from a non-expert was improper, we do not think that it was prejudicial to the defendant. The defendant brought out evidence on cross-examination which showed that the State did not take fingerprints from the televisions, nor from the skylight. The above testimony referred only to the roof. Prior to the above series of questions Officer Stephenson had described the roof of the H & H Tire Company as being constructed of tar paper; and restated that on the morning in question it was wet with dew. Under these conditions, we do not think it was prejudicial to allow the non-expert to testify that prints could not be removed from the roof.

"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." *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206.

"Where there is abundant evidence to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." 3 Strong, N. C. Index 2d, Criminal Law, § 169.

[6] Aside from the fact that we do not believe the defendant was prejudiced by the admission of this evidence, we note that an objection was entered to the introductory question only. The defense did not object to the substantive question.

"An objection to testimony not taken in apt time is waived. *S.*

v. Merrick, 172 N.C. 870, 90 S.E., 257. Afterward, a motion to strike out the testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal. *S. v. Merrick, supra; S. v. Pitts,* 177 N.C., 543, 98 S.E., 767." *State v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598.

[7] Even though we have carefully examined the record and find no prejudicial error, the appeal must be dismissed for failure of defendant to docket the record on appeal within the time provided by our rules. Rule 5, Rules of Practice in the Court of Appeals of North Carolina. We note that judgment was entered on 18 September 1968. The appeal was not docketed in this Court until 4 February 1969, considerably beyond the 90-day period, and no extension of time was requested.

Appeal dismissed.

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

JULIUS ROSS v. FLOSSIE SAMPSON

No. 6914SC111

(Filed 2 April 1969)

1. Appeal and Error § 39— time for docketing appeal — dismissal of appeal

Where record on appeal was not docketed in the Court of Appeals within ninety days from date of signing of the judgment, and appellant did not procure an extension of time in which to docket the appeal, the appeal is subject to dismissal. Rules of Practice in the Court of Appeals Nos. 5 and 48.

2. Appeal and Error § 39— time for docketing appeal — extension of time

Authority of trial court 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 appellant additional time to serve his case on appeal upon the appellee.

3. Appeal and Error § 39— time for docketing appeal — rule relating to call of the district

Provision of Court of Appeals Rule No. 5 requiring that record on appeal must be docketed at least twenty-eight days before the call of the

district to which the case belongs in order to be heard at the next ensuing call of the district does not abrogate requirement that record on appeal be docketed within ninety days of signing of judgment.

4. Trusts § 19— action to establish constructive trust — sufficiency of evidence

In an action to establish a constructive trust, plaintiff's case is properly submitted to the jury where there is evidence that (1) plaintiff and femme defendant lived together without benefit of clergy for eighteen years, (2) plaintiff gave all of his earnings to defendant who in turn purchased rental properties with the earnings, (3) there was an agreement between them that the properties thus acquired would be owned one-half by each, and (4) plaintiff, who was unable to read, and after being forced to leave home by defendant, learned for the first time that the properties were in the name of defendant alone.

APPEAL by defendant from *Clark, J.*, 9 September 1968, Civil Session, DURHAM County Superior Court.

Julius Ross (plaintiff) commenced this civil action on 8 January 1968 against Flossie Sampson (defendant) for the purpose of imposing a trust on several parcels of real estate situated in Durham County, North Carolina. The plaintiff alleged in his complaint that he and the defendant lived together without benefit of clergy for a period of some eighteen years; during this period of time he contributed all of his earnings to the defendant; the defendant purchased the properties in question with these earnings and with the rentals from houses located thereon; there was an understanding and agreement between them that the properties thus acquired would be owned one-half by each; he could neither read nor write; during 1963 the defendant grew tired of the plaintiff and forced him to leave home; and he thereafter learned for the first time that the properties were in the name of the defendant alone and not in their joint names.

The jury answered the issues submitted to it as follows:

"I. Is the plaintiff the owner under a trust in his favor held by the defendant of a one-half (½) undivided interest in the lands described in the Complaint, as follows:

A. The Park Lane property (described in the Complaint in paragraph 7(a))?

ANSWER: Yes.

B. The Jackson Street property (described in the Complaint in paragraphs 7(b) and (d))?

ANSWER: Yes.

C. The McLaurin Avenue property (described in the Complaint in paragraph 7(c))?

ANSWER: Yes."

Upon this verdict and a stipulation of the parties as to the amount of certain indebtedness on the properties, the trial court entered a judgment under date of 19 September 1968. It was adjudged that the plaintiff was the owner of a one-half undivided interest in specifically described properties, which the defendant, as trustee, held in trust for the benefit of the plaintiff, and that the plaintiff and defendant were tenants in common of these properties, each owning a one-half undivided interest therein. The defendant objected and excepted to this judgment and appealed to this Court.

Brooks & Brooks by Eugene C. Brooks, III, for plaintiff appellee.

Pearson, Malone, Johnson & DeJarmon by W. G. Pearson, II, for defendant appellant.

CAMPBELL, J.

[1] The judgment appealed from was signed by Judge Clark and filed on 19 September 1968. The record on appeal was docketed by the defendant in this Court on 2 January 1969. Ninety days from the date of this judgment expired on 18 December 1968. The defendant did not procure an extension of time in which to docket the record on appeal. Therefore, this appeal may be dismissed under Rule 48 of the Rules of Practice in the Court of Appeals for failure to comply with Rule 5.

[2] On 23 December 1968 the plaintiff duly filed a motion in accordance with Rule 17 to docket and dismiss the appeal for failure to comply with Rule 5. The defendant filed an answer to this motion. In support of the contention that the motion should be denied, counsel for the defendant relies upon an order procured from Judge Clark which extended the time for serving the case on appeal upon the plaintiff. However, counsel for the defendant has confused the time allowed for serving a case on appeal with the time allowed for docketing a record on appeal in this Court. As pointed out by the following language of Brock, J., in *Smith v. Starnes,* 1 N.C. App. 192, 160 S.E. 2d 547, the two time periods are entirely different.

> "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."

[3] Counsel for the defendant also relies upon the fact that Rule 5 provides:

"In order for an appeal to stand for hearing at any call of any session of this Court, the record on appeal must be docketed at least twenty-eight days before the call of the district to which the case belongs, and if so docketed, shall be heard at the next ensuing call of the district, unless for cause it is continued."

However, this twenty-eight day rule is a separate and distinct rule, which does not abrogate the ninety day requirement. It applies only after the ninety day requirement has been complied with. Therefore, if a record on appeal is properly docketed under this ninety day requirement and if it is "docketed at least twenty-eight days before the call of the district to which the case belongs", it will be heard in this Court at the next ensuing call of that district. If a record on appeal is properly docketed, but it is docketed within twenty-eight days of "the call of the district to which the case belongs", it will be heard in this Court at the second call of that district after the date of docketing.

[4] Despite the failure of the defendant to comply with the Rules of Practice and the motion filed by the plaintiff, we have nevertheless considered the errors assigned by the defendant. First, we hold that upon the evidence presented by the plaintiff, he was entitled to have the case submitted to the jury.

"It is well established in this jurisdiction that upon motion to nonsuit, the plaintiff's evidence is 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, and defendant's evidence which tends to impeach or contradict plaintiff's evidence is not considered. It is elementary that discrepancies and contradictions even in plaintiff's evidence are matters for the jury and not the judge." *Williams v. Hall,* 1 N.C. App. 508, 162 S.E. 2d 84.

Second, we hold that, in the absence of any objection or tender of other issues by the defendant, the issues submitted to the jury were

sufficient to enable the jury to make a factual determination. Third, we hold that the charge of the trial court, when considered in its entirety, did not contain any error prejudicial to the defendant.

Affirmed.

BRITT and MORRIS, JJ., concur.

EDWIN BROWIN GLYMPH v. CATHERINE DeCENZO GLYMPH

No. 6914DC165

(Filed 2 April 1969)

1. Evidence § 22— evidence at former trial

In an action for absolute divorce on the ground of separation for more than one year, the trial court properly refused to permit defendant to introduce the transcript of testimony in a divorce action instituted by plaintiff against defendant in another state where defendant failed to show that the witnesses who provided the testimony are not present in this State and are unavailable to testify in this action, and the only explanation of defendant's absence from the present trial is an unverified motion for continuance made by her attorney stating that she is undergoing medical treatment.

2. Divorce and Alimony § 13— separation for statutory period — sufficiency of evidence

The evidence *is held* sufficient to be submitted to the jury in this action for absolute divorce on the ground of separation for more than one year.

APPEAL by defendant from *Lee, J.*, at the October 1968 Civil Session of DURHAM District Court.

This is an action for absolute divorce on ground of separation for more than one year. In his complaint, filed 21 June 1967, plaintiff alleged his residency in Durham County, North Carolina, for more than six months next preceding the commencement of the action, marriage of the parties in California on 29 December 1962, separation of the parties on 15 April 1964 with intent to live permanently separate and apart, and the fact no children were born to the marriage.

Defendant was personally served with process and filed answer, further answer and cross-action in which she admitted the marriage but further alleged that the separation was brought about by ex-

treme cruelty on the part of plaintiff and that plaintiff willfully and without just cause abandoned the defendant on or about 14 December 1964. Inasmuch as defendant submitted to judgment of voluntary nonsuit of her cross-action, it is not necessary to state its allegations.

When the case came on for trial, defendant's counsel made a motion for continuance on the ground that defendant was physically unable to attend the trial, but the trial judge overruled the motion. The usual issues of marriage, residence, and separation were submitted to the jury and answered in favor of plaintiff. From judgment on the verdict granting plaintiff an absolute divorce, defendant appealed.

Norman E. Williams for plaintiff appellee.

John C. Randall for defendant appellant.

BRITT, J.

[1] Defendant's first assignment of error relates to the refusal of the trial court to permit defendant to introduce in evidence the transcript of testimony in an action for divorce instituted by plaintiff against defendant in the Superior Court of Tulare County, California, and heard in said court on 24 May 1965.

Several reasons can be given as to why the transcript was inadmissible, but we will discuss only one. The record discloses that after plaintiff rested his case and the court inquired if there was any evidence for the defendant, defendant's counsel stated that he desired to introduce the authenticated judgment entered by the California court. The trial court admitted the judgment in evidence and allowed defendant's counsel to read the judgment to the jury. Defendant's counsel then stated: "I would like to offer the Court transcript from the State of California." Plaintiff's counsel objected and the trial court sustained the objection. Defendant's counsel laid no foundation whatsoever for the introduction of the California transcript which included testimony of plaintiff, defendant and three witnesses, together with various exhibits. In his brief, defendant's counsel quotes from section 145 of Stansbury, N.C. Evidence 2d, which sets forth the requirements of admitting testimony given at a former trial. The section prescribes the conditions that must exist for such testimony to be admissible, including the following: "If the witness has since died, or become incapacitated by insanity or illness, or has removed from the jurisdiction or has otherwise become

unavailable to testify as a witness at the present trial. [References to footnotes and citations omitted.]"

In *Smith v. Moore,* 149 N.C. 185, 62 S.E. 892, in addressing itself to the question of admitting a record of testimony given at a former trial, the court said:

> "The admissibility of such evidence constitutes an exception to the general rule of exclusion of hearsay evidence, and rests upon a kind of legal necessity springing from an apparent impossibility or impracticability of procuring the testimony of the person from whom the information emanates. It is, therefore, incumbent upon the party offering such testimony to show affirmatively the evidence of all facts necessary to the bringing of the secondary evidence clearly within the exception, and, unless this is done, the evidence should be excluded."

Defendant's counsel failed to carry the burden of showing that the transcript of testimony from the California court was admissible. He attempted to introduce all of the testimony included in the transcript and, even though the court might speculate that the witnesses who provided the testimony were not present in this State, there was no showing by defendant that this was true. Defendant did not appear at the trial of the present action, and the only information in the record explaining her absence is the unverified motion for a continuance made by her attorney stating that "defendant is now undergoing a series of medical treatments that must be done in consecutive order, which treatments will be completed in approximately six weeks." In *Smith v. Moore, supra,* it is said: "To say that a witness is 'sick' or 'unable to attend court' is indefinite, and by no means determinative of the admissibility of her former testimony as original substantive evidence."

The assignment of error relating to the failure of the trial court to admit the California transcript is without merit and is overruled.

[2] Defendant's second assignment of error relates to the refusal of the trial court to grant defendant's motions for judgment as of nonsuit. We have reviewed the evidence in its entirety and find that it was sufficient to survive the motions for nonsuit, and the assignment of error pertaining thereto is overruled.

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

No error.

CAMPBELL and MORRIS, JJ., concur.

RICHARD CLARK, BY HIS NEXT FRIEND, ROBERT CLARK v. DORSEY ARTHUR JACKSON, JR.

No. 6911SC82

(Filed 2 April 1969)

Automobiles § 60— skidding on ice at intersection — negligence

In an action for personal injuries sustained by plaintiff guest passenger when defendant's automobile skidded on ice through an intersection and went down an embankment, evidence that there was some snow or sleet on shaded spots and shoulders of the highway, that immediately prior to the accident defendant was driving at a speed of 60 m. p. h. in a 55 m. p. h. zone, and that when defendant applied the brakes the automobile hit a patch of ice and skidded through the intersection *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in failing to exercise due care in view of prevailing road conditions and in driving at a speed that was excessive and which was greater than was reasonable and prudent under the conditions then prevailing.

APPEAL by plaintiff from *Canaday, J.*, at the 9 September 1968 Civil Session of HARNETT Superior Court.

Plaintiff filed his complaint 18 September 1962 alleging that defendant was negligent in the operation of the automobile driven by him on 5 February 1961, and in which plaintiff was riding as a guest passenger, in that defendant failed to decrease speed when approaching an intersection, operated at an excessive speed, failed to keep a proper lookout and failed to keep the automobile under proper control.

At the close of plaintiff's evidence, the court granted defendant's motion for judgment as of nonsuit. Plaintiff appeals from this ruling.

Robert H. Jones by C. McFarland Hunter for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Bob W. Bowers for defendant appellee.

BRITT, J.

The only question presented by this appeal is whether plaintiff offered sufficient evidence of defendant's negligence to require submission of the case to the jury. We hold that he did.

Defendant relies heavily on *Webb v. Clark*, 264 N.C. 474, 141 S.E. 2d 880. He contends that plaintiff's own evidence discloses that the cause of the accident was not speed on the part of defendant but the fact that defendant's vehicle suddenly and without notice came upon ice which made it impossible for defendant to stop. In his brief, defendant argues that he had no notice of, or reason to suspect the

presence of, ice on the highway at the intersection and that the presence of such ice was an independent agency which solely and proximately produced the accident with resulting injury to plaintiff.

Plaintiff's evidence, when considered in the light most favorable to him, as we are bound to do, tended to show: Plaintiff, defendant and three others, with defendant driving, embarked from plaintiff's home around 10:00 p.m. on a Sunday night to go to Angier. They traveled south on Rural Paved Road 1446 toward its intersection with Rural Paved Road 1441, at which point 1446 terminated in a "T" intersection rendering it necessary for travelers on 1446 to make a right-angle turn either to the right or left. As they proceeded, they went over a hill and then a downgrade toward the intersection which was 600 to 900 feet from the crest of the hill. There was a stop sign on R.P.R. 1446. It had snowed or sleeted during the week-end, and although most of the snow or sleet had melted, some remained on shaded spots of R.P.R. 1446 and also on its shoulders. As defendant crested the hill, he was driving approximately 60 mph and began applying his brakes. Plaintiff testified that as defendant "topped over the hill he applied his brakes but it didn't do any good. He just kept going * * *." Defendant's car hit a patch of ice and went into a skid, entering the left lane of travel as he approached the intersection. The car skidded through the intersection, down an embankment on the other side, and came to rest with the front end in a creek flowing under R.P.R. 1441 and the rear end resting on a culvert. Plaintiff sustained substantial injuries.

It is true that the Supreme Court held in *Webb v. Clark, supra,* that the mere skidding of a motor vehicle is not evidence of, and does not imply, negligence; it also held that "[w]hen the condition of a road is such that skidding may be reasonably anticipated, the driver of a vehicle must exercise care commensurate with the danger, to keep the vehicle under control so as to avoid injury to occupants of the vehicle and others on or off the highway." In *Webb,* the defendant was traveling at a speed of not more than 35 mph and that fact alone is sufficient to distinguish the case from the case before us in which the evidence showed that defendant was driving 60 mph in a 55 mph maximum speed zone immediately prior to the accident.

In *Wise v. Lodge,* 247 N.C. 250, 100 S.E. 2d 677, in an opinion by Parker, J. (now C.J.), we find the following:

> "G.S. 20-141 establishes the maximum speed at which motor vehicles are permitted to travel lawfully on the highways of the State, in a business district, in a residential district, and in other places. Section (a) of this statute provides 'no person shall

drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.' Section (c) of the same statute reads: 'The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed . . . when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway, and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care.'

* * *

The skidding of an automobile is not in itself, and without more, evidence of negligence. *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406; *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251.

But the skidding of an automobile may be evidence of negligence, if it appears that it was caused by a failure to exercise reasonable precaution to avoid it, when the conditions at the time made such a result probable in the absence of such precaution. [Citing authorities.]"

See also *Saunders v. Warren,* 264 N.C. 200, 141 S.E. 2d 308; *Hardee v. York,* 262 N.C. 237, 136 S.E. 2d 582; and *Durham v. Trucking Co.,* 247 N.C. 204, 100 S.E. 2d 348.

When considered in the light most favorable to him, plaintiff's evidence permits the legitimate inference that the skidding of defendant's automobile was caused by his failure to exercise due care in view of the prevailing conditions of the road and in driving at a speed that was excessive and which was greater than was reasonable and prudent under the conditions then existing.

We hold that the evidence presented a case for the jury and the judgment of nonsuit is

Reversed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. CLAUDE OVERBY

No. 6910SC56

(Filed 2 April 1969)

1. Criminal Law § 40— evidence of guilty plea in inferior court

In a prosecution in the superior court for assault with a deadly weapon upon defendant's appeal from a conviction of that offense in city court, persistent efforts by the solicitor to have the jury consider whether defendant had pleaded guilty or not guilty to the offense in city court was improper and highly prejudicial to defendant, the question of what defendant's plea was in city court not being for determination by the jury.

2. Criminal Law § 40— evidence of guilty plea in inferior court

Evidence as to a plea of guilty entered by a defendant in an inferior court is not competent against him in his trial *de novo* upon appeal to the superior court, defendant's trial in superior court being "without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon." G.S. 15-177.1.

3. Criminal Law § 18— appeal to superior court from inferior court

When a defendant in a criminal action appeals to the superior court from an inferior court, he is entitled to a trial anew and *de novo* by a jury from the beginning to the end in the superior court on both the law and the facts, without regard to the plea, trial, verdict or judgment in the inferior court.

4. Criminal Law § 40— evidence of guilty plea in inferior court

In a prosecution in the superior court upon defendants' appeal from city court, testimony by a State's witness that defendant pled guilty in city court is particularly damaging to defendant where the record does not show that defendant pled guilty but shows that he was "adjudged" guilty in city court.

APPEAL by defendant from *Bickett, J.*, First September 1968 Regular Criminal Session of Superior Court of WAKE County.

Defendant was tried in the City Court of Raleigh on a warrant charging him with assault with a deadly weapon. The record reveals that the verdict and judgment in the City Court of Raleigh were as follows:

"After hearing the evidence in the above-entitled action, it is adjudged that the defendant ..... guilty.

It is further ordered and adjudged that the defendant 12 months —N. C. State Department of Correction

Sentence to begin at expiration of sentence now serving for assault with intent to commit rape, he having been convicted in Durham County Superior Court on 4/20/66, and escape, he

having been convicted in Person County Superior Court May 18, 1967."

The defendant appealed to the Superior Court from the judgment imposed in the City Court of Raleigh.

Upon his plea of not guilty in the Superior Court, trial was by jury. From the imposition of a prison sentence upon the jury verdict of guilty of assault with a deadly weapon as charged in the warrant, the defendant appealed to the Court of Appeals.

Attorney General Robert Morgan and Deputy Attorney General Harry W. McGalliard for the State.

Ralph McDonald for the defendant appellant.

MALLARD, C.J.

The evidence for the State tends to show the following facts: On 7 June 1968 the defendant and Joseph James (Joseph) were both serving sentences in the State Prison at Raleigh. On this date during "feeding time" while the door of the cell occupied by Joseph was open, the defendant walked or ran into the cell and stabbed Joseph twice in the back with a weapon made out of a spoon that had been filed down. One end of the spoon was wrapped with adhesive tape. One of the prison guards who had seen the defendant go into the cell followed him and saw him make a striking motion twice on Joseph's back. It required eight stitches to close Joseph's wounds. The defendant advanced on the guard with the weapon at which time the guard struck him with a blackjack and knocked the weapon from his hand.

The defendant's evidence tends to show: On the night preceding 7 June 1968 the defendant and Joseph had had an argument; that Joseph had talked about the defendant's mother and had threatened to cut his throat. At the time of the altercation there was only one blow struck; the defendant hit Joseph with his fist and when he started back to his cell, the guard struck him. Defendant testified he had never seen the weapon introduced in evidence until he saw it in "Recorder's Court."

[1] Although the defendant was "adjudged" to be guilty in the City Court of Raleigh, the court permitted the assistant solicitor to ask the State's witness Norwood what plea the defendant entered in the city court when the case was tried there. The witness replied guilty; however, the defendant's counsel did not object until after the witness had answered, and the court did not rule on the objec-

tion. The assistant solicitor persisted in his questioning by then asking the witness the question, "Guilty as charged?" Defendant objected and the court overruled the objection. When defendant's counsel was cross-examining this witness about what he had testified to with respect to the plea of the defendant in the city court, the court on its own motion stopped him and sustained an objection which was not made by the State "as to whether he entered a plea of guilty in city court to this charge," and then instructed the jury not to consider whether he had entered a plea of guilty in the city court. After this occurred, the assistant solicitor again attempted to bring the matter of the plea in city court to the attention of the jury by asking the defendant how he had pleaded in the city court. Defendant's counsel objected, and the court did not rule on the objection. The defendant answered that he had pleaded not guilty. After defendant's counsel called the court's attention to the fact that the court had theretofore instructed the jury not to consider the plea in the city court, the court instructed the jury as follows:

> "Ladies and gentlemen, anything asked by the solicitor in connection with any statement heretofore made is in corroboration of Mr. Norwood and for no other purpose. It is not substantive evidence. Substantive evidence being that type of evidence that bears directly or circumstantially upon the issue involved. Corroborative evidence bearing merely upon the credibility of the witness. You understand that, don't you?"

Although defendant's counsel did not object or take exception to the foregoing instructions of the court, he did object to the assistant solicitor bringing up the question of what the plea was in the city court.

After all the above had occurred, the assistant solicitor again asked the defendant what plea he had entered, and again the defendant answered not guilty before his counsel objected. Defendant's counsel at the trial in superior court was not his counsel on this appeal.

[1] The assistant solicitor, notwithstanding the different rulings of the trial judge, persisted in his efforts to have the jury consider whether the defendant had pleaded guilty or not guilty in the city court. This persistence, under these circumstances, was improper and highly prejudicial to the defendant. The question of what the plea of the defendant was in the city court was not for determination by the jury.

G.S. 15-177.1 reads as follows:

"In all cases of appeal to the superior court in a criminal action

from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon."

[2] The words "without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon" mean, among other things, that evidence as to a plea of guilty entered by a defendant in the inferior court is not competent against him on his trial *de novo* on his appeal in the superior court. To hold otherwise in a criminal case on appeal would, we think, render meaningless the words "without prejudice" and "irrespective of the plea entered."

[3] When a defendant in a criminal action appeals to the superior court from an inferior court, he is entitled to a trial anew and *de novo* by a jury from the beginning to the end in the superior court on both the law and the facts, without regard to the plea, the trial, the verdict, or the judgment in the inferior court. *State v. Meadows*, 234 N.C. 657, 68 S.E. 2d 406.

[4] In this case the testimony as to a plea of guilty in the city court was particularly damaging to the defendant because the record does not reveal that he pleaded guilty; the record reveals that he was "adjudged" guilty. The word "adjudge" means "to decide or rule upon as a judge or with judicial or quasi-judicial powers." Webster's Third New International Dictionary (1968).

It is not necessary to discuss the other questions argued by the defendant in his brief as they may not recur on a new trial.

For the reasons above stated, the defendant is awarded a

New trial.

BRITT and PARKER, JJ., concur.

ANNA LEAN C. PORTER, T/A MOYOCK CAFE v. STATE BOARD OF ALCOHOLIC CONTROL

No. 6910SC70

(Filed 2 April 1969)

Administrative Law § 5; Intoxicating Liquor § 2— suspension of beer license — hearing before full ABC Board — review in superior court — failure to exhaust administrative remedies

The holder of a retail beer permit is entitled, after a hearing before an examiner for the State Board of Alcoholic Control as to whether his license should be revoked or suspended, to request a hearing before the full Board, and where he does not request such a hearing after notice of the date the Board would consider the matter, his application for judicial review under G.S. 143-307 must be dismissed for failure to exhaust available administrative remedies.

APPEAL by respondent from *Bowman, S.J.*, at the 10 October 1968 Session of WAKE Superior Court.

Petitioner filed a petition in the Superior Court of Wake County asking the court to review and reverse an order entered by respondent on 6 May 1968 suspending petitioner's retail beer permit. Respondent duly answered the petition and in conformity with G.S. 143-311 filed a certified copy of the record of the proceedings before the respondent Board.

From the record, it appears that on 15 March 1968 petitioner was served with a notice from respondent, summarized as follows: Respondent had information indicating that petitioner had violated the State ABC laws and/or regulations by selling and allowing the sale of beer during "illegal hours" and permitting the consumption of beer during "illegal hours" on her retail licensed premises on or about Sunday, 10 March 1968, at 12:55 a.m., in violation of G.S. 18-78.1(3) and G.S. 18-107; also failing to give her retail licensed premises proper supervision on said occasion. Petitioner was given notice to appear before respondent's hearing officer on 2 April 1968 at 1:30 p.m. at a designated place in Raleigh to show cause why her beer and/or wine permit should not be revoked or suspended. Petitioner was advised that she had the right to introduce evidence at the hearing and to be represented by counsel if she so desired.

The hearing was held on 2 April 1968 at which time petitioner, with her attorney, was present. Sworn testimony was given by ABC Officer Coates and he was cross-examined by petitioner's attorney. On 29 April 1968, the hearing officer advised petitioner by letter, with copy to petitioner's attorney in Raleigh, that the findings of fact and recommendation of the hearing officer regarding her hear-

ing of 2 April 1968 would be presented to respondent Board for review at its meeting in Raleigh on 6 May 1968 at 10:00 a.m. and that petitioner would be notified thereafter of the Board's decision in the matter.

On 6 May 1968, respondent entered an order that petitioner's retail beer permit be suspended for a period of 60 days, effective 20 May 1968; copies of the order were mailed to petitioner and her attorney. The record does not indicate that petitioner or her attorney appeared before respondent Board on 6 May 1968.

The matter came on for hearing in the superior court and was heard on the "petition and answer filed and upon review of the record of the proceedings held and documents filed as a part of the record and consideration of affidavit and arguments of counsel."

On 10 October 1968, judgment was entered setting forth certain findings of fact and conclusions of law, including a conclusion that respondent's order dated 6 May 1968 was entered without due process of law, and an adjudication that the order be reversed.

Respondent excepted to the signing and entry of the judgment and to each finding of fact and conclusion of law contained therein and appealed to this court.

Boyce, Lake & Burns for petitioner appellee.

Attorney General Robert Morgan by Staff Attorney Mrs. Christine Y. Denson for respondent appellant.

BRITT, J.

G.S. 143-307 provides:

> "§ 143-307. *Right to judicial review.* — Any person who is aggrieved by a final administrative decision, *and who has exhausted all administrative remedies made available to him by statute or agency rule,* is entitled to judicial review of such decision under this article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute. Nothing in this chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this article." (Emphasis added.)

We are unable to distinguish the legal principles involved in *Sinodis v. Board of Alcoholic Control,* 258 N.C. 282, 128 S.E. 2d 587,

from those presented by this appeal. Although the facts in *Sinodis* differed somewhat from those in this case, the procedures before respondent Board in both cases were almost identical. In *Sinodis,* the Supreme Court held that inasmuch as petitioners did not request a hearing by the Board, their application for judicial review would be dismissed. We quote from the opinion by Rodman, J.: "* * * Only those who have exhausted their administrative remedies can seek the benefit of the statute. G.S. 143-307. [Numerous citations.]"

In *Sinodis,* the Supreme Court determined that respondent Board, acting pursuant to the authority conferred by G.S. 18-138, promulgated rules governing hearings and that copies of such rules were, as required by G.S. 143-195, filed with the Secretary of State on 20 September 1956. Again we quote from the opinion, at page 286:

"* * * Rules 12 and 13 provide:

'12. When an applicant or permittee makes written request for an additional hearing before the full Board, the Chairman shall cause him to be given at least ten days written notice of the time and place of a Board meeting at which he may be heard.

'13. Upon such hearing, the Board shall consider the record of the hearing before the hearing officer and may take such additional evidence for or against the applicant or permittee as may be presented. The Board may limit the introduction of evidence which is irrelevant or immaterial or which is merely cumulative and may limit the time permitted for oral argument. All testimony shall be taken under oath or affirmation and recorded. All objections to evidence or procedure, rulings thereon, and exceptions thereto shall be entered in the record.'

In our opinion the rules as promulgated correctly interpret the statute. They accord a permittee full opportunity to show want of merit in the charges which, if true, would warrant revocation of his permit."

In the case before us, after the hearing was held before the hearing officer, at which time petitioner and her attorney were present and participated in the hearing, the hearing officer advised petitioner and her attorney in writing that his findings of fact and recommendation would be presented to respondent Board at its meeting in Raleigh on 6 May 1968 at 10:00 a.m. As was true in *Sinodis,* petitioner did not request a hearing by respondent Board, a right expressly accorded her. Hence her application for judicial review must be dismissed. G.S. 143-307; *Sinodis v. Board of Alcoholic Control,*

supra; In re Employment Security Com., 234 N.C. 651, 68 S.E. 2d 311; *In re Revocation of License of Wright*, 228 N.C. 301, 45 S.E. 2d 370.

Reversed.

MALLARD, C.J., and PARKER, J., concur.

FRANCES CROSS WATSON v. WILBUR AUGUSTA CARR AND WIFE, SHIRLEY VIOLA CARR

No. 6911SC77

(Filed 2 April 1969)

1. Pleadings § 13— counterclaim in contract — "subject of the action"

The "subject of the action" means, in connection with statute allowing counterclaim, the thing in respect to which the plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had. G.S. 1-137(1).

2. Pleadings § 13— counterclaim in contract — action to remove cloud on title

In plaintiff's action to remove cloud on title and to be declared owner in fee simple of the property in question, defendants in a further answer and counterclaim admitted the title of plaintiff subject to defendants' rights as assignees of four deeds of trust and liens for taxes paid and contended that they were owners of liens on the property and entitled to have the deeds of trust foreclosed and the liens satisfied. *Held:* Defendants' allegations state a permissible counterclaim under G.S. 1-137(1).

3. Mortgages and Deeds of Trust § 24— foreclosure by action — trustee as necessary party

The holder of a note secured by a deed of trust may sue the makers *in personam* for the debt and may sue *in rem* to subject the mortgaged property to the payment of the note, and may combine the two remedies in one civil action, G.S. 1-123, but in the action for foreclosure the trustee in the deed of trust is a necessary and indispensable party.

APPEAL by defendants from *Lupton, J.*, at the 7 October 1968 Session of LEE Superior Court.

This is an action to remove cloud from title. Plaintiff filed her complaint 20 March 1968 alleging: Her father, Walter Cross, died 12 May 1961 owning two adjoining tracts of land near Lemon Springs, N. C. Walter Cross was survived by his widow and six

daughters, including the plaintiff. As a result of her inheritance and of conveyances by three of her sisters, plaintiff owns a four-ninths undivided interest in the property. On 2 December 1963, Gladys M. Cross, widow of Walter Cross, made a deed to the defendants purporting to convey title to the property in question, as a result of which defendants claim an interest in the land adverse to the interest of plaintiff. Plaintiff asked that she be declared the owner in fee simple of a four-ninths undivided interest and that the cloud be removed from her title.

The defendants answered 14 August 1968 substantially admitting the allegations of the complaint but denying that they claim any interest in the land adverse to the plaintiff except as set forth in their counterclaim. Defendants then alleged: The consideration for the deed to them from Gladys M. Cross, which reserved a life estate for the grantor in a dwelling house, was that the grantees (defendants) should pay four notes secured by four deeds of trust on the subject property; three of the deeds of trust were executed by Walter Cross and wife, Gladys M. Cross, and the fourth by Gladys M. Cross, plaintiff and plaintiff's husband. The defendants paid the notes and became the assignees of the notes and deeds of trust. The defendants then prayed that the trustees named in the various deeds of trust and the owners of the remaining shares of the property (all of whom were named) be joined as parties to this action; that defendants be declared to have liens on the shares of the property other than their own, by reason of the right of the defendants to have contribution for the notes and taxes paid, as well as for improvements made upon the property. Defendants further asked that a commissioner be appointed to foreclose the deeds of trust and sell the lands in question with the proceeds to be disbursed according to law.

On 3 September 1968, plaintiff demurred to the further answer and counterclaim, asking that it be dismissed on the ground that the matters raised therein could not properly be pleaded as a counterclaim to plaintiff's action. Plaintiff also moved for judgment on the pleadings. The demurrer was sustained and the court adjudged plaintiff to be the owner of a four-ninths undivided interest, free of any claim of the defendants arising out of the deed to the defendants from Gladys M. Cross. The defendants excepted and appealed.

Pittman, Staton & Betts and Ronald T. Penny by J. C. Pittman for plaintiff appellee.

Gavin, Jackson & Gavin by H. W. Gavin for defendant appellants.

BRITT, J.

The question presented by this appeal is whether the counterclaim is permissible under G.S. 1-137, pertinent provisions of which are as follows:

> "The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:
> 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.
> * * *"

[1] If the counterclaim is permissible in this action, it is because it is connected with the subject of the action set forth in the complaint. "The 'subject of the action' means, in this connection, the thing in respect to which the plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had." To be connected with the subject of action "the connection of the case asserted in the counterclaim and the subject of the action must be immediate and direct, and presumably contemplated by the parties." *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614. The construction of the phrase "subject of the action" set out in the *Hancammon* case has been relied upon in numerous subsequent cases. *Insurance Co. v. Falconer,* 272 N.C. 702, 158 S.E. 2d 793; *Amusement Co. v. Tarkington,* 247 N.C. 444, 101 S.E. 2d 398; *Etheridge v. Wescott,* 244 N.C. 637, 94 S.E. 2d 846; *Bizzell v. Bizzell,* 237 N.C. 535, 75 S.E. 2d 536; *Garrett v. Rose,* 236 N.C. 299, 72 S.E. 2d 843.

[2] In this case, plaintiff seeks to remove a cloud from her title. Defendants admit the title of plaintiff subject to defendants' rights as assignees of four deeds of trust and liens for taxes paid, etc. Defendants contend that they are owners of liens on the property and are entitled to have the deeds of trust foreclosed and their liens satisfied. The subject of the action appears to be plaintiff's rights in the property, and assuming the truth of defendants' allegations, plaintiff's title remains clouded.

[3] It is well settled in this jurisdiction that the holder of a note secured by a deed of trust may sue the makers *in personam* for the debt and may sue *in rem* to subject the mortgaged property to the payment of the note, and may combine the two remedies in one

civil action, G.S. 1-123, but in the action for foreclosure the trustee in the deed of trust is a necessary and indispensable party. *Underwood v. Otwell,* 269 N.C. 571, 153 S.E. 2d 40.

As stated in an earlier case with regard to G.S. 1-123, "[t]his section has been liberally construed to the end that justiciable controversies may be expeditiously adjusted by judicial decree at a minimum of cost to the litigants and the public." *Pressley v. Tea Co.,* 226 N.C. 518, 39 S.E. 2d 382. The *Pressley* case arose under G.S. 1-123, but the purposes of G.S. 1-123 and G.S. 1-137 are the same. *Hancammon v. Carr, supra.* Current legislative intent is indicated by G.S. 1A-1, Rule 13.

[2] We hold that the trial court erred in sustaining plaintiff's demurrer to defendants' cross-action and entering judgment terminating the action. The judgment is vacated and this cause is remanded for further proceedings consistent with this opinion.

Error and remanded.

MALLARD, C.J., and PARKER, J., concur.

PERMELIA S. SHORT, WIDOW OF WILBURN C. SHORT, DECEASED, EMPLOYEE v. SLANE HOSIERY MILLS, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 6918IC43

(Filed 2 April 1969)

Master and Servant § 61— workmen's compensation death benefits — employee killed while assisting third party

In this action for death benefits under the Workmen's Compensation Act, findings of fact by the Industrial Commission that deceased employee drove his employer's truck to the city dump to dispose of trash from the employer's plant, and that the employee was killed at the city dump while trying to help a third party operate the dump mechanism on the third party's truck *are held* to support the Commission's determination that deceased was not acting for the benefit of his employer to any appreciable extent and that deceased's injuries did not arise out of and in the course of his employment.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission entered 9 September 1968, denying relief.

By this action plaintiff seeks to recover death benefits under

The North Carolina Workmen's Compensation Act (G.S., Chap. 97) by reason of the death of her husband, which she contends resulted from injury by accident arising out of and in the course of his employment with defendant employer.

At the hearing the parties stipulated that at the time of employee's death, on 30 August 1967, (1) the employer and employee were bound by the Workmen's Compensation Act, (2) the employer-employee relationship existed, (3) Liberty Mutual was the compensation carrier, and (4) employee's average weekly wage was $78.00. Also, there seems to be agreement that the deceased employee was killed instantaneously by accident during his normal working hours.

The evidence tends to show the following: Deceased began working for employer on 28 August 1967, and that one of his duties was to drive employer's truck to the city dump to dispose of trash which accumulated at employer's plant. On the date of his death, 30 August 1967, deceased drove employer's truck with a load of trash to the city dump. When he arrived at the city dump the truck of another manufacturer (Crestwood Furniture Company) was being unloaded by hand by Crestwood's employee, one Wiley Adams. The Crestwood truck was equipped with a dump mechanism which would tilt the bed of the truck to allow the trash to slide out; the defendant employer's truck had a flat-bed which did not tilt. There was sufficient room at the city dump for several trucks to unload at the same time. When deceased backed defendant employer's truck into position to unload, he inquired of Adams why he did not use the dump mechanism instead of unloading by hand. Adams replied that either the mechanism was broken or he didn't know how to operate it, because this was his first day on the job. Deceased said, "I know how to dump. Do you want me to dump?" Adams replied that he would appreciate it. Deceased then got out of his employer's truck, got into the cab of the Crestwood truck and undertook to operate the dump mechanism. When deceased was unable to operate the mechanism from inside the cab he got out and crawled under the bed of the Crestwood truck and pulled a lever by hand. This caused the bed of the truck to lift toward the dump position, but it stopped after reaching a height of about two and one-half to three feet. Deceased again reached under the bed of the truck (apparently to again operate the lever by hand) and the bed of the truck fell on him, crushing his head and shoulder between the bed and the chassis. He died instantly.

The evidence further tended to show: That deceased's foreman

had advised deceased that a time study had been made and that deceased should not take over thirty to forty-five minutes on a trip to the city dump; that drivers of trucks to the city dump were in the habit of assisting each other; that Adams (driver of the Crestwood dump truck) and deceased had never seen each other before the day in question, and had never before attempted to aid each other.

The Hearing Commissioner found the facts substantially in accord with the foregoing to which no exceptions are taken by plaintiff. The Hearing Commissioner's "finding of fact" number ten, to which plaintiff does except is as follows:

> "Deceased, in assisting Adams, was not acting for the benefit of defendant employer to any appreciable extent and did not sustain an injury by accident arising out of and in the course of his employment with defendant employer."

Based upon his findings of fact the Hearing Commissioner concluded that deceased did not sustain injury by accident arising out of and in the course of his employment, and he denied compensation. Upon appeal the North Carolina Industrial Commission affirmed, and plaintiff thereafter appealed to this Court, assigning as error finding number ten, the conclusion of law based thereon, and the award denying compensation.

Schoch, Schoch & Schoch, by Arch K. Schoch, Jr., for plaintiff appellant.

Lovelace, Hardin & Bain, by Edward R. Hardin, for defendant appellees.

BROCK, J.

Is the determination of the Hearing Commissioner, as affirmed by the Full Commission, to the effect that, in assisting Adams, *deceased was not acting for the benefit of his employer to any appreciable extent* a finding of fact, a mixed question of fact and law, or a conclusion of law? If a finding of fact, it is conclusive and binding upon us. If a mixed question of fact and law, it is likewise conclusive, provided there is sufficient evidence to sustain the element of fact involved. If a question of law only, it is subject to review *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515.

Clearly such a determination by the Commission is not a strict conclusion of law; and considered in the view most favorable to plaintiff's request for review, it would be, at most, a mixed question

of fact and law. Proceeding in this light for purposes of this appeal, the determination by the Commission is conclusive provided there is sufficient evidence to support the factual element.

Plaintiff takes no exception to the specific findings of fact by the Commission, but argues that the facts found and the inferences from the facts found compel a determination that deceased *was* acting for the benefit of his employer to an appreciable extent, and argues it would follow that his injury arose out of and in the course of his employment.

In our view the findings of fact, and legitimate inferences to be drawn therefrom, support the Commission's determination that deceased was not acting for the benefit of his employer to any appreciable extent. And such a determination compels a ruling that deceased's injuries did not arise out of and in the course of his employment. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596. Compensation was properly denied.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

LOWE'S OF RALEIGH, INC. v. WILLIS WORLDS AND LOIS WORLDS
No. 6923SC76

(Filed 2 April 1969)

1. Judgments § 14— default judgment — sufficiency of pleadings

A default judgment admits only the averments in the complaint, and the defendant may still show that such averments are insufficient to warrant the plaintiff's recovery.

2. Judgments § 14— default judgment — failure of complaint to state cause of action

A complaint which fails to state a cause of action is not sufficient to support a default judgment for plaintiff. G.S. 1-211.

3. Judgments § 14— default judgment — sufficiency of complaint

If complaint fails to state a cause of action as against one defendant, a default judgment against that defendant cannot be supported and must be set aside even without any showing of mistake, surprise or excusable neglect.

4. Evidence § 3— judicial notice

Courts may take judicial notice of facts of general knowledge.

5. Evidence § 3— judicial notice — gender of personal pronoun

Courts will take judicial notice of the fact that certain names are ordinarily given only to one of the sexes and that the gender of a personal pronoun may identify sex.

6. Evidence § 3— judicial notice — names

It is a matter of general common knowledge of which the court will take judicial notice that the name "Willis" is ordinarily given only to a male and the name "Lois" is ordinarily given only to a female.

7. Sales § 10; Judgments § 14— action to recover purchase price of goods — default judgment — sufficiency of complaint

In seller's action against "Willis Worlds" and "Lois Worlds" to recover purchase price of goods sold and delivered, where all the allegations in plaintiff's complaint, other than those in the paragraph relating solely to defendants' place of residence, refer to a single defendant, and where the personal pronoun "his" is used in paragraph alleging that defendant had promised to pay for the goods sold and delivered, the complaint fails to state a cause of action against the femme defendant and cannot support a default judgment against her.

APPEAL by defendant Lois Worlds from *Collier, J.*, September 1968 Session of WILKES Superior Court.

Plaintiff by its verified complaint alleged:

"The plaintiff, complaining of the *defendant,* alleges:

"1. The plaintiff is a North Carolina corporation, with its principal office in North Wilkesboro, Wilkes County, North Carolina.

"2. The defendants, Willis Worlds and Lois Worlds, are residents of Clayton, Johnston County, North Carolina.

"3. Commencing on or about April 25, 1966, and continuing through June 7, 1966, the plaintiff sold and delivered to the *defendant* goods, wares and merchandise and charged the same to the account of the *defendant* at the *defendant's* request and upon *his* promise to pay for the same. There is now a balance due on said account in the sum of $4,271.72.

"4. The *defendant is* indebted to the plaintiff on an open account for goods sold and delivered in the sum of $4,271.72, with interest thereon from the 23rd day of November, 1966. Demand has been made upon the *defendant* for payment and payment has not been made, and the plaintiff is entitled to judgment against the *defendant.*

"WHEREFORE, the plaintiff prays that it have and recover judgment against the *defendant* in the sum of $4,271.72, with

interest thereon from the 23rd day of November, 1966, together with the costs of this action." (Emphasis added.)

Summons with copy of the complaint was served on both defendants on 6 June 1967. By agreement of counsel for plaintiff, the defendants were granted until 26 July 1967 within which to answer or otherwise plead. On 26 July 1967 the clerk of superior court for good cause granted defendants until 14 August 1967 in which to answer, demur or otherwise plead.

On 1 December 1967 judgment by default final was rendered against both defendants. On 6 April 1968 the defendant, Lois Worlds, filed motion to set aside the default judgment on the grounds that the complaint stated no cause of action against her. The clerk of superior court denied the motion. On appeal, the judge of superior court also denied the motion, finding that the complaint stated a cause of action and that the movant had presented no evidence showing mistake, surprise or excusable neglect. From the order denying her motion to set aside the default judgment as against her, defendant Lois Worlds appealed.

Ralph Davis for plaintiff appellee.

L. Austin Stevens for defendant appellant.

PARKER, J.

[1-3] The sole question presented by this appeal is whether the complaint stated a cause of action against the appealing defendant, Lois Worlds. A default judgment admits only the averments in the complaint, and the defendant may still show that such averments are insufficient to warrant the plaintiff's recovery. *Beard v. Sovereign Lodge,* 184 N.C. 154, 113 S.E. 661. A complaint which fails to state a cause of action is not sufficient to support a default judgment for plaintiff. G.S. 1-211; *Cohee v. Sligh,* 259 N.C. 248, 130 S.E. 2d 310; *Presnell v. Beshears,* 227 N.C. 279, 41 S.E. 2d 835. Accordingly, if the complaint in the present action failed to state a cause of action as against Lois Worlds, the default judgment against her cannot be supported and must be set aside even without any showing of mistake, surprise or excusable neglect.

It should be noted that the complaint complains of the *defendant* in the singular, and alleges that plaintiff sold and delivered to the *defendant* upon *his* promise to pay, and that the *defendant is* indebted to the plaintiff. The only allegation in the complaint relating to both defendants is in paragraph 2, alleging that they are

residents of Johnston County. The complaint clearly stated a cause of action against a male defendant. It stated no cause of action against a female defendant.

[4, 5] Courts may take judicial notice of facts of general knowledge. 3 Strong N.C. Index 2d, Evidence, § 3, p. 596. This includes taking judicial notice of the fact that certain names are ordinarily given only to one of the sexes and that the gender of a personal pronoun may identify sex. Long ago the North Carolina Supreme Court held that identification in a bill of indictment of the victim of the crime as "Mary Ann Taylor," along with the use of the personal pronoun "her," was sufficient to indicate that the victim was a female. *State v. Farmer,* 26 N.C. 224. The same decision had been reached in an even earlier case in which the victim had been identified as "Mary M. Cook" and the personal pronoun "her" had been used in the bill of indictment. *State v. Goings,* 20 N.C. 289. Courts on other states have similarly held that certain names designate females. *People v. Mansfield,* 181 Ill. App. 710 (Minnie); *People v. De Mas,* 173 Ill. App. 130 (Lena); *People v. Pizzi,* 170 Ill. App. 537 (Ethel); *State v. Hussey,* 7 Iowa 409 (Nancy); *Tillson v. State,* 29 Kan. 452 (Ruth); *Taylor v. State,* 86 Neb. 795 (Pearl); *Taylor v. Commonwealth,* 61 Va. 825 (Ellen and Frances). A Texas Court has held that use in an information of the personal pronoun "his" sufficiently identified the defendant as being a male and use of the personal pronoun "her" sufficiently identified the victim as being female. *Slawson v. State,* 39 Tex. Crim. 176, 45 S.W. 575.

[6, 7] It is a matter of general common knowledge that the name "Willis" is ordinarily given only to a male and the name "Lois" is ordinarily given only to a female. The name "Willis" is included in a list of common English given names for men found in Webster's New Collegiate Dictionary, 1961 Edition, p. 1134, and the name "Lois" is included in a similar list of given names for women, Id., p. 1136. Accordingly, this Court may take judicial notice in this case that "Willis Worlds" refers to a male and that "Lois Worlds" refers to a female. Since all allegations in plaintiff's complaint, other than those in paragraph 2 which related solely to the place of residence of the defendants, refer to a single defendant and since the personal pronoun "his" is used in paragraph 3 in alleging that the defendant had promised to pay for the goods which plaintiff had sold and delivered, the essential allegations which stated a cause of action referred only to the male defendant, Willis Worlds. There were no allegations as to any type of relationship between the defendant Willis Worlds and the defendant Lois Worlds through which Lois could be held liable for his promise to pay. The complaint

failed to state a cause of action against the defendant Lois Worlds and cannot support a default judgment against her. She is entitled to have the default judgment set aside insofar as it affects her. The order appealed from is reversed and this case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MALLARD, C.J., and BRITT, J., concur.

BILLY WAYNE ALDRIDGE v. STATE OF NORTH CAROLINA

No. 6914SC187

(Filed 2 April 1969)

1. Criminal Law § 181— post-conviction review — writ of certiorari

No appeal lies from a final judgment entered upon a petition and proceeding for post-conviction review under the Post-Conviction Hearing Act, review being available only upon application by the petitioner or by the State for a writ of certiorari. G.S. 15-222.

2. Constitutional Law § 4; Criminal Law § 181— post-conviction statute — review of constitutionality on appeal

Where constitutionality of G.S. 15-220 providing that a withdrawal of a petition for post-conviction review shall constitute a waiver of any claim of denial of constitutional rights was not raised and passed upon in the superior court, the Court of Appeals will not consider its constitutionality on appeal.

PURPORTED appeal by petitioner from *Clark, J.*, at the 7 October 1968 Session of DURHAM Superior Court.

This is an attempted appeal from the denial of a petition for a post-conviction hearing pursuant to G.S. 15-217, et seq. In a petition dated 19 June 1965, petitioner alleged that at the September 1963 Session of Durham Superior Court, on advice of counsel, he entered a plea of nolo contendere to a bill of indictment charging armed robbery and on said plea he was sentenced to State Prison for a period of not less than eighteen years nor more than twenty-two years; that he did not appeal from said sentence. He further alleged that his constitutional rights as guaranteed under the Federal and State Constitutions were substantially denied and violated at the time of and after his arrest; he alleged specific grounds of constitutional violations.

On 3 September 1965, petitioner filed a written, verified motion to withdraw his petition for post-conviction hearing. On the same day, Bickett, J., entered an order allowing the petition to be withdrawn; the following statement is found in the order: "It further appearing to the Court upon questioning the petitioner Billy Wayne Aldridge that it is his desire to withdraw his petition for a Post Conviction Hearing * * *."

In August 1968, petitioner filed another petition for post-conviction review pursuant to G.S. 15-217, et seq., which petition alleges substantially the same grounds alleged in the first petition. On 8 October 1968, Clark, J., entered a judgment denying the second petition, setting forth in the judgment that a previous petition had been filed and withdrawn and that by virtue of G.S. 15-220 petitioner was not entitled to the relief sought in the second petition.

Thereafter, pursuant to a finding by the court that petitioner was indigent, John C. Randall, Esq., was appointed to represent defendant and the purported appeal to this court was taken.

Attorney General Robert Morgan and Staff Attorney Dale Shepherd for the State.

John C. Randall for petitioner appellant.

BRITT, J.

[1] As was said by this court in *Nolan v. State,* 1 N.C. App. 618, 162 S.E. 2d 88, in an opinion by Parker, J., "[n]o appeal lies from a final judgment entered upon a petition and proceeding for post-conviction review under the North Carolina Post-Conviction Hearing Act, review being available only upon application by the petitioner or by the State for a Writ of *Certiorari.* G.S. 15-222. Accordingly, the appeal which petitioner has attempted to make in this case is dismissed." Nevertheless, we have considered the record presently before us as a petition for a writ of *certiorari* to review the judgment sought to be appealed from and, thus considered, have carefully reviewed the entire record and considered all questions raised in the briefs.

[2] G.S. 15-220 contains the following proviso:

> "* * * The court may, in its discretion, grant leave at any stage of the proceeding prior to entry of judgment to withdraw the petition. Withdrawal of a petition shall constitute a waiver of any claim of denial of constitutional rights or of other error

remediable under this article which has been alleged in the petition. * * *"

The sole argument brought forward in petitioner's brief is that the quoted proviso is unconstitutional, being in conflict with sections 18 and 21 of Article I of the State Constitution and section 9(2) of Article I of the Federal Constitution.

In *Lane v. Insurance Co.*, 258 N.C. 318, 128 S.E. 2d 398, in an opinion by Bobbitt, J., we find the following:

"On appeal, by brief in this Court, defendant challenges for the first time the constitutionality of G.S. 20-279.21(f)(1) as construed in *Swain* when applied to an assigned risk policy. This constitutional question was not raised in the court below and may not be raised for the first time in this Court. *Phillips v. Shaw, Comr. of Revenue,* 238 N.C. 518, 78 S.E. 2d 314; *Baker v. Varser,* 240 N.C. 260, 267, 82 S.E. 2d 90; *Pinnix v. Toomey,* 242 N.C. 358, 367, 87 S.E. 2d 893. 'Therefore, in conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below.' *Denny, J.* (now C.J.), in *S. v. Jones,* 242 N.C. 563, 564, 89 S.E. 2d 129."

Inasmuch as the constitutionality of the quoted proviso of G.S. 15-220 was not raised and passed upon in the superior court, we will not consider its constitutionality here.

For the reasons stated, the record docketed in this court is dismissed as an appeal and, considered as a petition for writ of *certiorari,* the same is

Denied.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. JAMES CAMPBELL McKINNON

No. 6916SC40

(Filed 2 April 1969)

1. Criminal Law § 23— appeal from guilty plea

Defendant's plea of guilty precludes defendant from questioning the facts charged in the indictment, and his appeal presents only the question

of whether the facts charged constitute an offense punishable under the laws and Constitution.

2. Criminal Law § 23— guilty plea — voluntariness

Defendant's plea of guilty will not be disturbed on appeal where the record reveals that upon examination of defendant in open court the trial judge determined that the plea was freely, understandingly and voluntarily made.

APPEAL by defendant from *Burgwyn, E.J.*, at the August 1968 Session of ROBESON Superior Court.

The record filed in this court indicates a defect in the bill of indictment. However, by appropriate order we have obtained from the Clerk of the Superior Court of Robeson County a true copy of the bill of indictment and find that the same properly charges that the defendant did on 28 December 1967 unlawfully, willfully and feloniously assault one Kathleen Lennon with a certain deadly weapon, to wit: a rifle, with the felonious intent to kill and murder the said Kathleen Lennon, inflicting serious injuries upon the said Kathleen Lennon not resulting in death.

The indictment was returned by the grand jury at the January 1968 Criminal Session, and on 2 May 1968 Carr, J., upon a determination of defendant's indigency, appointed Everett L. Henry, Esq., of the Robeson County Bar, to represent the defendant.

The case was called for trial on 14 August 1968 at which time the defendant, through his said court-appointed attorney, entered a plea of guilty to the charge contained in the bill of indictment. At the same time, defendant executed an affidavit in the form of twelve questions and answers to the effect that he fully understood the charges against him, that he was guilty of the charges, that he understood that upon a plea of guilty he could be imprisoned for as much as ten years, that he was satisfied with the services of his attorney and that he freely, understandingly and voluntarily authorized and instructed his attorney to enter a plea of guilty. After hearing evidence, the trial judge entered judgment that defendant be confined in State Prison for a term of not less than six nor more than ten years and assigned to work under the supervision of the State Department of Correction.

On 16 August 1968, defendant appeared before the trial judge and stated his desire to appeal from the judgment imposed. Upon a determination that defendant was indigent, the court allowed him to appeal as a pauper and appointed Attorney Fred Musselwhite to represent the defendant on appeal.

Attorney General Robert Morgan and Assistant Attorney General George A. Goodwyn for the State.

Musselwhite & Musselwhite by Fred L. Musselwhite for defendant appellant.

BRITT, J.

[1] The sole exception appearing in the record is to the judgment entered by the trial judge. In *State v. Warren,* 113 N.C. 683, 18 S.E. 498, it is said:

> "The defendant having pleaded guilty, his appeal could not call in question the facts charged nor the regularity and correctness in form of the warrant. * * * He is concluded as to these. * * * The appeal could only bring up for review the question whether the facts charged, and of which the defendant admitted himself to have been guilty, constitute an offense punishable under the laws and Constitution."

The foregoing excerpts from *State v. Warren, supra,* were quoted with approval in an opinion by Sharp, J., in *State v. Smith,* 265 N.C. 173, 143 S.E. 2d 293; also in an opinion by Parker, J. (now C.J.), in *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591.

[2] In his brief, defendant's counsel argues that defendant's plea of guilty was not freely, understandingly and voluntarily made. Assuming, *arguendo,* that this question is properly before us, the record discloses the following adjudication made by the trial judge prior to imposing sentence:

> "Upon examination of the defendant in open court, it is ascertained, determined and adjudged that the plea of guilty is freely, understandingly and voluntarily made, without undue influence, compulsion or duress and without promise of leniency and it is ordered that his plea of guilty be entered."

We hold that defendant was properly sentenced upon a valid bill of indictment and that the sentence imposed by the trial judge was within the statutory limits and did not violate any provision of the Federal or State Constitutions.

The judgment of the superior court is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. CHARLES J. KOTOFSKY
No. 6912SC140

(Filed 2 April 1969)

Constitutional Law § 36; Kidnapping § 2; Robbery § 6— sentence for armed robbery and kidnapping

Sentence of not less than 12 nor more than 15 years imposed upon defendant's pleas of guilty of armed robbery and kidnapping is within the statutory limits and cannot be considered cruel and unusual punishment.

APPEAL by defendant from *Canaday, J.*, at the 14 October 1968 Criminal Session of CUMBERLAND Superior Court.

The defendant was charged with armed robbery and kidnapping in a bill of indictment returned by a Cumberland County grand jury. Upon proper finding that defendant was indigent, the court appointed an attorney to represent him.

When the case was called for trial, the defendant, through his attorney, submitted a plea of guilty to the offenses of armed robbery and kidnapping. Before accepting the plea and imposing sentence, the trial judge questioned the defendant at length to determine if the plea was voluntarily made, with full understanding of the possible consequences of the plea. He then adjudged that the plea of guilty by the defendant was freely, understandingly and voluntarily made without undue influence, compulsion or duress, and without promise of leniency.

Upon acceptance of the plea of guilty and the hearing of pertinent testimony, the court consolidated the counts for purpose of judgment and imposed an active prison sentence of not less than 12 nor more than 15 years. Defendant appealed.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

Carter & Faircloth by Cyrus J. Faircloth for defendant appellant.

BRITT, J.

Following the trial in superior court, defendant's present counsel was appointed to represent him in this court. In his brief, he brings forward three assignments of error.

After judgment was imposed in superior court defendant's counsel moved that the judgment be arrested, contending that the bill of indictment, containing two counts against defendant, was defective. In his brief, counsel reviews the statutes and Supreme Court

decisions relating to armed robbery and kidnapping and then concludes that after a careful study of the law he can find no authority to support his assignments of error pertaining to the bill of indictment.

In his third assignment of error, defendant's counsel contends that the sentence imposed by the trial judge was excessive and violated the constitutional provisions against cruel and unusual punishment. In *State v. Kelly,* 3 N.C. App. 72, 164 S.E. 2d 22, in an opinion by Morris, J., this court held:

> "* * * 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 by the trial court was well within the maximum permitted by the statutes.

Each of the assignments of error is overruled and the judgment of the superior court is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. CAROLYN LEDBETTER
No. 6929SC154

(Filed 30 April 1969)

1. Criminal Law § 26— plea of former jeopardy — ruling by court

Failure of the trial court to make a formal and specific ruling on defendant's plea of former jeopardy entered at the commencement of the trial was not prejudicial error, the plea having been denied as a matter of law since the court proceeded with the trial.

2. Criminal Law § 26— former jeopardy — mistrial for illness of juror

Order of mistrial entered with consent of the parties during defendant's trial for involuntary manslaughter because of the sudden illness of a juror will not support a plea of former jeopardy at a subsequent

trial of defendant for the same offense, the order of mistrial for illness of a juror in a non-capital case being within the discretion of the trial court.

3. Criminal Law § 26— former jeopardy — mistrial with defendant's consent

Order of mistrial entered with defendant's consent will not support a plea of former jeopardy.

4. Criminal Law § 15; Jury § 2— motion for change of venue or for special venire

It is a matter of discretion with the trial judge whether to call a special venire or to remove the action to another county. G.S. 9-11(b), G.S. 9-12(a), G.S. 1-84.

5. Jury § 2— motion for special venire

In this prosecution for involuntary manslaughter of a child, no abuse of discretion is shown in the trial court's denial of defendant's motion for a special venire by fact that 22 out of 49 prospective jurors were excused for cause when they stated they were prejudiced against defendant and could not give her a fair trial.

6. Homicide § 21— involuntary manslaughter by abuse or neglect of child — sufficiency of evidence

In this prosecution for the involuntary manslaughter of defendant's stepchild, motion for nonsuit is properly denied where the evidence tends to show that the child died from peritonitis caused by a severe blow to the abdomen, that this condition existed in the child's body for approximately four hours prior to his death, that there were multiple bruises on the child's body, a bruise on the pancreas, and a torn bowel, that these injuries were caused by blunt force, that there were no noticeable bruises on the child the night before his death, and that defendant had actual and exclusive control and custody of the child for some seven hours preceding the child's death.

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

The test of the sufficiency of circumstantial evidence to be submitted to the jury is the same as the test for direct evidence: there must be 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 of guilt.

8. Criminal Law § 124; Homicide § 31— involuntary manslaughter prosecution — verdict of guilty of "manslaughter"

In this prosecution for involuntary manslaughter, the trial judge did not err in accepting a verdict of guilty of "manslaughter" where the indictment charged defendant with the crime of involuntary manslaughter and the charge related only to involuntary manslaughter, it being clear that defendant was convicted of involuntary manslaughter when the verdict is interpreted with reference to the indictment, evidence, and charge.

9. Criminal Law § 126— recall of jury and retaking of verdict

In this involuntary manslaughter prosecution, where the jury's verdict of guilty of "manslaughter" is unambiguous when interpreted with reference to the indictment, evidence and charge, defendant was not prejudiced when the jury was recalled after it had been excused and a verdict of guilty of "involuntary manslaughter" was received from the jury, the substance of the verdict remaining unaltered and the purported second taking of the verdict being mere surplusage.

10. Criminal Law § 128— motion to set aside verdict

In this prosecution for involuntary manslaughter, trial court properly refused to set aside verdict of guilty of "manslaughter" where it is clear from the indictment, evidence and charge that defendant was convicted of involuntary manslaughter.

APPEAL by defendant from *Collier, J.*, 16 December 1968 Special Criminal Session, HENDERSON County Superior Court.

A proper bill of indictment charged that, on 27 July 1967, Carolyn Ledbetter (defendant) and her husband, Steve Ledbetter, "with force and arms . . . did unlawfully, wilfully and feloniously neglect, abuse and fail to provide for adequate medical treatment of their minor child, Christopher Bryan Ledbetter, age 3 years, and by such abuse, wilful neglect, and failure to provide for proper medical treatment did, kill and slay Christopher Bryan Ledbetter. . . ."

The evidence on behalf of the State would permit a finding that Christopher Bryan Ledbetter (Christopher) was a three-year-old boy who lived with his stepmother, the defendant, and his father, Steve Ledbetter, in the Town of East Flat Rock, Henderson County; from one o'clock until four o'clock on Sunday afternoon, 25 June 1967, Christopher was observed in the yard of the Ledbetter home playing on a sliding board; he was barefoot and dressed in a short sleeve shirt and short pants; the weather was rainy, cold and foggy at the time; Chrhistopher remained outdoors exposed until his father came home and accompanied him into the house. On 26 June 1967 a deputy sheriff of Henderson County went to the Ledbetter home, where he observed Christopher in the yard. He testified:

> "I observed the little boy, Christopher sitting on a hobby horse in the yard. He was (*sic*) a tee shirt and a diaper on. The weather was very chilly, foggy and wet and had been raining over the night. I observed the physical condition of the child and he had chill bumps on him. His coloration was blue and he had two black eyes.
>
> I saw [the defendant] and she asked me what I was doing

there and I told her that the neighbors had called and I want to advise her if she knew the seriousness of child abuse."

The evidence on behalf of the State would also permit a finding that, between two and three o'clock on Thursday afternoon, 27 July 1967, the defendant took Christopher to the office of Dr. Edgar Lee Baker, an admitted medical expert; Christopher was not alive at that time; Dr. Baker examined Christopher and found multiple bruises on his body and some extension of the abdomen; Dr. Kenneth A. LaTourette, an admitted medical expert, performed an autopsy and observed numerous bruises on the body, a bruise in the pancreas and a torn bowel. On direct examination, Dr. LaTourette expressed an opinion that the cause of death was "peritonitis or inflammation of the abdominal cavity and this condition existed in his body at least four hours prior to his death"; that these injuries were caused by "blunt force"; and that there had been approximately ten blows. On cross-examination Dr. LaTourette testified that most of the wounds were superficial and that the wound in the stomach or abdomen, which caused the death, could have been brought about by a fall.

At the close of the State's evidence, the defendant and her husband made motions for judgment as of nonsuit. The trial judge denied the defendant's motion, but sustained her husband's motion.

Steve Ledbetter, a defense witness, testified that, on the night of 26 July 1967, he gave Christopher a bath and "there were not any noticeable bruises on him to the extent that I would be concerned or alarmed about him." Since Steve Ledbetter departed for work at 7:30 a.m., he was at his place of employment when the defendant took Christopher to the office of Dr. Baker.

The defendant offered evidence as to her good character, the love and affection shown by her toward Christopher, and the care and attention she gave him.

At the conclusion of all the evidence, the defendant renewed her motion for judgment as of nonsuit. The motion was denied and the case was submitted to the jury. From a verdict of guilty and the imposition of a sentence of not less than five years nor more than eight years, the defendant appealed to this Court.

Attorney General Robert Morgan and Assistant Attorney General Bernard A. Harrell for the State.

Arthur J. Redden for the defendant appellant.

CAMPBELL, J.

The first contention of the defendant is that Judge Collier erred in refusing to rule on her plea of former jeopardy entered at the commencement of her trial. The record shows that, during the week of 9 December 1968, Judge Bryson presided over a special criminal session of the Henderson County Superior Court; this case was called for trial; the defendant and her husband entered pleas of not guilty; a jury was selected and impaneled before the noon recess; immediately after the noon recess, Judge Bryson withdrew a juror and ordered a mistrial with the consent of all parties. In the order declaring the mistrial, Judge Bryson found as a fact that a juror had been taken to a hospital in serious condition as the result of a sudden illness. The record further shows that, during the week of 16 December 1968, Judge Collier presided over this special criminal session; this case was again called for trial; the defendant and her husband entered pleas of former jeopardy and not guilty, whereupon Judge Collier, the solicitor, and the attorneys for the defendant and her husband retired to the judge's chambers for a discussion; they subsequently returned to the courtroom and the solicitor on behalf of the State proceeded to select the jury. The defendant took an exception because her plea of former jeopardy was not formally and specifically denied.

[1] The defendant now claims that the trial court was requested to rule on this plea; the request was refused; and she was denied the right to be heard on this matter. The record, however, does not reveal any such request, refusal or denial. It is manifest, however, that the plea was denied as a matter of law since the court proceeded with the trial. The failure to make a formal and specific ruling under the circumstances of this case was not prejudicial error. See *State v. Garnett,* 4 N.C. App. 367, 167 S.E. 2d 63, for a discussion by Mallard, C.J., of a similar problem involving a trial judge's failure to specifically rule upon a motion of a defendant for judgment as of nonsuit.

[2] A plea of former jeopardy is properly denied when a mistrial is declared as the result of a juror's sudden illness. In *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599, the defendants were charged with conspiracy to break and enter, with a felonious breaking and entering, and with possession of burglary tools. The defendants were arraigned and pleas of not guilty were entered. After a jury was selected and after the State began introducing evidence, a defense attorney became suddenly ill. The trial judge thereupon ordered a mistrial over the defendants' objection and continued the

case. On the second trial a plea of former jeopardy was entered. The Supreme Court stated:

> "Decision on the plea of former jeopardy depends upon the validity of the mistrial order. Unless that order can be upheld, jeopardy attached, and the plea would be good. If the order is valid, the plea is not good.
>
> . . .
>
> For obvious reasons the rule against a mistrial finds its maximum rigidity in capital cases. A more flexible rule applies in cases of less gravity. 'The ordering of a mistrial in a case less than capital is a matter in the discretion of the judge, and the judge need not find facts constituting the reason for such order.' . . . 'We conclude that the trial judge in cases less than capital may, in the exercise of sound discretion, order a mistrial before verdict, without the consent of the defendant, for physical necessity such as the incapacitating illness of judge, juror or material witness. . . . His order is not reviewable except for gross abuse of discretion, and the burden is upon defendant to show such abuse.' . . . The incapacitating illness of the only counsel for one defendant, which developed after the trial began, is within the rule. The order withdrawing a juror, declaring a mistrial, and continuing the case to the next session of the court was valid. Hence the plea of former jeopardy was properly denied."

To like effect, see *State v. Pfeifer,* 266 N.C. 790, 147 S.E. 2d 190, where a juror became suddenly ill.

[3] There was no abuse of discretion in the instant case. The evidence was sufficient to support the denial of the plea of former jeopardy as a matter of law. In addition, the defendant consented to the order of mistrial. In *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243, the following was stated:

> "It is well established that the plea of former jeopardy cannot prevail on account of an order of mistrial when such order is entered upon motion or with the consent of the defendant."

The first contention of the defendant is without merit.

[5] The second contention of the defendant is that the trial judge erred in refusing to grant her motions for a special venire. It is argued that, if she was to get a fair and impartial trial, a special venire should have been called or the action removed to another county. In support of this argument, it is pointed out that twenty-two of the forty-nine prospective jurors were excused for cause since,

in their opinions, they were prejudiced against the defendant and her husband, or each of them and since, in their opinions, they could not give the defendant and her husband, or either of them, a fair and impartial trial.

[4] It is a matter of discretion with the trial judge whether to call a special venire or to remove the action to another county. G.S. 9-11(b) provides, *inter alia,* that "[t]he presiding judge may, in his discretion, . . . direct . . . a special venire be selected. . . ." G.S. 9-12(a) provides, *inter alia,* that "any judge of the superior court, [on the motion of the defendant] if he is of the opinion that it is necessary in order to provide a fair trial . . . may order as many jurors as he deems necessary to be summoned from any county or counties. . . ." G.S. 1-84 provides, *inter alia:*

> "In all . . . criminal actions in the superior and criminal courts, when it is suggested . . . that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county. . . ."

In *State v. Allen,* 222 N.C. 145, 22 S.E. 2d 233, the Supreme Court stated:

> "A motion for change of venue or for a special venire, may be granted or denied in the discretion of the trial judge, and his decision in the exercise of such discretion is not reviewable [in this Court] unless gross abuse [of discretion] is shown."

In *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916, the Supreme Court stated:

> "A motion for a change of venue or for a special venire from another county, upon the ground that the minds of the residents in the county in which the crime was committed had been influenced against the defendant, is addressed to the sound discretion of the trial court."

See *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457; *State v. Conrad,* 4 N.C. App. 50, 165 S.E. 2d 771; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10.

[5] The record in the instant case reveals no abuse of discretion by the trial judge in denying the motions for a special venire.

The second contention of the defendant is without merit.

[6] The third contention of the defendant is that the trial judge

erred in denying her motions for judgment as of nonsuit entered at the close of the State's evidence and renewed at the conclusion of all the evidence. It is argued that "[t]here is not one iota of evidence that the defendant placed a finger on the deceased child except to love and to care for the child." There is in fact no direct evidence that the defendant is the guilty party. However, there is circumstantial evidence to the effect that she committed the crime in question. *State v. Langlois,* 258 N.C. 491, 128 S.E. 2d 803, is a case factually similar to the instant case. The Supreme Court held that the evidence raised only a mere conjecture as to the existence of the defendant's guilt and that her guilt could not be based on mere probability as to past events. By "past events" the Supreme Court was referring to the evidence that, prior to the time in question, she had been observed hitting the child with her fists and with the tongue of the child's wagon. However, these two cases are readily distinguishable.

In *Langlois* the deceased was a three-and-one-half-year-old boy who "had been suffering from anemia most of his life" and who was described as being clumsy and as falling often. In the instant case, the deceased was a three-year-old boy described as physically normal for a child his age. In *Langlois* the death resulted from extensive peritonitis caused by the rupture of the small intestine, a condition which had existed for twenty-four to forty-eight hours prior to death. The evidence did not reveal whether the defendant had actual control and custody of the child during this period of time. The doctor who performed the autopsy testified that the " 'lacerations and bruises were traumatic in nature, that is, caused by blows to his body not self-inflicted.' " The lacerations and bruises numbered approximately 150, most of which were superficial. "There were approximately a dozen or more lacerations which were through the skin which would have required suturing . . . had the child lived. The laceration on the abdomen of the child was approximately three eighths to one half inch deep." In the instant case Dr. LaTourette, who performed the autopsy, testified:

> "It is my opinion these conditions had existed for at least four hours before death. . . .
>
> . . . I have an opinion satisfactory to myself as to what caused the death of Christopher Ledbetter and that is peritonitis or inflammation of the abdominal cavity and this condition existed in his body at least four hours prior to his death.
>
> . . . His death was caused by acute peritonitis which is a

poisoning in the abdomen cavity which had been set up for some four hours, a little more or a little less. . . ."

He further testified:

"[B]efore the autopsy I observed bruises on the body, on the abdomen, arms, legs, forehead and face. . . .

. . . The abdomen was distended. It contained a mixture of fluid and gas and the bowel was bruises (*sic*) at several points. There was a wide open tear through the beginning of the small intestine. The supporting tissue that holds that part of the bowel had a tear through it. . . . [T]here was a bruise in the pancreas. . . .

. . . The condition of the head and brain consisted of a bruise two to three inches in diameter in the deep part of the scalp, over the back side of the skull and a fresh hemorrhage on the underside of the brain, under the left lobe of the cerebellum.

. . . [There was] a tear in the surface of the liver. . . .

I have an opinion satisfactory to myself what would cause injuries that I have observed upon the body of Christopher Ledbetter, that is, blunt force, and I believe there were more than one blow, approximately ten blows or more in my opinion."

[6, 7] The State's evidence was sufficient to show that, on 27 July 1967, the defendant had actual and exclusive control and custody of the child from 7:30 in the morning until between 2:00 and 3:00 in the afternoon when the child was taken to the office of Dr. Baker. The defendants' husband and father of the child was at his place of employment during such period. He testified that he had bathed the child the night before "and there were not any noticeable bruises on him to the extent that I would be concerned or alarmed about him." This evidence distinguishes the two cases, and it is abundantly clear that the State's evidence in the instant case is much stronger and probative than in *Langlois*.

" 'On motion to nonsuit, the evidence must be considered in the light most favorable to the state, and the state is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Contradictions and discrepancies, even in the state's evidence, are for the jury to resolve, and do not warrant nonsuit. Only the evidence favorable to the state will be considered, and and (*sic*) defendant's evidence relating to matters of defense, or defendant's evidence in conflict with that of

the state, will not be considered.' " (citation omitted) *State v. Young,* 271 N.C. 589, 157 S.E. 2d 10.

"The State's evidence is circumstantial, but the test of its sufficiency is the same whether the evidence be circumstantial, direct, or both. '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.' " (citation omitted) *State v. Tillman,* 269 N.C. 276, 152 S.E. 2d 159.

"The rule stated in [*State v. Tillman, supra*] does not mean that the evidence, in the Court's opinion, excludes every reasonable hypothesis of innocence. Should the Court decide that the State has offered substantial evidence of defendant's guilt, it becomes a question for the jury whether this evidence establishes beyond a reasonable doubt that defendant, and no other person, committed the crime charged." *State v. Bailiff,* 2 N.C. App. 608, 163 S.E. 2d 398.

"[T]here must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts." *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

Again, quoting from Brock, J., in *State v. Bailiff, supra:* "Considering the evidence in the light most favorable to the State we think the combination of facts as disclosed by the evidence constitutes substantial evidence of defendant's guilt, and not merely suspicious circumstances."

The third contention of the defendant is without merit.

[8] The fourth contention of the defendant is that the trial judge committed error in accepting the verdict of the jury. It is argued that the trial judge instructed "the jury that they could only find the defendant guilty or not guilty of involuntary manslaughter and could not find her guilty of manslaughter," but that "the jury convicted her of manslaughter directly contrary to the . . . charge." The record reveals the following:

"The jury returns in open court, the defendant being present and the Clerk taking the verdict stated:

CLERK: Members of the jury, have you reached a verdict?

FOREMAN: We have.

CLERK: How do you find? Do you find the defendant, Carolyn Ledbetter, guilty or not guilty of manslaughter, as charged in the Bill of Indictment . . .?

(EXCEPTION No. 5)

FOREMAN: We have found her guilty."

The bill of indictment (*supra*) is in accordance with the following definition:

"Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty." 4 Strong, N. C. Index 2d, Homicide, § 6, p. 197.

Judge Collier in his charge to the jury, after defining voluntary manslaughter, stated:

"In this case, you are not to concern yourself with voluntary manslaughter. You are to concern yourself with involuntary manslaughter.

. . .

So, I charge you . . . if you find from the evidence and beyond a reasonable doubt . . . that . . . the defendant . . . so mistreated and abused the deceased child . . . or that she so failed to use that degree of care toward the deceased child which a reasonably prudent person would use under the same or similar circumstances and that such conduct was accomplished by such wanton and reckless disregard of the consequences so as to amount to culpable or criminal negligence . . . and such conduct on her part was the proximate result of the death of Christopher Ledbetter, then it would be your duty to convict the defendant . . . of involuntary manslaughter."

The charge, to which no exception was interposed, is concerned solely with one crime, involuntary manslaughter. Voluntary manslaughter was not involved in any manner, and this was unequivocally brought to the attention of the jury. There could have been no confusion in the jurors' minds as to what crime was submitted to

them for consideration or as to what crime the clerk was referring to when he spoke of the bill of indictment.

In *State v. Green,* 266 N.C. 785, 147 S.E. 2d 377, it was stated:

> "There can be no doubt as to the identity of the criminal offense of which defendant was convicted. What was said in . . . *S. v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58, is controlling here: 'A verdict, apparently ambiguous, "may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court." . . . "The verdict should be taken in connection with the charge of his Honor and the evidence in the case." . . .'"

In the instant case there could be no doubt as to the identity of the criminal offense of which the defendant was charged, tried and convicted. "When the verdict is interpreted with reference to the warrant, the evidence, and the charge, it is unambiguous." *State v. Anderson,* 265 N.C. 548, 144 S.E. 2d 581.

The fourth contention of the defendant is without merit.

[9] The fifth contention of the defendant is that the trial judge committed error in attempting to take the verdict a second time after the clerk had taken the verdict once and after an exception had been interposed by the defendant. The following appears in the record:

> "CLERK: How do you find? Do you find the defendant, Carolyn Ledbetter, guilty or not guilty of manslaughter, as charged in the Bill of Indictment . . .?
>
> (EXCEPTION No. 5)
>
> FOREMAN: We have found her guilty.
>
> THE CLERK: You find the defendant guilty, so say you all?
>
> THE COURT: Now, members of the jury, this is the last jury case we will have this week. (Jury excused).
>
> MR. REDDEN: I move that the verdict be set aside. Your Honor charged that [they] could only find her guilty of involuntary manslaughter. They found her guilty of manslaughter as charged in the Bill of Indictment.
>
> THE COURT: They were only considering involuntary manslaughter.
>
> MR. REDDEN: Maybe so, but they came in with a general verdict of guilty as charged in the Bill of Indictment.

MR. LOWE: If your Honor would call them back.

MR. REDDEN: I don't know whether you can do that or not. I don't think you can do that at all. They have already rendered their verdict and I move to set it aside.

THE COURT: You had better bring them back, so we can clear it up. Sheriff, bring them on back. (Jury comes back in courtroom.)

MR. REDDEN: Will your Honor let the record show that the jury had left the courtroom and your Honor calls them back.

THE COURT: Yes, sir. Would you rise, please. (Jury stands)

THE COURT: It has been brought to my attention that in taking the verdict, the Clerk used the word manslaughter and I have asked him to take the verdict again before you leave. Take the verdict.

CLERK: How do you find? Do you find the defendant Carolyn Ledbetter guilty or not guilty of involuntary manslaughter, as charged by the Court . . .?

FOREMAN: We have found her guilty."

It is argued that the trial judge committed error in accepting the initial verdict and in not instructing the jurors to "retire and render a proper verdict based upon the instructions." As stated *supra,* it is clear that the defendant was properly found guilty of involuntary manslaughter. The initial verdict is unambiguous when interpreted with reference to the warrant, the evidence and the charge. When the jury returned and again stated that they had found her guilty of "involuntary manslaughter", this was nothing more than a simple change in form. The change, which was in fact unnecessary, did not prejudice the defendant in any way. It was simply a different way of saying the same thing. The substance and meaning of the verdict remained unaltered. The second purported taking of the verdict was mere surplusage and the defendant was in no way prejudiced. See *State v. Whitley,* 208 N.C. 661, 182 S.E. 338; *State v. Snipes,* 185 N.C. 743, 117 S.E. 500; and *State v. Kinsauls,* 126 N.C. 1095, 36 S.E. 31.

The fifth contention of the defendant is without merit.

[10] The sixth contention of the defendant is that the trial judge committed error in refusing to grant her motion to set the verdict aside. It is argued that the trial judge should have set the verdict aside "as being inconsistent and directly contrary to his charge." However, as seen *supra,* such an argument is unfounded. The trial

judge acted within his discretion, and there was absolutely no abuse of this discretion. *State v. Massey,* 273 N.C. 721, 161 S.E. 2d 103.

The sixth contention of the defendant is without merit.

This was a difficult and emotional case, and it is apparent that the trial judge approached his task with the utmost concern and preparation. The defendant had a fair and impartial trial, and her rights were vigorously protected at each step of the proceedings. The triers of the facts found against the defendant. In law we find

No error.

BROCK and MORRIS, JJ., concur.

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

No. 6915SC95

(Filed 30 April 1969)

1. Municipal Corporations § 30— action to restrain noncompliance with zoning ordinance — defense of landowner

In municipality's action to restrain landowners from continuing construction work on their land until they obtain a zoning permit therefor in compliance with zoning ordinance, landowners may assert as an affirmative defense that they in good faith and without notice of the pending adoption of the ordinance incurred substantial expense in reliance upon a building permit issued to them by the municipality prior to the adoption of the ordinance.

2. Municipal Corporations § 30; Administrative Law § 2— action to restrain noncompliance with zoning ordinance — exhaustion of administrative remedies

In municipality's action to restrain landowners from continuing construction work on their land until they obtain a zoning permit therefor in compliance with a zoning ordinance, landowners, who asserted as an affirmative defense their reliance upon a building permit issued by the municipality prior to the enactment of the ordinance, are not required to exhaust their administrative remedies by applying for a zoning permit in order to challenge the ineffectiveness of the ordinance, since to compel landowners to seek relief under the ordinance would be a patently useless step, increase cost and promote multiplicity of actions.

3. Municipal Corporations § 30; Administrative Law § 2— challenge to validity of zoning ordinance — exhaustion of administrative remedies

The exhaustion of administrative remedies is not a prerequisite to the

raising of a defense of the invalidity of a zoning ordinance as it applies to certain property.

4. Municipal Corporations § 30— *issuance of building permit* — rights of landowners — effect of subsequently enacted ordinance

The mere issuance of a building permit vests no rights in the permittee against a subsequently enacted ordinance prohibiting the intended use, but the issuance of a permit coupled with a substantial change of position by the permittee in reliance thereon, acting in good faith, vests the right to complete the construction.

5. Municipal Corporations § 30— zoning ordinance — completion of nonconforming use — landowner's good faith and expenses — nature of expenses

In order for landowners to complete construction of a nonconforming use prohibited by a zoning ordinance enacted after the issuance of a building permit, the landowners must show that they in good faith made substantial expenditures in reliance upon the building permit prior to the enactment of the ordinance, but the expenditures need not be limited to the land itself.

6. Municipal Ordinances § 30— action to restrain noncompliance with zoning ordinance — instruction on defenses

On issue as to whether landowners made substantial expenditures in reliance upon building permit so as to allow them to complete construction of nonconforming use prohibited by zoning ordinance enacted after issuance of the permit, instructions which permitted jury to consider all expenditures made in good faith from date of issuance of the permit to date landowners received notice of revocation of the permit, rather than expenditures made from issuance of permit to effective date of ordinance, *is held* erroneous.

APPEAL by plaintiff from *Hall, J.*, September 1968 Civil Session, Superior Court of ORANGE.

On 11 July 1968, the Town of Hillsborough brought an action against defendants alleging the adoption on 27 May 1968 of a zoning ordinance, copy of which was attached to the complaint; that the ordinance prohibited excavation or land preparation until a zoning permit had been issued; that defendants had begun excavation and land preparation on their lot described in the complaint without first obtaining a zoning permit. The town asked that defendants be permanently restrained and enjoined from excavating or otherwise preparing their lot described in the complaint for any nonfarm use, or from erecting any building, buildings or any structure thereon without first obtaining a zoning permit therefor. Temporary restraining order was entered 11 July 1968, and amended on 31 July 1968, to permit defendants to landscape the property in question. Defendants answered averring that the town had issued

to them on 3 May 1968 a building permit, copy of which was attached to the answer, and that in reliance thereon and in good faith, they had "expended huge sums of money and incurred substantial obligations in proceeding with the construction, excavation, purchase and improvement of said land and in purchasing equipment, and other items of labor and material, to enable the defendants to use the said tract of land as a commercial business enterprise." They further averred that at no time from the issuance of the permit until 11 June 1968 did they know that their intended use of the land was proscribed by the ordinance; that at the time of the issuance of the permit, and at the times the substantial expenditures were made and the obligations incurred in good faith, in reliance on the building permit, the use intended by them was a lawful use of the land. They asked that the temporary restraining order be dissolved, that they be permitted to proceed with the contemplated use of the land as authorized by the building permit.

Upon trial, the issue submitted: "Did the defendants in good faith and without notice of the pending zoning ordinance prohibiting the use of their property for business purposes, incur substantial expenses in reliance upon the building permit issued to them on May 3, 1968?" was answered in favor of defendants, and judgment was entered thereon vacating the restraining order. Plaintiff appealed.

Graham & Cheshire by Lucius M. Cheshire for plaintiff appellant.

Alonzo Brown Coleman, Jr., for defendant appellees.

MORRIS, J.

Plaintiff assigns as error the refusal of the trial court to grant plaintiff's motion for judgment as a matter of law for that plaintiff's only prayer is that defendants not be allowed to continue the land preparation without obtaining a zoning permit. It is stipulated that defendants have not applied for a zoning permit. Plaintiff contends that defendants have, therefore, not exhausted their administrative remedies. Plaintiff also assigns as error the court's denial of its motion for a directed verdict on defendants' affirmative defense for that defendants failed to introduce evidence of any work done on the land itself prior to the enactment of the ordinance and failed to introduce evidence of expense incurred prior to the date defendants had constructive notice of the zoning ordinance by virtue of publication of notice of public hearing. Request for peremptory instructions to that effect was refused, and plaintiff excepted. Plain-

tiff tendered the following issue, which was refused and plaintiff excepted: "Have the defendants in good faith and without notice of the pending zoning ordinance incurred substantial expenses in making improvements to the property of the defendants?" Plaintiff also assigns as error portions of the judge's charge for that the charge did not limit expenditures merely to the land itself and for that the court failed to charge the jury that defendants were not justified in making expenditures in reliance on a building permit after notice of a pending ordinance had been published.

The questions raised by plaintiff's assignments of error are threefold. May defendants in this action assert the defense of reliance on the building permit or are they required to apply for a zoning permit? If the defense may be asserted, are they limited to expenditures and work on the land itself? And must these expenditures and work be made and done prior to publication of notice of public hearing?

Plaintiff relies on *Garner v. Weston,* 263 N.C. 487, 139 S.E. 2d 642, as authority for its contention that defendants must exhaust administrative remedies and cannot assert the defense of reliance on a building permit. We do not agree that *Garner v. Weston* is authority for this position. There the landowners had acquired property and were in the process of constructing a trailer park within one mile of the town limits of Garner. The town adopted an extraterritorial zoning ordinance effective 15 April 1963. In August 1963 Garner brought suit to enjoin defendants from constructing the trailer park. Defendants answered contending that they had a vested right in completing the project as a nonconforming use by reason of their having made plans, expended considerable sums of money in grading streets, digging a well, building a pump house, laying waterlines, concrete patios, and buying trailers. Jury trial was waived by the parties. The court heard the evidence and found facts which were contrary to most of defendants' evidence. Nevertheless, defendants in their brief stated there was no dispute about the facts found. The facts found included a finding that health regulations required the obtaining of a permit before construction could begin and that defendants did not have one. The court further found that the ordinance empowered the board of adjustment to issue a variance permit upon proper showing and defendants did not apply for such a permit. The court found the defendants had not shown any valid defense to plaintiff's action. On appeal, the Supreme Court noted that since there was no dispute about the facts found, it was bound by them; that they were sufficient to support the conclusions, which, in turn sustained the judgment. The Court noted, however, "The court

found the zoning ordinance of the Town of Garner made provision for a hearing before the Board of Adjustment upon application for a permit to complete a nonconforming use, but the defendants have not applied for such permit and hence have not exhausted their administrative remedies. (citations omitted.) The defendants' showing, in view of their stipulations, is not sufficient to permit reversal of the judgment. However, in view of the expenses incurred, the defendants, if so advised, may make application for a nonconforming use permit as a hardship case. Such permit, however, is discretionary with the Board of Adjustment."

[1, 2] We do not construe the case as requiring the landowner to apply for a zoning permit under an ordinance which he contends is ineffective in its application to him by reason of vested rights he contends he has acquired which make the ordinance ineffective to the land use complained of as in contravention to the ordinance. In the *Garner* case the landowner had not been issued a building permit by the municipality.

We are of the opinion that the affirmative defense raised by defendants is permissible. If defendants, acting in good faith and in reliance on the building permit, had acquired a vested right to use their property for commercial purposes, they are not required to apply for a zoning permit as provided by the ordinance. Indeed, to require this procedure would be a vain thing under the terms of the ordinance. The ordinance provides that "all buildings and other structures upon which substantial construction was begun prior to adoption of this ordinance or amendment to it, and which do not conform to the requirement of said ordinance or amendment shall be classified as non-conforming buildings or structures. No other beginnings of buildings or structures or uses of land which do not conform to the provisions of this ordinance shall entitle said buildings or structures or uses of land to non-conforming status under the provisions of this ordinance." § 11.1, Hillsborough North Carolina Zoning Ordinance. The ordinance further requires application for zoning permit to be made to the Hillsborough Zoning Officer and by § 12.2 provides: "The Zoning Officer is hereby authorized and it shall be his duty to enforce the provisions of this ordinance *exactly* as written. The Zoning Officer shall have no powers of interpretation or for the granting of exceptions or variances. In any case of doubt as to the legality of a request for a Zoning Permit the Zoning Officer shall refer the request to the Board of Adjustment. Appeal from decisions of the Zoning Officer may be made to the Board of Adjustment."

[3] To compel defendants to seek relief under the provisions of the ordinance would be a patently useless step, increase costs and promote multiplicity of actions. The exhaustion of administrative remedies is not a prerequisite to the raising of a defense of the invalidity of the zoning ordinance as it applies to a certain property. *County of Lake v. MacNeal,* 24 Ill. 2d 253, 181 N.E. 2d 85.

We now address ourselves to the remaining question raised by plaintiff's assignments of error.

[4] Certainly the mere issuance of a building permit vests no rights in the permittee against a subsequently enacted ordinance prohibiting the intended use. 8 McQuillin, Municipal Corporations, (3d ed. 1965) § 25.155, p. 492. But our Court has recognized the principle that the issuance of a permit coupled with a substantial change of position by the permittee in reliance thereon, acting in good faith, vests the right to complete the construction. The principle is stated in *Warner v. W & O, Inc.,* 263 N.C. 37, 138 S.E. 2d 782, as follows:

> "The permit created no vested right; it merely authorized permittee to act. If he, at a time when it was lawful, exercised the privilege granted him, he thereby acquired a property right which would be protected; but he could not remain inactive and thereby deny to the municipality the right to make needed changes in its ordinances. It is not necessary for the permittee to show that the construction authorized by the permit has been completed before the ordinance is amended. He is protected if, acting in good faith, he has made expenditures on the faith of the permit at a time when the act was lawful. *Stowe v. Burke,* 255 N.C. 527, 122 S.E. 2d 374; *In Re Appeal of Supply Co.,* 202 N.C. 496, 163 S.E. 462; 101 C.J.S., 1006-7, 58 Am. Jur. 1041."

In *Stowe v. Burke,* 255 N.C. 527, 122 S.E. 2d 374, the defendants received a permit from the city to construct apartment houses on 7 July 1961 and on 17 July 1961 the city passed a zoning ordinance prohibiting the use of the defendants' property for apartment purposes. During this 10-day period the defendants spent some $55,000 for foundation work on the property. The Court held, for the first time in North Carolina, that in order for a party to acquire a vested right to complete construction of a nonconforming use, expenditures made prior to the enactment of the zoning ordinance must have been made in good faith. Evidence showed that the defendants were aware of a "community of opposition" to the construction of apartments on the property, and that they had received a copy of the proposed

ordinance. Thus, the Court upheld the trial court's conclusion that the defendants had not acted in good faith and therefore acquired no vested right to construct the proposed apartment project on the property. (The case was tried without a jury.) In the case at bar, the evidence on the question of good faith is in substantial conflict.

[5] Plaintiff contends that the test must be whether actual construction has begun or whether the land was physically used for the contemplated construction, and not expenditures made other than on the land itself in preparation to build. This view finds support in some jurisdictions. *Kiges v. St. Paul,* 240 Minn. 522, 62 N.W. 2d 363. While there is certainly no easy formula available to resolve issues of this kind, we believe that fairness to both the public and the individual property owner is better served by a more flexible rule. The majority of jurisdictions do not require that the substantial expenditures be made to the land itself. *Tremarco Corp. v. Garzio,* 161 A. 2d 241 (N.J.); *Clairmont Development Co. v. Morgan,* 149 S.E. 2d 489 (Ga.); 8 McQuillan, Municipal Corporations, § 25.157 and cases there cited; 101 C.J.S., Zoning, § 243 and cases there cited. "Obviously, where a use under a permit has been undertaken, with investment of capital, the purchase of equipment, employment of workers or the like, the protection of that permit is then close if not tantamount to the protection of a nonconforming use existing at the time that zoning restrictions become effective; . . ." McQuillin, Municipal Corporations, *supra.*

Our Court in *In Re Tadlock,* 261 N.C. 120, 134 S.E. 2d 177, said that the mere planning of a development is insufficient to enlarge a nonconforming use. Although the precise questions raised here have not been before the North Carolina Supreme Court, a brief review of a few cases would indicate that expenditures should not necessarily be limited to the land itself, but must be made or incurred in good faith and prior to the effective date of the ordinance.

In *In Re Appeal of Supply Co.,* 202 N.C. 496, 163 S.E. 462, plaintiffs had obtained a permit from the city of Goldsboro to operate a filling station. Approximately seven months later the city adopted a zoning ordinance which prohibited the operation of plaintiffs' proposed station, except that the ordinance provided as follows:

> "Nothing herein contained shall require any change in the plans, construction, size or designated use of any building, structure or part thereof for which a building permit has been granted by the building inspector before this ordinance becomes effective and the construction of which from such plans shall have been

started within 90 days after this ordinance becomes effective, . . ."

Three days before the expiration of the 90-day period the plaintiffs placed a grease dispenser and goods to be sold out of a filling station upon the premises. The Court held that it was a question for the jury as to whether, under the circumstances, the plaintiffs were precluded from installing the gas pumps in accordance with the permit issued them by the city.

In the *Tadlock* case, *supra,* the property owner had planned to build a trailer park in three stages. However, he had only worked on one section at the time of the enactment of the ordinance. The Court held that "by planning the development in three stages and confining actual construction to Area 1 only, the applicants as to Areas 2 and 3 fall within the rule that planning a development alone is insufficient to enlarge a nonconforming use." From the Court's discussion it would appear that little or no funds had been spent on Areas 2 and 3 at the time the ordinance was enacted.

In *Warner v. W & O, Inc., supra,* the property owner obtained a permit to construct apartment houses on certain property for which they held an option. The action was brought by adjoining landowners in December 1962 to enjoin defendants from continuing construction on the ground that the proposed use would violate the zoning ordinance. The permit was granted on 8 August 1962 and on 13 September 1962 the city amended the zoning ordinance prohibiting plaintiff's proposed structure. The amendment was to become effective on 28 September 1962. In discussing expenditures made prior to the effective date of the amendment, the Court does not state that a vested interest may be acquired only by making improvements to the land. The Court states, "It is not necessary for the permittee to show that the construction authorized by the permit has been completed before the ordinance is amended. He is protected if, acting in good faith, he has made expenditures on the faith of the permit at a time when the act was lawful." Also, "The law accords protection to nonconforming users who, relying on the authorization given them, have made *substantial expenditures* in an honest belief that the project would not violate declared public policy. It does not protect one who makes expenditures with knowledge that the expenditures are made for a purpose declared unlawful by duly enacted ordinance." (Emphasis added.) The Court discusses each of the expenditures made by the landowner and concludes that they were not such expenditures as would give him a vested right. Expenditures for architect's drawings were made prior

to receiving the permit. Therefore, they were not made in reliance on the permit. The cost of removing six or seven trees from the property would not have been substantial. The parties had purchased property in reliance on the permit. However, this was done after the ordinance was amended, and the court found that there was no binding contract to purchase the property prior to the amendment. The Court does not say that expenditures, in order to create a vested interest in a nonconforming use, must have been made for improvements to the land.

The testimony as to the good faith of defendant's was sharply in conflict. Evidence was admitted, without objection, as to all expenditures made and obligations incurred by defendants after the issuance of the permit both before and after the effective date of the ordinance. This evidence was recapitulated by the trial court in its charge. The court correctly instructed the jury that the permit created no vested rights in the defendants, that it merely authorized the defendants to act and if they exercised the privilege granted by the building permit at a time when it was lawful, a property right would be acquired, would be protected, and further that it is not necessary that the proposed construction be completed prior to the adoption of the zoning ordinance.

[6] However, the court also charged as follows: "If the defendants acted in good faith and made substantial expenditures in reliance on the permit, but without notice of the pending ordinance prohibiting the use of the property for business purposes, the defendant would be protected, that is, if the defendant made substantial expenditures in the honest belief that the proposed construction would not violate the zoning regulations, the defendant would be protected and would be entitled to complete their proposed building, as a non-conforming use." Plaintiff assigns this portion of the charge as error. We are constrained to agree. We are of the opinion that the court did not sufficiently explain and declare the law applicable. The jury could have believed that they were free to consider all expenditures made in good faith from the issuance of the permit to June 11, the date defendants received notice of the revocation of the building permit, rather than those made in good faith after the issuance of the permit and before 27 May, the date of enactment and effective date of the ordinance. The possibility that the jurors might have been misled is accentuated by the fact that evidence of all ex-

penditures and obligations incurred was before them without objection and had been recapitulated by the court.

Since there must be a new trial, we do not discuss the evidence.

New trial.

CAMPBELL and BRITT, JJ., concur.

DONALD GUY KINNEY v. CHARLES REID GOLEY, SR.

— AND —

KENNETH E. CROWSON, BY HIS NEXT FRIEND, BOBBIE M. GREEN v. CHARLES R. GOLEY AND DONALD GUY KINNEY

— AND —

JOHN L. NOLL, JR. v. CHARLES R. GOLEY AND DONALD GUY KINNEY

No. 68SC153

(Filed 30 April 1969)

1. Automobiles § 9— failure to give turn signal — evidence of negligence

Since the amendment of G.S. 20-154 by Ch. 768, Session Laws of 1965, failure of a motorist to give a turn signal required by the statute is not negligence *per se*, but a violation of the statute must be considered by the jury along with other facts and circumstances in deciding whether the motorist has breached his common law duty of exercising due care.

2. Automobiles § 90— instructions — failure to give turn signal — negligence per se

In this consolidated trial of three actions arising out of an automobile collision, the court erred in instructing the jury that failure to give a left turn signal in violation of G.S. 20-154 constitutes negligence *per se*, and such error was not cured when the court read to the jury G.S. 20-154 in its entirety, including the proviso that a violation of its provisions should not be considered negligence *per se*, since it cannot be known which instruction was followed by the jury in arriving at a verdict.

3. Automobiles § 90— failure to give turn signal — instructions — error not cured

Error by the trial court in instructing the jury that failure to give a turn signal required by G.S. 20-154 constitutes negligence *per se* is not cured by another portion of the charge relating to the question of whether failure to give the turn signal was a proximate cause of the collision.

4. Trial § 8— consolidation of actions for trial

The trial court possesses discretionary power in proper cases to order the consolidation of actions for trial.

5. Automobiles § 43; Trial § 8— actions by driver and passengers — consolidation for trial

Where the driver of one automobile involved in a collision brings an action against the driver of the other automobile involved in the collision, and passengers in the first automobile bring actions against both drivers, it is the better practice to try the actions brought by the passengers separately from the action brought by one driver against the other, since the issue of contributory negligence is not involved in the actions brought by the passengers but is involved in the action of one driver against the other driver.

6. Courts §§ 4, 14; Venue § 8— removal of action from municipal court to superior court — jurisdiction upon remand for new trial

Contention that court erred in removing action from Municipal Court of High Point in which it was originally instituted to the Superior Court of Guilford County is rendered moot by the effecutation of the Judicial Department Act of 1965 in the Eighteenth District, G.S. 7A-131, and upon remand of the case for new trial, the trial will properly be held in the superior court since the amount in controversy exceeds $5,000. G.S. 7A-243.

APPEALS by defendant Goley and by plaintiff Crowson and plaintiff Noll from *Crissman, J.*, 6 November 1967 Civil Session, GUILFORD Superior Court, High Point Division.

These appeals are from the trial of three civil actions which were consolidated for trial. Each action arose from the collision which occurred about 11:25 a.m. 9 March 1966 on U. S. Highway 220 about six miles south of Asheboro, in Randolph County, N. C., when a 1966 Mustang driven by Donald Guy Kinney collided with a 1954 Ford driven by Charles R. Goley. John L. Noll, Jr., and Kenneth E. Crowson were passengers in the Mustang. Goley was the sole occupant of the Ford. All occupants of the two vehicles were injured and all are involved in this litigation.

At the scene of the collision U. S. Highway 220 is a two-lane paved highway running generally north and south, with one lane for northbound and one lane for southbound traffic. The center of the highway is marked with a broken white line with solid yellow lines on either side. The highway is straight for a considerable distance on either side of the place of collision but visibility is limited for both northbound and southbound traffic by reason of the fact that the highway passes over a hill, the crest of which is some 200 to 225 feet north of the point of collision. At the point of collision the highway runs downgrade for southbound traffic and upgrade for northbound traffic. A gasoline service station is situated approximately on the crest of the hill on the west side of the highway, with a paved apron extending approximately 300 feet along the edge of

the highway. At the time of the collision the weather was clear and the highway surface was dry. The posted speed limit was 55 miles per hour. The Mustang driven by Kinney and in which Noll and Crowson were passengers was traveling south and had just passed over the crest of the hill immediately prior to the collision. The Ford driven by Goley was traveling north.

Kinney's version of the accident: He was traveling south on Highway 220 with Crowson and Noll as passengers at a rate of approximately 40 to 45 miles per hour. As he approached the crest of the hill from the north side he could see south along the highway approximately 200 yards and saw the top of an approaching vehicle, which he later learned was being driven by Goley. The Goley vehicle appeared to be approximately three feet over on his (Kinney's) side of the road, so he took his foot off of the accelerator and placed it on the brake pedal. One of the passengers, he believed it was Noll, said: "What in the hell is this guy going to do?" but before this statement was completed and as Kinney placed his foot on the brake pedal, the approaching vehicle moved back onto its proper side of the highway. Kinney then started to put his foot on the accelerator to resume speed but before he did so, the approaching vehicle made a sharp left turn directly in front of him when the two vehicles were 60 to 75 yards apart. Kinney applied his brakes and blew his horn but was not able to avoid the collision. He did not see any turn signal given by the driver of the approaching vehicle, either by hand or by mechanical signaling device.

Goley's version of the accident: He was traveling north on Highway 220 towards Asheboro. At a point approximately 300 to 400 feet before he reached the service station which was located on the west side of the highway, he turned his signal lights on to make a left turn into the service station. He was traveling approximately 40 miles per hour but slowed down to about fifteen miles per hour and looked north on Highway 220 and saw nothing coming before attempting to make the left turn. He started making the left turn into the service station driveway at a point approximately 150 feet south from the crest of the hill and was then hit by the other vehicle, which he never saw approaching.

Crowson and Noll's (passengers) version of the accident: They were riding in the Kinney vehicle, Noll being seated in the front seat beside the driver and Crowson sitting in the rear seat behind Noll. When the approaching Goley vehicle was first observed, it appeared to be straddling the center line of the highway. It appeared that it would go back onto its side of the highway, but never did

completely and made an angled turn towards the service station, when the collision occurred. No turn signals were observed on the Goley vehicle. Kinney was traveling 50 to 60 miles per hour as he drove over the crest of the hill. He continued traveling straight ahead, did not reduce his speed or apply his brakes until he was 50 to 60 feet from the approaching vehicle, and did not blow his horn.

The physical evidence, as testified to by the Highway Patrolman who investigated the collision and as illustrated by photographs which were taken at the time, showed skid marks left by the Kinney vehicle for a distance of 72 feet, in a straight line leading to the point of impact. These skid marks were in the southbound traffic lane near the west side of the highway. The front of the Kinney vehicle and the right front of the Goley vehicle were smashed.

As a result of the collision, three civil actions were instituted and were subsequently consolidated for purposes of trial with the following results:

Case No. 1: Kinney (driver) v. Goley (driver), in which Kinney sued to recover for injuries allegedly sustained as a result of Goley's negligence and in which Goley answered, denying negligence on his part, pleading contributory negligence on the part of Kinney, and counterclaimed for injuries to Goley allegedly sustained as a result of Kinney's negligence. The jury answered the issues of negligence in favor of Kinney, against Goley, and awarded Kinney the sum of $45,000.00 as damages.

Case No. 2: Crowson (passenger) v. Goley (driver) and Kinney (driver), in which Crowson sued both drivers to recover for injuries allegedly sustained as a result of the negligence of each of the defendant drivers. The jury answered the issues of negligence in favor of Kinney, against Goley, and awarded Crowson damages in the sum of $6,000.00, recoverable solely from defendant Goley.

Case No. 3: Noll (passenger) v. Goley (driver) and Kinney (driver), in which Crowson sued both drivers to recover for inlegedly sustained as a result of the negligence of each of the defendant drivers. The jury answered the issues of negligence in favor of Kinney, against Goley, and awarded Noll damages in the sum of $100,000.00, recoverable solely from defendant Goley.

Kinney and Noll filed their respective actions (Cases Nos. 1 and 3) in the Superior Court of Guilford County, High Point Division. Crowson's action (Case No. 2) was instituted in the Municipal Court of the City of High Point and was later removed to the Su-

perior Court of Guilford County, High Point Division, upon motion of Goley over Crowson's objection.

From judgments entered upon the verdicts, defendant Goley has appealed in all three cases, and plaintiffs Crowson and Noll have each appealed in their respective cases, all appellants contending that a new trial should be granted because of errors committed by the trial judge during the consolidated trial of the three cases.

J. W. Clontz, Jerry C. Wilson, Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and Larry B. Sitton, for appellee Donald Guy Kinney (plaintiff in Case No. 1 and defendant in Cases Nos. 2 and 3).

Ottway Burton, and Haworth, Riggs, Kuhn & Haworth, by John Haworth, for defendant appellant Charles R. Goley, Sr.

Arch K. Schoch, Jr., for appellant Kenneth E. Crowson (plaintiff in Case No. 2).

Jerry M. Shuping, and Smith & Casper, by Archie L. Smith for appellant John L. Noll, Jr. (plaintiff in Case No. 3).

PARKER, J.

There is no substantial conflict in the evidence indicating that the automobile collision which gave rise to the three cases here on appeal occurred when the Goley vehicle, traveling north on Highway 220, turned from the northbound lane of travel to cross over the southbound lane in order to enter the service station on the west side of the highway. There is sharp conflict in the evidence, however, as to whether Goley had given a left turn signal before making the turn. Appellant Goley, a defendant in all three cases, assigns as error the trial judge's charge to the jury as to the effect of G.S. 20-154, if they should find as a fact that he had failed to give a proper turn signal. In this connection, the court charged:

> "If you should find from the evidence, and by its greater weight, that this defendant did fail to give such signal, either by the mechanical signal indicating a left turn, or by his hand straight out to the left, as the statute requires, that that would be negligence, per se, that is, that would be negligence of itself, but that wouldn't be enough to find him actionably negligent; so, you have to further find from the evidence, and by its greater weight, that such failure to give a signal was a proximate cause of the collision that took place; but if you find from the evidence, and by its greater weight, that he did fail to give

> the signal required by statute, and that that was a proximate cause of the collision, then the Court charges you it would be your duty to answer that first issue, 'Yes,' under those circumstances."

The above-quoted portion of the charge, which was the subject of appellant Goley's Exception No. 9, was given in connection with the judge's charge to the jury in the case in which Kinney was plaintiff and Goley was defendant, and the first issue referred to was as to whether plaintiff Kinney was injured by the negligence of defendant Goley. By a subsequent portion of the charge, which is the subject of appellant Goley's Exception No. 21, the trial judge charged in each of the three cases that if the jury should find from the evidence and by its greater weight that:

> "(I)f he (Goley) started making his turn without having given a signal for making a turn, as required by statute; and, if you are further satisfied from the evidence and by its greater weight that . . . such failure to give a signal, as required by statute, a distance of 200 feet back from where he turned, if you find that either of those was a proximate cause, a cause without which the collision would not have occurred and one which he should have foreseen that such collision was likely, or that something similar was likely to happen, then the Court charges you that it would be your duty to answer that issue 'Yes.'"

The issue referred to in each of the three cases was as to whether plaintiff was injured by negligence of defendant Goley.

[1] Prior to 1 July 1965, failure to give a turn signal as and when required by G.S. 20-154 had been held by the North Carolina Supreme Court to be negligence *per se*. *Cowan v. Transfer Co.*, 262 N.C. 550, 138 S.E. 2d 228; *Mitchell v. White*, 256 N.C. 437, 124 S.E. 2d 137; *Grimm v. Watson*, 233 N.C. 65, 62 S.E. 2d 538. By Chapter 768 of the 1965 Session Laws the Legislature amended G.S. 20-154(b), effective 1 July 1965, by adding thereto a proviso as follows:

> "(P)rovided further that the violation of this section shall not constitute negligence per se."

The collision in the present case occurred after the effective date of this amendment.

In *Cowan v. Transfer Co., supra*, Moore, J., in discussing another highway safety statute which had also been amended by the Legis-

lature to provide that a violation was not to be considered negligence *per se,* stated:

> "It is the generally accepted view that the violation of a statute enacted for the safety and protection of the public constitutes negligence *per se, i.e.,* negligence as a matter of law. The statute prescribes the standard, and the standard fixed by the statute is absolute. The common law rule of ordinary care does not apply — proof of the breach of the statute is proof of negligence. The violator is liable if injury or damage results, irrespective of how careful or prudent he has been in other respects. No person is at liberty to adopt other methods and precautions which in his opinion are equally or more efficacious to avoid injury. But casual connection between the violation and the injury or damage sustained must be shown; that is to say, proximate cause must be established. In short, where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefits or others, if he neglects to perform that duty, he is liable to those for whose protection or benefit it was imposed for any injuries or damage of the character which the statute or ordinance was designed to prevent, and which was proximately produced by such neglect, provided the injured party is free from contributory negligence. *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 311; 38 Am. Jur., Negligence, § 158, pp. 827-829; 65 C.J.S., Negligence, § 19, pp. 418-420.
>
> "Where, as in G.S. 20-149(b), a violation is declared not to be negligence *per se,* the common law rule of ordinary care applies, and a violation is only evidence to be considered with other facts and circumstances in determining whether the violator used due care.
>
> "The distinction, between a violation of a statute or ordinance which is negligence *per se* and a violation which is not, is one of duty. In the former the duty is to obey the statute, in the latter the duty is due care under the circumstances. In both instances other facts and circumstances are to be considered on the question of proximate cause; in the latter, other facts and circumstances are to be considered also on the question of negligence. In practical effect the real distinction is not so great as seems apparent from the definitions."

[2] When the trial court in the cases presently before us instructed the jury that if they found as a fact that Goley had failed to give the turn signal as required by G.S. 20-154 the violation of the statute would be negligence *per se,* the court usurped one of the

functions of the jury. Since a violation of G.S. 20-154 is no longer to be considered negligence *per se*, the jury, if they find as a fact the statute was violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the violator has breached his common law duty of exercising ordinary care. If a violation of the statute is to be considered negligence *per se*, the jury would not need to perform this function, since the statute, rather than the common law duty of ordinary care, would provide the applicable standard.

The trial court did read to the jury G.S. 20-154 in its entirety, including the proviso that violation of its provisions should not be considered negligence *per se*. However, simply reading the amended statute could not effectively correct the judge's erroneous charge by which he had instructed the jury directly contrary to the provisions of the amended statute. Conflicting instructions to the jury upon a material point, the one correct and the other incorrect, must be held for prejudicial error, requiring a new trial, since it cannot be known which instruction was followed by the jury in arriving at a verdict. *Barber v. Heeden*, 265 N.C. 682, 144 S.E. 2d 886.

[3] Appellee Kinney contends, nevertheless, that any error in the judge's charge in this connection was rendered harmless when the judge went on to charge the jury:

> "Defendant says that didn't have anything in the world to do with it, that the man was already over in the plaintiff's lane when he first saw him and that that put him on notice, that he didn't need any further signal, and the Court charges you that you are to remember the evidence, and that if, under this evidence, you are of the opinion that he was already on notice about it, and that such a signal was not necessary, then you would not consider that at all in the matter to be considered as negligence."

We view this portion of the charge as relating to the question of whether failure to give the signal as required by G.S. 20-154(b) was a proximate cause of the collision, rather than as relating to the question of whether Goley had breached his duty of ordinary care. In any event, since it is impossible to know which of the sharply conflicting versions of the collision the jury found to be the truth of the matter, the above portion of the charge could not eliminate the prejudicial error which was contained in the court's previous very clear, but erroneous, instruction that failure to give the turn signal required by the statute must be considered negligence of itself. Since the erroneous portion of the charge was relevant to all three cases

here on appeal, appellant Goley is entitled to new trials in all three of the cases. In view of this holding, it is not necessary that we consider appellant Goley's remaining assignments of error, which relate to other portions of the court's instructions to the jury.

[4, 5] Appellants Crowson and Noll each assign as error the action of the trial judge in consolidating the three cases for trial over their objections. It is well established that the trial court possesses discretionary power in proper cases to order the consolidation of actions for trial. *Kanoy v. Hinshaw,* 273 N.C. 418, 160 S.E. 2d 296; *Davis v. Jessup,* 257 N.C. 215, 125 S.E. 2d 440; *Peeples v. R. R.,* 228 N.C. 590, 46 S.E. 2d 649; 1 McIntosh, N. C. Practice 2d, §§ 1342, 1343. In *Kanoy v. Hinshaw, supra,* while a majority of the Supreme Court approved consolidation under the facts there presented, the Court, speaking through Branch, J., said: "We do wish to stress, however, that in considering consolidation of actions for trial, the trial court should carefully weigh the possibilities of confusion, misunderstanding or prejudice to the parties which might arise from such consolidation." Consideration of the appeal presently before us leads to the conclusion that it would be better to try the actions brought by Crowson and Noll, passengers in the Kinney automobile, separately from the action brought by driver Kinney against driver Goley. The issue of contributory negligence is not involved in the actions brought by the two passengers against both drivers. It is directly involved in the action brought by one driver against the other driver. Consolidation of the three cases for trial presents difficulties in charging the jury in a manner which will not lead to confusion. Under similar circumstances, the North Carolina Supreme Court has held that it would be better practice not to consolidate for purposes of trial. *Dixon v. Brockwell,* 227 N.C. 567, 42 S.E. 2d 680.

[6] Appellant Crowson also assigns as error the removal of his action from the Municipal Court of the City of High Point, in which it was originally instituted, to the Superior Court of Guilford County, High Point Division, which action was taken by the trial court on motion of defendant Goley but over objection of plaintiff Crowson. This contention, however, has been rendered moot by the effectuation of the Judicial Department Act of 1965, G.S. 7A-1, *et seq.,* in the Eighteenth District. G.S. 7A-131. Upon remand of all three of the cases involved in this appeal for new trial, the trial would properly be held in the superior court division, since the amount in controversy in each case exceeds $5,000.00. G.S. 7A-243.

We deem it unnecessary to consider the remaining assignments

of error made by appellants Crowson and Noll, since in any event there must be new trials and the questions raised will probably not recur.

New trial.

MALLARD, C.J., and BROCK, J., concur.

PINEY MOUNTAIN PROPERTIES, INC. v. NATIONAL THEATRE SUPPLY COMPANY, A CORPORATION; CLARK C. TOTHEROW AND JOHN R. INGLE, SUBSTITUTE TRUSTEES

No. 6928SC193

(Filed 30 April 1969)

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

Assignments of error not supported by reason or argument in appellant's brief are deemed abandoned.

2. Mortgages and Deeds of Trust § 19— injunction to prevent foreclosure — sufficiency of evidence

Under the terms of an escrow agreement, plaintiff, holder of a note secured by a purchase money deed of trust on certain property, was given the right to pay two superior construction loan deeds of trust on the property in case of default and to have that amount credited on a nonnegotiable note secured by a deed of trust on the property, which note and deed of trust were later assigned to defendants. The two construction loan deeds of trust were paid with funds received from a new long-term loan secured by a deed of trust on the property, default was made in payment of the new loan, and payments have been made by plaintiff to keep the new loan in current status. *Held:* In this action to restrain defendants from foreclosing the deed of trust assigned to it, the trial court properly found that the parties intended that the new long-term note and deed of trust be in substitution of the construction loan notes and deeds of trust, that plaintiff was therefore entitled to credit upon the nonnegotiable note held by defendant for payments which plaintiff made upon the new long-term loan, and that the note held by defendant is not in default when such credits are considered.

3. Bills and Notes § 19— assignee of nonnegotiable note

The assignee of a nonnegotiable note is not a holder in due course and takes the note subject to all defenses which might have been asserted against the payee.

4. Mortgages and Deeds of Trust § 19— injunction to prevent foreclosure

In this action to restrain defendants from foreclosing under a deed of

trust, defendants should not be permanently restrained from such foreclosure notwithstanding the evidence shows that the note secured by the deed of trust is not in default, since the note may become in default at some time in the future while defendants are still assignees thereof.

5. Mortgages and Deeds of Trust § 20— finding that mortgage lien is extinguished — necessary parties

In this action to restrain defendants from foreclosing a deed of trust, the court erred in finding that the lien of a deed of trust held by a corporation which was not a party to the present action was extinguished by a merger of the legal and equitable title in the corporation, since the corporation would be a necessary party to any such adjudication.

APPEAL by defendant from a judgment by *Martin (Harry C.), J.*, entered 23 October 1968, after a trial at the 1 April 1968 Session, BUNCOMBE Superior Court.

In the year 1960 H. L. Thrash, Jr., and Dewey R. Worley began negotiations to purchase from Piney Mountain Properties a tract of land located on Tunnel Road in the City of Asheville, Buncombe County, North Carolina. Thrash and Worley also negotiated with C. E. Hemingway relative to constructing a motel on said tract of land. Thrash and Worley later formed a corporation by the name of Host of America Motels of Asheville, Inc., for the purpose of owning and operating the motel; and Hemingway later formed a corporation by the name of Mohow, Inc., for the purpose of financing and constructing the motel. Although the early transactions were by the individuals, there is no controversy that the newly formed corporations succeeded to all the rights and liabilities of their respective organizers; therefore, all of the transactions will be treated as though made by the corporations.

For convenience, Piney Mountain Properties, Inc., will be referred to as Piney Mt.; H. L. Thrash, Jr. and Dewey R. Worley and Host of America Motels of Asheville, Inc., will be referred to as Motel; and C. E. Hemingway and Mohow, Inc., will be referred to as Mohow.

On 14 December 1960 Piney Mt. conveyed the tract of land on Tunnel Road to Motel and Motel executed its note secured by a deed of trust for the purchase money. On 21 December 1960 Motel conveyed the property to Mohow.

By an instrument entitled Escrow Agreement dated 1 August 1961 Motel, Mohow and Piney Mt., agreed upon the financing for construction of the motel and the priority of the various liens of the deeds of trust which were described in the instrument, and the rights, liabilities and privileges of all three of the parties.

The Escrow Agreement contemplated that Mohow would secure construction money by note, or notes, secured by a deed of trust upon the property involved, and the agreement provided that Piney Mt. would subordinate the lien of its purchase money deed of trust to the lien of the construction loan deed of trust. The agreement further provided that in the event Mohow secured a long term permanent construction loan Mohow would give credit for the amount of the loan on the note which Motel was to execute and deliver to Mohow for the construction cost.

Although the Escrow Agreement mentioned construction loans from First Citizens Bank & Trust Co., Charlotte, and Durham Life Insurance Company, so far as the record discloses no such loans were obtained. Instead, Mohow negotiated construction loans from Cameron Brown ($275,000) and Knox Homes Corp. ($214,500), and Piney Mt. subordinated the lien of its purchase money deed of trust to the liens of the two construction loans. Thereafter Mohow reconveyed title to the property to Motel and Motel executed and delivered its note secured by deed of trust on the property involved to Mohow in the sum of $961,875. This note was to cover $506,250 as partial payment to Mohow for the construction of the motel, plus $455,625 as carrying charges over a fifteen-year period.

The Escrow Agreement provided that Piney Mt. would also subordinate the lien of its purchase money deed of trust to the lien of the deed of trust securing the note for $961,875 from Motel to Mohow; and Piney Mt. executed the subordination agreement.

The record is not clear as to why it was done, but Piney Mt. thereafter received three notes secured by deeds of trust upon the property involved in substitution for its original purchase money deed of trust.

Thereafter Mohow and Motel obtained a loan from Florida Capital Corp. ($165,000) evidenced by a note from Motel and Mohow, and secured by a deed of trust on the property involved. Next, a long term loan was negotiated with Goodyear Mortgage Company, and Motel executed its note in the sum of $672,000, secured by a deed of trust on the property involved. Simultaneously with the execution of the note and deed of trust by Motel to Goodyear Mortgage Company, Piney Mt. and Mohow executed an agreement which subordinated the liens of their security to the lien of Goodyear's security. The subordination agreement contained the following language: "IT IS EXPRESSLY UNDERSTOOD AND AGREED that except for such subordination, the Deeds of Trust now held by the respective

parties hereto, . . . and all and singularly the terms and conditions thereof shall be and remain in full force and effect."

The note for $961,875, secured by deed of trust on the property involved, which Motel had executed to Mohow, and to which Piney Mt. agreed to subordinate its security, provided that it was subordinate to the deeds of trust to Cameron Brown and Knox Homes Corp., and further provided that in case of default in payment to Cameron Brown or Knox Homes Corp., Piney Mt. would be entitled to pay those superior liens and receive *pro tanto* credit upon the $961,875 note and lien insofar as it affected Piney Mt.'s security.

Mohow purchased furniture and fixtures for the motel from National Theatre Supply Company, and executed and delivered to National Theatre Supply Company its unsecured note for $45,025.65 in payment of the costs of the furniture and fixtures. Thereafter, as collateral security for the $45,025.65 note, Mohow assigned to National Theatre Supply Company its $961,875 note and deed of trust from Motel.

There was default in the payment of the obligation to Goodyear Mortgage Company, and, in accordance with the provisions of its deed of trust, Goodyear notified Piney Mt. of the default. Piney Mt. instituted and completed foreclosure of its three deeds of trust (which were subordinated to the Mohow lien of $961,875 and the Goodyear lien of $672,000) and became the final purchaser at the foreclosure sale. Piney Mt. thereafter paid to Goodyear the sum of $76,662.99 to cover the arrears on Goodyear's note, and Piney Mt. has since made the monthly payments to Goodyear to maintain that note in current status, having paid at the time of the institution of this action a total of $119,223.03 on the Goodyear note.

Mohow defaulted in payment of its $45,025.65 note to National Theatre Supply Company and National Theatre Supply caused foreclosure proceedings to be instituted upon the $961,875 deed of trust which Mohow had assigned to it as collateral security.

Piney Mt. instituted this action to restrain the foreclosure by National Theatre Supply alleging credits due on the $961,875 note secured by the deed of trust based upon credits provided for in the Escrow Agreement, in the deed of trust to secure the $961,875 note, and in the agreement by Mohow and Piney Mt. to subordinate their liens to the Goodyear Mortgage lien. Piney Mt. also alleges other grounds for extinguishment of the Mohow lien, but they are not considered pertinent for purposes of this opinion. Also, there were

numerous conveyances, notes and deeds of trust, assignments, a receivership, negotiations, and correspondence which have been omitted from the foregoing summary of transactions, because we consider that those discussed are sufficient for disposition of this appeal.

After issuance of a temporary restraining order, which upon hearing was continued in effect until final trial, the case was, by agreement, heard by Judge Martin sitting without a jury. Judge Martin made extensive findings of fact, and concluded upon several grounds that National Theatre Supply Company was not entitled to foreclosure of the assigned deed of trust.

Van Winkle, Walton, Buck, Wall, Starnes & Hyde, by Herbert Hyde; and Bennett, Kelly & Long, by Robert B. Long, Jr., for plaintiff appellee.

McGuire, Baley & Wood, by Richard A. Wood, Jr., and James T. Rusher; and Myers, Sedberry & Collie, by Charles T. Myers, for defendant appellant.

BROCK, J.

[2] The primary question for determination is whether the note and deed of trust to Florida Capital Corp. was in substitution, within the contemplation of the parties, of the note and deed of trust to Knox Homes Corp.; and whether the note and deed of trust to Goodyear Mortgage Company was in substitution, within the contemplation of the parties, of the notes and deeds of trust to Cameron Brown and Florida Capital Corp. If so, the recitations and provisions of the Escrow Agreement and the deed of trust from Motel to Mohow would apply equally to the deed of trust to Goodyear Mortgage Company.

[1] Defendant filed an exception to a portion of finding of fact No. 24, which deals with the loan from Florida Capital Corp., and this is subject to its assignment of error No. 17. The portion of finding of fact No. 24 which is excepted to reads as follows:

> "That the monies borrowed by Mohow, Inc., and Host of America Motels of Asheville, Inc., were used to pay off the note executed by Mohow, Inc., in favor of Knox Homes Corporation, said note being secured by a deed of trust from Mohow, Inc., to Elmer Hilker, Trustee as aforesaid."

Defendant makes no argument or contention in its brief that there is no competent evidence to support this finding of fact, and since no reason or argument is stated in defendant's brief in support of

this assignment of error, it is deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Therefore, for purposes of this lawsuit, it is established as a fact that the proceeds from the Florida Capital Corp. loan were applied to pay off the balance of the original construction loan from Knox Homes Corp.

[1] Finding of fact No. 28 by the trial court is as follows:

> "28. That a portion of the proceeds from the loan by Goodyear Mortgage Corporation as aforesaid was applied to pay off the aforesaid note to Cameron-Brown Company, said note being secured by a deed of trust recorded in Deed of Trust Book 645 at Page 251 and the note to Florida Capital Corporation said note being secured by a deed of trust recorded in Deed of Trust Book 661 at Page 418."

Defendant filed an exception to this finding of fact and it is the subject of its assignment of error No. 20. However, defendant makes no argument or contention in its brief that there is no competent evidence to support this finding of fact, and since no reason or argument is stated in defendant's brief to support this assignment of error, it is deemed abandoned. Rule 28, *supra.*

[2] Therefore, for purposes of this lawsuit, it is established as a fact that a portion of the proceeds from the Goodyear Mortgage Company loan was applied to pay off the original construction loans from Cameron Brown and Florida Capital Corp. (the proceeds from Florida Capital Corp. loan having been applied to pay the balance of the Knox Homes Corp. loan). The foregoing facts, when coupled with the recitals and provisions of the Escrow Agreement, with the provisions of the deed of trust from Motel to Mohow, and with the provisions of the subordination agreement executed by Piney Mt. and Mohow for the benefit of Goodyear Mortgage Company, clearly support the trial judge's finding of fact No. 30, which reads as follows:

> "30. That it was the intention of all parties to said deed of subordination and affected thereby that the transaction with Goodyear Mortgage Corporation and the said loan from Goodyear Mortgage Corporation was to be a substitution of capital for and in place of the liens paid off from the proceeds of the loan from Goodyear Mortgage Corporation, to wit: The loan from Cameron-Brown Company and the loan from Florida Capital Corporation, and that it was further the intention of all of the parties that all of said parties would retain all rights under the agreements and instruments theretofore entered into by them."

By findings of fact Nos. 37(a) and 37(b), to which no exceptions are taken, Judge Martin found, in effect, that at the time of the institution of this action the $961,875 note was not in default. These findings of fact are as follows:

> "37(a). That the payments made on the note in the amount of $961,875.00 and the Goodyear note in the sum of $672,000.00 prior to the institution of this action totaled $241,100.86.
>
> "37(b). That the total amount which could have been due on the Mohow note by its terms prior to the institution of this suit was in the sum of $224,437.50."

Absent an exception properly taken and assigned as error, this Court is bound by the findings of fact by the trial court. For purposes of this lawsuit those findings are conclusive.

[2-4] Therefore, having determined that the $961,875 note, secured by deed of trust, from Motel to Mohow was not in default by reason of the credits due thereon from the terms of the deed of trust itself, because the note and deed of trust to Goodyear Mortgage Company was in substitution of the original construction loan, it follows that we concur in the ruling of the trial judge that the substituted trustees under the $961,875 note should be restrained and enjoined from foreclosing under the deed of trust. National Theatre Supply Company is not a holder in due course of the $961,875 because by its terms it is a nonnegotiable note; therefore National Theatre Supply Company took the note subject to all defenses which might have been asserted against the payee. 1 Strong, N.C. Index 2d, Bills and Notes, § 19, p. 732. However, they should not be *permanently* restrained and enjoined for the reasons that it is possible that the $961,875 note may become in default at some time in the future while defendants are still assignees thereof. Therefore, we modify and affirm paragraph 1 of the Order of the trial judge to the extent that it should be modified to read as follows:

> 1. That the defendants, National Theatre Supply Company, a corporation; Clark C. Totherow and John R. Ingle, Substitute Trustees, be and they are hereby restrained and enjoined from foreclosing on the lands described in the deed of trust recorded in Deed of Trust Book 650 at Page 375 in the Buncombe County, North Carolina, Registry, from Host of America Motels of Asheville, Inc., to Jack T. Hamilton, Trustee for Mohow, Inc., the same being dated July 12, 1963, and recorded July 16, 1963, in the office of the Register of Deeds for Buncombe County, North Carolina, until such time as they can show that the note

secured by said deed of trust is in default, after considering the credits due upon said note by payments made upon the Goodyear Mortgage Company note.

[5] Apparently paragraphs 2 and 3 of the Order of the trial court were entered as a result of the trial judge's conclusion that a merger of the legal and equitable title has occurred in Mohow, thereby extinguishing the lien of the deed of trust. Mohow is not a party to this action. The assignment of the $961,875 note was not of the full value thereof, but, on the contrary, it was assigned only as collateral security for the $45,025.65 note given by Mohow to defendant. Mohow would be a necessary party to a determination that the lien of its deed of trust to secure the $961,875 note had been extinguished by any merger of the legal and equitable title. Since Mohow is not a party to this action any adjudication in regard thereto was error. Therefore, we reverse that part of the Order set out in paragraphs 2 and 3, reading as follows:

"2. That the note in the sum of $961,875.00 from Host of America Motels of Asheville, Inc., to Mohow, Inc., be and the same is hereby declared to be null and void and of no effect; and that the deed of trust securing the same from Host of America Motels of Asheville, Inc., to Jack T. Hamilton, Trustee for Mohow, Inc., be and the same is hereby cancelled of record. AND IT IS FURTHER ORDERED that the defendants, National Theatre Supply Company, Clark C. Cotherow (sic) and John R. Ingle, Substitute Trustees, cancel the same of record.

"3. That the instrument recorded in Deed Book 931 at Page 39 be and the same is hereby cancelled of record."

We do not disturb paragraph 4 of the Order which taxes the cost of the action against the defendant.

Modified and affirmed in part.

Reversed in part.

CAMPBELL and MORRIS, JJ., concur.

BAILLIE LUMBER COMPANY, INC. v. KINCAID CAROLINA CORPORATION

No. 6927SC87

(Filed 30 April 1969)

1. Accord and Satisfaction § 2— burden of proof

The burden of proving the defense of accord and satisfaction is on the debtor.

2. Accord and Satisfaction § 2— question of law and fact

The question of accord and satisfaction may be one of fact and of law.

3. Trial § 57— trial by agreement of the parties — role of the trial judge

In a trial wherein the parties submitted to the court an agreed statement of the facts and issues to be answered by the court, the trial judge is the judge of both the law and the facts.

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

Where the facts supported by competent evidence are sufficient to support the conclusions of law and the judgment, an assignment of error to the findings of fact and to the failure to find other facts will be overruled.

5. Accord and Satisfaction § 1; Compromise and Settlement § 1— disputed and undisputed claims

A compromise and settlement must be based on a disputed claim; an accord and satisfaction may be based on an undisputed or liquidated claim.

6. Compromise and Settlement § 1— statutory settlement

G.S. 1-540 applies as a compromise and settlement when an agreement is made and accepted.

7. Accord and Satisfaction § 1— essentials of the accord — offer and acceptance

An offer by a debtor to pay its creditor thirty-five per cent of the undisputed contract price of lumber on condition that within sixty days from August 16 a sufficient number of its other creditors accept a similar offer of thirty-five per cent in full settlement of their accounts, and the reply by the creditor agreeing to accept thirty-five per cent of the account in settlement of the debt provided that payment be made on or before September 20, do not constitute an agreement such as will support the debtor's plea of accord and satisfaction.

8. Accord and Satisfaction § 1— essentials of the agreement and satisfaction

An accord and satisfaction is composed of two elements: the accord which is the agreement and the satisfaction which is the execution or performance of the agreement.

9. Accord and Satisfaction § 1— payment on undisputed claim — common law rule

Under the common law, an agreement to receive a part of a debt due in lieu of the whole of an undisputed, as distinguished from a disputed debt due, was held to be a *nudum pactum* as to all in excess of the sum actually paid.

10. Accord and Satisfaction § 1— definition of liquidated account

An account is liquidated when the amount thereof has been fixed by agreement or if it can be exactly determined by the application of rules of arithmetic or of law.

11. Accord and Satisfaction § 1— acceptance of check in payment — creditor's right to collect balance of debt

Nothing else appearing, a check given and received by the creditor which purports to be payment in full of an account does not preclude the creditor accepting it from showing that in fact it was not in full unless under the principle of accord and satisfaction there had been an acceptance of the check in settlement of a disputed account.

12. Accord and Satisfaction § 1— what constitutes an agreement — payment by and acceptance of check

Where there had been no agreement between the creditor and debtor to pay a sum less than the total amount of the account due, nor had there been an offer to pay the debt by installments, payment by the debtor of thirty-five per cent of the undisputed debt by two separately dated checks bearing on the face of one the words "first instalment of agreed settlement" and on the other "final instalment of agreed settlement," and the negotiation of the checks by the creditor with the indorsement "with reservation of all our rights," do not as a matter of law result in accord and satisfaction of the undisputed account; consequently, the creditor may enforce collection of the unpaid balance of the account. G.S. 1-540.

13. Accord and Satisfaction § 1— the accord — necessity for consideration

Consideration must in some form be present in an accord.

14. Accord and Satisfaction § 1; Compromise and Settlement § 1— applicability of contract law

Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts.

15. Uniform Commercial Code § 2— construction and interpretation

The courts are required to liberally construe and apply the provisions of the Uniform Commercial Code to promote its underlying purposes and policies. G.S. 25-1-102.

16. Uniform Commercial Code § 3— date of application

The Uniform Commercial Code, which became effective at midnight on 30 June 1967, does not apply to transactions validly entered into before 1 July 1967.

17. Uniform Commercial Code § 3— date of application

Although lumber was sold and delivered prior to 1 July 1967, provisions of the Uniform Commercial Code are applicable to the giving and receiving of checks in payment of the lumber where the transactions relating to the checks occurred after 1 July 1967. G.S. 25-10-101, G.S. 25-10-102, G.S. 25-3-104.

18. Uniform Commercial Code § 4— what constitutes acceptance under reservation of rights

Where debtor pays thirty-five per cent of an account with checks bearing on the face of one the words "first instalment of agreed settlement" and on the other "final instalment of agreed settlement," the creditor reserves its right to collect the remainder of the unpaid account when it indorses the checks "with reservation of all our rights." G.S. 25-1-207.

APPEAL by defendant from *Snepp, J.*, September 1968 Civil Session of the Superior Court of LINCOLN County.

The plaintiff, Baillie Lumber Company, Inc. (Baillie), a lumber distributor in New York, on 6 April 1967 sold and delivered a quantity of lumber to the defendant, Kincaid Carolina Corporation (Kincaid). On 6 April 1967 Baillie sent its statement for the lumber to Kincaid in the amount of $2,447.61. There was no controversy over the quantity, quality, or price of the lumber. Kincaid admits in its answer to Baillie's complaint that the contract price for the lumber was $2,447.61 and that it was payable within thirty days. Kincaid did not pay for the lumber, and on 16 August 1967, through its attorneys, wrote its creditors, enclosed a financial statement, asserted that it could not pay them, and offered them a thirty-five per cent settlement. This letter contained, among other things, the following:

> "Provided a sufficient number of creditors accept this proposal within sixty (60) days from the date of this letter, the stockholders will make available to the company sufficient funds to pay to the trade creditors 35% in full settlement of their account. The company also intends to pay in full forty-four creditors whose accounts are less than $200.00 each, and which accounts total $3,145.37. The stockholders feel that this will enable them to liquidate the current assets in an orderly fashion, and to find a buyer for the fixed assets under other than forced sale conditions."

On 25 August 1967 Baillie replied to defendant's letter, as follows:

"Gentlemen:

Re: Account Owing to Baillie Lumber Co., Inc. in the Amount of $2,447.61

We have reviewed your letter of August 16, 1967, and the enclosed Statement of Financial Position as of July 31, 1967.

Provided that such letter and such Statement of Financial Position together contain all of the relevent (sic) information which is needed to be furnished to enable us, as a creditor of Kincaid Carolina Corporation, to determine the action to be taken on the proposal therein made to creditors and provided that payment is made to us on or before September 20, 1967, we agree to accept 35% of our account in full settlement."

The record reveals no further communication between the parties until the date of 27 February 1968 when Kincaid forwarded to Baillie its check no. 4985 dated 27 February 1968 in the sum of $428.33 with the following words typed on the face thereof: "First instalment of agreed settlement." Baillie received the money for this check after typing on the back thereof above its indorsement the following words: "With reservation of all our rights."

Thereafter, Kincaid forwarded to Baillie its check no. 5118 dated 12 April 1968 in the sum of $428.33 with the following words typed on the face thereof: "Final instalment of agreed settlement." Baillie received the money for this check after writing on the back thereof above its indorsement the following words: "With reservations of all our rights."

On 2 May 1968 Baillie instituted this action asserting, among other things, that Kincaid had paid $856.66 of the contract purchase price of the lumber, leaving a balance due of $1,590.95. Kincaid in its answer asserted that Baillie had agreed upon a settlement of this account and had accepted payment of a lesser sum in compromise of the whole as a full and complete discharge of the same. As a further answer, Kincaid asserted in its answer that when Baillie received, cashed, retained, and appropriated the proceeds from the two checks that such resulted in an accord and satisfaction and that G.S. 1-540 is a complete defense and bar to any recovery in this case.

When the case came on for trial, the parties submitted to the

court an agreed statement of facts and agreed that the issues submitted by them be answered by the court.

The court made findings of fact, conclusions of law, and entered judgment that Baillie have and recover of Kincaid the sum of $1,590.05 with interest. Kincaid appealed, assigning error.

Ervin, Horack & McCartha by C. Eugene McCartha for plaintiff appellee.

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

MALLARD, C.J.

When the case was called for trial, the parties submitted to the court an agreed statement of facts and issues as follows:

"AGREED STATEMENT OF FACTS AND ISSUES

Plaintiff and Defendant stipulate and agree the facts in this case are as follows:

Plaintiff is a lumber distributor in Hamburg, New York. Defendant is a furniture manufacturer in Lincolnton, North Carolina. Sometime prior to April 6, 1967, defendant placed an order with plaintiff for 8,964 feet of cherry lumber. Plaintiff filled the order and on April 6, 1967, sent its statement to defendant in the amount of $2,447.61 for the lumber. A copy of the statement is attached.

On August 16, 1967, defendant, through its attorneys, wrote its creditors offering a 35% settlement to them. A copy of defendant's letter to plaintiff is attached.

On August 25, 1967, plaintiff replied to defendant's offer. A copy of plaintiff's letter of reply is attached.

There were no further communications between plaintiff and defendant until February 27, 1968.

On February 27, 1968, defendant forwarded its check number 4985 in the amount of $428.33 to plaintiff with the words 'first installment of agreed settlement' on the face of the check, which was endorsed by plaintiff 'with reservation of all our rights.' A copy of the check is attached.

On April 2, 1968, defendant forwarded its check number 5118 in the amount of $428.33 to plaintiff with the words 'final installment of agreed settlement' on the face of the check, which was endorsed by plaintiff 'with reservation of all our rights.' A copy of the check is attached.

On May 2, 1968, plaintiff entered suit against defendant for $1,590.95, which is the difference between the amount of plaintiff's statement of April 6, 1967, and the two checks forwarded to plaintiff by defendant.

Plaintiff and Defendant agree that the issues that arise in this case are as follow:

1. Was defendant indebted to plaintiff in the amount of $2,-447.61 for the purchase of lumber, as alleged by plaintiff in its Complaint?

   ANSWER: Yes, by agreement of the parties.

2. Was there an accord and satisfaction between plaintiff and defendant, as alleged by defendant in its Further Answer and Defense?

   ANSWER: .....(To be answered by the Court)

3. How much, if any, is plaintiff entitled to recover from defendant?

   ANSWER: .....(To be answered by the Court)"

Defendant Kincaid assigns as error a portion of the findings of fact by the trial judge, all of the conclusions of law, and the signing and entering of the judgment.

The judgment, which includes the court's findings of fact, reads as follows:

"This matter coming on to be heard before the undersigned Judge presiding over the September 1968 Mixed Session of the Superior Court for Lincoln County, the parties submitted to the Court an agreed statement of facts, and agreed that the issues submitted by them be answered by the Court. The Court therefore makes findings of fact, and enters its conclusions of law and judgment as follows:

FINDINGS OF FACT

1. On May 6, 1967, plaintiff sold and delivered to defendant certain lumber, for which defendant agreed to pay plaintiff $2,447.61.

2. Under date of August 16, 1967, defendant, as part of a general settlement with its creditors, offered to pay plaintiff 35% of the sum of $2,447.61 due plaintiff, in full satisfaction of the debt.

3. Under date of August 25, 1967, plaintiff agreed to accept said settlement, upon condition that payment of the offered sum be made to it on or before September 20, 1967.

4. Defendant did not pay said sum to plaintiff on or before September 20, 1967.

5. On February 27, 1968, defendant forwarded a check in the amount of four hundred twenty-eight dollars thirty-three cents ($428.33), being one-half (½) of thirty-five (35%) per cent of plaintiff's claim, to the plaintiff with the words 'First installment of agreed settlement' on the face of the check. Said check was endorsed by plaintiff 'With reservation of all our rights' and was cashed by the plaintiff. On April 2, 1968, defendant forwarded its check #5118 in the amount of four hundred twenty-eight dollars thirty-three cents ($428.33) to the plaintiff with the words 'Final Installment' on the face of the check. Said check was endorsed by the plaintiff 'With reservation of all our rights' and was cashed by the plaintiff.

CONCLUSIONS OF LAW

1. No accord and satisfaction was had between plaintiff and defendant.

2. Plaintiff, by accepting the checks of defendant dated February 27, 1968, and April 12, 1968, with reservation of rights, reserved its right to collect the balance of the amount claimed to be due it.

3. Defendant is indebted to plaintiff in the sum of $1,590.05 (sic).

JUDGMENT

It is ordered, adjudged and decreed:

1. That plaintiff have and recover judgment of defendant in the sum of $1,590.05 (sic), with interest thereon from May 6, 1967, until paid.

2. That defendant pay the costs of this action."

The "findings of fact" in paragraph numbered 5 are not identical to the facts contained in the "Agreed Statement of Facts and Issues"; however, they are in substantial accord and Kincaid, having agreed to the facts, will not be heard to controvert them.

However, Kincaid contends that the court erred when it failed to find that the checks were tendered to Baillie in full satisfaction of Baillie's claim. Kincaid specifically requested the court to so

find. Kincaid also contends that the refusal of the court to so find was tantamount to an affirmative finding that it had not made such a request.

[1-4] The burden of proving the defense of accord and satisfaction was on Kincaid. The question of accord and satisfaction may be one of fact and of law. *Rosser v. Bynum,* 168 N.C. 340, 84 S.E. 393; *Allgood v. Trust Co.,* 242 N.C. 506, 88 S.E. 2d 825. In this case the trial judge was the judge of both the law and the facts. The court, upon the competent evidence offered, found the facts and then stated as its conclusion of law that there was no accord and satisfaction between the parties. The facts found support the conclusions of law and the judgment. Kincaid's assignment of error to the findings of fact and failure to find other facts is overruled.

G.S. 1-540 reads as follows:

> "By agreement receipt of less sum is discharge. — In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same."

[5] By the words of this statute, G.S. 1-540, a compromise and settlement is indicated; and a compromise, as distinguished from accord and satisfaction, must be based on a disputed claim while accord and satisfaction may be based on an undisputed or liquidated claim. *Products Corporation v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587.

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

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

[6-8] It should be noted that G.S. 1-540 applies as a compromise and settlement when an agreement is made and accepted. In the

case before us Kincaid in the letter of its attorney made a conditional offer to Baillie. The condition was to pay thirty-five per cent if a sufficient number of creditors accepted the proposal within sixty days from 16 August 1967. In reply thereto on 25 August 1967, Baillie made a conditional acceptance of the offer. The conditions were to accept if Kincaid's letter contained all of the relevant information and if payment was made to Baillie on or before 20 September 1967. Thus, it is seen that Baillie did not accept the offer of Kincaid as made. The counterproposal as made by Baillie was not accepted by Kincaid. It is part of the agreed statement of facts that after 25 August 1967 there was no further communication between the parties until 27 February 1968. Baillie was not paid anything on its account on or before 20 September 1967 in accordance with its proposal. The principles of law applicable here have been stated by Justice Rodman in the case of *Prentzas v. Prentzas,* 260 N.C. 101, 131 S.E. 2d 678, as follows:

> "Defendants' plea of accord and satisfaction 'is recognized as a method of discharging a contract, or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement.' *Walker v. Burt,* 182 N.C. 325, 109 S.E. 43; *Products Corp. v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587; *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668; *Allgood v. Trust Co.,* 242 N.C. 506, 88 S.E. 2d 825, 1 Am. Jur. 2d 301.
>
> The word 'agreement' implies the parties are of one mind — all have a common understanding of the rights and obligations of the others — there has been a meeting of the minds. *Richardson v. Storage Co.,* 223 N.C. 344, 26 S.E. 2d 897; *Sprinkle v. Ponder,* 233 N.C. 312, 64 S.E. 2d 171; *Allgood v. Trust Co., supra; McCraw v. Llewellyn,* 256 N.C. 213, 123 S.E. 2d 575. Agreements are reached by an offer by one party and an acceptance by the other. This is true even though the legal effect of the acceptance may not be understood. *Wright v. McMullan,* 249 N.C. 591, 107 S.E. 2d 98; *McGill v. Freight,* 245 N.C. 469, 96 S.E. 2d 438; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488."

The accord is the agreement and the satisfaction is the execution or performance of the agreement. *Bizzell v. Bizzell, supra.*

[9] There is a well-recognized distinction between liquidated or undisputed claims and unliquidated or disputed ones. Under the common law, an agreement to receive a part of a debt due in lieu of the whole of an undisputed, as distinguished from a disputed debt

due, was held to be a *nudum pactum* as to all in excess of the sum actually paid. *Union Bank v. Board of Commissioners,* 116 N.C. 339, 21 S.E. 410 (1895).

[10] In the present case the account of Baillie for the lumber sold and delivered by it to Kincaid was both liquidated and undisputed. An account is liquidated when the amount thereof has been fixed by agreement or if it can be exactly determined by the application of rules of arithmetic or of law. Black's Law Dictionary, 4th Ed.

[11] It is the law in North Carolina, nothing else appearing, that a check given and received by the creditor, which purports to be payment in full of an account, does not preclude the creditor accepting it from showing that in fact it was not in full unless under the principle of accord and satisfaction there had been an acceptance of the check in settlement of a disputed account. *Koonce v. Motor Lines, Inc.,* 249 N. C. 390, 106 S.E. 2d 576; *Allgood v. Trust Co., supra; Rosser v. Bynum, supra.*

[12] The original proposal of Kincaid did not contain any reference to payments of the proposed thirty-five per cent by installments; therefore, when Baillie received the check dated 27 February 1968, there had been no offer theretofore made to pay anything by installments and certainly no agreement to pay a sum less than the total amount due had been theretofore made and accepted with respect to the account Kincaid owed Baillie. There had been an offer made by each party but no acceptance by the other of the offer as made. Therefore, unless the words printed on the face of the first check, "First instalment of agreed settlement" or the words on the second check, "Final instalment of agreed settlement," constitute a new offer and unless the indorsement constitutes an acceptance thereof, the provisions of G.S. 1-540 do not apply.

We do not think that the words appearing on the face of the first check constituted any specific offer of settlement. It was vague in that it stated it was the first installment of an agreed settlement. Baillie, upon receipt of it, could not know how many more installments were to follow because there had been no agreed settlement. Under the circumstances, Baillie was entitled to treat the transaction as merely the act of an honest debtor remitting less than was due. Baillie, by its indorsement of the first check, "With reservation of all our rights," put Kincaid on notice that it was not accepting such check as an agreed settlement.

The second check is dated 12 April 1968 which is over forty days after the date of the first one. Even if this second check was mailed

on 2 April 1968, as indicated in the agreed statement of facts, the indorsement by a collecting bank, as shown on the back thereof, indicates that it was being negotiated on 18 April 1968. From this, it is manifest that the drawee bank could not have paid this check until after that date. Kincaid had ample notice from Baillie's indorsement over its signature that the first check had not been accepted as an installment on a settlement for less than the full amount due.

In 1 Am. Jur. 2d, Accord and Satisfaction, § 18, p. 317, there appears the following:

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

We do not think that in this case the memorandum placed on the face of the checks by Kincaid and the memorandum placed on the back of the checks by Baillie, in view of the circumstances and of the dates of the two transactions, constitute an offer and acceptance so as to bring this transaction as a matter of law within the provisions of G.S. 1-540.

[13] The checks involved herein were in payment of part of a liquidated and undisputed debt which was already due. Kincaid has paid but a part of its indebtedness and suffers no detriment. By these partial payments, Baillie has received no more than it was entitled to receive for its lumber sold and delivered to Kincaid. No consideration exists for the discharge of the balance due Baillie for its lumber. Consideration must in some form or other be present in an accord. *Bizzell v. Bizzell, supra; State of Del. v. Mass. Bonding & Ins. Co.*, 40 Del. 274, 9 A. 2d 77 (1939).

[14] In *Casualty Co. v. Teer Co.*, 250 N.C. 547, 109 S.E. 2d 171, it is said:

> "Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts. *Dobias v. White*, 239 N.C. 409, 80 S.E. 2d 23."

Baillie contends that the provisions of G.S. 25-1-207 are applic-

able. This section of the statute is a part of the Uniform Commercial Code and reads:

> "Performance or acceptance under reservation of rights. — A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient."

[15] This section of the statute comes under Article 1 which is that portion of the Uniform Commercial Code setting forth "General definitions and Interpretation." We are required to liberally construe and apply the provisions of the Uniform Commercial Code to promote its underlying purposes and policies. G.S. 25-1-102.

[16, 17] The Uniform Commercial Code became effective at midnight on 30 June 1967. G.S. 25-10-101. Section 25-10-102 provides that the Code shall not apply to transactions validly entered into before 1 July 1967. The lumber was sold and delivered prior to 1 July 1967; however, all the transactions with respect to the checks as set forth above occurred after 1 July 1967, the date the Code became effective. We think that the provisions of the Uniform Commercial Code are applicable to the giving and receiving of the checks in this case. G.S. 25-3-104.

[18] Applying the provisions of G.S. 25-1-207 to the facts of this case, it is clear that Baillie by indorsing the checks, "With reservation of all our rights," complied with that portion of the statute requiring an explicit reservation of rights. Apparently, Kincaid was claiming a right to settle under its rejected offer of payment of thirty-five per cent of Baillie's claim. Baillie contended that such was unwarranted and that it was entitled to payment of its account. We hold that Baillie, by its indorsement with explicit reservations, did not accept the second check in full payment but in the manner provided in G.S. 25-1-207 reserved its right to collect the remainder of its unpaid bill.

[12] We also hold that the checks sent by Kincaid and accepted by Baillie, under the circumstances presented by this record, do not as a matter of law result in an accord and satisfaction of the undisputed and liquidated account owed Baillie by Kincaid, and the trial court found and concluded that they did not. It follows, therefore, that Baillie had the right to enforce collection of the unpaid balance of its original claim.

For the reasons stated above, we think all of Kincaid's assign-

ments of error should be and they are, therefore, overruled. The judgment of the Superior Court is affirmed.

Affirmed.

Britt and Parker, JJ., concur.

CHARLES DAVID McNEILL AND WIFE, MARGARET P. McNEILL v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 6916SC188

(Filed 30 April 1969)

1. Eminent Domain § 2; Highways § 5— right-of-way agreement — right of access

A highway right-of-way agreement providing that the landowners, their heirs and assigns "shall have no access to the proposed highway to be constructed on said right of way except" at two designated survey stations *is held* to convey to the landowners definite property rights in the survey stations.

2. Eminent Domain § 2; Highways § 5— denial of access granted by right-of-way agreement

Where a right-of-way agreement between the Highway Commission and a landowner for the taking of land for a limited access highway provides that the landowner should have no right of access to the highway except at two designated survey stations which do not abut the landowner's property, the right of access in accordance with the agreement is a property right, and the permanent removal by the Commission of access at one of the survey stations constitutes a taking for which successors in title to the original landowner are entitled to compensation.

3. Eminent Domain § 2; Highways § 5— consideration for right of way — right of access

The Highway Commission can not only pay money as consideration for a right-of-way agreement, but can grant to the landowner a right of access at a particularly designated point.

Appeal from *Bailey, J.*, 14 October 1968 Civil Session, Robeson County Superior Court.

Charles David McNeill and wife, Margaret P. McNeill, (plaintiffs) instituted this civil action for compensation against the North Carolina State Highway Commission (Commission) for the taking and appropriation by Commission of certain alleged property rights of the plaintiffs.

In October 1953 Johnny L. McNeill and wife, Eula O'Neal McNeill, (original grantors) owned a tract of land in Robeson County, North Carolina. In connection with State Highway Project No. 3971 (Project No. 3971), the new U. S. Highway 301 (U. S. 301) was located across a portion of this tract. As a result the Commission and original grantors entered into a right-of-way agreement under date of 29 October 1953. The agreement, which was reduced to writing and recorded on 27 April 1954 in Book 11-J, at page 236, in the Robeson County Public Registry, stated:

> ". . . [R]ecognizing the benefits to said property by reason of the construction of the proposed highway development in accordance with the survey and plans, proposed for same, and in consideration of the construction of said project, [original grantors] hereby [grant] to the [Commission] the right-of-way for said highway project as hereinafter described and releases the [Commission] from all claims for damages by reason of said right-of-way across the lands of [original grantors], and of the past and future use thereof by the [Commission], its successors and assigns. . . ."

The agreement then conveyed a right-of-way 260 feet in width and some 2280 feet in length "in accordance with plans for said project in the office of the [Commission] in Raleigh, N. C.; subject to the following provisions only: For the above described right-of-way and for any and all damage to the property due to the construction of the above project, Commission to pay [original grantors], $8000.00. It is further understood and agreed that [original grantors], their heirs and assigns, shall have no access to the proposed highway to be constructed on said right-of-way except as follows: 167 + 73.9 and 131 + 70."

These numbers, 167 + 73.9 and 131 + 70, were survey stations on U.S. 301. These survey stations did not abut the original grantors' land. Survey Station 167 + 73.9 was located at a point some 1273.9 feet north of the place where the northernmost line of the original grantors' land abutted U.S. 301 and at a point where North Carolina Highways 72 and 711 crossed over U.S. 301 by bridge. Ramps gave access to the main north and southbound lanes of travel of U.S. 301 from this crossover. Survey Station 131 + 70 was located fifty feet south of the place where the southernmost line of the original grantors' land abutted U.S. 301. In accordance with the plans for Project No. 3971, an eighteen foot service road was constructed on each side of and parallel with U.S. 301. At Survey Station 131 + 70 there was a grade crossing between the two service

roads, at which point there was access to these north and southbound lanes of travel.

From 1 July 1955, when Project No. 3971 was completed, until 28 May 1965, the original grantors, their successors in title and the general public used the access points at Survey Stations 167 + 73.9 and 131 + 70 for the purposes of crossing U.S. 301 and getting on and off its north and southbound lanes of travel. Access for abutting landowners was also available at all points lying to the west of the eighteen foot service road located on the western side of U.S. 301.

As the result of two deeds, the last one being in 1961, the plaintiffs acquired title to the southern portion of the original grantors' tract of land. This portion is located on the western side of U.S. 301.

In 1965 a new highway improvement project, State Highway Project No. 8.13978, was undertaken by the Commission, pursuant to which U.S. 301 was utilized as a portion of Interstate Highway No. 95 (Interstate). In connection with this project the interchange at Survey Station 167 + 73.9 was redesigned and reconstructed and the grade crossing at Survey Station 131 + 70 was permanently removed. The eighteen foot service road, which abutted the plaintiffs' property and which was located on the western side of Interstate, was left intact. As a result of these changes, there was no access from plaintiffs' property to the north and southbound lanes of travel at Survey Station 131 + 70. Access to these lanes of travel was obtained by proceeding from plaintiffs' property to the service road and then traveling south for an unspecified distance to the next interchange or by proceeding from plaintiffs' property to the service road and then traveling north to the new interchange at Survey Station 167 + 73.9.

The plaintiffs contended that as a result of the permanent removal of access to Interstate at Survey Station 131 + 70, they were deprived of a property right for which they were entitled to compensation. The Commission denied the taking of any interest in land belonging to the plaintiffs.

Judge Bailey heard the matter for the purpose of determining issues raised by the pleadings and not for the purpose of determining the issue of damages. He made findings of fact based on the evidence and conclusions of law based on the findings of fact. He concluded that the Commission had taken a property right from the plaintiffs by permanently removing access to Interstate at Survey Station 131 + 70 and that the plaintiffs were, therefore, entitled to

compensation. The Commission appealed from the judgment to this Court.

Nye & Mitchell by Charles B. Nye for plaintiff appellees.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Assistant Attorney General Andrew McDaniel for defendant appellant.

Campbell, J.

[1] The question presented for determination is whether the plaintiffs had a property right which was taken or destroyed when the Commission permanently removed access to Interstate at Survey Station 131 + 70.

The Commission's first contention is that no property rights were created in the original grantors in Survey Stations 167 + 73.9 and 131 + 70 because the Commission did not intend to create such rights. It is argued that the agreement did not contract away any right of access to this tract of land since access remained by way of the service road and that the references to the survey stations in the agreement were merely descriptive words to indicate a means by which access to the north and southbound lanes of travel would be available to the original grantors, their successors in title, other landowners whose property did not adjoin or abut these access points and the general public.

The right-of-way agreement specifically referred to the fact that the parties thereto recognized "the benefits to said property by reason of the construction of the proposed highway development in accordance with the survey and plans proposed for same." It specifically provided that the original grantors, their heirs and assigns, "shall have no access to the proposed highway to be constructed on said right-of-way except as follows: 167 + 73.9 and 131 + 70." These were not simply descriptive words, and they did not limit access to the service roads only. These words conveyed definite property rights in Survey Stations 167 + 73.9 and 131 + 70 and eliminated access at any other point.

The first contention is without merit.

[2] The Commission's second contention is that, even if it intended to create property rights in the original grantors in Survey Stations 167 + 73.9 and 131 + 70, it had no authority to grant such private property rights inside a public highway where neither access point adjoined or abutted the original grantors' tract of land.

Relying upon N.C. Const. art. 1, § 7, the Commission argued that its authority is limited and that it can only exercise power with respect to controlling an abutting landowner's access rights. The Commission stated that it has never interfered with the access rights of the original grantors or the plaintiffs because there has always been access to the service road and because "[t]he only property right in the highway which runs with the land is the abutters' rights of access for 'free and convenient access' to the nearest lane of travel which is the service road." The Commission further argued that since the plaintiffs were not parties to the right-of-way agreement, there is no privity of contract between the Commission and plaintiffs; the plaintiffs did not acquire any property rights running with the land in these access points; and the original grantors did not specifically attempt to assign any property rights which they might have acquired under this agreement.

Right-of-way agreements similar to the one between the Commission and original grantors have been construed by the Supreme Court. As is true in the instant case, the agreements were entered into prior to the enactment in 1957 of G.S. 136-89.52. Therefore, we are not concerned with what effect, if any, the statute would have.

[3] In *Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782, the Supreme Court held:

> "The fact that [the landowners'] right of access arose out of an agreement and a deed does not prevent its being a property right. Indeed, [the Commission's] right-of-way was created by agreement, but it is nonetheless a property right.
>
> The [Commission] has authority by virtue of G.S. 136-19 to acquire rights-of-way by purchase. . . . This right of access was an easement, a property right, and as such was subject to condemnation [in the future]."

In connection with the purchase of a right-of-way, the Commission can not only pay money, but can grant a right of access at a particularly designated point.

In *Abdalla v. Highway Commission,* 261 N.C. 114, 134 S.E. 2d 81, the Supreme Court stated:

> "It is generally recognized that the owner of land abutting a highway has a right beyond that which is enjoyed by the general public, a special right of easement in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation."

The case pointed out the extent of the common law rights of an abutting landowner to access to a highway and how such common law rights may be changed by agreement. The plaintiffs in that case first gave up all right of access and then by way of exception reserved a specific right of access to the highway "by way of service roads and ramps." The Supreme Court again reiterated that a right of access to a public highway is an easement appurtenant to the land and pointed out that the Commission stands in the position of a servient owner with the right to locate an access route under the general rule that where an easement is granted or reserved in general terms, which do not fix a specific location, then the owner of the servient estate has the right in the first instance to designate the specific location of such easement, subject to the limitation that this right be exercised in a reasonable manner with due regard to the rights of the owner of the easement.

In *Petroleum Marketers v. Highway Commission,* 269 N.C. 411, 152 S.E. 2d 508, a right-of-way agreement designated a survey station as an access point. However, this access point was later found to be hazardous to the safety of the traveling public. The Supreme Court held that while the Commission had the power to eliminate such an access point, it could not do so without paying the landowner for his property right. It was noted that the agreement in *Abdalla v. Highway Commission, supra,* provided for access "by way of service roads and ramps", whereas, the agreement there had no such provision. The access point was simply a survey station. The Supreme Court then pointed out:

> "This right of direct access from the plaintiff's land to the highway, whether it existed prior to the agreement *or was created by* it, was an easement appurtenant to the plaintiff's land and was a private property right in the plaintiff, over and above the plaintiff's right, as a member of the public, to use this ramp as a means of getting to the . . . lanes of the highway." (emphasis added)

It was specifically noted that in construing a right-of-way agreement all of the language contained therein is to be considered and that a landowner can rely upon language creating easement rights and property rights greater than those of the general public.

In *French v. Highway Commission,* 273 N.C. 108, 159 S.E. 2d 320, a case involving the same highway improvement projects as the instant case, the Supreme Court stated:

> "It would be, indeed, a strained construction of the Right of Way Agreement to say that the parties by stipulating for a

> right of access 'to the proposed highway to be constructed' at the two points in question meant only a right of access to service roads and did not contemplate the construction of and continuance of the crossovers shown upon the plans then in existence and to which the agreement referred. Had the Right of Way Agreement contained no reference whatever to the plaintiff's access to the highway at the points in question, he, along with the rest of the world, would now have the right to travel along the service roads from these points to their points of interchange with the through travel lanes of the highway."

The following language of the Supreme Court is applicable to the present situation:

> ". . . [T]he plain meaning of the agreement was that the landowner [in this case the original grantors] surrendered whatever claims she might otherwise have had to a direct access to the highway at other points in exchange for a cash consideration and a reservation or grant of a right of direct access to the highway at the designated point."

The Commission there contended that the landowner had all the rights he was entitled to since he had the means of getting on and off the service road. This contention was answered as follows:

> "It is clear that the parties did not contract with reference to access to the service road only. The service road is part of the highway, but access to it only was not what the parties clearly intended when they executed and accepted the Right of Way Agreement." See *Realty Co. v. Highway Comm.*, 1 N.C. App. 82, 160 S.E. 2d 83.

[2, 3] The only difference between *French v. Highway Commission, supra,* and the instant case is that in the former the access points abutted the plaintiff's land, while in the latter the access points did not abut the original grantors' tract of land. However, this difference is not a distinction in law. As noted *supra,* the Commission can not only pay money as consideration for a right-of-way agreement, but can grant to the landowner a right of access at a particularly designated point. Under the agreement in question, the original grantors relinquished a right of access to the highway at a point which abutted their land. In lieu thereof the Commission granted them access at Survey Stations 167 + 73.9 and 131 + 70.

The second contention is without merit.

The order of Judge Bailey is affirmed and this cause is remanded to the Superior Court of Robeson County for a determination pur-

suant to law of just compensation for damages, if any, which the plaintiffs may have suffered by reason of the taking of the easement of direct access to the highway at Survey Station 131 + 70, and in this regard, any changes in the access at Survey Station 167 + 73.9 are to be taken into consideration in affixing such damages.

Affirmed.

MORRIS and PARKER, JJ., concur.

MRS. RUBY W. PETTY, WIDOW; EDGAR PETTY, DECEASED EMPLOYEE v. ASSOCIATED TRANSPORT, INC., SELF-INSURER

No. 6915IC153

(Filed 30 April 1969)

1. Master and Servant § 96— workmen's compensation — review in Court of Appeals

In an appeal to the Court of Appeals from a decision of the Industrial Commission, review is limited to the questions of whether there is competent evidence to support the findings of the Commission and whether such findings support the conclusions of law and decision of the Commission.

2. Evidence § 50— expert medical testimony

A medical expert may express his opinion as to the cause of the physical condition of a person if his opinion is based either upon facts within his personal knowledge or upon an assumed state of facts supported by evidence and recited in a hypothetical question.

3. Master and Servant § 58— workmen's compensation — suicide following accident

In this action for benefits under the Workmen's Compensation Act for the death of an employee by suicide following an injury by accident arising out of and in the course of his employment, the competent evidence is sufficient to support findings by the Industrial Commission to the effect that deceased employee did not suffer any brain injury in the accident, that he knew the nature and extent of his surroundings, that the depression he experienced after the accident was a normal reaction to the accident and the length of time required for recovery, and that the death of deceased employee was occasioned by his wilful intention to kill himself, and the findings support the Commission's decision denying compensation. G.S. 97-12.

4. Master and Servant § 93— workmen's compensation — review before Full Commission

The Industrial Commission has authority to strike findings of fact and conclusions of law of the hearing commissioner and to substitute its own findings and conclusions in place thereof.

APPEAL by plaintiff from opinion and award of Industrial Commission of 10 September 1968.

This proceedings originated before the North Carolina Industrial Commission pursuant to the Workmen's Compensation Act. Plaintiff, widow of deceased employee, Edgar Petty, filed claim for death benefits for the death of her husband. The matter was heard by Commissioner William F. Marshall, Jr., who denied the claim. Upon appeal, the Full Commission overruled plaintiff's exceptions, made a substituted finding of fact, entered a substitute conclusion of law and affirmed all other findings of fact, conclusions of law and denial of compensation, with Chairman Bean dissenting. Plaintiff appealed from the order entered by the Full Commission. It was stipulated that the parties are subject to and bound by the provisions of the Workmen's Compensation Act; that employer was a self-insurer; that on 13 February 1966 deceased employee was injured by accident arising out of and in the course of employment; that the parties entered into an agreement, properly approved by the Commission, under the terms of which employee received temporary total disability from 13 February 1966 until 2 July 1966 in the amount of $750; that in addition, defendant paid medical bills in the amount of $1369.05; that the date of the last compensation check was 7 July 1966; that deceased employee died of self-inflicted wounds on 8 July 1966; that although injury occurred in Maryland, employer's place of business is in North Carolina and the employment of employee was in North Carolina and was not for services exclusively outside of North Carolina; that no other compensation claim is on file or shall be filed in any other jurisdiction.

W. R. Dalton, Jr., and John H. Vernon for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill by Luke Wright for defendant appellee.

MORRIS, J.

The deputy commissioner found the following facts:

"1. The deceased employee was a Caucasian male, approximately fifty-seven years of age as of the date of the injury,

February 13, 1966. He was employed by the defendant employer as an over-the-road truck driver and regularly performed his duties since the date of his employment in 1954.

2. The deceased employee's average weekly wage was in an amount sufficient to entitle him to the maximum benefits under the North Carolina Workmen's Compensation Act, in that his average weekly wage was $150.00.

3. As stipulated, the deceased employee was injured by accident arising out of and in the course of his employment on February 13, 1966, (a fellow employee was actually driving the truck) while riding in the truck and a rock broke the window of the truck and struck the plaintiff on the right jaw, causing a fracture of the mandible with nonunion of symphysis.

4. The deceased employee was hospitalized at Prince George General Hospital at Cheverly, Maryland, on the date of the accident where Dr. Kavanaugh performed a multiple open reduction and on February 15, 1966, Dr. Kavanaugh performed further surgery by way of a reduction of the fracture of the maxilla and application of arch bars. The deceased employee was discharged from the Maryland hospital on February 22, 1966, to his home in North Carolina where follow-up care was to be received. Accordingly, the plaintiff saw several doctors in the Burlington area and Dr. Peacock at the Memorial Hospital at Chapel Hill, North Carolina.

5. During one of the medical consultations it was discovered that there was an improper healing or nonunion of the fracture, which necessitated further surgery. The deceased employee was admitted to the North Carolina Memorial Hospital and underwent further surgery and he was discharged from the North Carolina Memorial Hospital on April 17, 1966, and from Dr. Peacock's services on or about June 15, 1966.

6. In the period following his release from the Chapel Hill Hospital, plaintiff experienced periods of depression and was seen in the Alamance County Health Clinic by a psychiatrist. All evidentiary medical records and all medical evidence points to the fact that plaintiff did not suffer any brain injury in the accident; that the deceased employee knew the nature and extent of his surroundings and that the depression experienced was the normal reaction to the nature and length of time of recovery for the accident and subsequent operation, all of which the undersigned finds as a fact.

7. As set forth above, the undersigned finds as a fact that there is no causal relationship between the self-inflicted injuries resulting in death on July 7, 1966, and the industrial injury sustained on February 13, 1966."

Based on the foregoing findings of fact, he made the following conclusion of law:

"1. There is no causal relationship shown connecting the admitted industrial accident of February 13, 1966, and the self-inflicted injuries resulting in death on July 7, 1966. *Painter v. Mead Corporation,* 258 N.C. 741."

On appeal, the Full Commission entered an opinion and award. The portions pertinent to this appeal follow:

"Counsel for plaintiff and counsel for defendant appeared before the Full Commission and ably argued their respective contentions. The Full Commission has reviewed all the competent evidence received in this case together with the Opinion and Award of Commissioner Marshall. It is the opinion of the Full Commission that the correct results were reached by Commissioner Marshall. However, the Full Commission is further of the opinion that the basis for the decision should rest on the provision contained in G.S. 97-12 concerning the willful intention of the employee to kill himself, rather than upon the basis of causal relationship.

THEREFORE, the Full Commission amends the Opinion and Award heretofore filed in this case as follows:

(1) Finding of Fact No. 7 as the same appears on page 5 of the Opinion and Award is hereby stricken out and there is substituted in lieu thereof the following: '7. The deceased employee shot himself to death with his own pistol on 13 February 1966, deceased having obtained such pistol on 12 February 1966 from a policeman to whom he had loaned it. The death of deceased employee was occasioned by his willful and premeditated intention to kill himself.'

(2) The conclusion of law as the same appears on page 5 of the Opinion and Award is hereby stricken out and there is substituted in lieu thereof the following: 'The death of the deceased employee was occasioned by the willful and premeditated intention of the employee to kill himself. The plaintiff is therefore not entitled to compensation. G.S. 97-12; cf. *Painter v. Mead Corporation,* 258 N.C. 741.'

> The Full Commission is further of the opinion that the exceptions as filed by plaintiff are without substantial merit; that the findings of fact and conclusion of law of Commissioner Marshall, as above amended, are supported by the competent evidence and the applicable law; and that the correct results under the law and facts has been reached. THEREFORE, the Full Commission overrules the exceptions as filed by plaintiff and adopts as its own the Opinion and Award of Commissioner Marshall, as above amended. The results reached in such Opinion and Award be, and they are hereby AFFIRMED, as amended."

Plaintiff contends that the Full Commission did not independently find the facts embraced by finding of fact No. 6, that this finding is not supported by the evidence, that the Full Commission erred in overruling plaintiff's exceptions and in affirming the opinion and award of Commissioner Marshall, that it was error to rest the decision on G.S. 97-12 rather than upon causal relationship and that the Full Commission's finding of fact No. 7 is not supported by the evidence and its conclusion of law is not supported by the findings of fact.

G.S. 97-38 provides for the payment of compensation "[i]f death results approximately from the accident and within 2 years thereafter, or while total disability still continues and within six years after the accident . . ." but G.S. 97-12 provides that "[n]o compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

Plaintiff calls attention in her brief to the case of *Painter v. Mead,* 258 N.C. 741, 129 S.E. 2d 482, wherein our Supreme Court discussed under what circumstances suicide following injury by accident may be compensable. The Court discussed the case of *In Re Sponatski,* 220 Mass. 526, 108 N.E. 466, embodying what is commonly referred to as the *Sponatski* rule, then the majority rule. Justice Higgins, writing for the Court, said:

> "In holding the evidence sufficient to support a finding that by reason of insanity the suicide was the result of an uncontrollable impulse, or in a delirium of frenzy without conscious volition to cause death, we are not thereby to be understood as fixing as our standard the rigid rule of the *Sponatski* case. We go no further now than to hold the evidence was sufficient to meet the reasonable tests of that rule which the Industrial Commission seems to have used as the standard. Any further discussion is not now required."

Plaintiff argues that the Commission has in this case erroneously applied the *Sponatski* rule in denying an award. In her brief plaintiff very ably reviews the case law in other jurisdictions and correctly, we think, concludes that *Sponatski* is no longer the majority rule. However, in our view of the matter this question is not before us.

[1] The record before us presents the problem of determining whether the competent evidence is sufficient to support the findings of fact. If the findings are supported by competent evidence and are determinative of all the questions at issue, we must accept the findings as final truth, because we are bound by them. We then determine whether they support the conclusions of law and decision of the Commission. *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747; *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439.

[2] The Commission, in cases in which it has jurisdiction, is the sole fact finding body. *Brice v. Salvage Co., supra.* It considers the *competent* evidence before it. Plaintiff earnestly contends that all of the medical evidence, if believed, compels an award. A careful reading of the transcript reveals that very little of the testimony of the only expert witness in the field of psychiatry was admitted. The Commissioner correctly applied the rule set out in *Todd v. Watts*, 269 N.C. 417, 152 S.E. 2d 448:

> "Since it is the jury's province to find the facts, the data upon which an expert witness bases his opinion must be presented to the jury in accordance with established rules of evidence. Stansbury, N.C. Evidence § 136 (2d Ed. 1963). 'It is well settled in the law of evidence that a physician or surgeon may express his opinion as to the cause of the physical condition of a person if his opinion is based either upon facts within his personal knowledge, or upon an assumed state of facts supported by evidence and recited in a hypothetical question.' *Spivey v. Newman*, 232 N.C. 281, 284, 59 S.E. 2d 844, 847."

[3] Our examination of the competent evidence before the Commission leads us to the inescapable conclusion that there is competent evidence to support the findings of fact, including findings 6 and 7 challenged by the plaintiff, and we are of the opinion that the findings support the conclusion and decision of the Commission.

[4] Plaintiff challenges the action of the Commission in striking finding of fact No. 7 and the conclusion of law and substituting a different finding of fact and conclusion. The power and duties of the Commission in this respect are succinctly stated in *Brewer v. Trucking Co.*, 256 N.C. 175, 123 S.E. 2d 608:

"Rules promulgated by the Commission are for the benefit of the Commission and must be complied with by the parties to a proceeding brought pursuant to the provisions of our Workmen's Compensation Act. However, these rules do not limit the power of the Commission to review, modify, adopt, or reject the findings of fact found by a Deputy Commissioner or by an individual member of the Commission when acting as a hearing Commissioner. In fact, the Commission is the fact finding body under our Workmen's Compensation Act. The finding of facts is one of the primary duties of the Commission. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760; *Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515. A finding of fact by a hearing Commissioner or by a Deputy Commissioner never reaches the Superior Court or this court unless it has been affirmed by the Commission. 100 C.J.S., Workmen's Compensation, Section 687, page 1044. Certainly, the power to review the evidence, reconsider it, receive further evidence, rehear the parties or their representatives, and, if proper, to amend the award, carries with it the power to modify or strike out findings of fact made by the Deputy Commissioner or hearing Commissioner if in the judgment of the Commission such finding is not proper."

No error.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. THOMAS GARNETT

No. 6926SC46

(Filed 30 April 1969)

1. Criminal Law § 155.5— time of docketing record on appeal

Where defendant fails to docket the record on appeal within the time provided by Rule 5 of the Rules of Practice in the Court of Appeals, the appeal is subject to dismissal (1) under Rule 17 if the appellee shall file a proper certificate prior to the docketing of such record on appeal or (2) under Rule 48 by the Court of Appeals on its own motion.

2. Criminal Law § 159— statement of evidence on appeal — repeal of Rule 19(d)(2)

Rule 19(d)(2), which permits the appellant to file with the Clerk of the Court of Appeals the stenographic transcript of the evidence in the trial tribunal, has been repealed by the Supreme Court pursuant to au-

thority contained in G.S. 7A-33; the repeal is effective 1 July 1969 and applies to all appeals docketed for hearing in the Court of Appeals at the Fall Session 1969 and thereafter.

3. Criminal Law § 105— motions for nonsuit — necessity for trial court's ruling

Although trial judge should rule on each motion for judgment as of nonsuit, there is no prejudicial error in this case where trial judge failed to rule on defendant's motion for nonsuit at the close of all the evidence, since (1) the court specifically denied the motion made at the close of the State's evidence and (2) neither the appealing defendant nor the other defendants who were tried with him offered any evidence.

4. Burglary and Unlawful Breakings § 5; Larceny § 7— prosecutions — sufficiency of the evidence

In prosecution upon indictment charging defendant with felonious breaking and entering and with felonious larceny, there was sufficient evidence to withstand defendant's motion for judgment as of nonsuit and to require submission of the case to the jury.

5. Criminal Law § 104— motion to nonsuit — consideration of evidence

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

6. Criminal Law § 9— aiders and abettors

One who is present, aiding and abetting in a crime actually perpetrated by another, is equally guilty with the actual perpetrator.

7. Criminal Law § 171; Larceny § 8— prosecution on two-count indictment — error relating to one count — concurrent sentences

Where nine-to-ten year sentence imposed in felonious larceny prosecution is to run concurrently as a matter of law with a ten-year sentence imposed in prosecution for felonious breaking and entering, defendant is not prejudiced by trial court's erroneous instruction which failed to specifically instruct the jury that before they could return a verdict of guilty of felonious larceny they must find either that the stolen property was of a value of over two hundred dollars or that the property was stolen after a felonious breaking or entry with intent to commit larceny.

8. Criminal Law § 167— test of prejudicial error

The test whether technical error is prejudicial to a defendant is to be determined upon the basis of whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

APPEAL by defendant from *Falls, J.*, 5 August 1968 Schedule "A" Criminal Session of Superior Court of MECKLENBURG County.

Defendant was tried on a bill of indictment charging him with (1) the felony of breaking and entering a building occupied by Ad-

vance Store Company Incorporated (Advance Store) at 2947 Freedom Drive in the City of Charlotte, and (2) the felony of the larceny of property of the Advance Store of the value of $519.49, "as a result of the unlawful breaking or entering on the day and year aforesaid of Advance Store Company Incorporated, a corporation, 2947 Freedom Drive, Charlotte, North Carolina." The defendant pleaded not guilty. The verdict of the jury was "(g)uilty as charged in the Bill of Indictment." The judgment appears in the record on appeal as follows:

> "It is the JUDGMENT of the Court that the defendant be confined in the State Prison at Raleigh, North Carolina, for a period of Ten (10) years on the first count, and a period of not less than Nine (9) nor more than Ten (10) years on the second count."

To the entry of the foregoing judgment, the defendant objected, assigned error, and appealed to the Court of Appeals.

Attorney General Robert Morgan and Staff Attorney (Mrs.) Christine Y. Denson for the State.

Elbert E. Foster for the defendant appellant.

MALLARD, C.J.

[1] The verdict was returned by the jury on 13 August 1968. Appeal entries were signed by the judge on 15 August 1968. The record on appeal was not docketed in the Court of Appeals until 18 November 1968. No order extending the time for docketing the record on appeal appears in the record. The defendant failed to docket the record on appeal within the time provided by Rule 5 of the Rules of Practice in the Court of Appeals, the pertinent parts thereof providing 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."

The above portion of Rule 5 providing for a dismissal is permitted under Rule 17 if the appellee shall file a proper certificate prior to the docketing of such record on appeal. However, Rule 48 reads:

"If these rules are not complied with, the appeal may be dismissed."

Upon the failure of a defendant to docket the record on appeal as provided by Rule 5, this Court may under the provisions of Rule 48 on its own motion dismiss the appeal.

[2] The defendant chose to submit the evidence in this case under the provisions of Rule 19(d)(2) as it was prior to its repeal on 11 February 1969 by the Supreme Court of North Carolina pursuant to authority contained in G.S. 7A-33. Rule 19(d)(2), (which has been repealed effective 1 July 1969 and to apply to all appeals docketed for hearing in the Court of Appeals at the Fall Session 1969 and thereafter), permitted the stenographic transcript of the evidence in the trial tribunal to be filed with the clerk of the Court of Appeals, and then the appellant in an appendix to his brief would set forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the question 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. Defendant does not have an appendix to his brief although he attempts to raise questions on appeal relating to the evidence.

Defendant's appeal should be dismissed because of the failure to docket the record on appeal in time, and the failure to comply with the rules with respect to attaching an appendix to the brief concerning the evidence when it was pertinent to the questions raised on appeal. However, we do not dismiss the appeal but consider it on its merits.

The evidence offered by the State tends to show that on 6 July 1968 at about 2:15 a.m., two police officers of the City of Charlotte were on duty patrolling in an automobile in the Freedom Village Shopping Center area in the City of Charlotte. They cut off the lights of their automobile and drove behind the stores, and as they approached an alleyway between the Advance Store building and the branch post office building, they observed three men standing behind an automobile loading three television sets into its open trunk. Another television set was nearby. Edna Barnes, the owner of the automobile, was in the driver's seat; she was arrested and charged with breaking and entering and larceny. The defendant, Thomas Garnett, was one of the three men loading television sets into the rear of the automobile. As the officers approached the automobile, the defendant and the other two men ran. All three were pursued, caught, and arrested for breaking and entering and larceny. The television sets they had were the property of Advance Store,

and as late as 9:00 p.m. on 5 July 1968 these television sets were located inside and near the front of its store building in Freedom Village Shopping Center. The television sets were offered into evidence. The glass front of the store building had been broken and "a six foot hole knocked in the plate glass window" some time after 9:00 p.m. when the store was closed and before the officers observed it after their arrival at about 2:15 a.m. the next morning. After the officers had arrested the three men and one woman, they searched the Advance Store building and found another woman by the name of Doris Jackson concealed in the building behind some boxes. None of the persons apprehended worked for Advance Store and none had authority to enter the building on this occasion.

[3] Defendant contends that the court committed error when it failed to rule on his motion for judgment as of nonsuit at the close of all the evidence. This contention is without merit. There was no evidence offered by this defendant or either of the other defendants who were tried with him. The transcript of the testimony reveals that the court specifically denied this defendant's motion for judgment as of nonsuit made at the close of the State's evidence, which in this case was the only evidence offered. This defendant, after announcing that he had no evidence, renewed his motion for judgment as of nonsuit, and the trial court did not specifically rule upon this latter motion but submitted the case to the jury. Judges should rule on each motion for nonsuit. However, under the circumstances presented here, there was no prejudicial error committed by failing to specifically rule on this defendant's second motion for nonsuit.

[4, 5] There was ample evidence against this defendant to withstand the motion for judgment as of nonsuit and to require the submission of this case to the jury. "On motion to nonsuit, the evidence must be considered in the light most favorable to the state, and the state is entitled to every reasonable intendment thereon and every reasonable inference therefrom." 2 Strong, N.C. Index 2d, Criminal Law, § 104.

Defendant argues and contends that the trial court committed error in overruling defendant's objections and motions to strike certain questions and answers regarding other persons found at the scene of the crime and not then on trial. We have carefully considered each of these and are of the opinion that no prejudicial error appears.

Defendant contends that "(t)he Court erred in charging the Jury that the defendant could be found guilty as an aider and abettor and referring to other persons not on trial, and there being no

showing at any time, before or after judgment, that a principal had been convicted." This contention is without merit. We think the judge's charge with respect to aiding and abetting was not prejudicial to the defendant.

[6] It is well settled that one who is present, aiding and abetting in a crime actually perpetrated by another, is equally guilty with the actual perpetrator. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44. One who is present, aiding and abetting in the commission of a crime, is guilty as a principal. *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169; 2 Strong, N.C. Index 2d, Criminal Law, § 9.

[7, 8] Defendant excepted to the following part of the judge's instructions to the jury relating to the charge of the felony of larceny:

> "Therefore, with respect to the second count, that is, the count of larceny charged in the bill of indictment, if you find from the evidence and beyond a reasonable doubt, the burden being upon the State of North Carolina to so satisfy you, that the defendants took and carried away the television sets, the property of the Advance Stores, Inc., without its consent and against its will, that such property was taken and carried away by the defendants with the felonious intent to deprive the owner, the Advance Stores, of its property permanently and to convert the same to the defendants' own use or to the use of some other person other than the true owners, the Advance Stores, if you find these to be the facts beyond a reasonable doubt, then it would be your duty to render a verdict of guilty."

The three television sets were in evidence, and there was no other evidence as to their value. The circumstances of the case are such that the judge in this charge assumed that they were worth more than $200 or had been stolen from the store building of Advance Store. The error in these instructions is that the court did not specifically instruct the jury that before they could return a verdict of guilty of the felony of larceny as charged, they must find that the property stolen was of the value of over two hundred dollars, or that the property was stolen from within the building of the Advance Store after a felonious breaking or entry therein with intent to commit the crime of larceny. *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297. The question arises as to whether the error was prejudicial to the defendant. In 3 Strong, N.C. Index 2d, Criminal Law, § 167, the pertinent rule is stated as follows:

> "The burden is on defendant not only to show error but also to show that the error complained of affected the result adversely

to him, as the presumption is in favor of the regularity of the trial below. . . .

Mere technical error will not entitle defendant to a new trial; it is necessary that error be material and prejudicial and amount to a denial of some substantial right. Whether technical error is prejudicial is to be determined upon the basis of whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."

In the case of *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406, the trial judge stated an opinion in his charge as to the age of the alleged victim of the rape and kidnapping charged therein, and Justice Lake in the opinion said:

"It is error for the judge, whether in his charge to the jury or at any other time during the course of the trial, by direct statement or otherwise, to intimate to the jury his own opinion concerning the sufficiency of the evidence to show the existence of a material fact, but such error is not cause for a new trial if it falls within the category of harmless, nonprejudicial error. The seriousness of the offense charged and the severity of the potential penalty therefor do not constitute or affect the test to be applied in determining whether an error is prejudicial or nonprejudicial. The test is not the possibility of a different result upon another trial. The test is whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."

No error in the trial of this defendant as to the first count of the felony of breaking and entering has been made to appear. On the verdict of guilty of breaking and entering as charged in the bill of indictment, the judgment of the court was that the defendant be imprisoned for a term of ten years. On the second count of larceny, the judgment was that he be imprisoned for not less than nine nor more than ten years. There was no order to the contrary, and therefore the sentence on the count of larceny will run concurrently as a matter of law with the sentence on the first count of breaking and entering. *State v. Efird,* 271 N.C. 730, 157 S.E. 2d 538.

All of the evidence in this case tends to show that the television sets were the property of Advance Store, that they were in its place of business at 9:00 p.m. on this same night before the defendant was seen helping load them into an automobile at the back of the Ad-

vance store at about 2:15 a.m., and a front glass window of the store had been broken. We do not think there is any reasonable possibility that on a new trial a jury would find that the television sets were not taken out of the building occupied by Advance Store after it had been broken and entered with the intent to commit the crime of larceny. It is also evidence that there were three of these television sets. The number of the television sets alone would ordinarily indicate a value of over $200.

It is also observed that by upholding the sentence on the second count of larceny, the defendant will complete the sentence on it before the expiration of the sentence imposed on the first count of breaking and entering. The defendant is therefore not prejudiced by the judgment imposed on the count of larceny. *State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377; *State v. Booker,* 250 N.C. 272, 108 S.E. 2d 426; *State v. Troutman,* 249 N.C. 398, 106 S.E. 2d 572; *State v. Cephus,* 241 N.C. 562, 86 S.E. 2d 70; *State v. Perry,* 3 N.C. App. 356, 164 S.E. 2d 629.

We are of the opinion that there is no reasonable possibility that had the error in question not been committed, a different result would have been reached at the trial out of which this appeal arises. We therefore conclude that this error in the charge on the second count was not prejudicial to the defendant, under these circumstances, and is not sufficient to require a new trial on the second count of larceny.

In the trial we find no prejudicial error.

No error.

BRITT and PARKER, JJ., concur.

AARON M. HALE AND WIFE, ANNA S. HALE v. EFFIE MAE MORGAN MOORE, AND HUSBAND, GARLAND EUGENE MOORE; NELLIE IRENE BELLAMY AND HUSBAND, HOWARD B. BELLAMY

No. 6910SC124

(Filed 30 April 1969)

1. Deeds § 19— restrictive covenants — nature of the servitude

The servitude imposed by restrictive covenants is a species of incorporeal right and restrains the owner of the servient estate from making certain use of his property; such right or interest reserved in a conveyance will be effective as against all who deraign title through the grantee, although the reservation is not expressed in subsequent deeds.

2. Deeds § 19— validity of restrictive covenants

Covenants restricting the use of property will be sustained where reasonable, not contrary to public policy, not in restraint of trade and not for the purpose of creating a monopoly.

3. Deeds § 19— action to declare restrictive covenants unenforceable — sufficiency of evidence

In an action to have declared null and void restrictive covenants in the plaintiffs' deed which limits the use of their property to residential purposes only, there is sufficient evidence to support the conclusion of the trial court that the character of the neighborhood wherein the tract is located has not changed so substantially as to render the use of the tract impractical for residential purposes, notwithstanding there is also evidence tending to show that the property is more valuable for commercial rather than residential purposes and that the number of businesses in the vicinity has increased considerably since the restriction was put on the lot.

4. Deeds § 19— restriction personal to grantor

Where restrictive covenant is not part of a general plan of development, the restriction is personal to the grantor and is deemed to be for the benefit of the land retained by the grantor.

APPEAL by plaintiffs from *Hobgood, J.*, 30 September 1968 Civil Session, Superior Court of WAKE.

This is an action to have restrictive covenants contained in plaintiffs' deed declared null and void, and to enjoin the defendant, Effie Moore, from interfering with the plaintiffs' unrestricted use of this property. Nellie Irene Bellamy and Howard B. Bellamy have been dismissed as parties hereto.

The parties waived jury trial and submitted the case on stipulations and evidence. The stipulations show that on 21 December 1938 Chloe Davis Morgan conveyed a 25-acre tract of land located approximately one and one-fourth miles from the city limits of Raleigh on the east side of U.S. Highway 401 to Effie Moore, a defendant in this case. In February 1953, Effie Moore and husband conveyed two acres of land to S. D. Alexander, this being part of the 25 acres conveyed to her in 1938. This two-acre tract is located in the southeast corner of the original tract and borders on U.S. Highway 401. This deed to S. D. Alexander contained the following restriction which is the subject of this action:

> "This deed is conveyed subject to the lien of the Wake County taxes for the year 1953, and subject to the following permanent restriction as to the use of said land, said restriction to run with said land by whomsoever owned: The property herein conveyed shall be used for residential purposes only and shall not be used for business, manufacturing or commercial purposes."

At the time of this conveyance the nature of the neighborhood surrounding the property was farmland and residential property.

On 28 July 1958, Aaron M. Hale became the owner of the two-acre tract of land previously conveyed to S. D. Alexander. He took the property with actual and constructive notice of the restrictions contained in the deed to S. D. Alexander.

On 29 April 1963, Effie Moore and husband conveyed to Nellie Irene Bellamy a tract of land containing 28,250 square feet and lying immediately north of and adjacent to the two-acre tract of land now held by Aaron M. Hale, plaintiff. This property conveyed to Irene Bellamy was part of the original 25-acre tract of land conveyed to Effie Moore in 1938. The deed to Nellie Irene Bellamy contains no restrictions as to use of the property. A general automobile garage is now located on the lot.

On 7 May 1963, Effie Moore and husband conveyed to the Stephenson Enterprises, Inc., a tract of land containing 5.06 acres and lying immediately north of and adjacent to the 28,250 square foot lot conveyed to Nellie Irene Bellamy. This property conveyed to the Stephenson Enterprises, Inc., is part of the original 25-acre tract of land conveyed to Effie Moore in 1938. The deed to Stephenson Enterprises, Inc., like the deed to Nellie M. Bellamy, contains no restrictions as to use of the property. The defendant, Effie Moore, presently holds all of the land conveyed to her in 1938 except for the three conveyances mentioned above.

Plaintiffs offered evidence which tended to show that the area in which this two-acre lot is located is no longer farmland and residential property exclusively. There are now a number of businesses within a mile radius of the two-acre tract. Their evidence also tends to show that the two-acre lot would presently have a value of approximately $30,000 for commercial purposes, and $4,000 to $8,000 for residential purposes.

After hearing the evidence, the court found the facts and made conclusions as follows:

"FINDINGS OF FACT

1. That in 1953 the defendant, Effie Mae Morgan Moore, with the joinder of her husband, G. E. Moore, conveyed the two-acre tract shown on plaintiffs' Exhibits #1 and #18 subject to the restrictive covenant for a purchase price of $5,000.00. The defendants could have sold the said two-acre tract for a higher price if conveyed without the restriction. No other conveyances

out of the original twenty-five acre tract were contemplated at the time of the sale in 1953.

2. That the plaintiffs paid $7,000.00 for said two acre tract in 1958 and at the time of their purchase, the plaintiff had both record and actual notice of the residential restriction on said property. This tract is now vacant.

3. That the only other conveyances cut out of the original twenty-five acre tract owned by the defendant, Effie Mae Morgan Moore, were the conveyances of the Bellamy tract for $7,500.00 and the Stephenson Enterprises tract for $27,000.00 in 1963, which tracts are shown on plaintiffs' Exhibits #1 and #18.

4. The Stephenson Tract is now owned by Green Electric Company and on the front portion thereof is a building used in the electrical business. The rear portion of said tract which surrounds the Bellamy parcel on the east is a large excavated hole and is not used at present.

5. The Bellamy parcel has a garage building thereon and is used for an automatic transmission repair shop.

6. The ten acre tract also owned by the plaintiffs adjoining the said two acre tract on the south is used as the residence of the plaintiffs.

7. The defendant, Effie Mae Morgan Moore, retains title to the remaining portion of the original twenty-five acre tract which consists of more than seventeen acres and the defendants' home is situated thereon.

8. Since 1953, United States Highway Number 401 has been widened in front of the Hale and Moore properties and several new businesses have opened along said road including a trailer sales business, a small shopping center and several filling stations and other businesses. There are many homes on said highway within the immediate area of the subject property and a large amount of vacant and undeveloped land. Adjoining the Hale and Moore properties on the east and south is a large residential subdivision known as Greenbrier Estates which is shown on plaintiffs' Exhibit #18 which has in excess of 300 lots and approximately 260 houses have already been constructed thereon.

9. The two-acre tract owned by the plaintiffs has a reasonable

market value for residential use and could be used for such purpose.

From the foregoing stipulations and findings of fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The three conveyances by the defendant, Effie Mae Morgan Moore, with the joinder of her husband, out of the original twenty-five acre tract of land acquired in 1938 were not made in accordance with a general plan or scheme.

2. The defendant, Effie Mae Morgan Moore, at the time of the original sale in 1953 made an express contract for a valuable consideration with S. D. Alexander, plaintiffs' predecessor in title, imposing a specific restriction upon the use of the two acre tract subsequently acquired by the plaintiffs in 1958 for the benefit and convenience of the defendant in her disposition or use of the other portions of the original twenty-five acres retained.

3. The said express contract was embodied in the covenants inserted in the deed conveying the two acre tract to the plaintiffs' predecessor in title and referred to in each of the subsequent deeds in plaintiffs' chain of title; in addition, the plaintiffs had actual notice of said restriction at the time of their purchase in 1958.

4. The restriction is reasonable in character and duration and is not contrary to public policy.

5. The character of the neighborhood has not changed so substantially as to render the use of the said two acre tract impractical for residential use.

6. The covenant contained in the 1953 deed to plaintiffs' predecessors in title is a valid covenant and may be enforced by the defendant, Effie Mae Morgan Moore, during her lifetime."

Plaintiffs excepted to the findings and conclusions and appealed.

Purrington, Joslin, Culbertson & Sedberry by William Joslin for plaintiff appellants.

Manning, Fulton & Skinner by M. Marshall Happer III for defendant appellees.

MORRIS, J.

At the outset, we note that the restriction which the defendant, Effie Moore, placed on the lot in question in 1953 was not part of a general plan of development. At the time this restriction was put on the two-acre tract which the plaintiff now holds, the defendant, Effie Moore, was not obligated to restrict the balance of her property in any way upon conveyance.

[1] This restrictive covenant, if not inequitable, is enforceable against the plaintiffs. "The servitude imposed by restrictive covenants is a species of incorporeal right. It restrains the owner of the servient estate from making certain use of his property. *Turner v. Glenn,* 220 N.C. 620, and cases cited; 14 Am. Jur., 608-09. Such right or interest reserved in a conveyance will be effective as against all who deraign title through the grantee, although the reservation is not expressed in subsequent deeds." *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344.

[2] Plaintiffs argue, however, that the character of this neighborhood has changed to such an extent since the imposition of this covenant that the property cannot be reasonably used for residential purposes, and that to enforce this covenant would be inequitable. "The courts have generally sustained covenants restricting the use of property where reasonable, not contrary to public policy, not in restraint of trade and not for the purpose of creating a monopoly — and building restrictions have never been regarded as impolitic. So long as the beneficial enjoyment of the estate is not materially impaired and the public good and interest are not violated such restrictions are valid. Subject to these limitations the court will enforce its restrictions and prohibitions to the same extent that it would lend judicial sanction to any other valid contractual relationship. 14 Am. Jur., 616. Hence, the restriction is not void *ab initio.* If conditions have arisen or circumstances have developed which make the enforcement thereof inequitable and unjust, . . . the burden of so showing rests upon him who seeks its annulment. Until he has so shown the restriction is binding and effective." *Sheets v. Dillon, supra.*

[3] Plaintiffs introduced evidence tending to show that the property in question is more valuable for commercial purposes than it is for residential purposes. There was also evidence that the number of businesses in the vicinity of the property has increased considerably since the restriction was put on the lot in 1953. However, evidence was also introduced tending to show that the neighborhood has never been exclusively residential and that it is not exclusively

commercial today. The defendants' home is located on the remaining 17 acres of the 25-acre tract which was conveyed to the femme defendant in 1938. The plaintiffs' home is located on a 10-acre tract of land which adjoins the two-acre tract on which this restriction is imposed. There are a number of homes within a short distance of this lot which face U.S. Highway 401. Located southeast of the restricted property and adjoining the balance of the 25-acre tract owned by the defendant, and adjoining the 10-acre tract on which the plaintiff's home is located, is Greenbriar Estates, a subdivision, in which there are approximately 260 homes. We hold that there was sufficient evidence from which the trial court could have concluded that "The character of the neighborhood has not changed so substantially as to render the use of the said two acre tract impractical for residential use."

[4] The restriction, not being part of a general plan of development, is personal to the grantor, the femme defendant, and is deemed to be for the benefit of the land retained by the grantor. *Sheets v. Dillon, supra.* It appears that Garland Eugene Moore had no interest in this property when it was conveyed in 1953, and that he joined in the conveyance only for the purpose of releasing his marital rights in the property. Therefore, the trial court properly concluded that the restriction could be enforced during the lifetime of Effie Moore. *Maples v. Horton,* 239 N.C. 394, 80 S.E. 2d 38.

The evidence offered by the plaintiffs was not so conclusive that only one inference could be drawn therefrom. The parties agreed to have the case heard by the trial judge without a jury. The findings of fact made by the court below are supported by the stipulations and evidence, and these findings of fact support the conclusions of law. We find no error.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. MARTHA KIRBY

No. 6926SC49

(Filed 30 April 1969)

1. Criminal Law § 104— nonsuit — consideration of evidence

Upon motion for nonsuit in a criminal action, the evidence must be considered in the light most favorable to the State, all contradictions and dis-

crepancies therein must be resolved in its favor and it must be given the benefit of every reasonable inference to be drawn from the evidence.

2. Criminal Law § 104— nonsuit — consideration of defendant's evidence

Upon motion for nonsuit, all of the evidence admitted, including that offered by defendant which is favorable to the State, must be considered by the court.

3. Criminal Law § 106— nonsuit — sufficiency of evidence

The test of the sufficiency of evidence to withstand motion for nonsuit is the same whether the evidence is circumstantial, direct or both.

4. Homicide § 21— sufficiency of evidence

In this prosecution for second degree murder, defendant's motion for nonsuit is properly denied where the State's evidence tends to show that the fatally wounded body of deceased was found lying in a doorway to his home, that deceased had been shot five times, that defendant, the wife of deceased, was found lying on a bed in the home with a pistol approximately three to five inches from her hand, and that bullets found in deceased's body were fired from the pistol found near defendant.

5. Homicide §§ 14, 21— nonsuit — evidence of self-defense

In a homicide prosecution, strong evidence of self-defense does not entitle defendant to a nonsuit since defendant has the burden of proving self-defense to the satisfaction of the jury.

6. Criminal Law § 5; Homicide § 28— instructions — mental capacity

In this prosecution for second degree murder, the court did not err in instructing the jury that the fact that the episode produced a shock or trauma which created a mental block so that defendant did not subsequently recall what had happened would not entitle her to an acquittal, the test of mental responsibility being the capacity of defendant to distinguish between right and wrong at the time of and in respect to the matter under investigation.

7. Criminal Law § 132— motion to set aside verdict as contrary to weight of evidence

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial court, and the court's denial of such a motion is not reviewable on appeal in the absence of manifest abuse of discretion.

APPEAL by defendant from *Ervin, J.*, at the 8 July 1968 Regular Schedule "B" Session of MECKLENBURG Superior Court.

By indictment proper in form, defendant was charged with second-degree murder of her husband, Howard Eugene Kirby, on 26 February 1968. The jury returned a verdict of guilty of manslaughter

and from an active prison sentence of not less than two nor more than five years imposed by the court, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Millard R. Rich, Jr., for the State.

Henry E. Fisher for defendant appellant.

BRITT, J.

In the first assignment of error brought forward and argued in her brief, defendant contends that the trial court erred in overruling her motion for nonsuit interposed at the close of the State's evidence and renewed at the close of all the evidence.

[1-3] It is firmly established in this jurisdiction that upon a motion for judgment as of nonsuit in a criminal action, the evidence must be considered by the court in the light most favorable to the State, all contradictions and discrepancies therein must be resolved in its favor and it must be given the benefit of every reasonable inference to be drawn from the evidence. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169. All of the evidence admitted, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon the motion. *State v. Cutler, supra; State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833. The test of the sufficiency of evidence to withstand such a motion is the same whether the evidence is circumstantial, direct, or both. *State v. Cutler, supra; State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

As was said by Lake, J., in *State v. Cutler, supra,* "[t]hese controlling principles of law are more easily stated than applied to the evidence in a particular case. Of necessity, the application must be made to the evidence introduced in each case, as a whole, and adjudications in prior cases are rarely controlling as the evidence differs from case to case."

[4] Briefly summarized, the State's evidence in the instant case tended to show the following:

On 26 February 1968, the defendant, her deceased husband, and their ten-year-old son occupied a comfortable home at 1322 Marble Street in the City of Charlotte. Defendant and Howard Kirby, the deceased, were married in 1957 and prior to his death deceased was a long-haul driver for Central Motor Lines. Between 2:00 and 3:00 p.m. on Monday, 26 February 1968, John Eagle, a cab driver, pursuant to a call, went to 1322 Marble Street and drove into the

driveway. He saw the front louver door of the home eased open and could see the head of a man, later identified as Howard Kirby, lying in the doorway waving his hands. Mr. Eagle asked Kirby what he wanted and he said, "Call me an ambulance, I've been shot." The driver returned to his cab, contacted his dispatcher and requested that he call an ambulance and the police. The cab driver remained near the house until the ambulance arrived, then went with the ambulance attendants to Howard Kirby, but he appeared to be dead at that time. The police then arrived and proceeded to call the county medical examiner who, shortly thereafter, arrived and declared Howard Kirby dead. Very soon after the cab driver entered the house with the ambulance attendants, he heard a female voice in another room say, "Please don't hurt me any more." The police arrived at the home at approximately five minutes after 3:00 and concluded at that time that Howard Kirby was dead. His body, clad only in a T-shirt and socks, was lying face down in the front doorway. The police proceeded to search the house which contained four or five rooms, including two bedrooms. In the front bedroom they found the defendant, dressed only in a pajama top, lying face down on the lower of two bunk beds; one of her hands extended over the bed and approximately three to five inches from her hand was a .25 caliber Colt automatic pistol. The police tried to arouse defendant by turning her over on her side and shaking her but were unable to do so. As the police turned her over and shook her, she said, "Don't hit me again. * * * Please quit hitting me." Defendant was later removed from the room and taken by ambulance to a hospital where she remained for approximately two weeks. The room in which defendant was found was her son's bedroom. The master bedroom, theretofore occupied by defendant and deceased, was completely disorganized; the bed was messed up, the telephone was on the floor with the receiver out of the cradle, and there were blood stains and an open pocket knife on the floor.

The Mecklenburg County medical examiner examined the body of deceased very soon after it was found by the police and later in the day he performed an autopsy. The examiner found that the decedent had five gunshot wounds caused by entry of bullets and three wounds caused by exit of bullets. Two bullets were removed from the body and the fatal shot entered the right upper abdomen, passed through the right chest and through the liver and right lung, causing hemorrhage resulting in death. The course of the fatal wound extended slightly upward and backward. It was stipulated and admitted that if a named FBI agent were present in court he would testify that in his opinion the two bullets removed from the

deceased's body and the three or four spent bullets that were found at the scene were all fired by one and the same gun, the Colt automatic found near defendant's hand.

The defendant introduced numerous witnesses who testified to her good character and reputation. She testified in her defense and gave testimony substantially as follows: The deceased was a good husband except when he was drinking and on those occasions he was violent and abusive. He began drinking on Saturday prior to 26 February and continued to drink at intervals throughout Sunday and Sunday evening. On Sunday evening he became quite abusive and after defendant put her son to bed in his room, she went to bed, sharing the same bed with deceased. He proceeded to curse and abuse her, struck her in the face and kicked her off the bed several times. Defendant begged her husband to stop his cursing and abusing her and she found it necessary on two occasions to go to their son's room and calm him. After her husband continued abusing her, she went to the kitchen and took several sleeping pills in addition to a tranquilizer which she had taken. She then told her husband that she had taken a sufficient quantity of sleeping pills to make her sleep in spite of his abuses. She testified that she did not know anything else that happened until Monday night when she awoke in a hospital in Charlotte. She testified that the Colt automatic pistol was hers, that she kept it under the mattress in the bedroom, that she kept it for protection inasmuch as her husband's work kept him away from home for extended periods of time, but that she had never fired the pistol in her life that she remembered.

The ten-year-old son testified that on Sunday night he heard his father tell his mother that he was going to kill her. He further testified that on Monday morning he got up at ten minutes before 8:00 and went to school, that he saw his mother in her bedroom and said goodbye to her and that he thought she said goodbye to him.

[4, 5] Applying pertinent principles of law, we hold that the evidence was sufficient to survive the motions for nonsuit and that the trial court did not commit error in overruling said motions. The strong evidence of self-defense did not entitle the defendant to a nonsuit as the burden was on the defendant to prove self-defense to the satisfaction of the jury. *State v. Pennell*, 231 N.C. 651, 58 S.E. 2d 341; 4 Strong, N.C. Index 2d, Homicide, § 14, p. 211.

In her next assignment of error, defendant contends that the trial court erred when it charged the jury as follows:

> "If you find that the defendant committed a criminal act and that at the time she committed this criminal act she realized

the nature and character of the act, and knew that the act was wrong, that is, that she understood the moral character of the act performed, then the court instructs you that the mere fact that the episode produced a shock or trauma which created a mental block so that she did not subsequently recall what had happened, this alone would not entitle her to an acquittal."

[6] Immediately preceding the portion of the charge above-quoted, the trial court instructed the jury to the effect that if it found that the defendant at the time and place of the homicide was in a state of mind that rendered her incapable of comprehending the criminal character of her act, and that her incapacity was a result of an overdose or excessive use of a drug she had taken, then the jury should acquit the defendant and find her not guilty. Defendant's counsel strenuously argues that this client's lapse of memory rendered it difficult, if not impossible, for him to present a proper defense in this case. Although defense counsel's position can be appreciated, the fact remains that it is well-established law in this State that the test of mental responsibility is the capacity of defendant to distinguish between right and wrong *at the time of* and in respect to the matter under investigation. 2 Strong, N.C. Index 2d, Criminal Law, § 5, and cases therein cited. We hold that the challenged portion of the charge, particularly when considered contextually with other portions of the charge, was not error and the assignment of error relating thereto is overruled.

Finally, defendant assigns as error the failure of the court to set aside the verdict as being contrary to the greater weight of the evidence and for errors committed during the progress of the trial.

[7] A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial court, and its refusal to grant the motion is not reviewable on appeal in the absence of manifest abuse of discretion. *State v. McKinnon*, 223 N.C. 160, 25 S.E. 2d 606; *State v. Reddick*, 222 N.C. 520, 23 S.E. 2d 909. No abuse of discretion has been shown and we find no errors committed during the trial that would require setting the verdict aside. The assignment of error is overruled.

The record before us discloses that defendant received a fair trial, free from prejudicial error, and the sentence imposed was well within the limits provided by statute.

No error.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. CLAIBORNE LEE SHERRON

No. 6914SC72

(Filed 30 April 1969)

1. Criminal Law § 155.5— failure to aptly docket record on appeal

Where the record on appeal was docketed 175 days after the date of the judgment appealed from, the appeal is subject to dismissal by the Court of Appeals *ex mero motu* for failure to comply with the rules of the Court. Rules of Practice in the Court of Appeals Nos. 5 and 48.

2. Criminal Law § 162— objection to question not fully asked

The trial court is not required to rule upon objection to a question not fully asked, but may defer ruling until the entire question has been presented.

3. Criminal Law §§ 86, 162— objection to "line of questioning"

In this prosecution for assault on a female, the trial court properly overruled defendant's objection "to the whole line of questioning" of defendant by the solicitor relating to his prior convictions and properly ruled on each question as it was presented.

4. Criminal Law § 86— cross-examination of defendant — prior convictions

A defendant who testifies in a criminal case may be cross-examined as to his prior convictions for the purpose of impeaching him as a witness.

5. Criminal Law §§ 95, 113— evidence competent only for impeachment — request for instructions

The court is not required to instruct the jury that evidence competent for the purpose of impeachment be so restricted where defendant makes no request for such an instruction.

6. Assault and Battery § 4— assault on spouse

The martial relationship does not afford a license to commit assault.

7. Assault and Battery § 14— sufficiency of evidence

The evidence *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of assault on a female.

8. Criminal Law §§ 18, 138— appeal from district court to superior court — increased sentence

Increased sentence imposed in the superior court following defendant's appeal from conviction in the district court did not place an unconstitutional burden on defendant's right to appeal from the district court.

9. Constitutional Law § 29; Criminal Law § 18— right to jury trial — misdemeanors — appeal to superior court from district court

The constitutional right of a defendant charged with a misdemeanor to have a jury trial is not infringed by the fact that he has first to submit to trial without a jury in the district court and then appeal to superior court in order to obtain a jury trial. G.S. 7A-196; G.S. 7A-272; Art. I, § 13, N. C. Constitution.

10. Criminal Law § 138— punishment — credit for time in custody pending appeal to superior court

Defendant is not entitled to credit upon a sentence imposed in the superior court for time spent in custody in default of bond while awaiting trial *de novo* in the superior court following conviction in the district court.

11. Criminal Law § 134— place of imprisonment — misdemeanor

A defendant may be sentenced to Central Prison only upon conviction of a felony. G.S. 148-28.

12. Criminal Law § 134— misdemeanor — confinement in Central Prison pending appeal

Upon defendant's conviction of the misdemeanor of assault on a female, the court erred in directing that defendant be confined for his safety in Central Prison at Raleigh pending his appeal to the Court of Appeals absent a finding that Central Prison has been properly designated for that purpose by the Commissioner of Correction or his authorized representative. G.S. 153-189.1.

APPEAL by defendant from *Copeland, J.*, at the 3 June 1968 Criminal Session of DURHAM Superior Court.

Defendant was charged in a warrant, proper in form, with the crime of assault on a female person, he being a male over eighteen years old, in violation of G.S. 14-33. In district court he pleaded not guilty, was found guilty, and was sentenced to four months in jail. He appealed to superior court, where he again pleaded not guilty and was tried by jury.

The evidence favorable to the State indicated that the defendant and the prosecuting witness were married in July 1967 and that she and her four children by a previous marriage were staying at her mother's house at the time of the events complained of in the warrant. About 9:00 p.m. on Friday evening, 10 May 1968, the defendant came to the house. When he arrived, the prosecuting witness was sitting on the porch with her four-year-old child. He jerked the prosecuting witness from her chair and commanded her to leave with him. In struggling to get away from him, her blouse came off and she fell down. The defendant jerked her to her feet, then threw her against the banisters. The defendant then stated: "Well, this is all I am going to do in front of the children." As he was leaving, he threw a flower pot at the prosecuting witness. These events were witnessed by the children and mother of the prosecuting witness.

The defendant testified in his own behalf to the effect that he was simply trying to get his wife to go with him but that she jerked away and fell down; that he accidentally kicked the flower pot off the porch and pitched it back on the porch as he was leaving.

On verdict of guilty, the court entered judgment that defendant be imprisoned in the Durham County Jail for a period of 21-24 months, to be assigned to work under the supervision of the State Department of Correction. Defendant gave notice of appeal. On finding defendant to be indigent, the court, at defendant's request, appointed the counsel who had represented him at the trial to represent him in perfecting the appeal and ordered Durham County to pay the cost of the transcript and other costs incident to perfecting the appeal. The court also entered the following order:

> "The court determines for the safety of the defendant and the safety of others in the Durham County jail that the defendant shall be confined in the Central Prison in Raleigh pending his appeal."

Attorney General Robert Morgan and Staff Attorney (Mrs.) Christine Y. Denson for the State.

John C. Randall for defendant appellant.

PARKER, J.

[1] The judgment sentencing defendant was entered 12 June 1968. The record on appeal was docketed in this Court 4 December 1968. This was 175 days after the date of the judgment appealed from. For failure to docket within the time prescribed by the rules of this Court, this case should be dismissed *ex mero motu.* Rules 5 and 48, Rules of Practice in the Court of Appeals; *State v. Farrell,* 3 N.C. App. 196, 164 S.E. 2d 388; *State v. Squires,* 1 N.C. App. 199, 160 S.E. 2d 550. Nevertheless, in an effort to determine that justice is done, we have reviewed the record with respect to the assignments of error brought forward for review.

[2] Defendant's first two assignments of error relate to the court's action in permitting the solicitor to ask defendant certain questions on cross-examination relating to defendant's previous occupation and prior convictions. However, defendant's objections were interposed prematurely before the solicitor completed asking the questions, and the court properly deferred ruling in each instance until the entire question had been asked. In case of the questions which are the subject matter of exceptions #5 and 6, defendant failed to object when the entire questions were asked. In case of the question which is the subject matter of exception #7, the court properly sustained defendant's objection when timely made. In neither instance was the court required to rule upon a question not yet fully asked.

[3] In the case of exception #8, defendant interposed objection "to the whole line of questioning" relating to his prior convictions and requested the court to instruct the jury not to consider them. The court properly refused this request and properly ruled on each question as it was presented.

[4, 5] It is elementary law that a defendant who elects to testify in a criminal case may be cross-examined as to his prior convictions for purposes of impeaching him as a witness. *State v. Jeffries,* 3 N.C. App. 218, 164 S.E. 2d 398; Stansbury, N.C. Evidence 2d, § 112. Defendant did not request that the evidence, competent for the purpose of impeachment, be so restricted. Absent this request the court is not required to give such instructions. *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310.

[6, 7] Defendant next assigns as error the overruling of his motion for nonsuit. In support of his contention that nonsuit should have been allowed, defendant quotes from *State v. Oliver,* 70 N.C. 60, which was decided in 1874, as follows:

> "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."

While today as in 1874 family disputes are better settled at home than in the courts, neither in 1874 nor at any time thereafter has the marital relationship afforded a license to commit assault. *State v. Oliver, supra,* does not so hold. In that case the husband was convicted for switching his wife; on appeal the judgment was affirmed. In the case presently before us there was plenary evidence to justify submitting the question of defendant's guilt to the jury, and the motion for nonsuit was properly overruled.

[8, 9] Defendant contends his motion in arrest of judgment should have been granted on the ground that the increased sentence imposed in the superior court placed an unconstitutional burden on his right to appeal from the district court. This contention is without merit. *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371. Defendant further contends that his motion in arrest of judgment should have been granted on the additional grounds that his constitutional right to a jury trial has been infringed, in that in order to obtain a jury trial he had first to submit to trial without a jury in the district court and then appeal to superior court stigmatized by conviction in the court below. Defendant contends this procedure placed an impermissible burden upon exercise of his constitutional right to a

jury trial. This contention is also without merit. Art. I, § 13 of the North Carolina Constitution provides:

> "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal."

By G.S. 7A-272 the district court has exclusive, original jurisdiction for the trial of criminal actions below the grade of felony, and the same are declared to be petty misdemeanors. G.S. 7A-196 provides: "In criminal cases there shall be no jury trials in the district court. Upon appeal to superior court trial shall be de novo, with jury trial as provided by law." This provision does not transgress the requirements of Art. I, § 13 of our State Constitution. *State v. Norman,* 237 N.C. 205, 74 S.E. 2d 602; *State v. Pulliam,* 184 N.C. 681, 114 S.E. 394.

[10] There is also no merit to defendant's contention that he is entitled to credit for the time he spent in custody following his trial and conviction in the district court and while awaiting trial *de novo* in the superior court. It is true that on any subsequent sentence imposed for the same conduct, a defendant must be given full credit for all time served under the previous sentence, *State v. Stafford, supra; State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522, but the time for which defendant here seeks credit was while he was in custody in default of bond awaiting his trial *de novo* in the superior court. It was not time spent while serving any sentence as punishment for the conduct charged in the warrant, and defendant's claim for credit is denied under the authority of *Williams v. State,* 269 N.C. 301, 152 S.E. 2d 111; and *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633; see Note, 44 N.C.L.R. 458.

[11, 12] Defendant also excepts to the portion of the trial court's judgment which directed that defendant be confined in the Central Prison in Raleigh pending his appeal. A defendant may be sentenced to the Central Prison only upon conviction of a felony. G.S. 148-28; *State v. Floyd,* 246 N.C. 434, 98 S.E. 2d 478; *State v. Cagle,* 241 N.C. 134, 84 S.E. 2d 649. Defendant in the present case was convicted only of a misdemeanor and should not have been ordered confined in Central Prison. G.S. 153-189.1 does authorize the resident judge holding superior court in the district, whenever necessary for the safety of the prisoner or to avoid a breach of the peace in the county, to order a prisoner held in any county jail transferred to a secure jail in some other county or to a unit of the State Prison System designated by the Commissioner of Correction or his au-

thorized representative. Under this statute the trial court, upon making an appropriate finding that it was necessary for the safety of the defendant, could have ordered defendant transferred to "a unit of the State Prison System designated by the Commissioner of Correction or his authorized representative," but the court should not have ordered defendant transferred directly to Central Prison absent a finding that the Central Prison had been properly designated for that purpose by the Commissioner of Correction or his authorized representative. However, in the present case the portion of the court's order here complained of by defendant was by its terms to be effective only pending his appeal, and in any event upon determination of this appeal defendant should be returned to the common jail of Durham County as provided in G.S. 153-189.1. Had defendant desired to raise effectively an objection as to the lawfulness of the place of his confinement pending the determination of this appeal, he could have applied for a writ of habeas corpus. Having failed to do so, upon determination of this appeal the question has become moot.

We have examined the other assignments of error relating to remarks made by the assistant solicitor and to the judge's charge, and find no prejudicial error.

No error.

MALLARD, C.J., and BRITT, J., concur.

MRS. RUTH E. HELMS v. MRS. PEGGY SMITH WILLIAMS AND MERCY HOSPITAL, INC.

No. 6926SC149

(Filed 30 April 1969)

1. Hospitals § 3— defense of charitable immunity — liability insurance coverage

Even though charitable hospital had liability insurance in effect at the time plaintiff was injured, hospital is entitled to assert the defense of charitable immunity where the cause of action arose prior to the decision in *Rabon v. Hospital*, 269 N.C. 1, which abolished the defense.

2. Hospitals § 3— negligence of hospital in selection and retention of nurse — jury question

Issue of charitable hospital's negligence in the selection and retention of a head nurse should have been submitted to the jury where plaintiff

offered evidence tending to show that while plaintiff was recuperating from a back operation the head nurse administered a hypodermic injection in such a manner that the hypodermic needle broke, that the nurse allowed the broken needle to remain in plaintiff's hip without informing the plaintiff or the hospital, that severe infection resulted, and that defendant hospital had knowledge from its own records that the nurse did not have the training, personality or ability to be a head nurse.

3. Hospitals § 3— liability of hospital for employee negligence

A hospital, whether charitable or profit-making, is liable for the negligent acts of its employee under the doctrine of *respondeat superior* if it fails to exercise due care in the selection or retention of such employee.

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

It is elementary that upon motion for judgment of nonsuit the evidence of the plaintiff must be taken to be true and must be considered in the light most favorable to him.

APPEAL by plaintiff from *Ervin, J.*, 23 September 1968 Civil B. Session of Superior Court of MECKLENBURG County.

Plaintiff, Mrs. Ruth E. Helms (plaintiff), alleges she was injured and damaged by the negligence of Mrs. Peggy Jean Smith Williams (Williams) acting as the agent, servant, and employee of the corporate defendant, Mercy Hospital, Inc. (Mercy). Plaintiff alleges that defendant Mercy negligently employed and retained in employment the defendant Williams when it knew or should have known that Williams was incompetent to perform the duties assigned to her. Mercy denied negligence, pleaded the statute of limitations, and alleged it was a charitable corporation and therefore immune to and exempted from liability for the negligent acts of Williams alleged in the complaint.

After a pretrial hearing, the trial court entered the following judgment with respect to the defendant Mercy:

"At the conclusion of the defendants' evidence page 44, Transcript Folder 1, in support of its plea in bar of immunity as a charitable corporation, the court finds as facts from the evidence and concludes as a matter of law that the corporate defendant Mercy Hospital, Inc., is a charitable corporation and entitled to the immunity of an eleemosynary institution as a defense to its liability in this action;

Based on the foregoing finding of facts and the conclusion of law, IT IS ORDERED, ADJUDGED AND DECREED that the corporate defendant Mercy Hospital, Inc., is a charitable corporation and is entitled to the defense of charitable immunity to the plaintiff's

cause of action as set out in the complaint in the above entitled action."

At the close of plaintiff's evidence, the trial court allowed Mercy's motion for judgment as of nonsuit and submitted the case to the jury who answered the issues as follows:

"1. Was the plaintiff injured and damaged by the negligence of the defendant, Mrs. Peggy Joyce Smith Williams, as alleged in the complaint?

ANSWER: Yes

2. What amount of damages, if any, is the plaintiff entitled to recover of the defendant, Mrs. Peggy Joyce Smith Williams, by reason of her injuries?

ANSWER: $15,000.00"

Judgment was entered upon this verdict from which there was no appeal by either party.

Plaintiff excepted and appealed from the judgment entered as to Mercy.

Carswell & Justice by James F. Justice, C. J. Leonard, Jr., and James H. Carson for plaintiff appellant.

Myers, Sedberry & Collie by J. C. Sedberry and Charles T. Myers for defendant Mercy Hospital, Inc., appellee.

MALLARD, C.J.

[1] In *Rabon v. Hospital,* 269 N.C. 1, 152 S.E. 2d 485, Justice Sharp, speaking for the Court, said:

"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."

Thereafter, the General Assembly of 1967 enacted the following:

"The common-law defense of charitable immunity is abolished and 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 occurrence in controversy here is alleged to have happened on 5 February 1964, which is prior to the decision in *Rabon* and the effective date of the statute above mentioned.

The law as it existed prior to *Rabon* relating to the liability of hospitals for the negligent acts of its employees is stated in *Williams v. Hospital, supra* (overruled in *Rabon*), as follows:

"It is settled law in this jurisdiction that a charitable institution may not be held liable to a beneficiary of the charity for the negligence of its servants or employees if it has exercised due care in their selection and retention. *Barden v. R. R.*, 152 N.C. 318, 67 S.E. 971; *Hoke v. Glenn*, 167 N.C. 594, 83 S.E. 807; *Herndon v. Massey*, 217 N.C. 610, 8 S.E. 2d 914; *Johnson v. Hospital*, 196 N.C. 610, 146 S.E. 573; *Smith v. Duke University*, 219 N.C. 628, 14 S.E. 2d 643. It is to be noted that the rule to which we adhere holds a charitable institution liable for failure to exercise due care in the selection and retention of its servants (*Hoke v. Glenn, supra*), and also permits a servant to recover for administrative negligence of the charity. *Cowans v. Hospital*, 197 N.C. 41, 147 S.E. 672. Thus the rule to which we adhere is that of qualified immunity."

We are of the opinion and so hold that under the facts of this case and inasmuch as this cause of action arose prior to the decision in *Rabon* and the effective date of the statute that Mercy is entitled to assert the defense of charitable immunity.

Plaintiff also contends that one of the questions involved on this appeal is whether the defense of charitable immunity is available to the corporate defendant in view of the fact that it had liability insurance coverage in effect at the time plaintiff was injured.

In *Rabon v. Hospital, supra,* beginning at bottom of page three, it is said, "Nor does the fact that a charitable institution has procured liability insurance affect its immunity." It is common knowledge that insurance companies base their premiums upon the exposure involved. At the time Mercy obtained this insurance, the doctrine of charitable immunity limited its exposure.

[1] If *Rabon* means what it says, and we believe that it does, we are of the opinion that it is the law in North Carolina, and we so hold, that even though Mercy had liability insurance, such did not waive the defense of charitable immunity available to it at the time of this occurrence. *Hayes v. Wilmington,* 243 N.C. 548, 91 S.E. 2d 690; *Flanner v. Saint Joseph Home,* 227 N.C. 342, 42 S.E. 2d 225; *Herndon v. Massey, supra.* For a statement of opposite view, see *Hill v. James Walker Memorial Hospital, et al,* ..... F. 2d ..... (4th Cir. 1969).

[2] Plaintiff contends that there was sufficient evidence to require submission of this case to the jury upon her allegation that Mercy was negligent in the selection and retention of Williams as head nurse.

The evidence for the plaintiff, taken in the light most favorable to plaintiff, tends to show that plaintiff was admitted on 4 January 1964 to Mercy, preparatory to an operation on her back. The back operation was successfully performed. While she was recuperating from this operation, Williams, who was employed by defendant Mercy as a head nurse on 5 February 1964, gave her a hypodermic injection in a negligent manner and in doing so negligently broke the hypodermic needle, leaving the broken part in plaintiff's hip. This caused excessive bleeding to such an extent the bed linens had to be changed. Williams was not adequately trained and did not have "the personality, the order, industriousness, nor ability to be a head nurse," and Mercy had had knowledge thereof since 1958 inasmuch as information to that effect was in its own records. Williams, although she was the head nurse, did not report and did not make a record of the incident of the broken hypodermic needle as required by the rules and regulations of Mercy. Neither did Williams inform plaintiff of the broken hypodermic needle. Had the incident of the broken needle been reported promptly, it would have been a simple matter to remove it. However, as a result of remaining imbedded in the plaintiff's hip for a considerable period of time, the broken hypodermic needle caused severe infection which required plaintiff's hospitalization at institutions other than at Mercy. As a result of the infection, plaintiff developed thrombo-phlebitis. In view of our ruling herein, we do not summarize all of the evidence.

In *Norfolk Prot. Hospital v. Plunkett,* 162 Va. 151, 173 S.E. 363, the Court upheld a verdict for the plaintiff on the basis that the hospital was negligent in selecting and retaining a nurse whose negligence proximately caused the plaintiff's injuries and in the course of its opinion stated:

"It is not sufficient to say that a nurse is competent simply because she is capable of discharging the manual duties incumbent upon her as a nurse. It is a matter of common knowledge that the welfare of a patient is as much the responsibility of the nurse as it is of the physician. If she is lacking in educational preparation, if she is guilty of indiscretions that impair her physical or mental status, if she is lacking in that moral character which imbues the patient with confidence, then it cannot be said that she is a competent person to be placed in charge of a helpless patient."

[3] It is now and has been the law in North Carolina that a hospital, whether charitable or profit-making, is liable for the negligent acts of its employee under the doctrine of *respondeat superior* if it fails to exercise due care in the selection or retention of such employee. Such negligence is sometimes referred to as "corporate negligence." *Rabon v. Hospital, supra; Williams v. Hospital Asso., supra; Cowans v. Hospital, supra; Johnson v. Hospital, supra; Hoke v. Glenn, supra;* see also *President and Dir. of Georgetown College v. Hughes*, 130 F. 2d 810; 25 A.L.R. 2d 113, 179.

[4] In the case of *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607, Justice Lake, speaking for the Court, said:

"It is elementary that upon a motion for judgment of nonsuit the evidence of the plaintiff must be taken to be true and must be considered in the light most favorable to him, resolving all contradictions therein in his favor, and giving him the benefit of every inference in his favor which can reasonably be drawn from it."

[2] Applying the above principles of law to the facts in the case before us, we are of the opinion and so hold that there was ample evidence to require submission to the jury of the question of the negligence of Mercy in the selection and retention of Williams as head nurse, and that the trial court committed error in allowing Mercy's motion for judgment of nonsuit.

Reversed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT GRIFFIN, JR.

No. 6910SC170

(Filed 30 April 1969)

1. Constitutional Law § 32; Criminal Law § 66— right to counsel at lineup

Out-of-court lineup identification of defendant by armed robbery victim was not rendered unconstitutional by fact that defendant was not represented by counsel and did not waive his right to counsel at the lineup, where defendant was not a suspect in the armed robbery in question at the time of the lineup, the lineup was arranged to give the robbery victim an opportunity to view four other persons who were suspects in the robbery, and defendant was in custody on another charge and was placed in the lineup only as a filler.

2. Constitutional Law § 32; Criminal Law § 66— in-court identification — lineup identification

In this armed robbery prosecution, the evidence on *voir dire* fully supports the trial court's findings of fact that the victim's in-court identification of defendant as the perpetrator of the robbery was an independent identification based upon what the witness observed at the time of the robbery and was not tainted by any illegal lineup.

3. Constitutional Law § 32; Criminal Law § 66— lineup identification — in-court identification having independent origin

In this armed robbery prosecution, the court properly admitted the in-court identification of defendant as the perpetrator of the robbery where a prior out-of-court lineup identification of defendant was constitutional and the in-court identification was not fruit of the lineup but was an independent identification based upon what the witness observed at the time of the robbery.

4. Criminal Law § 155.5— failure to aptly docket record on appeal

The appeal is subject to be dismissed under Rule 48 where the record on appeal was not filed within 90 days after the date of the judgment appealed from as required by Rule 5.

APPEAL by defendant from *McKinnon, J.*, 30 September 1968, WAKE County Superior Court.

Robert Griffin, Jr., (defendant) was charged under two bills of indictment with the felony of armed robbery of Sherrill Houston Styers (Styers) and with the felony of larceny of a 1965 model Ford automobile owned by Checker Cab Company of Raleigh, Inc., (Checker). The automobile was valued at $2,500. The two cases were consolidated for trial. The defendant entered a plea of not guilty to both charges.

The evidence on behalf of the State tends to show that Styers was employed by Checker as a taxicab driver; at 1:00 a.m. on 27 April

1968, he was parked at a well-lighted taxicab stand in the vicinity of the bus station on West Morgan Street in the City of Raleigh; the defendant and an unidentified male companion approached the taxicab and engaged Styers to drive them to a house on Carnage Street; they did not recall the street number of the house; they stated, however, that they would recognize the house on sight; they got in the back seat of the taxicab, the defendant sitting on the right side and his companion sitting immediately behind Styers on the left side; when the taxicab rounded the corner at Carnage Street, Styers turned on the interior light, which remained on for some five minutes or longer; the passengers recognized the house and Styers stopped; the defendant then undertook to pay the fare of ninety-five cents; after taking fifteen pennies and other change from his pocket, the defendant counted out ninety cents, one coin at a time; the method of payment on the part of the defendant was such as to cause Styers to become concerned about the passengers' intentions; as a result of this concern, Styers began to look very closely at the defendant; as Styers started to turn off the taxicab's meter, the defendant put a knife to his throat and ordered him out of the taxicab; the defendant and his companion then took money from Styers' pockets and his wristwatch; the companion ordered Styers to walk in front of him across a school yard and down an embankment, at which point he left Styers and returned to the taxicab; defendant and his companion then drove off in the taxicab, with the defendant as driver and the companion as passenger.

Styers immediately reported the matter to police authorities, who commenced an investigation. The taxicab was found abandoned later the same day. During the course of this investigation, Styers was shown numerous police photographs, from which he picked some five or six as showing physical features similar to those of the robbers. One of the pictures was actually of the defendant, but Styers did not recognize him because the picture had been taken several years before.

During May 1968 the police detective investigating the matter arrested four persons as suspects in a robbery unrelated to the one in question. The defendant was not one of these four. The detective, nevertheless, decided that these four suspects might have been involved in the Styers robbery. Therefore, a lineup was arranged in order to give Styers an opportunity to view them. The jailer who organized the lineup was instructed by the detective to place additional persons in it as "fillers" so that the lineup would consist of some seven or eight persons. It so happened that one of the "fillers" was the defendant. At that time the defendant was not a suspect in

the Styers robbery, and he was actually in jail on an unrelated charge. On viewing the lineup, Styers immediately pointed out the defendant as being one of the two men who had robbed him.

Before the defendant was identified by Styers at the trial, a *voir dire* examination was conducted on the question of the validity of such an in-court identification. After the State and defendant were given ample opportunity to present evidence for the court's consideration, Judge McKinnon found that the defendant was not a suspect of the robbery in question at the time of the lineup; he was not represented by counsel; and he had not waived any of his constitutional rights. He further found that Styers had ample opportunity to observe the defendant during the commission of the offense. He then held that the lineup identification could not be introduced into evidence. However, he held that it was competent for the jury to consider the in-court identification because Styers had ample opportunity to observe the defendant on 27 April 1968, which would permit him to recognize and identify the defendant at the trial, and because such in-court identification was not tainted by any procedure in the conduct of the lineup. The jury returned and Styers was permitted to identify the defendant as one of the two robbers.

The jury returned a verdict of guilty on both charges. On 3 October 1968 Judge McKinnon entered a judgment that the defendant be confined in the State's prison for a term of not less than twenty years nor more than twenty-five years on the charge of armed robbery and that he be confined in the State's prison for a term of ten years, to run concurrently, on the charge of larceny. The defendant appealed to this Court.

Attorney General Robert Morgan and Assistant Attorney General Bernard A. Harrell for the State.

Howard F. Twiggs for defendant appellant.

CAMPBELL, J.

The defendant's first contention is that his rights under the Fifth and Sixth Amendments to the Constitution of the United States, as made applicable to the states, by the Fourteenth Amendment, were violated when he was identified by Styers in a lineup as one of the two men who committed the crimes charged. He relies upon the recent cases of the United States Supreme Court which have held that:

> ". . . [A] post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of

> the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." *Gilbert v. California,* 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1951.

While a lineup such as the one in the instant case does not violate the privilege against self-incrimination, it is constitutional error to admit "in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin." *Gilbert v. California, supra; U. S. v. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926.

In *Wade* the following appears:

> "We think . . . the proper test to be applied in these situations is that quoted in *Wong Sun v. United States,* 371 US 471, 488, 9 L ed 2d 441, 455, 83 S Ct 407, '"[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." . . .' . . . Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification."

[1] Unlike *Wade* and *Gilbert* there was no illegal lineup in the instant case. On the *voir dire* examination the testimony revealed that at the time of the lineup the defendant was in custody, charged with a crime unrelated to cases on trial, and that he was not represented by counsel and had not waived any of his constitutional rights. However, he had not been accused of the crimes in question nor was he a suspect. The lineup was arranged in order for Styers to view four individuals who had been arrested for armed robbery of a service station on North Boulevard in Raleigh and who, the police believed, might have robbed Styers. It was not arranged in order for Styers to view the defendant, and the defendant participated in the lineup solely as a "filler" (*i.e.,* one added to the lineup in order to make the identification of the suspect more accurate and

reliable). Therefore, the failure to provide counsel under these circumstances was not a denial of any constitutional rights, and this is not altered by the fact that subsequent to the crimes, but prior to the lineup. Styers had selected a photograph of the defendant as a "look-alike." This picture was not a recent one and Styers did not recognize the person in the photograph as being the one who had robbed him. He selected the picture, along with four or five others, because it possessed a physical characteristic, such as a nose or mouth, similar to the assailant.

It is noted that the lineup was conducted in a fair and impartial manner. All of the participants were Negro males dressed in casual clothing unlike that worn on the night in question, and there was nothing in their dress which would unduly attract the attention of Styers to any specific person. The participants varied in height, but this slight variance was not such as to render the lineup unfair. They also varied in weight, but all of them were of slender to medium build. They were about the same age. It is also noted that the description which Styers gave the investigating officer immediately after the commission of the offenses was similar to the defendant's actual physical appearance.

[2] Unlike *Wade* and *Gilbert,* the in-court identification in the instant case was found by Judge McKinnon to be from an independent origin and not tainted by any illegal lineup. The findings of fact and conclusions of law on the *voir dire* examination by Judge McKinnon were fully supported by the evidence introduced on this *voir dire* examination.

Judge McKinnon fully complied with the requirements of what a trial judge should do in order to satisfy himself that the in-court identification is competent for the jury to consider and that it is not tainted by any procedure in the conduct of the lineup. Compare with *Rivers v. United States,* 3 Cr. L. 3263, 400 F. 2d 935 (5th Cir., 1968).

[3] What was said in *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353, is equally appropriate in this case:

> "The in-court identification of the defendant by [Styers] was, therefore, not 'fruit of a poisonous tree.' First, the lineup was not 'a poisonous tree.' Second, the in-court identification was not fruit of the lineup, but was an independent identification based upon what the witness observed at the time of the robbery."

Furthermore, in the instant case no evidence of the lineup identification was admitted in the trial before the jury.

The defendant's first contention is without merit.

We have considered the defendant's second and third contentions and have found them to be without merit. Since specific discussion of those contentions would not be beneficial to the Bench and Bar, we refrain from same.

[4] The record on appeal in the instant case was not filed within ninety days after the date of the judgment appealed from. Therefore, the appeal may be dismissed under Rule 48 of the Rules of Practice in the Court of Appeals for failure to comply with Rule 5. We have nevertheless considered this appeal on its merits.

The record shows that the defendant has had a fair trial and no prejudicial error has been shown.

Affirmed.

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

THOMPSON APEX COMPANY v. MURRAY TIRE SERVICE, INC.

No. 6910SC137

(Filed 30 April 1969)

1. Evidence § 29— records made in the course of business — admissibility — proper foundation

Tire rubber manufacturer's quality control test reports, although ordinarily admissible as an exception to the hearsay rule as records kept in the regular course of business, *are held* erroneously admitted without proper foundation where there is no evidence as to who made the tests or whether the tests were made by an authorized person, and where the evidence is insufficient to show how the tests were made.

2. Evidence § 3— facts within common knowledge — manufacturer's quality control testing

It is a matter of common knowledge that the greater majority of manufacturing plants today employ quality control tests as a part of their regular daily manufacturing process.

3. Evidence § 3— facts within common knowledge — manufacturer's test laboratory

The court will assume that a tire rubber manufacturer, as most other large manufacturers, employs several people in its quality control laboratory, that each works independently of the other in compiling records of tests made and in making the various tests, and that it is extremely

doubtful that any single witness would have personal knowledge of the entire contents of the test records.

APPEAL from *Hobgood, J.*, 19 August 1968 Regular Civil Session, Superior Court of WAKE.

Plaintiff, on 29 June 1966, instituted action to obtain judgment against defendant for a past due account in the amount of $10,079.84. Defendant answered admitting the unpaid contract price to be $10,079.84 but denying owing any portion thereof to plaintiff. In its further answer and counterclaim defendant averred that over a number of years it had built up a profitable tire retreading business and had acquired an excellent reputation as a retreader; that plaintiff knew that any retread rubber purchased by defendant would be used by defendant in retreading the tires of its customers; that plaintiff's agent for a period of several months repeatedly called on defendant for the purpose of obtaining defendant's business and warranted that all retread rubber furnished by plaintiff to defendant would be of excellent quality and in all respects suitable for use in retreading tires; that defendant, relying on said warranties and representations, ceased purchasing rubber from other suppliers and began to purchase from plaintiff; that thereafter defendant experienced unusually high incidence of return of tires retreaded by it for the reason that the retreads had come off the tires; that at least half the retread rubber furnished by defendant was defective and not fit for use in retreading tires "in that the cushion gum, an integral part of the retread rubber, was defective in such a way that, after a tire retreaded with rubber furnished by the plaintiff had been driven a relatively short distance, the cushion gum separated from the rest of the retread rubber and adhered to the carcass of the tire, with the result that the tread then separated itself from the carcass of the tire and came off"; that defendant had incurred certain expense (set out with particularity) in re-retreading customers' tires and had suffered damage by reason of the loss of customers and damage to its reputation as a retreader of tires. Plaintiff by reply essentially denied all these averments. The parties stipulated that the correct balance was $10,079.84, and the jury answered the issue as to whether the cushion gum sold by plaintiff to defendant was defective as alleged in the counterclaim in favor of plaintiff. Judgment was entered in favor of plaintiff against defendant in the amount of $10,079.84 with interest and defendant appealed.

Jordan, Morris and Hoke by John R. Jordan, Jr., and Eugene Hafer for plaintiff appellee.

John V. Hunter, III, for defendant appellant.

MORRIS, J.

All of defendant's assignments of error are addressed to the admission of certain evidence over objection.

[1] William J. Scichilone, Sales Manager of the Tread Rubber Division of Thompson Apex, testified for the plaintiff. He testified that rubber shipped by plaintiff to defendant had been tested, that records of the tests were kept as a part of the business records of the company at the home office, that upon request the records of tests were sent to him as general sales manager, that the records of the tests made on the rubber shipped to defendant were examined by him, that the tests were made in the company laboratory and the lab report made there, that the laboratory is a part of the plant and in the same building, that reports are always made of tests and always become a part of the records, that he has access to those records. Witness identified the reports attached to sales data on rubber shipped to defendant and Plaintiff's Exhibits G-1 through G-17 were, over objection, introduced into evidence.

Defendant bases its objection to the introduction of the test results on its contention that these tests had not been made by the witness, nor under his supervision, and that he actually spent very little time in the laboratory. Defendant contends that the court committed prejudicial error in admitting into evidence these tests results without a foundation having been laid that the tests were reliable, conducted by competent personnel and adequate equipment, and promptly and accurately recorded.

[2, 3] It is conceded that the tests in question were quality control tests. We think it is a matter of common knowledge that the great majority of manufacturing plants today employ quality control tests as a part of their regular daily manufacturing process. Nor do we think it amiss that we assume that plaintiff, as most other large manufacturers, employs several people in its quality control laboratory and that each works independently of the other in compiling records of tests made and in making the various tests. It is extremely doubtful that any single witness would ever have personal knowledge of the entire contents of these test records. Obviously strict application of the hearsay rule would render them inadmissible.

We think an analogous situation is presented in *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326. The question presented there was the admissibility of hospital records. Defendant had denied liability on an insurance policy on the ground that the application for the policy contained false statements with respect to in-

sured's health. The application contained representations that applicant was in good health, had never had heart trouble, kidney trouble, diabetes, alcoholism, etc. Defendant attempted to introduce hospital records showing, during the two years prior to the application, admissions to the hospital for varying lengths of time for chronic alcoholism, portal cirrhosis, and valvular heart disease, among other things. Plaintiff objected to the admission of the records and they were allowed for the purpose only of showing when applicant was in the hospital. On appeal plaintiff insisted that the records were inadmissible for two reasons: (1) they were hearsay and (2) were privileged communications. The Supreme Court upheld their exclusion as privileged communications because there was no finding by the trial court that, in its opinion, their admission was necessary to a proper administration of justice. However, Justice Moore, writing for the Court, discussing the first ground of objection, said:

> "Hospital records, when offered as primary evidence, are hearsay. However, we think they come within one of the well recognized exceptions to the hearsay rule — entries made in the regular course of business. Modern business and professional activities have become so complex, involving so many persons, each performing a different function, that an accurate daily record of each transaction is required in order to avoid utter confusion. An inaccurate and false record would be worse than no record at all. Ordinarily, therefore, *records made in the usual course of business, made contemporaneously with the occurrences, acts, and events recorded by one authorized to make them and before litigation has arisen, are admitted upon proper identification and authentication.* (citing cases)." (Emphasis supplied.)

The Court went on to say that where hospital records are legally admissible, proper foundation must, of course, be laid for their introduction. A qualified witness must testify "to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam.*"

In *Nelson v. Union Wire Rope Corporation,* 39 Ill. App. 2d 73, 187 N.E. 2d 425, one of the issues involved was whether certain cable was defective. Quality control tests relating to the heats of steel from one or more of which the wire for the cable in question was manufactured were admitted into evidence over objection. The chief chemist for the company testified that the record recorded the

chemical analysis of each heat of steel; that these analyses were made of every heat of steel by 24 chemists under his direction and were recorded from tests of the various heats made while the steel was molten; that the handwriting of the records was not his but that of competent chemists who made the tests under direction of the witness; that the accuracy of the chemists' work was checked by him in the laboratory periodically; that the records were kept in the regular course of business under his supervision; that he examined and checked over each of the heats of steel concerned; that the records had been under his jurisdiction and kept in his department since the time they were made. The Appellate Court of Illinois said as to these records: "They are the records of a third person, and are admissible under the long-recognized common law rule relating to records kept in the regular course of business — an exception to the hearsay rule, recognized as such because this type of evidence arises from a circumstance offering every inducement to the accurate recording of information and none to its falsification." *Nelson v. Union Wire Rope Corporation, supra.*

[1] We think that quality control tests such as were offered in the instant case are properly admissible as records kept in the regular course of business. While we do not think that the foundation laid for their introduction into evidence in *Nelson v. Union Wire Rope Corporation, supra,* represents the minimum requirements, we are of the opinion that the foundation laid by plaintiff here falls short of the requirements laid down by the North Carolina Supreme Court. There is no evidence as to who made the tests nor whether they were made by a person authorized to make them. This type of test is vitally important in the business of manufacturing rubber, and there should be some evidence that the tests were made by a person having knowledge of the data they contain. The record is also silent as to how the records were made except that "A sample is taken on each and every 400 pound batch of material that our company manufactures. Then when the sample is matched with the sheet and each one of the sheets, by a sheet that is approximately ten pounds to 15 pounds, somewhere in there, then after the lab okays it — the lab comes down and okays that sheet that is tagged, then it goes into a smaller mixer and through a series of mills, etc., then it is extruded; the material then checked on the hour, then approximately every ten — approximately ten batches are checked at random. By that I mean we don't know which batch but just for a recheck again every ten batches are checked at random." This is the only evidence as to how or by whom the tests were made in the foundation laid by plaintiff. We do not deem it sufficient.

This was a hard fought, unusually well tried lawsuit which consumed a week in its trial. Both plaintiff and defendant were ably represented. Nevertheless, we cannot speculate that the jury would not have reached a different conclusion had the tests been excluded. Since it appears to us that the tests were improperly admitted, there must be a new trial.

We have examined plaintiff's other assignments of error and find them to be without merit. Since these questions are not likely to arise upon another trial, we do not deem it necessary to discuss them.

New trial.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. WINFORD WAYNE BAILEY

No. 6926SC80

(Filed 30 April 1969)

1. Criminal Law § 71— evidence competent as shorthand statement of fact

In this prosecution for an attempt to commit common-law robbery, testimony by the prosecutrix that defendant had his hand in his pocket and "it looked like he had a gun" *is held* competent as a shorthand statement of fact.

2. Criminal Law § 116— instructions — failure of defendant to testify

In this prosecution for an attempt to commit common-law robbery, the trial court committed no error in instructing the jury that the failure of defendant to testify "does not raise any presumption against him." G.S. 8-54.

3. Robbery § 1— common-law robbery defined

Common-law robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation; absent the elements of violence or intimidation, the offense becomes larceny.

4. Criminal Law § 115— necessity for submission of lesser degrees of crime charged

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises only when there is evidence from which the jury could find that such included crime of lesser degree was committed.

5. Robbery § 5— attempt to commit common-law robbery — necessity for submission of attempted larceny

In this prosecution for an attempt to commit common-law robbery, the trial court was not required to submit the issue of defendant's guilt of the lesser offense of an attempt to commit larceny where the State's evidence shows all the elements of an attempt to commit robbery and there is no conflicting evidence, the mere contention that the jury might accept part of the State's evidence and reject that part which tends to show violence or intimidation being insufficient to require submission of the lesser offense.

6. Criminal Law §§ 6, 111— instructions — defense of intoxication

In this prosecution for an attempt to commit common-law robbery, the trial court did not err in failing to instruct the jury as to the defense of intoxication where there was evidence that defendant had been drinking but there was no evidence that he was intoxicated.

7. Criminal Law § 3— attempt to commit crime

An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission.

8. Robbery § 5— instructions — attempt to commit common-law robbery

In this prosecution for an attempt to commit common-law robbery, the court properly and adequately charged the jury that they must find both that the defendant had the specific intent to commit the crime of common-law robbery and that he committed a direct but ineffectual act toward the commission of that crime.

9. Robbery §§ 4, 6— attempt to commit common-law robbery — sufficiency of evidence

In order to sustain a conviction of an attempt to commit common-law robbery, the jury need not find that the victim was actually intimidated by defendant's words and actions and that his fear was reasonably induced thereby, the State being required merely to show that defendant had the intent to commit the crime and had committed a direct but ineffectual act toward its commission.

10. Robbery § 6— attempt to commit common-law robbery — punishment

Sentence of seven to ten years is supported by a verdict of guilty of an attempt to commit common-law robbery, an attempt to commit the offense of common-law robbery being an infamous crime which by virtue of G.S. 14-3(b) has been converted into a felony punishable as prescribed in G.S. 14-2.

APPEAL by defendant from *Falls, J.*, September 1968 Criminal Session of MECKLENBURG Superior Court.

Defendant was tried on his plea of not guilty to an indictment, proper in form, charging him with robbery from the person of one Ruby Welch Deese.

Evidence favorable to the State tended to show: On 9 August 1968 Mrs. Deese was employed as assistant manager on duty at the Little General Store on Shamrock Drive in Charlotte, N. C. About 10:00 p.m. the defendant entered the store, picked up a six-pack of beer and a carton of cigarettes, and laid them on the counter. The only persons in the store at the time were Mrs. Deese and the defendant. Defendant told Mrs. Deese: "Get the keys and lock the door, then do exactly as I say and you won't get hurt." Mrs. Deese testified that as defendant said this, he kept his hand in his pocket in such a way that "it looked like he had a gun." Mrs. Deese then went to the door and turned the key so that the door appeared to be locked, but she did not actually lock it. Defendant then said to her: "Come back to the cash register and open the drawer. Get a brown paper bag and put all the money in it." Mrs. Deese testified that in response to this direction she took the money out of the cash register and put it in the paper bag "because he ordered it. He still had that right hand in his pocket . . . I expected him to start shooting." While she was putting the money in the bag, defendant said: "That is your car out there, isn't it? Give me your keys." As Mrs. Deese was placing the money with her car keys on the counter, Mr. Wilson, a customer, started to enter the store. Defendant pushed this customer out and announced that the store was closed. While this occurred, Mrs. Deese attempted to signal to the customer that she was being robbed. The customer walked back to his car, but almost immediately thereafter returned, entered through the door, and asked Mrs. Deese if she carried licorice candy. Mrs. Deese replied that she did not, and at the same time again signaled to the customer that she was being robbed. The customer then seized the defendant, threw him to the floor, and held him until the police arrived. No weapon was found on the defendant. Defendant did not offer any evidence.

The jury returned a verdict of guilty of an attempt to commit common-law robbery. From judgment imposing sentence of seven to ten years in the State's Prison, defendant appealed.

Attorney General Robert Morgan, Assistant Attorney General Parks H. Icenhour, Roy A. Giles, Jr., and Rafford E. Jones, for the State.

Childers & Fowler, by Max L. Childers for defendant appellant.

PARKER, J.

[1] Defendant assigns as error the trial court's ruling allowing the State's witness, Mrs. Deese, to testify that the defendant had

his hand in his pocket and "it looked like he had a gun." Defendant contends this was error in that it permitted the witness to testify to a conclusion. It is not unusual, however, that the customary speech patterns of a witness may be such that the only reasonable method for the particular witness to transmit his observations to the jury is by the statement of what may be technically considered a conclusion or opinion. Such shorthand statements of facts have been long recognized as competent. *State v. Nichols,* 268 N.C. 152, 150 S.E. 2d 21; Stansbury, N.C. Evidence 2d, § 125, p. 285. While in the present case it may have been possible for one skilled in the use of descriptive language to portray otherwise the appearance created by defendant's hand while thrust in his pocket, nevertheless the most practical method was the one employed by the witness. Her words conveyed to the jury an accurate description of what she actually saw, and no unfairness to defendant resulted in permitting her statement to stand. This assignment of error is overruled.

[2] Defendant next assigns as error the court's instruction to the jury that the failure of defendant to testify "does not raise any presumption against him." In this connection defendant contends that the judge should have used the word "inference" instead of the word "presumption," and that he was prejudiced thereby. There is no merit to this contention. G.S. 8-54 expressly provides that a defendant in a criminal proceeding is, "at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any *presumption* against him." (Emphasis added.) Denny, J. (later C.J.), speaking for the Court in *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733, called attention to the fact that "the failure of a defendant to go upon the witness stand and testify in his own behalf should not be made the subject of comment, except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and his failure to testify 'shall not create any *presumption* against him.'" (Emphasis added.) It may be noted that the word "presumption" as used in G.S. 8-54 is equivalent to what is at present generally understood by the word "inference." Stansbury, N.C. Evidence 2d, § 56, p. 117, and § 215, p. 550. In the present case the trial court committed no error in using the exact word employed in the statute.

[3-5] Under the trial court's instructions, the case was submitted to the jury on the single issue of defendant's guilt or innocence of an attempt to commit common-law robbery. Defendant contends there was error in the court's failure to charge the jury as to the lesser offense of an attempt to commit larceny. In support of this

contention, defendant argues that there was no evidence of any act of violence on his part and that the jury might find from the State's evidence that the witness Deese was not actually put in fear by any action of the defendant, or that her fear, if it existed, did not have a reasonable basis, and that such a finding would remove one of the essential elements of the crime of robbery. It is true that robbery, a common-law offense not defined by statute in North Carolina, is merely an aggravated form of larceny, *State v. Lawrence*, 262 N.C. 162, 136 S.E. 2d 595, and has been defined as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation." *State v. Lunsford*, 229 N.C. 229, 49 S.E. 2d 410. Absent the elements of violence or intimidation, the offense becomes larceny. It is also true that under G.S. 15-170 a defendant in a criminal action "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." However, "(t)he necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545. In the present case, the State's evidence did not show a completed robbery but did show all elements of an attempt to commit a robbery. There was no conflicting evidence. It will not suffice to argue, as does the defendant, that the jury might accept part of the State's evidence but reject that portion of Mrs. Deese's testimony in which she testified that she complied with defendant's demands to hand over money because he ordered it and "it looked like he had a gun," and "I expected him to start shooting." The court properly submitted the case to the jury on the single issue as to defendant's guilt or innocence of the offense of an attempt to commit common-law robbery.

[6] Appellant also contends that the trial court erred in failing to charge the jury as to the defense of intoxication. However, there was no evidence upon which to base instructions on the defense of intoxication. There was evidence that defendant had been drinking, but in the light most favorable to him there was no evidence that he was intoxicated.

[7-9] Finally, appellant contends that there was error in the charge in that the court did not instruct the jury that in order to convict, the State must show beyond a reasonable doubt that the fear of the victim must have been reasonably induced, and that the defendant did some overt act which would have resulted in final completion of the robbery had defendant not been stopped. "An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission." *State v. Surles,* 230 N.C. 272, 52 S.E. 2d 880. "An attempt has two elements: a specific intent to commit a particular crime, and a direct ineffectual act toward its commission. In other words, there must be unity of intent and overt act." 21 Am. Jur. 2d, Criminal Law, § 110, p. 189. Tested by these principles, the court properly and adequately charged the jury in the present case that they must find both that the defendant had the specific intent to commit the crime of common-law robbery and that he had committed a direct but ineffectual act toward the commission of that crime. While the evidence would have amply supported a jury finding that the prosecuting witness had been actually intimidated by the defendant's words and actions and that her fear was reasonably induced thereby, such findings were not required in order to sustain defendant's conviction of the offense of an attempt to commit common-law robbery. The State was merely required to show that defendant had the intent to commit the crime and had committed a direct but ineffectual act toward its commission. Had defendant succeeded in carrying out his intent, he would have been guilty of carrying out the completed robbery, rather than of an attempt to commit it. There was no error in the judge's charge.

[10] Finally, it should be observed that while at common law an attempt to commit a felony was a misdemeanor, *State v. Stephens,* 170 N.C. 745, 87 S.E. 131, our Supreme Court has held that an attempt to commit the offense of common-law robbery is an infamous crime, *State v. McNeely,* 244 N.C. 737, 94 S.E. 2d 853, and by virtue of G.S. 14-3(b) has been converted into a felony punishable as prescribed in G.S. 14-2. Therefore, the sentence imposed in the present case is supported by the verdict.

In the entire trial we find

No error.

MALLARD, C.J., and BRITT, J., concur.

TIM PEGRAM v. TOMRICH CORPORATION

No. 6914SC175

(Filed 30 April 1969)

1. Lis Pendens— the statutes

In this State the common law rule of *lis pendens* has been replaced by statute, G.S. 1-116 to G.S. 1-120.1.

2. Lis Pendens— action affecting title to realty — personal judgment for payment of money

An action to secure a personal judgment for payment of money is not an action "affecting title to real property" within the meaning of G.S. 1-116(a)(1), even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant.

3. Lis Pendens— action to establish trust

An action to establish a trust as to certain described real property is an action "affecting title to real property" within the meaning of G.S. 1-116(a)(1), and a valid notice of *lis pendens* may be filed in connection therewith.

4. Pleadings § 2— nature of cause of action — determination

The nature of plaintiff's action must be determined by reference to the facts alleged in the body of the complaint rather than by what is contained in the prayer for relief.

5. Lis Pendens— vacating notice of lis pendens

Order of the trial court vacating plaintiff's notice of *lis pendens is held* proper on the ground that plaintiff's action is not one "affecting title to real property," the allegations of plaintiff's complaint being insufficient to state a cause of action to impress either an express or an implied trust upon the real property described in the notice of *lis pendens.*

6. Trusts § 1— creation of express trust in realty — the intention

An express trust in realty can come into existence only by the execution of an actual intention to create it by the person having dominion over the realty.

7. Trusts § 13— creation of resulting trust in realty

Where plaintiff fails to allege that he furnished any part of the funds with which defendant's lands were purchased, the complaint is deemed insufficient to support the imposition of a resulting trust upon the lands by operation of law.

APPEAL by plaintiff from *Ragsdale, J.,* 6 January 1969 Civil Session of DURHAM Superior Court.

At the time of instituting this civil action on 11 October 1968, plaintiff filed a notice of *lis pendens* against certain described real properties of the defendant and obtained an extension of time in

which to file complaint. Thereafter plaintiff filed complaint in which in substance he alleged: That in January, 1967, plaintiff and defendant entered into an agreement to develop, construct speculative housing on, and sell for profit certain real properties then owned by defendant and to be thereafter acquired, the plaintiff to furnish labor and skill possessed by him and defendant to furnish the properties and capital; that the profits from properties on which plaintiff worked were to be shared equally by the parties; that the plaintiff was to be "General Manager — Building" of defendant corporation, and profits were to be computed after deducting agreed salaries of plaintiff and of the president of the defendant corporation; that on 15 January 1967 plaintiff began performing in accordance with the contract; that on that date the defendant corporation owned certain described real properties and thereafter acquired certain other described properties, and through efforts of the plaintiff the defendant corporation entered into contracts for improving and constructing houses thereon; that on 10 June 1968 defendant repudiated its contract with plaintiff and offered him another substitute contract, unacceptable to him; that plaintiff demanded of defendant an accounting of profits made and to be made and demanded payment of the profits; that defendant paid plaintiff accrued salary but refused to account or pay over any part of the profits due plaintiff on the properties that he had aided in developing and selling. Plaintiff also alleged that "(t)he Plaintiff's remedies at law with regard to the properties still held by the Defendant are inadequate and the Plaintiff is informed and believes that he is entitled to equitable relief regarding these properties." In his prayer for relief plaintiff asked for money judgment in the sum of $9,750.00 "for profits on properties already sold and that the Defendant be declared to hold the properties still in its possession in trust for the mutual use and benefit of Plaintiff and Defendant in accordance with the terms of the contract as alleged."

On motion of defendant, the court entered an order vacating the notice of *lis pendens*, plaintiff excepted and appealed.

Bobby W. Rogers, for plaintiff appellant.

Powe, Porter & Alphin, by E. K. Powe and Willis P. Whichard, for defendant appellee.

PARKER, J.

[1] Plaintiff appellant's sole assignment of error is to entry of the order vacating his notice of *lis pendens*. In this State the com-

mon law rule of *lis pendens* has been replaced by statute, G.S. 1-116 to G.S. 1-120.1; *Cutter v. Realty Co.*, 265 N.C. 664, 144 S.E. 2d 882. The applicable statute, G.S. 1-116(a), describes three types of action in which a notice of pending litigation may be filed:

"(1) Actions affecting title to real property;

"(2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and

"(3) Actions in which any order of attachment is issued and real property it attached."

Since it is clearly apparent that plaintiff's action in the present case is not of type 2, "to foreclose any mortgage or deed of trust or to enforce any lien on real property," nor of type 3, since no order of attachment has been issued, the notice of *lis pendens* with which we are here concerned is not valid unless, as appellant contends, this is an action "affecting title to real property."

[2-5] An action to secure a personal judgment for payment of money is not an action "affecting title to real property" within the meaning of G.S. 1-116(a)(1), even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant. *Booker v. Porth*, 1 N.C. App. 434, 161 S.E. 2d 767. In his prayer for relief, plaintiff asks for a money judgment and in addition asks "that the Defendant be declared to hold the properties still in its possession in trust for the mutual use and benefit of Plaintiff and Defendant in accordance with the terms of the contract as alleged." Plaintiff contends, therefore, that his action is brought not only to obtain a money judgment but also for the purpose of impressing a trust upon defendant's lands. An action to establish a trust as to certain described real property is an action "affecting title to real property" within the meaning of G.S. 1-116(a)(1), and a valid notice of *lis pendens* may be filed in connection therewith. *Cutter v. Realty Co., supra; Insurance Co. v. Knox*, 220 N.C. 725, 18 S.E. 2d 436. However, the nature of plaintiff's action must be determined by reference to the facts alleged in the body of the complaint rather than by what is contained in the prayer for relief. *Jones v. R. R.*, 193 N.C. 590, 137 S.E. 706; 1 McIntosh, N.C. Practice 2d, § 1111. The only question presented by this appeal, therefore, is whether the facts alleged in plaintiff's complaint are sufficient to state a cause of action to impress a trust upon the real property described in the notice of *lis pendens*. We hold that the facts alleged are not sufficient for that purpose.

[6] Plaintiff has not alleged that his contract with defendant included any express agreement by defendant to hold title as trustee

for the mutual benefit of the parties, either to the lands already owned by defendant when the agreement was made or to the lands which defendant would thereafter acquire with its own funds. There is no allegation that defendant ever in fact had any such intention. Since an express trust can come into existence only by the execution of an actual intention to create it by the person having dominion over the property made subject to it, no facts indicating creation of an express trust have been alleged. 54 Am. Jur., Trusts, § 5, p. 22.

[7] Nor do the facts alleged in plaintiff's complaint support the imposition of a trust upon defendant's lands by operation of law. Plaintiff has not alleged that he furnished any part of the funds with which the lands were purchased. Thus the classical case in which equity will impose a resulting trust, implying the intention to create it as a matter of law, does not exist here. Nor is there any allegation of any fraudulent conduct on the part of defendant so as to support imposition of a constructive trust declaring defendant a trustee *ex maleficio* in order to prevent commission of a fraud.

Brogden v. Gibson, 165 N.C. 16, 80 S.E. 966, relied on by appellant, is clearly distinguishable from the present case. In *Brogden v. Gibson, supra,* the plaintiff had alleged, and the jury's verdict had found, that plaintiff and defendant had entered into an oral agreement to buy and sell certain lots, the plaintiff agreeing to do the active business in that behalf and defendant furnishing the money with which to make the purchases, profits to be divided equally between them; that "the defendant secretly and without plaintiff's knowledge, and with the intent to defeat his rights in the contract, caused (the owner from whom the parties were purchasing) to convey the lots to him individually and thereby got control of the title;" that defendant declined to honor his agreement "claiming sole and absolute ownership *in spite of the plain terms of the contract, by which he agreed that the lands should be held in trust for the plaintiff and himself,* as aforesaid, and not for him individually in his own right." (Emphasis added.) Thus, in *Brogden v. Gibson, supra,* there were allegations and proof, both of an express trust created by the contract of the parties, and of fraudulent conduct on the part of the defendant from which equity might have imposed a constructive trust upon him. The trial court, upon the verdict, declared that defendant held the land in trust, "according to the terms of the agreement between the parties." On appeal, this judgment was affirmed by the Supreme Court, the Court stating in an opinion by Walker, J.:

> "We cannot doubt for a moment that *the agreement was that the title to the land should be taken in the name of the plaintiff,*

or, at least, in the joint names of the parties, as the plaintiff was authorized to sell as well as to buy the lot, and everything necessary to carry out this purpose is implied. It surely was not intended that defendant should be able to block the execution of the agreement by taking the title to himself and refusing to convey." (Emphasis added.)

The Court held in *Brogden v. Gibson, supra,* that the action there was to enforce a parol trust and thus with not within the North Carolina Statute of Frauds.

In the case presently before us, as noted above, there is no factual allegation to support imposition of either an express or an implied trust. Plaintiff's allegation that his "remedies at law with regard to the properties still held by the defendant are inadequate and the plaintiff is informed and believes that he is entitled to equitable relief regarding these properties," alleges no facts and amounts to nothing more than plaintiff's erroneous conclusion of law. The factual allegations in plaintiff's complaint are not sufficient to invoke equitable remedies, and certainly are not sufficient to establish a trust as to the real properties described in the notice of *lis pendens.*

Plaintiff's action is not one "affecting title to real property," and the order vacating his notice of *lis pendens* is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

CHARLES P. MICHAELS, ADMINISTRATOR OF THE ESTATE OF GERALD D. MICHAELS v. TERRY EUGENE CARSON AND TUX BOWERS MOTOR COMPANY, INC.

No. 6925SC212

(Filed 30 April 1969)

1. Appeal and Error § 6; Trial § 55— order setting aside verdict — review of nonsuit question

An appellate court will not review the trial court's denial of defendant's motions for nonsuit when the trial court has set aside the verdict in defendant's favor as being against the greater weight of the evidence, since the case remains on the civil issue docket for trial *de novo* unaffected by rulings made during the trial.

2. Appeal and Error § 54; Trial § 48— motion to set aside verdict — appellate review

The action of the trial court in setting aside a verdict as against the greater weight of the evidence is not subject to review on appeal in the absence of an abuse of discretion.

3. Trial § 51— order setting aside verdict — necessity for findings of fact

The trial court need not make findings of fact to support an order setting aside the verdict as against the greater weight of the evidence.

APPEAL by defendant Terry Eugene Carson from *Anglin, J.*, October 1968 Regular Civil Session, BURKE County Superior Court.

Charles P. Michaels (plaintiff) instituted this wrongful death action in his representative capacity as administrator for the estate of Gerald D. Michaels (deceased) against Terry Eugene Carson (Carson) and Tux Bowers Motor Company, Inc. (Company). The plaintiff alleged in his complaint that Carson, a minor, was employed by Company; at approximately 9:00 p.m. on 25 October 1966, Carson was operating a 1961 Oldsmobile owned by Company within the course and scope of his employment as the agent, servant and employee of Company and with the express or implied consent of Company; Carson was operating this automobile in a westerly direction on Main Street in Old Fort, North Carolina; deceased was riding as a guest passenger in the right front seat; at the time in question, the weather was misty and rainy and the highway was wet; Carson was operating the automobile at a high rate of speed, without keeping a careful and proper lookout and without keeping the automobile under proper and reasonable control; he was driving at a speed greater than reasonable and prudent under existing conditions; the automobile failed to make a southerly curve and continued in a straight line striking a tree located to the right of the highway; and deceased was thereby mortally injured. Deceased died on 28 October 1966.

Downie Woodrow Carson was appointed guardian *ad litem* for Carson, his minor son.

In his answer, Carson denied operating the automobile at a high rate of speed, without keeping a careful and proper lookout and without keeping the automobile under proper and reasonable control. He denied driving at a speed greater than reasonable and prudent under existing conditions. As a further answer, Carson alleged that as he approached the curve in question, he met another automobile which was proceeding in an easterly direction; this second automo-

bile had its headlights burning on bright; Carson dimmed his headlights; the driver of the second automobile, whose identity is unknown, failed to dim his headlights, thereby momentarily blinding Carson; Carson, who was faced with a sudden emergency, attempted to continue operating in a westerly direction; however, Carson ran off the right side of the highway, colliding with a tree. Carson alleged that the sole and proximate cause of the accident was the failure of the driver of the second automobile to dim its headlights. As an alternative, Carson alleged that, even if he was negligent, deceased was contributorily negligent because deceased and Clara Elizabeth McKinney (Clara), Carson's girlfriend, were engaging in conduct which was calculated to and which did in fact distract and divert the attention of Carson and because deceased made no objection to the manner in which Carson was operating the vehicle.

In its answer, Company denied that Carson was operating the automobile within the course and scope of his employment as the agent, servant and employee of Company or with the express or implied consent of Company. During the trial the plaintiff submitted to a voluntary nonsuit as to Company.

The plaintiff introduced evidence which tended to show that, on 25 October 1966, three boys and three girls, all teenagers, were riding in the automobile; Lindy Epley (Epley) was dating Barbara Lewis; Carson was dating Clara; deceased was dating June Efler, who was taken home about five minutes prior to the accident; Epley was driving at that time; Carson, Clara and deceased were riding in the back seat; deceased put his arm around the shoulders of Clara, but nothing was said by Carson about such conduct; approximately one-half mile from the scene of the accident, Epley stated that he did not want to drive anymore because he was dating; the automobile was stopped and the five occupants got out in order to change seats; while outside, deceased kissed Clara in the presence of Carson; Clara responded to and appreciated this attention; although Carson appeared to be somewhat mad, there were no angry words exchanged; Carson started driving at that point; Clara was seated between Carson and deceased in the front seat; when he departed, Carson "took off fast and kept going fast" and the "car spun"; he was driving approximately 50 to 65 miles per hour; after the automobile slid the first time, Epley pushed Barbara Lewis down in the floor of the back seat and he fell over in the seat for protection; the weather was rainy and misty and the road was wet; deceased, who was two years older than Carson and taller and heavier than Carson, made no comment about the manner in which the auto-

mobile was being operated; and deceased did not ask Carson to stop in order that he could get out.

Carson, an adverse witness for the plaintiff, testified that, as he approached the curve in question, he saw a curve warning sign, but he did not see the Old Fort city limit sign or the 35 miles per hour speed limit sign. He further testified that he dimmed his headlights when a second automobile approached him from the east, but the driver of the second automobile failed to dim his headlights, thereby momentarily blinding him.

Highway Patrolman A. W. Rector, a witness for the plaintiff, testified that the accident occurred about 9:00 p.m. on 25 October 1966 at a slight southerly curve on Highway 70, which is Main Street in Old Fort; the curve is located within the city limits of Old Fort at a point where the posted speed limit is 35 miles per hour; the automobile was heavily damaged on the right side, as the result of striking a tree located on the northern shoulder of Main Street; from the tree to the street is a distance of approximately four feet; there were continuous tire marks from the automobile back to this tree, a distance of 106 feet, 8 inches; the marks then continued back from the tree in an easterly direction for an additional 86 feet, 6 inches.

At the conclusion of the plaintiff's evidence, Carson made a motion for judgment of involuntary nonsuit, which was denied. Carson offered no evidence and rested. His motion for judgment of involuntary nonsuit was then renewed and again denied. After the jury found Carson negligent and deceased contributorily negligent, the plaintiff made a motion to set the verdict aside as contrary to the greater weight of the evidence. The trial judge thereupon entered the following order:

> "The Court, in its discretion, orders and adjudges that the verdict of the jury be and hereby is set aside as being contrary to the greater weight of the evidence, and that the case remain on the civil issue docket for trial de novo."

Carson excepted and appealed to this Court.

Byrd, Byrd & Ervin by John W. Ervin, Jr., and Robert B. Byrd for plaintiff appellee.

Patrick, Harper and Dixon by Charles D. Dixon for Terry Eugene Carson, defendant appellant.

CAMPBELL, J.

[1] Carson assigns as error the refusal of the trial judge to allow his motion for judgment of involuntary nonsuit entered at the conclusion of the plaintiff's evidence and renewed at the conclusion of all the evidence. In his brief, it is frankly admitted that ordinarily an appellate court will not review the trial judge's denial of such a motion when the verdict has been set aside as against the greater weight of the evidence. In *Goldston v. Wright,* 257 N.C. 279, 125 S.E. 2d 462, the Supreme Court stated:

> "Defendant assigns as error the denial by the trial court of his motion for a judgment of involuntary nonsuit made at the close of plaintiff's evidence; defendant offered no evidence. This question is not presented. When the trial court, in its discretion, set aside the verdict, and ordered a new trial, the case remained on the civil issue docket for trial *de novo,* unaffected by rulings made therein during the trial. . . . Defendant, in respect to the denial of his motion for a judgment of involuntary nonsuit, has nothing to appeal from, for the very simple reason that in this respect there is neither a final judgment nor any interlocutory order of the superior court affecting his rights."

This assignment of error is overruled.

[2] Carson next assigns as error the granting by the trial judge of the plaintiff's motion to set aside the verdict as contrary to the greater weight of the evidence. It is argued that "the Trial Judge exceeded the legitimate bounds of his discretion." In *Edwards v. Phifer,* 120 N.C. 405, 27 S.E. 79, the Supreme Court stated:

> "No principle is more fully settled than that this court will not interfere with the discretion of a trial judge in setting aside the verdict as being against the weight of evidence. . . . The rule has been well laid down . . . as follows: 'The defendant had a verdict and the Judge set it aside and granted a new trial, because, in his opinion, it was against the weight of the evidence. The defendant appealed, and the only question is, can we review his Honor's order? We have so often said that we cannot that it is a matter of some surprise that we should have the question presented again. . . . [W]hen [the trial judge] is of the opinion that, considering the number of the witnesses, their intelligence, their opportunity of knowing the truth, their character, their behavior, on the examination and all the circumstances on both sides, the weight of the evidence is clearly on one side, how is it practicable for us to review it unless we had the same advantages? And even if we had, we cannot try

facts.' In many cases, setting aside the verdict is the only way in which substantial justice can be done, and in any event no irreparable harm can ensue, as a new trial is the result."

In *Goldston v. Chambers,* 272 N.C. 53, 157 S.E. 2d 676, the Supreme Court stated:

"It is within the power of the trial judge in the exercise of his sound discretion to set aside a jury verdict, in whole or in part. . . . A verdict is a solemn act of a jury, and it should not be set aside without mature consideration; but the power of the court to set aside a verdict as a matter of discretion has always been inherent and is necessary to the proper administration of justice. . . .

. . .

We have held repeatedly since 1820 in case after case, and no principle is more fully settled in this jurisdiction, that the action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion."

[3] In granting the plaintiff's motion, it was not necessary for the trial judge to find the facts to support his order. *Bird v. Bradburn,* 131 N.C. 488, 42 S.E. 936.

"The record in this case discloses no abuse of discretion on the part of the trial judge; hence, the order setting aside the verdict in this case is not subject to review on appeal." *City of Randleman v. Hudson,* 2 N.C. App. 404, 163 S.E. 2d 77.

This assignment of error is overruled.

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. RONNIE BERTHA AND WILLIAM RAY ACKER

No. 6926SC106

(Filed 30 April 1969)

1. Constitutional Law § 32; Criminal Law § 66— on-the-scene identification — right to counsel

Defendant's constitutional rights were not violated when he was brought to the scene of a break-in a few hours after the crime occurred and was

identified by a witness for the State while seated in a police car and under arrest without benefit of counsel and without a formal lineup.

2. Burglary and Unlawful Breakings § 5; Larceny § 7— nonsuit — sufficiency of evidence

In this prosecution for breaking and entering and larceny, defendant's motions for nonsuit were properly denied where the State's evidence tended to show that prosecutrix' apartment was broken and entered through the rear door and a television, fan, iron and hair dryer stolen therefrom, that on the day in question a neighbor of the prosecutrix saw defendant and his codefendant crouched in shrubbery at the rear of prosecutrix' apartment, that defendant was holding a television set and the codefendant was holding a fan, that they walked toward an empty house, and that the stolen television and iron were found locked in a closet in the empty house.

3. Burglary and Unlawful Breakings § 6; Larceny § 8— instructions — expression of opinion on the evidence

In this prosecution for breaking and entering and larceny of a television set and other personal property, the trial judge expressed an opinion on the evidence in violation of G.S. 1-180 when he instructed the jury that a witness for the State had testified that she saw defendants with "this" television set in their possession, one of the issues for jury determination being whether the television set which the witness saw in defendants' possession and which she testified was similar to the stolen television was in fact the television stolen from prosecutrix.

4. Criminal Law § 113— instructions — statement of material fact not in evidence

While an inadvertence in recapitulating the evidence is generally deemed waived unless it is called to the trial court's attention in time for correction, an instruction containing a statement of a material fact not shown in evidence must be held prejudicial even though not called to the court's attention at the time.

APPEAL by defendant Acker from *Falls, J.*, at the 30 September 1968 Session of MECKLENBURG Superior Court.

By indictments proper in form, the defendants were charged with breaking and entering and larceny of goods of the value of $200 or more.

The evidence favorable to the State tended to show that Beatrice Rooks left her apartment locked when she went to work at 7:45 a.m. on 9 July 1968. When she returned from work about 5:30 p.m., Miss Rooks discovered that the screen had been cut and the glass removed from the rear door and that her television set, steam iron, hair dryer and electric fan were missing. The apartment building in which the theft occurred consisted of four units, two on the lower floor and two on the upper floor. The Rooks apartment was the lower right unit. Ella Mae Blakeney testified that she occupied

the upper left unit of the building at the time of the larceny; that she saw two persons, later identified as the defendants, crouched in shrubbery at the rear of the Rooks apartment between 4:00 p.m. and 4:30 p.m. on 9 July 1968; defendant Acker was holding a television, defendant Bertha a fan; they then walked toward an empty house. Miss Rooks and Miss Blakeney went to the empty house shortly after 5:30 p.m. and found the stolen television and iron locked in a closet in the abandoned house. Sometime later, after 8:00 p.m., the police came to the apartments and Miss Blakeney identified defendant Acker, who was seated in the police car and under arrest. Miss Blakeney testified that she "had seen the boys around" but did not know their names.

The case was submitted to the jury which found each defendant guilty of both charges. From judgment entered on the verdict, defendant Acker appealed.

Attorney General Robert Morgan and Staff Attorney Andrew A. Vanore, Jr., for the State.

Mercer J. Blankenship, Jr., for defendant appellant.

BRITT, J.

[1] The first question presented by this appeal is whether the identification of the appellant in the absence of his counsel and without a formal lineup violated his constitutional rights.

The confrontation in this case occurred after 12 June 1967, the effective date of *United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149; *Gilbert v. California,* 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178; *Stovall v. Denno,* 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199.

As the *Wade* and *Gilbert* cases dealt with formal lineup situations, there has been some question as to the extent of application to informal confrontations. Only a few cases have been found where an informal confrontation occurred after the effective date of *Wade* and *Gilbert.* These cases are not in agreement, but the difference may be in the facts. In *Rivers v. United States,* 400 F. 2d 935, 3 Cr. L. 3263 (5th Cir. 1968), the victim was a rural mail carrier. He was shot while making change for the assailant but managed to drive to a house and get help. He was taken to a hospital and treated. The identification occurred as the victim was being transferred to an ambulance for transportation to another hospital, while the appellant was accompanied in the police car by a brother and a cousin.

Noting the absence of clear evidence of the necessity of an immediate confrontation, the court concluded that the identification must be established by means independent of the unlawful confrontation. The court relied heavily on the interpretation of *Wade* given by White, J., in his dissent: "The rule applies to any lineup, to any other techniques employed to produce an identification and a fortiori to a face-to-face encounter between the witness and the suspect alone, *regardless of when the identification occurs, in time or place, and whether before or after indictment or information.*" (Emphasis added.)

The *Rivers* case was followed in *United States v. Kinnard,* 294 F. Supp. 286, 4 Cr. L. 2141, where the District Court for the District of Columbia asked for guidance from the Court of Appeals for that district. This call was answered by the Court of Appeals for the District of Columbia in *Russell v. United States,* 4 Cr. L. 2349, where the court held that the on-the-scene identification of a thief at 5:00 a.m. almost immediately after the theft was permissible.

We think the decision in *Russell* is applicable to the facts in the instant case and that defendant's constitutional rights were not violated by the out-of-court identification complained of. The assignment of error relating thereto is overruled.

[2] Appellant's next assignment of error relates to the failure of the trial court to grant his motion for nonsuit interposed at the close of the State's evidence and renewed at the close of all the evidence.

Without restating the evidence, we hold that appellant's motions were properly overruled. If there is more than a scintilla of competent evidence to support the allegations of the warrant or bill of indictment, motions of nonsuit are properly denied. *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241. The circumstances of this case and the attendant facts make it a question for the jury. *State v. Brown,* 1 N.C. App. 145, 160 S.E. 2d 508; *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112.

[3] Appellant assigns as error the following excerpt from the trial judge's instructions to the jury:

> "* * * [B]ut as I recall the testimony of Ella Mae Blakeney, she saw these two defendants standing in bushes at the rear of the apartment house with *this* television set and the iron in their possession and that she saw them take it *to* this abandoned house.
>
> Now, members of the jury, if you find those to be the facts from

the evidence and beyond a reasonable doubt, the court instructs you that would constitute recent possession in this case." (Emphasis added.)

The statement as to the testimony is clearly inaccurate. One of the issues to be decided by the jury was whether the television set which Miss Blakeney saw in appellant's hands and which she testified was similar to the stolen television, was in fact the stolen television. By referring to "this" television set, the court in effect established the television set in the hands of appellant as being the stolen property. Furthermore, Miss Blakeney testified that she saw the defendants carrying the television set and the fan *toward* the abandoned house.

[4] Generally, an inadvertence in recapitulating the evidence must be called to the trial court's attention in time for correction, otherwise it is waived. *State v. Cornelius,* 265 N.C. 452, 144 S.E. 2d 203. However, an instruction containing a statement of a material fact not shown in evidence must be held prejudicial even though not called to the court's attention at the time. 3 Strong, N.C. Index 2d, Criminal Law, § 113, p. 15, citing numerous authorities.

The assignment of error is well taken. We hold that the court's instruction constituted an opinion on the evidence in violation of G.S. 1-180 and the error was sufficiently prejudicial to entitle the appellant to a new trial. It is so ordered.

New trial.

MALLARD, C.J., and PARKER, J., concur.

NANNIE MAE BURNS v. EWART BURNS, EXECUTOR OF THE ESTATE OF MARY CLEO BURNS, DECEASED

No. 6929SC168

(Filed 30 April 1969)

1. Quasi Contracts § 1— creation of implied contract for services rendered

In the absence of some express or implied gratuity, services rendered by one person to or for another, which are knowingly and voluntarily received, are presumed to be given and accepted in expectation of being paid for, and the law will imply a promise to pay what they are reasonably worth.

2. Executors and Administrators § 26— action for services rendered decedent — presumption and burden of proof

Although there is no presumption that the services rendered by a sister-in-law while living within the family are gratuitous, the burden still rests upon her to show circumstances from which it might be inferred that the services were rendered and received with the mutual understanding that they were to be paid for.

3. Quasi Contracts § 1— quantum meruit

Quantum meruit must rest upon an implied contract.

4. Executors and Administrators § 24— action for personal services rendered decedent — sister-in-law — sufficiency of evidence

Evidence that plaintiff rendered personal services to her sister-in-law in caring for her in her old age and final illness and that the plaintiff's daughter overheard a conversation in which the sister-in-law told plaintiff that she would pay her "at the end" is sufficient to be submitted to the jury in plaintiff's action to recover for personal services rendered the sister-in-law.

5. Damages § 16; Executors and Administrators § 27— action for personal services rendered decedent — instruction on damages

In an action to recover for personal services allegedly rendered to defendant's testate, plaintiff alleged that the reasonable value of her services was $100 per month from November 1954 through October 1959, and was $150 per month from November 1959 through November 1966 — a total of $18,700. In an additional paragraph and in the prayer for relief plaintiff alleged that she was damaged in the total sum of $18,700. The trial court ruled that plaintiff was limited to compensation for services rendered within the three years next preceding the death of decedent in 1966. The jury returned a verdict awarding $13,500 to plaintiff. *Held:* Plaintiff's recovery is limited to the per-month value of her services specifically alleged in the complaint, and trial court erred in failing to instruct the jury that plaintiff's maximum recovery would be an amount equal to $150 per month for not more than three years.

6. Pleadings § 36— allegata and probata

To establish a cause of action there must be both *allegata* and *probata*, and the two must correspond.

7. Pleadings § 36— recovery on theory of the complaint

Plaintiff must make out his case secundum allegata, and may recover, if at all, only on the theory of the complaint.

8. Pleadings § 2— statement of cause of action — general v. specific allegations

Where both general and specific allegations are made respecting the same matter, the latter control.

9. Pleadings § 7— prayer for relief

The prayer for relief is not a necessary part of the complaint; the relief to which plaintiff is entitled is to be determined by the facts alleged

in the complaint and established by the evidence, and not in the prayer for relief.

10. Executors and Administrators § 27— action for services rendered decedent — measure of damages

In an action to recover for personal services rendered a decedent, the measure of damages is the reasonable market value of such services.

APPEAL by defendant from *Martin, J.*, at the September 1968 Session of RUTHERFORD Superior Court.

This is an action for personal services allegedly rendered by plaintiff to defendant's testate. Plaintiff's evidence tended to show: Decedent, a retired school teacher and sister of plaintiff's husband, resided in the home of plaintiff and her husband from October 1954 until decedent's death in November 1966. Plaintiff's husband died in October 1959 after which decedent continued to live in the home with plaintiff. Decedent was 72 years old when she began living in plaintiff's home and was 83 when she died. She was in reasonably good health until 1964 when she fell and received injuries to her head. After that time, she did not leave the house often but was able to be up and around. She was able to make her own bed and sweep her own room until January 1966 when she suffered a stroke. Thereafter, she was unable to walk and her condition became progressively worse until her death. From the time of decedent's stroke until her death, plaintiff lifted her from her bed to her chair, prepared her meals, dressed her, washed and ironed her clothing, and bathed her. Plaintiff's daughter testified that she overheard a conversation between decedent and plaintiff and heard decedent tell plaintiff that she would pay her "at the end," that she might need her money while she was living.

Issues were submitted to and answered by the jury as follows:

"1. Did the Plaintiff, Nannie Mae Burns, perform services of value for Mary Cleo Burns during the last three years of the life of the said Mary Cleo Burns, under circumstances upon which an implied agreement arose that she was to receive compensation for said services?

ANSWER: Yes.

2. If so, what amount is the Plaintiff entitled to recover of the defendant for said services?

ANSWER: $13,500.00."

From judgment predicated on the verdict in favor of plaintiff, defendant appealed.

Hamrick & Hamrick by J. Nat Hamrick and J. A. Benoy for plaintiff appellee.

George R. Morrow and Carroll W. Walden, Jr., for defendant appellant.

BRITT, J.

Defendant's first assignment of error relates to the failure of the trial court to grant defendant's motions for nonsuit.

[1] The rule applicable to the case before us has been well established in this jurisdiction. In *Ray v. Robinson,* 216 N.C. 430, 5 S.E. 2d 127, in an opinion by Stacy, C.J., it is said: "It is established by a number of decisions, that in the absence of some express or implied gratuity, usually arising out of family relationship or mutual interdependence, services rendered by one person to or for another, which are knowingly and voluntarily received, are presumed to be given and accepted in expectation of being paid for, and the law will imply a promise to pay what they are reasonable worth. *Winkler v. Killian, supra* [141 N.C. 575, 54 S.E. 540]; *Callahan v. Wood,* 118 N.C., 752, 24 S.E., 542." The rule has been quoted with approval in numerous decisions, including *Johnson v. Sanders,* 260 N.C. 291, 132 S.E. 2d 582, and *McCraw v. Llewellyn,* 256 N.C. 213, 123 S.E. 2d 575.

[2] Our Supreme Court has held that the relationship of daughter-in-law does not raise the presumption that services performed while living within the family are gratuitous. *Lindley v. Frazier,* 231 N.C. 44, 55 S.E. 2d 815. The court has gone even further and held that there is no presumption that personal services rendered by an adult daughter to her father are gratuitous when such services are rendered after the daughter has married and left her father's house and established a home of her own. *Johnson v. Sanders, supra.* It follows that there is no presumption that the services rendered by plaintiff, a sister-in-law, in the instant case were gratuitous.

[2, 3] Although the plaintiff was not confronted with the presumption that the services rendered by her were gratuitous, the burden still rested upon her to show circumstances from which it might be inferred that the services were rendered and received with the mutual understanding that they were to be paid for. The *quantum meruit* must rest upon an implied contract. Nothing else appearing, such an inference is permissible when a person knowingly accepts from another services of value. *Lindley v. Frazier, supra.* We think that the evidence introduced by plaintiff was sufficient to

show circumstances from which it might be inferred that the services were rendered by plaintiff and received by decedent with the understanding that they were to be paid for.

[4] Defendant relies very strongly on *Lindley v. Frazier, supra,* in which the court held that the motion for nonsuit should have been allowed. The cases are clearly distinguishable. The assignment of error relating to defendant's motions for nonsuit is overruled.

[5] Defendant assigns as error the failure of the trial court to instruct the jury that the maximum recovery would be an amount equal to $150 per month, for not more than three years.

In her amended complaint, plaintiff alleged that the reasonable value of her services rendered to the decedent was $100 per month from November 1954 through October 1959, and the reasonable value of services rendered from November 1959 through November 1966 was $150 per month. The trial court ruled that plaintiff was limited to compensation for services rendered within three years next preceding the death of decedent. Although plaintiff excepted to this ruling, she did not appeal, therefore, that question is not before us and we do not pass upon the propriety of the trial court's ruling. We deem it appropriate to pass upon the question of whether plaintiff's recovery was limited to $150 per month for the three-year period in view of the court's ruling.

In addition to the specific allegations contained in paragraph 6 of the amended complaint and summarized above, in paragraph 8 plaintiff alleged that because of decedent's failure to keep her promises, "plaintiff has been damaged" in the total sum of $18,700. In her prayer for relief, plaintiff prayed for judgment against the estate of the decedent for the sum of $18,700. It will be noted that by calculating $100 per month from November 1954 through October 1959 and $150 per month from November 1959 through November 1966, the total is $18,700, the amount declared by plaintiff to be due her in paragraph 8 of the amended complaint and the amount asked for in the prayer for relief.

[5-9] It is well-established law in this State that to establish a cause of action there must be both allegata and probata, and the two must correspond. The plaintiff must make out his case secundum allegata, and may recover, if at all, only on the theory of the complaint. 6 Strong, N.C. Index 2d, Pleadings, § 36, pp. 368, 369, 370, and cases therein cited. Where both general and specific allegations are made respecting the same matter, the latter control. 71 C.J.S., Pleading, § 56, p. 143. The prayer for relief is not a necessary part

of the complaint and the relief to which plaintiff is entitled is to be determined by the facts alleged in the complaint and established by the evidence, and not in the prayer for relief. *Oil Co. v. Fair,* 3 N.C. App. 175, 164 S.E. 2d 482; 6 Strong, N.C. Index 2d, Pleadings, § 7, pp. 304, 305. Applying these principles to the instant case, we hold that plaintiff was limited to the specific amounts alleged in her amended complaint, and the trial court committed error in not limiting the amount of recovery to the per-month value of the services alleged in the amended complaint. The assignment of error is well taken and is sustained.

[10] Defendant also assigns as error the failure of the trial court to instruct the jury as to the proper measure of damage. The court instructed the jury that if they came to the second issue, their answer would be such amount, if any, as the plaintiff had satisfied them by the greater weight of the evidence was the reasonable fair market value of the services allegedly rendered the decedent during the last three years of her life. Plaintiff did not introduce any evidence showing the market value of the services rendered.

In *Cline v. Cline,* 258 N.C. 295, 128 S.E. 2d 401, an action was brought to recover for personal services rendered. As was the case here, plaintiff did not introduce evidence showing the market value of the services rendered. The holding of the court is well summarized in the sixth headnote as follows:

> "The damages recoverable on an implied contract to pay for personal services rendered decedent is the reasonable market value of such services, without considering the financial condition of the recipient or the value of such services to him, with the burden upon plaintiff to establish by evidence facts furnishing a reasonable basis for the assessment of the damages according to some definite and legal rule, and an instruction merely that the jury should answer the issue of damages in whatever amount the jury should find to be the reasonable value of the services must be held for error."

We think the holding in *Cline* is applicable to the facts in the instant case. The assignment of error is sustained.

We have considered the other assignments of error brought forward and argued in defendant's brief but deem it unnecessary to discuss them, as the questions raised probably will not recur upon a retrial of this action.

New trial.

MALLARD, C.J., and PARKER, J., concur.

KENNETH L. JARVIS v. MRS. CHARLES E. PARNELL

No. 6910SC125

(Filed 30 April 1969)

1. Fraud § 2— fraud in the factum and fraud in the treaty — defenses against third party

Fraud in the treaty, which renders an instrument voidable, is not available as a defense against an innocent third party; however, fraud in the factum, which renders an instrument completely void, is available as a defense against an innocent third party.

2. Principal and Agent § 4— proof of agency

In an action to recover on a promissory note executed by defendant's purported agent, where defendant denies that she authorized or approved the execution of the note on her behalf by the agent, the plaintiff has the burden of establishing the agent's power and authority as the defendant's express agent.

3. Bills and Notes § 19— maker's defense against assignee of a note — fraudulent misrepresentation in procurement of note

In plaintiff's action to recover on a promissory note executed to a third party by defendant's agent and attorney in fact, the defense of fraudulent misrepresentation in the procurement of the note is available to the defendant, and the plaintiff cannot maintain that he is an innocent purchaser of the note, where the recitals of agency on the note were sufficient to put plaintiff on notice to acquaint himself with the agent's authority, and since if it be assumed that plaintiff is the subrogee of the third party, as the pleadings suggest, defendant would be entitled to assert against plaintiff any defense available against the third party, including fraud.

4. Principal and Agent § 5— special agent — scope of authority

A special agent can only contract for his principal within the limits of his authority, and a third person dealing with such an agent must acquaint himself with the strict extent of the agent's authority and deal with the agent accordingly.

5. Principal and Agent § 5— agent dealing with commercial paper — scope of authority

Where the asserted power of an agent to indorse or otherwise deal with commercial paper is grounded upon a letter or power of attorney, such writing is to be strictly construed upon the question of whether and how far it bestows authority to such matters upon the agent.

FROM *Hobgood, J.*, 12 August 1968 Session, WAKE County Superior Court. Kenneth L. Jarvis (plaintiff) petitioned the Court of Appeals for a writ of *certiorari*. The petition was allowed on 4 October 1968.

The plaintiff instituted this civil action on 15 March 1968 against Mrs. Charles E. Parnell (defendant) to recover $21,400 with in-

terest from 21 November 1967 allegedly due under a certain promissory note. He alleged that Cepco Distributing Company (Cepco) was a North Carolina corporation with its principal office in Forsyth County, North Carolina; on 7 May 1965 Cepco issued a promissory note (Note I) in the amount of $80,000 to Sun Capital Corporation (Sun), a Pennsylvania corporation with its principal office and place of business in the State of Pennsylvania; Note I was executed by the plaintiff while acting in his capacity as the president of Cepco; on 7 May 1965 the defendant's husband, Charles E. Parnell (husband), issued a collateral promissory note (Note II) to Sun in the amount of $80,000 as security for Note I; on 6 May 1965 Fred G. Crumpler, Jr., (Crumpler) was given a power of attorney under an instrument executed by the defendant; pursuant to and acting within the scope of his authority under this power of attorney, Crumpler executed on 7 May 1965 a collateral promissory note (Note III) on behalf of the defendant as security for Note I; Note III, the note upon which this action is founded, was issued to Sun in the amount of $51,000; and on 7 May 1965 the plaintiff in his individual capacity issued a collateral promissory note (Note IV) to Sun in the amount of $20,000 as security for Note I. Copies of Notes I, II, III and IV were attached to the complaint as Exhibits "A", "B", "C" and "E", respectively. A copy of the power of attorney was attached to the complaint as Exhibit "D".

Plaintiff further alleged that Cepco defaulted in the payment of Note I; at the time of default there was an outstanding balance of slightly more than $33,000; as a result of this default, Sun instituted an action in the Federal District Court for the Western District of Pennsylvania and obtained a judgment of $21,400 against the plaintiff; this judgment was docketed in the Federal District Court for the Eastern District of North Carolina; and as a result of legal process issuing from the latter court, the plaintiff entered into a consent judgment, pursuant to which the plaintiff paid $21,400 to Sun on 21 November 1967. This consent judgment recited that the plaintiff's payment of $21,400 would be applied to and credited to separate judgments which Sun held against Cepco, the defendant, and her husband and that the remaining balance on those judgments would not be affected by the plaintiff's payment of $21,400 to Sun. A copy of this consent judgment was attached to the complaint as Exhibit "F". Plaintiff further alleged that the husband was insolvent.

On 9 April 1968 the defendant filed a demurrer to the complaint. It was alleged that the complaint failed to state a cause of action against her because the power of attorney authorized Crumpler as

attorney in fact to obligate the defendant as guarantor for a sum not to exceed $51,000 upon such instruments as her husband might execute to Sun and because the complaint and exhibits attached thereto revealed that Crumpler executed Note III as collateral security for Note I, not for Note II. However, the demurrer was not heard. Instead, a consent order under date of 7 May 1968 was entered, in accordance with which the plaintiff amended his complaint to allege that Crumpler executed Note III while acting as the defendant's express agent and duly constituted attorney at law (*sic*) and while acting within the scope of his employment and agency. The reference to the power of attorney, a copy of which had been attached to the complaint as Exhibit "D", was eliminated by this amendment. The amended complaint was filed on 17 May 1968.

The defendant filed an answer to the amended complaint on 31 May 1968. She alleged that while a power of attorney had been executed to Crumpler, he had not been authorized to guarantee on her behalf any obligation of Cepco to Sun. She further alleged that this power of attorney had been procured by fraud on behalf of Sun. The following was set out as a further answer and defense:

> "1. That Sun Capital Corporation through its servants, agents and employees represented to the Defendant that her husband had embezzled money of Cepco Distributing Company, had defrauded the company, was guilty of embezzlement and threatened that unless Defendant would guarantee her husband's indebtedness to Sun Capital Corporation in an amount of $51,000.00 that Sun Capital Corporation would have the Defendant's husband indicted and that he would go to prison resulting in humiliation to the Defendant and her children. That relying upon said representations, the Defendant executed the specific and limited power of attorney set out as Exhibit 'D' attached to Plaintiff's original Complaint. That the aforesaid representations made by Sun Capital Corporation to the Plaintiff were false. That said statements were material and knowingly made with the purpose and intent to deceive and induce and did deceive and induce the Defendant into guaranteeing an alleged obligation of her husband for which she was not liable. That as a result of said conduct on the part of Sun Capital Corporation she has been injured and damaged and by reason of said fraud she is entitled to have said power of attorney declared null and void and of no effect and by reason thereof she is not indebted to the Plaintiff herein in any amount whatsoever.
>
> 2. Defendant denies that Fred G. Crumpler, Jr. was ever au-

thorized as her agent to execute Exhibit 'C' attached to the Plaintiff's Complaint. However, if any acts on her part might conceivably be construed as authorization on her part to Fred G. Crumpler, Jr. to execute the said Exhibit 'C', said acts on her part were procured by the actionable fraud and misrepresentations of Sun Capital Corporation, its servants, agents and employees, all as set out in Defendant's Further Answer and Defense and because of said fraudulent conduct on the part of Sun Capital Corporation she is entitled to and does disaffirm any such alleged acts of Fred G. Crumpler, Jr."

On 9 July 1968 the plaintiff filed a demurrer to the further answer and defense on the ground that the allegations *supra* did not constitute a defense to his cause of action. He argued that the defendant had attempted to excuse the execution of Note III on the basis of fraud committed by Sun, a third party which is not a party to this action, in obtaining the execution of Note III.

On 16 August 1968 Judge Hobgood overruled the plaintiff's demurrer. The plaintiff then petitioned this Court for a writ of *certiorari.*

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

Blackwell, Blackwell, Canady, Eller & Jones by W. R. Jones, Jr., for defendant appellee.

CAMPBELL, J.

The only question presented for determination is: "Did the trial judge err in overruling the plaintiff's demurrer to the further answer and defense of the defendant?" We think that this question should be answered in the negative.

[1] It is not the plaintiff's contention that the defendant failed to properly plead fraud. It is his contention that, regardless of whether it was properly pleaded, fraud is not a valid defense and should, therefore, be eliminated from the pleadings. He argues that the fraud pleaded by the defendant was fraud in the treaty practiced by Sun, a third party which is not a party to this action, and that there is no allegation of the plaintiff's participation in or knowledge of such fraud. In support of his contention, the plaintiff cites *Furst v. Merritt,* 190 N.C. 397, 130 S.E. 40, where fraud in the treaty and fraud in the factum were discussed and their differences pointed out. Since the evidence there was sufficient to establish either fraud in

the treaty or fraud in the factum and since the issues submitted to the jury did not point out the differences between the two types of fraud, a new trial was ordered. The Supreme Court specifically held that fraud in the treaty, even if established, would not be available as a defense against the plaintiff because the plaintiff was an innocent third party and because fraud in the treaty would only make the instrument voidable. However, fraud in the factum, if established, would make the instrument completely void and this would be a defense against such an innocent third party.

[2, 3] The defendant asserts that by virtue of the fraud practiced upon her by Sun in the procurement of the power of attorney to Crumpler, such power of attorney was voidable. However, the plaintiff is suing upon Note III, which was allegedly executed by the defendant's express agent and duly constituted attorney at law (*sic*), Crumpler. The power of attorney is not the subject matter of this action. The defendant also asserts that she had never authorized or approved the execution on her behalf of Note III by Crumpler while acting as her agent. Under these circumstances, the plaintiff has the burden of establishing Crumpler's power and authority as the defendant's express agent and duly constituted attorney at law (*sic*). Because of this requirement, the plaintiff does not stand in the shoes of an innocent third party holding a note of a maker who had been induced to execute same by fraud.

[4, 5] Note III, which was payable to the order of Sun and which was issued by Crumpler at attorney in fact for the defendant, recited:

> "This note cannot be sold, assigned, transferred or negotiated to any person until after notice has been given to the maker hereof in accordance with an agreement of even date herewith, and is subject to the terms of an agreement of even date herewith between Cepco Distributing Company et al."

Since Note III showed that it was executed by Crumpler as attorney in fact, anyone acquiring it was on notice that it had been issued by an agent. Therefore, the plaintiff would be under an obligation to acquaint himself with the agent's authority, even if the plaintiff was an innocent third party purchaser of the note for value and without notice.

> "This is true because a special agent can only contract for his principal within the limits of his authority, and a third person dealing with such an agent must acquaint himself with the strict extent of the agent's authority and deal with the agent

accordingly." *Iselin & Co. v. Saunders,* 231 N.C. 642, 58 S.E. 2d 614.

"Where the asserted power of an agent to indorse or otherwise deal with commercial paper is grounded upon a letter or power of attorney, such writing is to be strictly construed upon the question of whether and how far it bestows authority as to such matters upon the agent." 2 C.J.S., Agency, § 112, p. 1305.

Note III was not issued to the plaintiff. It was issued to Sun as collateral security for Note I.

[3] Neither the complaint nor the amended complaint reveal the circumstances under which the plaintiff became the owner of and entitled to Note III or indicate that the plaintiff is an innocent third party purchaser for value and without notice. On the contrary, the complaint and amended complaint are much more susceptible of the interpretation that the plaintiff is the subrogee of the rights of Sun in and to Note III. If the latter is true, the plaintiff would stand in the position of Sun and the defendant would be entitled to raise any defenses which she might have against Sun, including fraud. We do not think it unreasonable to assume that the plaintiff, as the president of Cepco, knew of all negotiations, and the consent judgment (Exhibit "F") showed that Sun still retained some claims against the defendant.

The plaintiff concedes that the defendant was entitled to, and has in fact, set up the defense of fraud against Sun. Nevertheless, the plaintiff attempts to avoid any connection between himself and Sun for the purposes of this action. However, this attempt has not succeeded. *Furst v. Merritt, supra,* the only case relied upon by him, is completely distinguishable.

We are of the opinion and so hold that Judge Hobgood was correct in overruling the demurrer.

Affirmed.

MORRIS and PARKER, JJ., concur

ROGER DALE CHAPMAN, PETITIONER v. STATE OF NORTH CAROLINA, RESPONDENT

AND

STATE OF NORTH CAROLINA v. ROGER DALE CHAPMAN

No. 6927SC138

(Filed 30 April 1969)

1. Constitutional Law § 32; Criminal Law § 21— preliminary hearing — right to counsel

Defendant's constitutional rights were not violated by failure of the court to appoint counsel to represent him at his preliminary hearing, the preliminary hearing not being a critical stage of the proceeding where defendant was not required to plead to the charges against him, defendant made no statement and did not testify at the hearing, defendant was allowed to cross-examine the State's witnesses, and no record of anything said or done at the hearing was offered at defendant's trial.

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

In this prosecution for breaking and entering and safecracking, defendant's motion for nonsuit is properly denied where the State's evidence tends to show that a movie theater was broken and entered, that a safe therein was broken open and the money taken, that the combination dial was partially knocked off and the safe had been prized or ripped, that defendant's fingerprints were found on the safe, and that defendant went toward the vicinity of the breakin on the night in question and returned two hours later with approximately $200.

3. Criminal Law § 60— fingerprints — G.S. 114-119

G.S. 114-119 does not require the State to establish that fingerprints taken by the arresting officer were authorized by the sheriff or chief of police in order to render such fingerprints admissible on trial.

4. Safecracking— instructions

In this prosecution for safecracking, the case was submitted to the jury under a clear explanation of the applicable principles of law when the charge is considered as a whole.

APPEAL by defendant from *Snepp, J.*, 9 September 1968 Session, LINCOLN Superior Court.

Defendant was charged in a bill of indictment with the felony of breaking and entering, and with the felony of safecracking.

Prior to trial, defendant filed a petition in the Superior Court alleging that his constitutional right to counsel had been denied him at his preliminary hearing, and praying that all charges against him be dismissed because of this. The petition was heard by Judge Snepp before defendant was placed upon trial. After hearing defendant's evidence and argument of counsel, Judge Snepp entered an order

dismissing the petition. Defendant excepted to the entry of this order, and entered a plea of not guilty to the charges of breaking and entering, and safecracking.

From verdicts of guilty, and judgments entered thereon; and from the dismissal of his pretrial petition, defendant appeals.

Robert Morgan, Attorney General, by James F. Bullock, Deputy Attorney General, for the State.

Randall & Clark, by Charles D. Randall, for the defendant.

BROCK, J.

Defendant was represented upon his pretrial petition, upon his trial, and upon this appeal by court-appointed counsel, and Lincoln County will pay the costs of the record.

Defendant's appeal from the dismissal of his pretrial petition:

[1] Defendant's primary argument is that a preliminary hearing is a critical stage of the proceedings, and that he was entitled to counsel at that time. It seems that *Gasque v. State*, 271 N.C. 323, 156 S.E. 2d 740, should have laid to rest any argument upon this point. While it may be true that the facts in *Gasque* are different from the facts of this case, the principles are the same. In this case defendant was arrested on 18 July 1968 and was advised at the time of his arrest that he was entitled to counsel. He told the arresting officer that he did not want appointed counsel, that he would get his own. Nevertheless he made no effort to contact an attorney until the morning of 20 July 1968. Upon his request on the 20th he was taken from his cell to the lobby of the jail in order to allow him to use the telephone. He talked with one attorney on the telephone, and unsuccessfully called to talk with another. The preliminary hearing was held during the afternoon of 20 July 1968, and defendant now complains that it should not have been held until 22 July 1968. When defendant was taken to the preliminary hearing before a justice of the peace, he again asked to call an attorney, and one of the officers called the attorney requested by defendant. For reasons not disclosed by the record neither of the attorneys appeared.

Defendant was not required to plead to the charges, he made no statement, and did not testify. He was allowed to cross-examine the State's witnesses. No record of anything done or said at the preliminary hearing was offered upon defendant's trial. The only prejudice urged by the defendant to have resulted from his failure to have

counsel is that there is a "possibility that a witness for the State may have received some information from the defendant having to conduct the cross-examination of the witnesses without the aid of counsel."

Upon the principles and reasoning clearly set forth in *Gasque v. State, supra,* the order denying and dismissing defendant's pre-trial petition is affirmed.

Defendant's appeal from the verdicts and judgments entered thereon:

[2] The State's evidence tended to show the following: During the night of 17 June 1968 the building used by Century Theater, a motion picture theater in the town of Lincolnton, was broken into, the manager's private office was broken into, and the safe containing approximately two hundred dollars was broken open, and the money taken. The combination dial had been partially knocked off, and "the safe had been prized or ripped." Latent fingerprints were taken from the safe and forwarded to the Identification Laboratory of the State Bureau of Investigation and were found to match fingerprints of defendant already on file, and also were found to match fingerprints of the defendant taken later at the time of his arrest. The State's evidence further tended to show that on the night in question (17 June 1968) defendant came to Lincolnton with his girl friend about 11:15 p.m. That they parked behind the hospital and defendant went "uptown," leaving his girl friend in the car. Defendant returned in about two hours with approximately two hundred dollars, and they went back to Newton to their motel. Defendant was an escapee from the North Carolina Department of Correction, and was driving a stolen automobile.

Defendant assigns as error the denial of his motion for judgment of nonsuit. Although circumstantial to some degree, we hold the evidence was sufficient to require submission of the case to the jury. This assignment of error is overruled.

[3] Defendant assigns as error the trial judge's action in overruling his objection to the admission into evidence of the ink impressions of defendant's fingerprints which were taken by the arresting officer at the time of defendant's arrest. Defendant asserts that G.S. 114-19 prohibits the use of these fingerprints unless the chief of police or sheriff took them, or authorized them to be taken. He argues that there has been no showing that the chief of police or sheriff authorized the arresting officer to take the ink impressions.

G.S. 114-19, which was enacted in 1965, has its origin in G.S.

148-79, which was originally enacted in 1925 and which was repealed in 1965 upon enactment of G.S. 114-19. As can be seen from the reading of Article 7 of G.S., Chap. 148 (G.S. 148-74 through 148-81), and from a reading of Article 4 of G.S., Chap. 114 (G.S. 114-12 through 114-19), the old and the new sections are concerned primarily with compiling records and statistics at one central point. There is nothing about the old or the new section which would lend itself to an interpretation that a new rule of evidence is thereby created.

No constitutional question is involved or argued here by the defendant, and no question is raised as to whether the ink impressions were properly identified as those of defendant taken by the arresting officer. We hold that G.S. 114-19 does not prohibit the use in evidence on trial of the prints of defendant taken by the arresting officer, even though there is no factual evidence to establish that such fingerprinting was authorized by the sheriff or chief of police. This assignment of error is overruled.

[4] Defendant next assigns as error a portion of the judge's charge to the jury. When taken out of context, the sentence assigned as error by defendant is an incomplete instruction; but when added to the sentence immediately preceding it, the explanation of the offense is full and clear. Certainly defendant cannot expect the trial judge to say everything in one sentence. The charge must be read as a whole, and when so done it is clear that the case was submitted to the jury under a clear explanation of the applicable principles of law. This assignment of error is overruled.

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

No error.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES R. WARREN

No. 6929SC67

(Filed 30 April 1969)

1. Escape § 1— testimony as to authority of defendant to leave work gang

In this prosecution for escape from a prison work gang, the court did not err in admitting testimony by the assistant prison superintendent that

"the defendant was not authorized to leave the custody of the foreman to which he had been assigned" where the witness also testified that he had the duty of assigning each inmate to a work detail, that he assigned defendant to a work detail on the date in question, and that the foreman does not have authority to excuse a prisoner from work or to send him outside the immediate work area.

2. Criminal Law § 86; Witnesses § 8— cross-examination of defendant as to prior convictions

A defendant who elects to testify in a criminal case may be cross-examined as to his prior convictions for the purpose of impeaching him as a witness.

3. Criminal Law § 86; Witnesses § 8— cross-examination of defendant as to prior convictions

In this prosecution for escape, the trial court did not commit prejudicial error in allowing the solicitor to ask defendant a question concerning a charge against defendant in another state after defendant had stated that the charge had been dismissed, the extent of cross-examination for the purpose of impeachment resting largely in the discretion of the trial judge.

4. Escape § 1— sufficiency of evidence

The evidence *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of a misdemeanor escape in violation of G.S. 148-45.

5. Escape § 1— justification for escape — deprivation of procedural rights

In this prosecution for escape, the trial court properly refused defendant's request for instructions to the effect that a gross deprivation of procedural rights would constitute justification for escaping from a criminal sentence so as to preclude a conviction for escape, since the deprivation of procedural rights before or during imprisonment does not constitute justification for an escape by a prisoner serving a sentence imposed by authority of law even though the sentence is later held to be irregular or voidable.

APPEAL by defendant from *Thornburg, S.J.,* Special August 1968 Session of Superior Court of POLK County.

Defendant was tried by a jury upon a bill of indictment charging him with the crime of escape from the North Carolina State Prison System while serving a sentence imposed on him for the crime of nonsupport, which is a misdemeanor. The verdict of the jury was guilty as charged.

From the judgment imposing a prison sentence of one year to begin at the expiration of the sentence or sentences then being served by the defendant, he appeals to the Court of Appeals.

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

McCown, Lavendar & McFarland by William H. Miller for defendant appellant.

MALLARD, C.J.

The pertinent parts of G.S. 148-45 relating to the misdemeanor of escape read as follows:

> "Any prisoner serving a sentence imposed upon conviction of a misdemeanor who escapes or attempts to escape from the State prison system shall for the first such offense be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than three months nor more than one year."

The State offered evidence tending to show that the defendant was tried in March 1968 in the Superior Court of Burke County for the crime of nonsupport and was sentenced to prison for eight months. Commitment was issued, and subsequently, the defendant was imprisoned in the Henderson County Unit No. 6524 of the State Prison System. On 2 May 1968 while working with a work crew in Polk County, the defendant escaped from the custody of the prison authorities.

Defendant as a witness offered evidence which tends to show that he had been tried and convicted in March 1968 in Burke County Superior Court for nonsupport of his children and that "I left the work gang because my constitutional rights were violated. The constitutional rights of mine that have been violated were double jeopardy, discrimination, common law, State law, and civil rights law. My civil rights are that I am not supposed to be discriminated against, nor my mail violated, or putting me in double jeopardy of a felony for which I am not serving time."

[1] The defendant contends that the trial judge committed error in admitting testimony of the State's witness Bain "that the defendant was not authorized to leave the custody of the foreman to which he had been assigned," and "that the defendant was not authorized to go into Rutherford County from Polk County." This contention is without merit. The witness Bain testified without objection that he, as Assistant Superintendent of Henderson County Prison Unit No. 6524, had the duty of assigning each inmate to a working detail. That he did assign the defendant to work in Polk County on a rural road off North Carolina Highway No. 9 on the 2nd day of May

1968. The witness Bain further testified that "(t)he man I assign each inmate to does not have authority to excuse him from work or to send him outside the immediate work area."

[2] Defendant contends that the trial judge committed error in overruling defendant's objections to the solicitor's question concerning previous convictions. The question was: "Mr. Warren, what have you been convicted of?" The trial judge overruled the objection, and the defendant excepted. The trial judge did not commit error in so doing. If there is any law that may be said to be "elementary law" in North Carolina, among such is the rule that a defendant who elects to testify in a criminal case may be cross-examined as to his prior convictions for the purpose of impeaching him as a witness. 7 Strong, N.C. Index 2d, Witnesses, § 8; Stansbury, N.C. Evidence 2d, § 112.

[3] Defendant bases his assignment of error no. 6 on his exception no. 8 taken while the solicitor for the State was cross-examining the defendant with respect to his criminal record. The following occurred while questions were being asked the defendant by the solicitor:

"Q. All right, how about Long Beach, California?

A. That case has been dismissed.

Q. Sir?

A. That case has been dismissed.

Q. I ask you if you didn't have a conviction for crime against children — (interrupted)

A. No, sir, I did not, no, sir.

(Continued) In Long Beach, California, February 19th, 1954?

OBJECTION OVERRULED EXCEPTION No. 8

A. No, sir."

There was no objection by the defendant to the first two questions above stated. The first question, nothing else appearing, does not relate to the defendant's criminal record. However, the defendant interpreted it to refer to some case. The only reference in the above questions or answers to a crime is in the third question, the one objected to, and the defendant, according to the record, interrupted the solicitor before he finished his question in his eagerness to deny it. It is also the law in North Carolina that the extent of cross-examination for the purposes of impeachment rests largely in the discretion of the trial judge. 7 Strong, N.C. Index 2d, Witnesses, § 8. No prejudicial error is shown here.

[4] Defendant contends that the trial judge committed error in failing to allow defendant's motion for judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence. This assignment of error is overruled. There was ample evidence to require the submission of the case to the jury on the charge of unlawful escape in violation of G.S. 148-45.

[5] Defendant assigns as error the failure of the trial judge to instruct the jury as requested in writing by the defendant as follows:

> "The deprivation of procedural rights may constitute particular grounds of justification for escaping from confinement under a criminal sentence so as to preclude conviction for the separate criminal offense of escape; as to the facts establishing the circumstances relied upon as showing justification, the court instructs you that the gross deprivation of procedural rights would constitute such grounds, and circumstances which would be justification for escaping."

The defendant asserts as justification for his request for such instruction that his constitutional rights have been violated.

The deprivation of procedural rights before or during imprisonment does not constitute grounds for, or justification for an escape by a prisoner serving a sentence imposed by authority of law. This is so even though the sentence the prisoner was serving at the time was later held to be irregular or voidable. A prisoner in such case may not put himself in defiance of the duly constituted authorities by escaping from custody but must seek redress in compliance with due process. *State v. Goff,* 264 N.C. 563, 142 S.E. 2d 142.

Defendant attempts to distinguish *State v. Goff, supra,* from this case by arguing that the defendant Warren attempted, through legal process, to obtain review of his conviction, that he filed a petition with this Court, and that he wrote the Attorney General in requesting assistance in procuring counsel and perfecting an appeal. We think that the principles of law relating to escape enunciated in the *Goff* case are applicable to the case before us. In *Goff,* the defendant, who was serving a sentence for felonious assault, escaped. The judgment and the sentence in the felonious assault case were vacated by the Supreme Court on the ground that the defendant had not been represented by counsel, and a trial *de novo* was ordered. The Court held that the defendant could be tried and sentenced on the charge of escape irrespective of the outcome of the new trial ordered in the felonious assault case.

Defendant also cites in support of his contention the West Vir-

ginia case of *State v. Boles,* 142 S.E. 2d 55, which holds that an escape by a prisoner from imprisonment under a void judgment does not constitute a crime. We do not agree that such is the law in North Carolina. The Supreme Court of North Carolina in the *Goff* case has held otherwise. See also *Boydston v. Wilson,* 365 F. 2d 238 (1966).

Defendant also raises other questions by assignment of error. We have carefully considered each of them, find them to be without merit, and deny them.

No error.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. EDNA ROYSTER BARNES AND SIMS MARSH

No. 6926SC64

(Filed 30 April 1969)

1. Criminal Law § 98— witness taken into custody by court order

If a witness is taken into custody during the course of the trial under such circumstances as to lead the jury to the conclusion that the judge was of the opinion that the witness was guilty of perjury, such action constitutes prejudicial error as being an expression of opinion by the court as to the credibility of the witness.

2. Criminal Law § 98— defendants taken into custody during trial by court order

In this prosecution for breaking and entering and larceny, the trial court properly denied defendants' motion for a new trial made on the ground that during the progress of the trial the defendants were taken into custody by order of the court where the record shows that defendants were taken into custody outside of the presence of any member of the jury and during the noon recess, nothing in the record indicates that the trial judge said or did anything in the presence of any member of the jury which would inform the jury that defendants had been placed in custody by court order, there is nothing in the record to show that the jury heard or observed anything from which they could gain the impression that the trial judge was indicating any opinion as to defendants' guilt, and defendants did not take the stand at the trial.

3. Criminal Law § 98— custody of accused during trial

The trial court has the inherent power to assure itself of the presence of the accused during the course of the trial, and for this purpose has

the discretion to direct that an accused previously free under bond be taken into custody during the trial, subject to the limitation that this must not be done in such manner or under such circumstances as to convey to the jury the impression that the court is expressing an opinion as to the probable guilt of the accused or as to his credibility if he becomes a witness.

4. Criminal Law §§ 155.5, 159— failure to comply with Rules — dismissal of appeal

The appeal is subject to dismissal where the record on appeal was not docketed within the time prescribed by Rule 5 and there is no appendix to appellants' brief as required by Rule 19(d)(2).

5. Criminal Law § 154— appeals by codefendants — one record on appeal

Codefendants appealing from the same judgment and trial should file only one record on appeal in the Court of Appeals unless valid reason appears for filing separate records.

APPEAL by defendants from *Falls, J.*, 5 August 1968, Schedule "A" Criminal Session of MECKLENBURG Superior Court.

The two defendants, Barnes and Marsh, were jointly tried with one Thomas Garnett on their pleas of not guilty to a single bill of indictment which charged all three defendants with (1) felonious breaking and entering and (2) felonious larceny. The jury found all defendants guilty as charged. From judgment sentencing each defendant to prison for a term of ten years on the first count and for not less than nine nor more than ten years on the second count, all defendants appealed, assigning errors.

Attorney General Robert Morgan and Staff Attorney (Mrs.) Christine Y. Denson for the State.

Peter A. Foley for defendant appellants.

PARKER, J.

Reference is made to the opinion of this Court filed this date in *State v. Garnett,* which was an appeal by a codefendant from judgment entered in the same trial. Insofar as appellants Barnes and Marsh make the same assignments of error as were made in the *Garnett* appeal, we find no prejudicial error for the reasons stated in that opinion.

[2] In addition to the assignments of error which were made in the *Garnett* appeal, the appellants Barnes and Marsh assign as error the refusal of the trial court to grant their motion for a new trial made on grounds that, during the progress of the trial, the two de-

fendants involved in this appeal had been taken into custody by order of the court. Appellants contend that thereby they had been prejudiced in the eyes of the jury, citing *State v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568, and *State v. McNeill,* 231 N.C. 666, 58 S.E. 2d 366.

In *State v. Simpson, supra,* the defendant and two of his witnesses were taken into custody in the courtroom in the presence of some members of the jury during noon recess of court. When court resumed, the jury being in the box, the defendant and his two witnesses were brought into the courtroom in custody of the sheriff. Later in the day the court instructed the solicitor to draw indictments against the defendant and his two witnesses for perjury. On appeal, a new trial was ordered because of the impeachment by the court of the defendant's testimony and that of his witnesses. The opinion of the Supreme Court stated that "(t)his was done, first, by ordering the defendant and his two witnesses into custody during the trial, which action by the court came to the attention of the jury trying the case, . . . and, secondly, by the manner in which the court's charge was given to the jury." In *State v. McNeill, supra,* immediately after a witness for the defendant had testified, the court ordered the sheriff to take the witness into custody. This was held to be prejudicial error as impeaching the credibility of the witness in the eyes of the jury.

In *State v. McBryde,* 270 N.C. 776, 155 S.E. 2d 266, as one of the defendant's chief witnesses stepped down from the witness stand, the court, in the presence of the jury, audibly told the witness not to leave the courtroom. Subsequently, during argument of counsel to the jury, the judge while sitting upon the bench had a conversation with the sheriff, heard only by the sheriff and the judge, and immediately thereafter the sheriff left the courtroom and took the witness into custody outside the courtroom, brought him back into the courtroom under custody, and placed him in the prisoner's box in the presence of the jury. On appeal, this was held to be prejudicial error entitling defendant to a new trial. The court, in an opinion by Branch, J., said:

> "The State correctly contends that the circumstances of the case determine whether it is prejudicial to defendant for the trial court to order a witness into custody in the presence of the jury. *State v. Wagstaff, supra.* It is not necessary that the trial judge audibly in so many words order the witness into custody. Here, the witness Parker was told by the trial judge not to leave the courtroom, and shortly thereafter he was placed

in custody in the prisoner's box in plain view of the jury. Parker was defendant's chief witness as to his principal defense. The words of the trial judge, coupled with his conference with the sheriff and the ensuing action by the sheriff in placing the prisoner in custody would unerringly lead the jury to the conclusion that the witness was guilty of perjury or of some other crime, which could only result in weakening his testimony in the eyes of the jury."

[1] These cases establish that if a witness is taken into custody during the course of the trial under such circumstances as to lead the jury to the conclusion that the judge was of the opinion that the witness was guilty of perjury, such action constitutes prejudicial error as being an expression of opinion by the court as to the credibility of the witness.

[2] In the present case the only reference in the record which indicates that the appellants were placed in custody during the course of the trial is contained in the statement of their counsel made to the court as the basis for the motion for a new trial and in the court's response to that motion. This clearly discloses that the appellants had been taken into custody outside of the presence of any member of the jury and during the noon recess of court. Nothing in the record indicates that the trial judge said or did anything in the presence of any member of the jury which would inform the jury that the appellants had been placed in custody by an order of the court. It is not unusual for defendants in criminal cases to be in custody while they are being tried. It is not even clearly evident from the present record that the jury was ever aware that appellants had been placed in custody. Certainly nothing in the record justifiably supports the conclusion that the jury heard or observed anything from which they could gain the impression that the trial judge was indicating any opinion as to the guilt of the appellants.

[3] It should also be noted that the appellants elected not to take the stand. Therefore no question as to their credibility was presented. It is recognized that the court has inherent power to assure itself of the presence of the accused during the course of the trial. For this purpose the trial judge has discretion to direct that an accused previously free under bond be taken into custody during the course of the trial. *State v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39. The only limitation is that this must not be done in such manner or under such circumstances as to convey to the jury the impression that the court is expressing an opinion as to the probable guilt of the accused or as to his credibility if he becomes a witness. Nothing in

the record would indicate that this occurred during the trial here under review. Since the record is barren of the reasons which prompted the court's action in ordering appellants into custody, there is no basis for any contention, and appellants make none, that the court abused its discretion.

[4, 5] The judgment here appealed from was entered 13 August 1968. The record on appeal was docketed in this Court on 25 November 1968. No order extending the time to docket the appeal appears in the record. Rule 5 of the Rules of the Court of Appeals. Evidence was submitted under Rule 19(d)(2). There is no appendix to appellants' brief. For failure to comply with the rules of this Court, this appeal is subject to dismissal. *State v. Garnett, supra.* Furthermore, no valid reason appears for filing by these appellants of a separate record on appeal from the same judgment and trial as was presented in the appeal by their codefendant Garnett. The unlimited right of appeal which our law grants to defendants sentenced in criminal proceedings and the provision by which the public must bear the expense of such appeals by indigent defendants, imposes on their court-appointed counsel the obligation to create no greater expense to the public in duplicating records and briefs than is reasonably required to protect the interest of their clients.

As in *State v. Garnett, supra,* we have not dismissed the present appeal but have considered it fully on its merits, and find

No error.

MALLARD, C.J., and BRITT, J., concur.

FRANK KILBY v. JESSE WILTON DOWDLE AND CAROLINA TRUCK & BODY COMPANY, INC.

No. 6928SC38

(Filed 30 April 1969)

1. Appeal and Error § 6— orders appealable — jurisdictional question

An appeal lies immediately from refusal to dismiss a cause for want of jurisdiction.

2. Courts § 2— authority of court to determine jurisdiction

In an action in the superior court to recover for personal injuries, the court has jurisdiction to pass upon defendant's plea in bar that the Industrial Commission had exclusive jurisdiction of the claim.

3. Appeal and Error § 57— review of findings of fact

Findings of fact by the court which are supported by competent evidence are binding and conclusive on appeal, notwithstanding there was evidence *contra.*

4. Master and Servant § 60— workmen's compensation — injuries compensable — employee's personal mission

Trial court's conclusions that employee was a guest passenger in his employer's truck at the time he was injured, and not an employee acting within the course and scope of employment, and that the injuries were not compensable under the Workmen's Compensation Act, *are held* proper upon findings of fact that (1) the plaintiff traveled to another state for the purpose of visiting relatives, (2) his employer's plant manager offered to have a fellow employee bring plaintiff back on the return trip, (3) the fellow employee would have made the trip at the same time on the same route regardless of plaintiff's presence, (4) it was not the employer's policy to have two drivers or a relief driver on such a trip, and (5) at the time of the accident plaintiff was not performing any services of benefit to his employer.

APPEAL by defendant Carolina Truck & Body Co., Inc. from *McLean, J.,* at the 24 June 1968 Session of BUNCOMBE Superior Court.

Plaintiff filed his complaint 29 June 1967, alleging that he was a guest passenger in a truck operated by defendant Dowdle as agent for defendant Carolina Truck & Body Co., Inc. (Carolina), that the truck was traveling south on U. S. Highway 52 in Madison County, Kentucky, and that he (plaintiff) sustained serious injury when the truck overturned due to the driver's negligence. Plaintiff alleged numerous acts of negligence on the part of the defendants, including unreasonable speed and failure to obey a stop sign.

Defendant Carolina filed answer 21 August 1967, denying the material allegations of the complaint. It also alleged, as a plea in bar, that the plaintiff at the time of the accident was an employee of Carolina and that the Industrial Commission had exclusive jurisdiction of the claim.

The plea in bar was heard by McLean, J., who made findings of fact substantially as follows: Prior to 12 June 1966, plaintiff was a truck repairman and mechanic employed by the defendant Carolina at its place of business in Asheville, N. C., and compensated at an hourly rate. On 10 June 1966, at the conclusion of his normal workday, plaintiff went to Georgetown, Kentucky, for the purpose of visiting relatives, traveling part of the way as guest of a fellow employee and part of the way by bus. Before plaintiff left Carolina's premises, its plant manager, upon learning of the proposed trip, offered to have defendant Dowdle stop at Georgetown, on his way

back from Pontiac, Michigan, and pick up plaintiff in order to save plaintiff the bus trip back to Asheville. At the time of the offer, the manager did not request plaintiff to perform any services on the return trip. Plaintiff requested no compensation for the return trip. Stopping at Georgetown, Kentucky, involved no deviation from the normal route followed from Pontiac to Asheville, and defendant Dowdle would have made the trip at the same time and on the same route regardless of plaintiff's presence. It was not the policy of Carolina to have two drivers on such a trip or to have relief drivers along the way. At the time of the accident on Sunday, 12 June 1966, plaintiff was not performing any services of benefit to Carolina. The trip to Kentucky by the plaintiff was neither consistent nor connected with Carolina's business of policy. The court concluded that the plaintiff was a guest passenger and not an employee acting within the course and scope of employment while riding in the vehicle of Carolina on 12 June 1966, that the plaintiff and Carolina were not bound by the Workmen's Compensation Act at the time of the injury, and that the injuries were not compensable under the Workmen's Compensation Act. The court overruled Carolina's plea in bar and ordered the cause set for trial. Carolina excepted to each finding of fact and conclusion of law and appealed.

Gudger & Erwin by Samuel J. Crow for plaintiff appellee.

Uzzell & DuMont by Harry DuMont for defendant appellant.

BRITT, J.

[1] An appeal lies immediately from refusal to dismiss a cause for want of jurisdiction. 1 Strong, N.C. Index 2d, Appeal and Error, § 6, p. 118.

[2] Carolina contends that the superior court did not have jurisdiction to pass upon the plea in bar; that the Industrial Commission had exclusive jurisdiction to determine if plaintiff at the time of the injury came under the provisions of the Workmen's Compensation Act. We think this case is governed by the decision in *Burgess v. Gibbs,* 262 N.C. 462, 137 S.E. 2d 806. In that case, the superior court had concluded, in a situation bearing some similarity to the one at hand, that the plaintiff was an employee subject to the Workmen's Compensation Act and had dismissed the action. Parker, J. (now C.J.), noted that "[w]hen the trial judge in the absence of the jury heard and decided all questions relating to the court's jurisdiction to entertain the instant action, he followed the sound rule that every court necessarily has inherent power to inquire into, hear and

determine the questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction. (Numerous citations.)" We hold that the superior court did have jurisdiction to pass upon the plea in bar.

[3] Carolina's assignments of error to the court's findings of fact are overruled. Although the evidence was in conflict on several crucial points, among which were whether plaintiff was to receive compensation for the trip and whether plaintiff was to render services to Carolina on the trip, competent evidence sufficient to support the findings of fact was introduced. Consequently, the findings of fact are binding and conclusive upon us, notwithstanding there was evidence *contra. Burgess v. Gibbs, supra.*

[4] Carolina's assignments of error to the court's conclusions of law are overruled. The conclusions of law made by the court, based on the facts found, were correct and comply fully with the rationale set out in *Humphrey v. Laundry,* 251 N.C. 47, 110 S.E. 2d 467. Here, the trip by the plaintiff bore no relation to the business being performed by Carolina. There was no question but that plaintiff would not have made the trip, except for his personal business. The work of Carolina in no way created a necessity for this trip by the plaintiff.

The plea in bar was properly overruled, and the judgment of the superior court is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA EX REL BROUGHTON HOSPITAL v. JOHN MORRIS HOLLIFIELD, GUARDIAN OF PAUL CONLEY, INCOMPETENT

No. 6929SC136

(Filed 30 April 1969)

1. Asylums; Insane Persons § 5— action for treatment and maintenance in State hospital

An action under G.S. 143-121 to recover for treatment and maintenance of an incompetent at a State hospital need not be instituted while the patient is receiving such treatment and maintenance but may be brought after the patient has left the State hospital, the State not being relegated after the patient leaves the hospital to an action under G.S. 143-126 against the patient's estate.

2. Asylums; Insane Persons § 6— action for treatment and maintenance in State hospital — retention of funds for support of incompetent

In an action under G.S. 143-121 to recover for treatment and maintenance of an incompetent at a State hospital, it is not required that sufficient funds be set aside and retained by the incompetent for his future support and maintenance and for that of members of his family who are dependent upon him before the State is entitled to recovery.

APPEAL from *Martin, J. (Harry C.),* September-October Session 1968, MCDOWELL County Superior Court.

The State of North Carolina (plaintiff), on behalf of Broughton Hospital (hospital), instituted this civil action against John Morris Hollifield (defendant), the guardian for Paul Conley, an incompetent (incompetent). Plaintiff sought to recover $15,120.99 for the treatment and maintenance of incompetent at hospital for intermittent times from 9 April 1931 to 31 May 1966. An itemized and verified statement, which was attached to the complaint as Exhibit One, showed the periods during which incompetent was supported, maintained and treated at hospital and the monthly charges therefor, which totaled $15,120.99.

Defendant filed an answer setting up the defense that incompetent was transferred on 31 May 1966 from hospital to a licensed private nursing home in McDowell County where he is now a patient and that he is, therefore, no longer a patient or inmate in hospital. Defendant set out that incompetent is 59 years of age; he has a life expectancy of at least sixteen years; and the custodial care, support and maintenance for the remainder of his life will cost at least $2,000 per year. Defendant asserts that the total value of incompetent's estate is not in excess of $15,000.

The action was originally instituted in Wake County Superior Court. However, on defendant's motion to change venue for the convenience of witnesses, the action was moved by mutual agreement to McDowell County Superior Court, where it was tried before a jury.

Judge Martin submitted one issue to the jury. "What amount, if any, is the plaintiff entitled to recover of the defendant?" The jury answered "$5,000.00." However, the verdict was set aside upon plaintiff's motion. Judge Martin then made findings of fact to the effect that the itemized and verified statement (Exhibit One) showed the monthly rate of charge, which was fixed by hospital's board of directors and which covered the period of confinement from 9 April 1931 to 31 May 1966; the total of $15,120.99 was predicated upon this rate of charge; and defendant had offered no evidence to show

any error in the calculation of the amount due, in the period of confinement, or in the crediting of any payments. Judge Martin thereupon entered a judgment in accordance with G.S. 143-118 that plaintiff recover of defendant $15,120.99. Defendant excepted and appealed to this Court.

Attorney General Robert Morgan by Staff Attorney L. Philip Covington for plaintiff appellee.

William C. Chambers for defendant appellant.

CAMPBELL, J.

[1] Defendant's first contention is that a State institution, such as hospital, may institute a civil action for treatment and maintenance only during the period of time when the patient is actually receiving such treatment and maintenance. It is argued that once a patient leaves the State institution, the action for treatment and maintenance may be instituted only after the patient's death. In support of this position, defendant relies upon G.S. 143-121, which provides:

> *"Action to recover costs.* — Immediately upon the fixing of the amount of such actual costs, as herein provided, a cause of action shall accrue therefor in favor of the State for the use of the institution in which such patient, pupil or inmate is receiving training, treatment, maintenance or care, and the State for the use of such institution may sue upon such cause of action in the courts of Wake County, or in the courts of the county in which such institution is located, against said patient, pupil or inmate, or his parents, or either of them, or guardian, trustee, committee, or other person legally responsible therefor, or in whose possession and control there may be any funds or property belonging to either the said pupil, patient or inmate, or to any person upon whom the said patient, pupil, or inmate may be legally dependent, including both parents."

Defendant relies specifically upon the words "is receiving" in the above statute. It is his position that, since incompetent is no longer "receiving training, treatment, maintenance or care" from hospital, plaintiff cannot maintain the present action and that, since no civil action was commenced on or before 31 May 1966, plaintiff is relegated to bringing an action under G.S. 143-126, which provides:

> *"Death of inmate; lien on estate.* — (a) In the event of the death of any inmate, pupil or patient of either of said institu-

> tions above named, leaving any such cost of care, maintenance, training and treatment unpaid, in whole or in part, then such unpaid cost shall constitute a first lien on all the property, both real and personal, of the said decedent, subject only to the payment of funeral expenses and taxes to the State of North Carolina."

It would be a strained and limited construction of G.S. 143-121 to hold that, once the patient is discharged from a State institution, a civil action for treatment and maintenance may not be instituted until after the patient's death. Such a construction would be improper and manifestly unjust to the State and the taxpayers. G.S. 143-117 through G.S. 143-127 were construed by the Supreme Court in *State Hospital v. Bank,* 207 N.C. 697, 178 S.E. 487, where it was stated:

> "There is no provision in the Constitution requiring or authorizing the General Assembly to provide for the care, treatment, or maintenance of nonindigent insane persons at the expense of the State. The General Assembly has at all times by appropriate statutes required such persons to pay at least the actual cost of their care, treatment, and maintenance, while they are patients in State institutions."

The first contention is without merit.

[2] Defendant's second contention is that, before plaintiff is entitled to recover for the treatment and maintenance of incompetent, sufficient funds must be set aside and retained by defendant for "adequate future support and maintenance of (incompetent) and the members of his family, if any, who are dependent upon him". Defendant relies upon the doctrine enunciated in *Read v. Turner,* 200 N.C. 773, 158 S.E. 475, where the Supreme Court held that creditors could not reach the assets of an incompetent person until adequate provision was made for the support and maintenance of the incompetent and dependent members of his family and that, after adequate provision was made, creditors could then reach only the excess. However, this doctrine is not applicable in the instant case because the Legislature has specifically provided for the payment of treatment and maintenance in State institutions from those persons who are not indigents.

The second contention is without merit.

The judgment of the superior court is

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. GEORGE MURPHY

No. 6926SC217

(Filed 30 April 1969)

1. Criminal Law § 91— motion for continuance — existence of material witness — affidavit

Motion for continuance by defendant's counsel on the ground that defendant had "just at this minute" informed him of the existence of a material witness *is held* properly denied where counsel had been in defendant's employ some four and one-half months prior to trial and had represented defendant at the preliminary hearing, and where no affidavit was presented to the court setting forth the nature of the evidence to be elicited from the witness.

2. Criminal Law § 91— continuances

Continuances are not favored and ought not to be granted unless the reasons therefor are fully established.

3. Criminal Law § 91— continuances — necessity for affidavit

Application for a continuance should be supported by an affidavit showing sufficient grounds for the continuance. G.S. 1-176.

4. Constitutional Law § 32; Criminal Law § 91— representation by counsel — the trial — duty of accused

Employment of counsel does not excuse an accused from giving proper attention to his case; he has the duty to be diligent in his own behalf.

APPEAL by defendant from *Falls, J.*, 6 January 1969 Schedule "B" Session, Superior Court of MECKLENBURG.

Defendant was convicted, on a proper bill of indictment, of felonious assault upon a plea of not guilty. It appears from the record that defendant was represented by privately employed counsel, that counsel was employed prior to 30 August 1968, represented defendant at his preliminary hearing and also at the trial in mid January 1969. Before the plea was entered, defendant moved for a continuance. The motion was denied and defendant excepted. The court entered judgment on the jury verdict of guilty as charged and defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis, Trial Attorney Claude W. Harris and Staff Attorney James E. Magner for the State.

T. O. Stennett for defendant appellant.

MORRIS, J.

[1] Defendant presents as his sole assignment of error the court's overruling his motion for a continuance. Prior to entering a plea, de-

fendant's counsel stated to the court that the defendant had "just at this minute" called to his attention a material witness he said was absolutely necessary to his defense, that the witness was serving time in the Prison Camp at Statesville, and that this was the first knowledge counsel had of this witness. The court inquired of counsel how long he had been employed by defendant and was told that he had been employed since prior to 30 August 1968. The court thereupon denied the motion and entered an order finding that the defendant had had privately employed counsel since the last of August 1968 and that the same counsel had represented defendant at his preliminary hearing, and the defendant had not before trial on 17 January 1969, communicated to his counsel the name of this witness. Based on these facts the court concluded the defendant had been derelict in not informing his counsel of the name of the witness or what his testimony would be if he were present.

Defendant now contends that the denial of the motion was a denial of his constitutional rights and not a matter of discretion with the court, and further, that it matters not that the fault was the defendant's.

Our Supreme Court has recently spoken to this precise question in *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617. There the grand jury had, on 8 August 1967, returned six indictments against defendant. The six cases were consolidated for trial and called the same day the indictments were returned. Defendant, through counsel, moved for a continuance for that the cases were called for trial within a few minutes after the return of the indictments. It was made to appear to the court that the calendar had been published a week prior to the beginning of the term, that each charge against defendant was listed thereon, and that counsel for defendant had been furnished a copy of the calendar. The court denied the motion. On appeal, the denial of the motion for continuance was the sole assignment of error, and defendant contended "that a constitutional question was brought into play in the denial of the motion for a continuance." In affirming the trial court, the Supreme Court reiterated the principle that the constitutional guaranty of the right to counsel requires that the accused and his counsel shall be afforded a reasonable time for the preparation of his defense. The Court further said:

> "In this case, however, no facts appear which would except defendant's motion for a continuance from the general rule that a motion for a continuance is addressed to the sound discretion of the trial judge, whose ruling thereon is subject to review only in cases of manifest abuse. 2 Strong, N.C. Index, 2d, Criminal

Law § 91 (1967). Whether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice."

[2-4] Defendant has shown neither error nor prejudice. As a general rule, continuances are not favored and ought not to be granted unless the reasons therefor are fully established. ". . . [I]t is desirable that an application for a continuance should be supported by an affidavit showing sufficient grounds for the continuance. Indeed, the relevant statute contemplates that this is to be done. G.S. 1-176, *S. v. Banks,* 204 N.C. 233, 167 S.E. 851." *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520. Here no affidavit was presented to the court nor was the court apprised of the evidence to be elicited from the witness. There is nothing to indicate whether the evidence would, in fact, be material if the witness were present. Additionally, defendant had employed counsel some 4½ months prior to trial and his counsel had represented him at his preliminary hearing. "Employment of counsel does not excuse an accused from giving proper attention to his case; he has the duty to be diligent in his own behalf." *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386. Had defendant desired the attendance and testimony of the witness, it behooved him to so notify his counsel who could have made timely arrangements for his presence and not wait until the case had been actually called for trial, particularly when accused had been represented for more than 4 months by counsel of his own choosing.

We find nothing in this case which takes it out of the general rule that a motion for continuance is addressed to the sound discretion of the trial judge. Certainly there is no abuse of discretion.

Affirmed.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. RALPH JACKSON
No. 6926SC135

(Filed 30 April 1969)

1. Larceny § 5— presumption arising from recent possession of stolen property — evidential fact

The presumption arising from the recent possession of stolen property is to be considered by the jury merely as an evidential fact, along with

the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt.

2. Larceny § 8— instruction on recent possession doctrine

In prosecutions for larceny and breaking and entering, an instruction which did not sufficiently explain to the jury that the presumption arising from possession of recently stolen property was merely to be considered as an evidential fact, along with the other evidence in the case, in determining whether the State had satisfied the jury beyond a reasonable doubt of defendant's guilt, *held* error.

3. Criminal Law § 112— instruction on burden of proof

An instruction that is open to interpretation that the burden is upon the defendant to rebut the presumption of his guilt is erroneous.

4. Larceny § 8; Burglary and Unlawful Breakings § 6— instruction on identity of article stolen

In prosecutions for larceny of television sets and breaking and entering, instruction which failed to require the jury to find from the evidence and beyond a reasonable doubt that the television sets found in defendant's possession were the same television sets taken from the store that was broken and entered, *held* error.

5. Burglary and Unlawful Breakings § 7— instruction as to possible verdicts — felonious intent

In a prosecution upon indictment charging that defendant did break and enter a named store with the intent to steal, an instruction that defendant would be guilty of a misdemeanor if the breaking and entering was done without the intent to commit felonious larceny "or other infamous crime," *held* error, since the State is restricted to the proof of the intent identified in the indictment.

6. Burglary and Unlawful Breakings § 2— felonious breaking and entering — the intent

Felonious intent is an essential element of breaking and entering with intent to commit a felony, G.S. 14-54, and it must be alleged and proved; the felonious intent proven must be the felonious intent alleged.

APPEAL by defendant from *Falls, J.*, 21 October 1968 Criminal Session, Superior Court of MECKLENBURG.

The defendant was indicted for breaking and entering with the intent to steal, for the larceny of three television sets of the value of more than $200, and of knowingly receiving stolen goods. To each of the charges the defendant entered a plea of not guilty.

The State's evidence tended to show that on the morning of 14 September 1968 at approximately 5 o'clock, Officer G. W. Shore of the Charlotte Police Department was driving near the Johnston Furniture Store which is located at 117 North Tryon Street in Char-

lotte when he heard an alarm. He started moving toward the sound, and as he did, he saw the defendant coming out of the alleyway which leads to the rear entrance of the Johnston Furniture Company. When Shore first saw the defendant he was carrying two television sets and was approximately 125 feet from the furniture store. After a short chase the defendant and one Walter Grier were apprehended by the police. An examination of the rear entrance to the furniture store revealed that the glass had been completely broken out of one door.

Willard H. Smith, manager of Johnston Furniture Store, testified that he arrived at the furniture store at approximately 5 a.m. on the morning in question. Before he left the store the night before, all the doors were checked and were found to be locked. When Smith entered the store the next morning, he discovered that three television sets were missing. State's exhibits Nos. 2, 3 and 4 were identified as being the television sets that were taken from the store. Officer Shore testified that exhibits Nos. 2 and 3 were the same television sets he saw the defendant carrying on the morning in question.

The jury returned verdicts of guilty of breaking and entering with the intent to commit a felony, and guilty of larceny. From consecutive sentences of imprisonment of 10 and 9 to 10 years, respectively, defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General Jean A. Benoy for the State.

Peter H. Gerns for defendant appellant.

MORRIS, J.

[1-4] The court's charge contained the following:

> "If and when it is established that the store has been broken into and entered, and that merchandise has been stolen therefrom, the recent possession of such stolen merchandise raises presumptions of fact that the possessor is guilty of the larceny and of the breaking and entering."

This was the extent of the charge by the trial court on the doctrine of "recent possession" and this portion of the charge, we think, constituted error. In *State v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725, Stacy, C.J., in a thorough discussion of the doctrine of recent possession, makes it clear that the doctrine does not place upon the defendant the burden to "raise in the minds of the jury a reasonable doubt that he stole the property, or the burden of establishing a

reasonable doubt as to his guilt." The doctrine "is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt." *State v. Baker,* 213 N.C. 524, 196 S.E. 829. We think the instruction quoted above, this being the entire instruction given on the doctrine of "recent possession", did not sufficiently explain to the jury that possession of recently stolen property was only to be considered along with the other evidence in the case in determining whether the State had satisfied the jury beyond a reasonable doubt of the defendant's guilt. An instruction that is open to interpretation that the burden is upon the defendant to rebut the presumption of his guilt is erroneous. *State v. Holbrook, supra; State v. Hayes,* 273 N.C. 712, 161 S.E. 2d 185. Further, the trial court, in its charge, failed to require the jury to find from the evidence and beyond a reasonable doubt that the television sets found in defendant's possession were the same television sets that were taken from the Johnston Furniture Company. "The Judge committed error in failing to charge the presumption or inference does not apply until the identity of the property is established." *State v. Jackson,* 274 N.C. 594, 164 S.E. 2d 369.

[5, 6] In charging the jury on felonious intent, the court stated that if the breaking and entering "was done without the intent to commit the felony of larceny *or other infamous crime,* then you would so indicate by your verdict; that is, he would be guilty of a misdemeanor." (Emphasis added.) The indictment under which the defendant was tried stated that he did break or enter the Johnston Furniture Company with the intent to steal, etc. "Felonious intent is an essential element of the crime defined in C.S., 4235 (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.'" *State v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751. "The indictment having identified the intent necessary, the State was held to the proof of that intent." *State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171. On the basis of these authorities, the underscored portion of the charge quoted above would appear to be erroneous.

For errors committed in the charge to the jury there must be a new trial. Other errors assigned, such as an apparent discrepancy between the indictment description of the stolen property and the evidence, are not discussed since they are not likely to re-occur.

New trial.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. MARION ROBBINS

No. 6927SC65

(Filed 30 April 1969)

1. Constitutional Law § 32; Criminal Law § 75— in-custody interrogation — right to counsel

If police propose to interrogate a person, they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation.

2. Constitutional Law § 32; Criminal Law § 75— right to appointed counsel prior to interrogation

Defendant was not effectively apprised of his right to have counsel appointed for him prior to any in-custody interrogation if he were financially unable to employ counsel and to confer with such attorney prior to the interrogation where the warning read to defendant by a police officer contained a statement that "We have no way of giving you a lawyer but one will be appointed for you if and when you go to Court," since defendant may have understood the officer to mean that he was not entitled to appointed counsel prior to trial, and a confession made by defendant during the interrogation is inadmissible at defendant's trial.

APPEAL by defendant from *Snepp, J.*, at the 7 October 1968 Session of GASTON Superior Court.

By indictments proper in form, the defendant was charged with two offenses of assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death. The cases were consolidated for trial. The evidence tended to show the following: Officer Holmesly of the Gaston County Rural Police received information as to the whereabouts of the defendant on 31 August 1968, shortly after the occurrences from which these indictments grew. He proceeded into South Carolina and was accompanied by officers of that state to a place where the defendant was found and put under arrest. Officer Holmesly read to the defendant from a paper as follows:

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in Court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer but one will be appointed for you if you wish if and when you go to Court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any

time. You also have the right to stop answering at any time until you talk to a lawyer." (Emphasis added.)

After the foregoing was read to the defendant, he signed some type of waiver but the record does not disclose its contents. The defendant then signed a waiver of extradition and took the officers to the Pete Phillips house in South Carolina and located a pistol which belonged to the defendant and which was allegedly used in the assaults. He also admitted having used the gun that morning at the residence of one of the prosecuting witnesses and gave the details of the occurrences as he recalled them.

When Officer Holmesly was put on the stand, a voir dire was held, and the court ruled that the defendant had been fully advised of his rights and that any statements made were voluntarily and understandingly made. The officer then related certain incriminating statements made by defendant.

The cases were submitted to the jury which returned a verdict of guilty of nonfelonious assault on each charge. Defendant appealed.

Attorney General Robert Morgan and Staff Attorneys Andrew A. Vanore, Jr., and Dale Shepherd for the State.

Horace M. Dubose, III, for defendant appellant.

BRITT, J.

[2] The first question presented by this appeal is whether the defendant was properly advised of his rights prior to questioning by the officers; more particularly, did the warning given by the officers effectively apprise the defendant of the fact that if he was financially unable to employ legal counsel, he was entitled to have counsel appointed to represent him and to confer with his court-appointed counsel before any questioning took place. The answer to this question is no.

[1] "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley v. Cochran,* 369 U.S. 506, 8 L. Ed. 2d 70, 82 S. Ct. 884. This statement was quoted as applicable in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, where the court said: "* * * [I]f police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford

one, a lawyer will be provided for him prior to any interrogation." (16 L. Ed. 2d at 724).

[2] A problem similar to the one in issue was before the court in *State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171. There the Supreme Court of North Carolina found that the evidence in that case did not warrant a finding that counsel had been offered at the interrogation or that it had been understandingly waived. In the *Thorpe* case, there were no findings made with respect to counsel; here, the findings were unsupported by the evidence. Here, as in the *Thorpe* case, the defendant could easily have understood that he was not entitled to court-appointed counsel prior to the trial. Such is not the law, and the correct law must be made clear to the defendant before questioning, if any statements or evidence resulting from such questioning are to be admissible. We quote the following from the opinion by Higgins, J., in the *Thorpe* case:

> "Recent decisions of the United States Supreme Court, however, have forced us to re-examine our trial court practice with respect to counsel in cases in which constitutional rights against self-incrimination are involved. Not only is the accused entitled to representation at the trial, but under certain circumstances, he is entitled to counsel at his in-custody interrogation. If the accused is without counsel, and is indigent, counsel must be provided by the authorities, or intelligently waived. The prohibition is not against interrogation without counsel. It is against the use of the admissions as evidence against the accused at his trial." (Citation of and quotations from *Miranda v. Arizona, supra.*)

Except for minor changes in words, a warning identical to the one used in this case was read to defendant in *Wilson v. State,* 216 So. 2d 741. The Alabama Court of Appeals held the warning insufficient.

The trial court committed error in permitting the introduction of the incriminating evidence provided by defendant in South Carolina following his arrest, and the error was sufficiently prejudicial to entitle the defendant to a new trial.

We deem it unnecessary to discuss the other assignments of error brought forward and argued in defendant's brief, as the questions raised may not recur upon a retrial of this action.

New trial.

MALLARD, C.J., and PARKER, J., concur.

LEE PERKINS v. AMERICAN MUTUAL FIRE INSURANCE COMPANY

No. 6927SC152

(Filed 30 April 1969)

1. Insurance § 105— action against insurer to determine coverage — attorneys' fees

Attorneys' fees are not allowable as an item of damages or as an item of court costs in plaintiff's action against an insurance company to determine coverage under a policy of automobile liability insurance.

2. Attorney and Client § 7— attorneys' fees — item of damages

In the absence of any contractual or statutory liability therefor, attorney fees and expenses of litigation incurred by the plaintiff or which plaintiff is obligated to pay in the litigation of his claim against defendant are not recoverable as an item of damages, either in a contract or a tort action.

3. Costs § 4— statutory costs — amount of allowance

Where a statute provides that the successful party may be allowed certain sums, termed "costs," by way of indemnity, for his expenses in the action, it is not in the power of the courts or juries to increase the allowance fixed by statute.

4. Attorney and Client § 7; Costs § 4— attorneys' fees — costs of court

Except as otherwise provided by statute, attorneys' fees are not regarded as a part of the court costs. G.S. 6-21, G.S. 6-21.1, G.S. 6-21.2.

APPEAL by plaintiff from *Ervin, J.*, 19 August 1968 Session, GASTON Superior Court.

Plaintiff was involved in an automobile accident on 18 February 1963. As a result of the accident certain tort actions were instituted against plaintiff seeking to recover damages. Plaintiff notified defendant and called upon it to defend the actions under the terms of the policy of liability insurance issued to plaintiff by defendant. Defendant declined to defend upon the grounds that the insurance policy was not in force on the date of the accident; and plaintiff employed counsel to defend. The tort actions terminated in a judgment against plaintiff.

The judgment was not paid, and, as a result of the unpaid judgment, plaintiff was notified that his operator's license was suspended. Plaintiff brought action against the Commissioner of Motor Vehicles seeking to retain his license, and incurred expense of attorney fees in that action.

Plaintiff brings this action against his insurer to recover the amount of (1) attorney fees incurred in defense of the tort actions,

(2) the judgment rendered against him in the tort action, (3) attorney fees incurred in the action against the Commissioner of Motor Vehicles, and (4) attorney fees incurred in the prosecution of this action.

This case was first heard in Superior Court before McLean, J., who made findings of fact and concluded as a matter of law that the plaintiff's policy was not in force on 18 February 1963, and denied recovery by plaintiff. On appeal our Supreme Court in *Perkins v. Insurance Co.*, 274 N.C. 134, 161 S.E. 2d 536, reversed the judgment of the trial court and remanded the cause with direction that the plaintiff be awarded judgment for such amount as he might establish in further proceedings. The facts are fully set out in the opinion of the Supreme Court.

Pursuant to instructions of the Supreme Court the matter was heard again in Superior Court before Ervin, J. After hearing additional evidence, Judge Ervin made separate findings and conclusions and entered judgment ordering defendant to pay to plaintiff the amount of (1) attorney fees incurred in the defense of the tort actions against plaintiff, (2) the judgment rendered against plaintiff as a result of the tort actions, plus interest and costs, and (3) the costs of this action.

Judge Ervin further concluded that plaintiff was *not* entitled to recover attorney fees incurred in the action against the Commissioner of Motor Vehicles to enjoin the suspension of his operator's license, nor attorney fees incurred in the prosecution of this action. The plaintiff duly filed exceptions to this judgment and appealed.

Mullen, Holland & Harrell, by Philip V. Harrell, for plaintiff appellant.

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

BROCK, J.

Counsel for plaintiff appellant has abandoned in oral argument any claim for attorney fees in the action against the Commissioner of Motor Vehicles. Therefore the sole question to be determined by this Court is whether the trial judge erred in concluding as a matter of law that plaintiff is not entitled to recover attorney fees incurred by him in the prosecution of this action.

[1] Plaintiff does not cite, and our research has failed to disclose, any case in North Carolina allowing the recovery of attorney fees

in an action against an insurance company to determine coverage under a policy. It is the contention of plaintiff that the counsel fees should be recovered as an element of damage for breach of the insurance contract by defendant in refusing to defend plaintiff and pay the judgment and expenses. However, it is not contended by plaintiff that the contract made provision for recovery of attorney fees in this instance.

[2, 3] The general rule is that, in the absence of any contractual or statutory liability therefor, attorney fees and expenses of litigation incurred by the plaintiff or which plaintiff is obligated to pay in the litigation of his claim against the defendant, are not recoverable as an item of damages, either in a contract or a tort action. The reason for the rule is that these expenses are not the legitimate consequence of the tort or breach of contract complained of, and to allow these expenses to the plaintiff, which are never allowed to a successful defendant, would give the former an unfair advantage in the contest. Where a statute provides that the successful party may be allowed certain sums, termed "costs," by way of indemnity, for his expenses in the action, it is not in the power of the courts or juries to increase the allowance fixed by statute. 22 Am. Jur. 2d, Damages, § 165, p. 234.

"The right to recover attorneys' fees from one's opponent in litigation as a part of the costs thereof does not exist at common law. Such an item of expense is not allowable in the absence of a statute or rule of court or in the absence of some agreement expressly authorizing the taxing of attorneys' fees in addition to the ordinary statutory costs." 20 Am. Jur. 2d, Costs, § 72, p. 58.

[4] While at one time the allowance of certain fixed attorney fees as a part of the costs of litigation was a policy in this State, statutes allowing this were repealed and nonallowance of counsel fees was deliberately adopted as the policy in 1879. *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578. This policy, except as modified by the provisions of G.S. 6-21, 6-21.1 and 6-21.2, has prevailed in this State since that date. "Except as otherwise provided by statute, G.S. 6-21, attorneys' fees are not now regarded as a part of the court costs in this jurisdiction." *Trust Co. v. Schneider, supra.*

[1] It is the opinion of this Court, and we so hold, that our statutes, G.S. 6-21, 6-21.1 and 6-21.2 do not authorize the allowance of attorney fees as a part of the court costs in cases such as the one at bar, and that this case does not come within their provisions.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. DILLARD PINK RAMEY

No. 6926SC180

(Filed 30 April 1969)

Homicide § 9— restoration of self-defense by quitting argument

In this manslaughter prosecution in which there was evidence from which the jury might infer that while defendant was at fault in bringing on the encounter, defendant was trying to quit the argument and communicated this fact to the deceased, the trial court erred in failing to instruct the jury that the right of self-defense may be restored to one who has started a fight or entered it willingly by quitting in good faith and giving his adversary notice of such action on his part.

APPEAL by defendant from *Hasty, J.*, September 1968 Schedule "C" Criminal Session, Superior Court of MECKLENBURG.

This cause was formerly before the North Carolina Supreme Court and reported in 273 N.C. 325, 160 S.E. 2d 56, at which time a new trial was awarded the defendant. At the second trial, the defendant was tried upon a bill of indictment charging him with the murder of Ardell Mabry. The State announced that it would not seek a conviction for first or second-degree murder, but would seek a conviction for manslaughter. Defendant entered a plea of not guilty.

The State's evidence tends to show that on 28 May 1967 the deceased and his family resided at 342 Kirby Drive in the Paw Creek section of Mecklenburg County. At the time in question the defendant and his family were neighbors of the deceased. Their houses were 100 to 200 feet apart. At approximately 5 p.m. on 28 May 1967 the deceased and his two sons arrived at their home, and, as they were getting out of their car, the defendant stood on his porch and cursed the deceased. The deceased then called to the defendant, "Old man, you won't come out in the road and call me those names." Defendant answered that he would and cursed the deceased again. The deceased then started out into the road when the defendant reached inside his house and got a rifle and aimed it at the deceased. Deceased then went into his house, got a shotgun, and was walking away from his house when the defendant shot him. State's evidence tends to show that the deceased did not aim his gun at the defendant.

Defendant offered evidence which tends to show that the deceased arrived at his home at approximately 5 p.m. on the day in question and cursed the defendant and asked him to fight. The deceased then went out into the road and drew a knife. Defendant stated that when deceased went out into the road, he (defendant) went into his house and stayed three or four minutes to allow de-

ceased to "cool off". He then went back outside and deceased cursed him again. Deceased went inside his house and got his gun, and walked down to an apple tree located approximately 70 feet from the defendant's house, and pointed the gun at the defendant. Defendant then ran into his house and got his gun. Defendant stated, "And when I got back out, he was moving over toward his — over toward the apple tree and I told him to drop the gun and I told him to drop it again and I said, 'don't do it' and about that time I saw a flash and then I fired."

The jury returned a verdict of guilty of manslaughter and defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Trial Attorney Eugene A. Smith for the State.

Childers and Fowler by Max L. Childers for defendant appellant.

Morris, J.

The defendant argues that the trial court committed error in not charging the jury that one is not deprived of the plea of self-defense because he was at fault in entering the encounter, if he voluntarily quit the fight or encounter and communicated that fact to his adversary.

In the present case there is evidence that the defendant started the argument between himself and the deceased by cursing the deceased. Evidence introduced by the defendant, if believed, would tend to show that after the original encounter between the parties the defendant went into his home for three or four minutes to allow the deceased to "cool off"; that he returned to his porch without his gun; that defendant did not get his gun until he saw the deceased coming toward his (defendant's) house with a gun; and that the defendant was asking the deceased "not to do it" when deceased fired his gun.

In *State v. Fairley,* 227 N.C. 134, 41 S.E. 2d 88, the evidence indicated that the defendant had started the dispute, but at the time of the shooting he was backing away from the deceased and was trying to quit the combat and to so notify the deceased. Defendant was granted a new trial because of the court's failure to instruct the jury on this aspect. To the same effect, see *State v. Robinson,* 213 N.C. 273, 195 S.E. 824, where the Court stated:

> "The charge failed to advert to and explain the law with reference to substantive rights of each of the defendants. As to both

> defendants the court below declared the law as to when they could not plead the perfect self-defense. Having done so, he should have gone further and told the jury that the right of self-defense may be restored to one who has started a fight, or entered into it willingly, by quitting in good faith and giving his adversary notice of such action on his part."

We think that in the present case there was some evidence from which the jury might infer that the defendant was trying to quit the argument and that this fact was communicated to the deceased. The trial court committed prejudicial error in failing to charge on this feature of the law of self-defense. *State v. Fairley, supra;* and *State v. Robinson, supra.*

> "The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial error. This is true even though there is no special prayer for instructions to that effect. *S. v. Merrick,* 171 N.C. 788, 88 S.E., 501; *S. v. Bost, supra* (192 N.C. 1, 133 S.E. 176); *S. v. Thornton, supra* (211 N.C. 413, 190 S.E. 758); *School Dist. v. Alamance County,* 211 N.C., 213, 193 S.E., 31." *State v. Robinson, supra.*

In instructing the jury the trial court stated the following: ". . . if you should find from the evidence in this case beyond a reasonable doubt that the defendant shot and killed the deceased and that the defendant *himself or his family* used excessive force . . ." (Emphasis added.) It is apparent that the underscored portion of the charge was a *lapsus linguæ.* However, it must be held to be error.

> "It is apparent from the exemplary manner in which the learned trial judge charged the jury in other respects and the able manner in which he presided at this trial that this erroneous portion of the charge was a *lapsus linguæ.* However, this Court has held many times that when there are conflicting instructions upon a material point, one correct and one incorrect, a new trial must be granted. Since the jury is not supposed to know which is the correct instruction, we must assume that the jury's verdict was influenced by that portion of the charge which is incorrect." *State v. Weston,* 273 N.C. 275, 159 S.E. 2d 883.

We do not discuss the defendant's other assignments of error as there must be a new trial, and they are not likely to re-occur.

New trial.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. WAYNE NEELY (CASE No. 68 CR 36)
— AND —
STATE OF NORTH CAROLINA v. JERRY LEON NEELY (CASE No. 68 CR 37)
No. 6929SC215

(Filed 30 April 1969)

1. Larceny § 7— nonsuit

Evidence tending to show that an inventory of television sets owned by a corporation disclosed that a set having a listed serial number was missing, and that three days later the set so identified was in the possession of defendants, *held* sufficient to overrule nonsuit.

2. Criminal Law § 97— introduction of additional evidence

The trial court has discretionary power to permit the State to introduce additional evidence after the State has rested its case and defendants have argued their motions for judgment as of nonsuit.

APPEAL from *Beal, S.J.*, 6 January 1969, Schedule "D" Criminal Session, MECKLENBURG County Superior Court.

Wayne Neely and Jerry Leon Neely were charged under separate warrants with willfully, maliciously and unlawfully stealing and carrying away a television set on or about 9 October 1968. The set was valued at $150 and was the property of Plaza Hardware, Inc., (Plaza). The defendants were tried in the Recorder's Court of the City of Charlotte and were found guilty. From the imposition of a two year jail sentence, they appealed to the Mecklenburg County Superior Court.

In superior court the two cases were consolidated, by consent, for the purpose of trial. The defendants entered pleas of not guilty. The jury returned a verdict of guilty of larceny. The trial judge thereupon sentenced the defendants to two years in the common jail of Mecklenburg County to be assigned to work under the supervision of the State Department of Correction. The defendants appealed to this Court.

Attorney General Robert Morgan and Assistant Attorney General George A. Goodwyn for the State.

W. Herbert Brown, Jr., for defendant appellants.

CAMPBELL, J.

[1] The defendants' first contention is that the trial judge erred in denying their motions for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence.

Considering the evidence in the light most favorable to the State, it tends to show that, on 7 October 1968, Plaza owned and had possession of a General Electric television set, which was stored in its warehouse; the set bore the Serial Number OG2E-21127; pursuant to a sale, Plaza attempted to deliver the set on 10 October 1968, but ascertained that the set was not in the warehouse; on 10 October 1968 the set in question was taken by the defendants to the home of Michael Daniels on South Church Street in the City of Charlotte; they offered to sell the set to him for $250; Daniels paid them $25 and the set was left with him; the defendants then departed; a detective with the Charlotte police department came to the home of Daniels a few hours later; the detective took charge of the set; and Daniels told the detective that the defendants had brought the set to his home and that he had paid them $25 for it.

In *State v. Holloway,* 265 N.C. 581, 144 S.E. 2d 634, the Supreme Court stated:

> "Evidence for the State tends to show: Approximately a week prior to May 21, 1963 an inventory was taken of television sets owned by Telerent, Inc., and stored in its warehouse at 613 West North Street, Raleigh, N. C. On May 23, 1963, upon discovering that many television sets were missing, employees of Telerent, Inc., took another inventory, determined that 37 sets were missing, and listed the model and serial numbers of the missing sets.
>
> Evidence for the State tends to show each of six of the television sets taken from said warehouse was in the possession of appellant alone or in the joint possession of appellant and his codefendants at a time generally identified as the last of May or the first of June 1963. As indicated, the State relies largely on the presumption arising from the possession of goods recently stolen. In our view, the evidence was sufficient to warrant submission to the jury; and defendant's assignment of error directed to the denial of his motion for judgment as of nonsuit is without merit."

In the instant case, the evidence for the State tends to show that, on 7 October 1968, the set was stored in Plaza's warehouse and that three days later on 10 October 1968 this set was in the possession of the defendants.

The first contention is without merit.

[2] The defendants' second contention is that the trial judge erred in permitting the case to be reopened and the State to introduce

additional evidence after the State had rested its case and after the defendants had argued their motions for judgment as of nonsuit.

In *State v. Brown,* 1 N.C. App. 145, 160 S.E. 2d 508, Morris, J., speaking for the Court, stated:

> "The general rule followed in the majority of jurisdictions is stated in 53 Am. Jur., Trial, § 128, p. 112, as follows:
>
> 'The trial judge possesses wide discretionary powers relative to the reopening of a criminal case for the introduction of further evidence after the parties have rested. In his discretion, a criminal case may be reopened for the reception of additional evidence after the case has been submitted to the jury and before their retirement to deliberate on their verdict, and according to the weight of authority, it lies within the sound discretion of the trial court to reopen a criminal case for the reception of additional evidence even after the jury has retired to deliberate on their verdict.'
>
> The North Carolina Supreme Court adheres to this rule and has stated that the trial court has discretionary power to permit the introduction of additional evidence after a party has rested, *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736, and even after the argument has begun. *State v. Jackson,* 265 N.C. 558, 144 S.E. 2d 584. As stated in *State v. Jackson, supra,* 'The trial court had discretionary power to permit the introduction of additional evidence after both parties had rested and arguments had been made to the jury.' "

The second contention is without merit.

A careful review of the record in the instant case indicates that the defendants had a fair and impartial trial, free of error.

The judgment of the trial court is

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JERRY LEON NEELY

No. 6926SC220

(Filed 30 April 1969)

1. Obstructing Justice— intimidation of witness — nonsuit

In a prosecution charging defendant with openly intimidating in the recorder's court a witness who had testified against him on a charge of larceny, defendant is not entitled to nonsuit on the ground that the witness had completed his testimony and was not under subpœna, since the witness was a prospective witness at the time the threats were made as a result of defendant's appeal to the superior court for a trial *de novo*.

2. Obstructing Justice— intimidation of witness or juror

The gist of the offense of intimidating or interfering with witnesses or jurors is the obstruction of justice. G.S. 14-226.

3. Criminal Law §§ 34, 169— evidence of defendant's criminal record elicited by defendant's counsel

Where defense counsel asked the State's witness on cross-examination, "You say you scared of these two defendants here?", defendant cannot complain of the witness' reply in explanation, "If anybody had a record like them, you'd be scared of them too."

APPEAL by defendant from *Thornburg, S.J.*, 3 February 1969, Schedule "D" Criminal Session, MECKLENBURG County Superior Court.

Jerry Leon Neely (defendant) and his brother, Wayne Neely, were charged under separate warrants with the misdemeanor of larceny. A third warrant charged that, on 24 October 1968, the defendant "with force and arms . . . did willfully, maliciously and unlawfully BY THREATS ATTEMPT TO INTIMIDATE IN OPEN CITY RECORDER'S COURT IN THE CITY OF CHARLOTTE MICHAEL DANIELS WHO HAD BEEN SUMMONED AS A WITNESS TO SAID COURT IN VIOLATION OF G.S. 14-226 OF NORTH CAROLINA against the Statutes in such case made and provided, against the peace and dignity of the State."

The evidence on behalf of the State would permit a finding that, on 25 October 1968, Michael Daniels appeared as a State's witness in the City Recorder's Court of the City of Charlotte; Daniels testified against the defendant and his brother, who were on trial for the misdemeanor of larceny; after the completion of the trial and the imposition of sentence and after an appeal had been taken to the superior court for a trial *de novo*, the defendant intimidated and threatened Daniels. The language used would indicate physical violence, and nothing would be served by repeating it here.

The three cases were consolidated for the purpose of trial in

superior court. The jury returned a verdict of not guilty on the larceny charges, but a verdict of guilty as to the defendant on the charge of intimidating and threatening a witness. The trial judge thereupon imposed a sentence of two years in the common jail of Mecklenburg County to be assigned to work under the supervision of the State Department of Correction. The defendant appealed to this Court.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, Trial Attorney Charles M. Hensey and Staff Attorney D. M. Jacobs for the State.

W. Herbert Brown, Jr., for defendant appellant.

CAMPBELL, J.

[1] The defendant's first contention is that the trial judge erred in denying his motions for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. It is argued that, since Daniels was not under a subpœna to testify as a witness and since his testimony had been completed when the threats were made, there was no intimidation or threatening of a witness within the meaning of G.S. 14-226, which provides:

> *"Intimidating or interfering with jurors and witnesses.* — If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a juror or witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such juror or witness from attendance upon such court, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court."

[1, 2] The gist of this offense is the obstruction of justice. In the instant case, Daniels was in the position of being a prospective witness because, at the time in question, an appeal had been taken to the superior court for a trial *de novo*. The evidence on behalf of the State clearly showed that, by his threats, the defendant was attempting to intimidate and threaten this witness and to prevent him from testifying in the superior court on the trial *de novo*.

> "Influencing or attempting to influence a witness in regard to the testimony he will give, or inducing or attempting to induce a witness to absent himself and therefore not to give any testimony, is an obstruction of justice. It is an offense against the

very object and purpose for which courts are established. It is a misdemeanor under the common law and an offense by statute in many jurisdictions. . . . It is immaterial, therefore, that the person procured to absent himself was not regularly summoned or legally bound to attend as a witness." 39 Am. Jur., Obstructing Justice, § 6, p. 504.

"It is an offense, at common law, to dissuade or prevent, or to attempt to dissuade or prevent, a witness from attending or testifying on the trial of a cause, and such conduct may be made an offense by statute. The gist of the offense is the willful and corrupt attempt to interfere with and obstruct the administration of justice." 67 C.J.S., Obstructing Justice, § 8, p. 53.

We are of the opinion that the evidence on behalf of the State was sufficient to withstand the defendant's motion for judgment as of nonsuit. Therefore, the first contention is without merit.

[3] The defendant's second contention is that the trial judge erred in denying his motion to strike an answer of a State's witness, Daniels. It is argued that the answer was unsolicited and unresponsive and that it concerned the defendant's criminal record. On the cross-examination of Daniels by the defense counsel, the following occurred:

"A. I was scared for me and my wife . . . I didn't want them doing nothing to me or my wife.

Q. You say you scared of these two defendants here?

A. Yeh. If anybody had a record like them, you'd be scared of them too.

BROWN: Move to strike the answer.

COURT: Motion denied."

The question asked by defense counsel was calculated to elicit the very response which was given. Daniels had a right to explain his answer and defense counsel "opened the door" for such an explanation. *State v. Williams,* 255 N.C. 82, 120 S.E. 2d 442. Therefore, the second contention is without merit.

The defendant had a fair and impartial trial free from prejudicial error.

The judgment of the trial court is

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM ALEXANDER WALKER

No. 6914SC185

(Filed 30 April 1969)

1. Rape § 18— assault with intent to commit rape — sufficiency of evidence

In this prosecution for assault with intent to commit rape, defendant's motion for nonsuit should be allowed where the evidence tends to show only that defendant fondled the prosecutrix against her will but desisted when his fondling did not break down the resistance and refusal of the prosecutrix, the evidence failing to show, circumstantially or otherwise, that defendant intended at any time during the assault to have carnal knowledge of the prosecutrix at all events, notwithstanding any resistance on her part.

2. Rape § 18— nonsuit of charge of assault with intent to commit rape — trial for assault on a female

In a prosecution for assault with intent to commit rape, nonsuit of the felony charge does not entitle defendant to his discharge, since the State may put defendant on trial under the same indictment for assault on a female, defendant being a male over the age of 18. G.S. 14-33.

APPEAL by defendant from *Burgwyn, E.J.*, and a jury, 18 November 1968 Session, DURHAM County Superior Court.

William Alexander Walker (defendant), a thirty-nine-year old male, was charged under a proper bill of indictment with the felony of assault with the intent to commit rape. A plea of not guilty was entered by the defendant. The evidence on behalf of the State tended to show that the alleged offense was committed on 22 April 1968 upon Sheila Marion Benfield (prosecutrix) and that the defendant and prosecutrix were next door neighbors on North Guthrie Avenue in the City of Durham. The evidence further tended to show that, on the day in question, the prosecutrix was twelve years old; she was at home taking care of her seven-year-old brother, her four-year-old sister and two other four-year-old boys; the defendant and a woman companion came to the prosecutrix's house at about 10:00 a.m.; they asked the prosecutrix, who was on the porch, if she wanted to go to Roxboro with them; she answered in the negative and went into the house; the woman companion departed after the prosecutrix left the porch, but the defendant followed the prosecutrix into the house; and after the prosecutrix sat down on a couch in the living room, the defendant "tried to start messing with me and I told him to go on."

The prosecutrix testified that, while they were in the living room, the defendant was feeling of her breasts; she told him to quit;

but he kept on doing it, until he finally left the house. The prosecutrix further testified that about 1:00 p.m. the same day she and her brother and sister laid down on a bed to take a nap; she went to sleep; when she "woke up", the defendant was on top of her; she had on her dress; she got up and went into the bathroom; he followed her into the bathroom and "tried to start messing with me again"; he again felt of her breasts and rubbed his hands on her breasts and on her "bottom"; while in the bathroom, he told her, "you ain't going to tell on me, are you?", to which she said nothing; and the defendant then left. The defendant at no time used any force.

At the close of the State's evidence and again at the conclusion of all the evidence, the defendant moved for judgment as of nonsuit. He also moved that the case be submitted to the jury on the offense of assault on a female and not on the offense of assault with the intent to commit rape. The motions were denied and the case was submitted to the jury, which returned a verdict of guilty as charged. The trial court entered a judgment of imprisonment for a term of not less than five years or more than fifteen years. From the imposition of the sentence, the defendant appealed to this Court.

Attorney General Robert Morgan, Trial Attorney William F. Briley and Staff Attorney Donald M. Jacobs for the State.

John C. Randall for defendant appellant.

CAMPBELL, J.

[1] The question presented for determination is: Did the trial judge err in denying the defendant's motion for judgment as of nonsuit on the charge of assault with the intent to commit rape? The answer is in the affirmative.

In *State v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649, the Supreme Court stated:

> "To convict a defendant on the charge of an assault with intent to commit rape the State must prove not only an assault but that defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part. . . . It is not necessary to complete the offense that the defendant retain the intent throughout the assault, but if he, at any time during the assault, have an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense. . . . Intent is an attitude or emotion of

> the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred. . . .
>
> Assuming the truth of prosecutrix's testimony, as we must on the motion to nonsuit, defendant assaulted prosecutrix and intended to gratify his passion upon her person, but the evidence fails to show, circumstantially or otherwise, that he intended at any time during the assault to have carnal knowledge of her, at all events, notwithstanding any resistance on her part. Defendant was in his own home and his wife was in another room within earshot of any outcry. He did not threaten to do her violence if she refused to yield. When she threatened to scream he immediately desisted. It is true that he thumblatched the door, but this seems more consistent with the intent to avoid interruption in case he engaged in the act than any intent to imprison or restrain prosecutrix. He, himself, released the lock. He attempted to persuade her to yield by pretention that the sex act was a religious rite necessary to her cure. But his conduct did not show any intention to overcome her resistance by force and have the intercourse at all events."

Likewise, in this case, the evidence fails to show, circumstantially or otherwise, that the defendant intended at any time during the assault to have carnal knowledge of the prosecutrix at all events, notwithstanding any resistance on her part. The defendant made no threats and used no violence. He desisted when requested to do so and when his fondling did not break down the resistance and refusal of the prosecutrix. The conduct of the defendant did not show any intention to overcome resistance of the prosecutrix by force and to have intercourse at all events.

[2] The trial judge erred in denying the defendant's motion for judgment as of nonsuit on the charge of assault with the intent to commit rape. However, he is not entitled to discharge. Since he is a male person over eighteen years of age, the State may put him on trial for the misdemeanor of assault on a female. G.S. 14-33. A new indictment is not necessary and he may be tried for the misdemeanor under the present bill of indictment. *State v. Gammons, supra.*

New trial.

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

STATE OF NORTH CAROLINA v. SAMMIE LEWIS AUSTIN

No. 6926SC89

(Filed 30 April 1969)

Criminal Law §§ 86, 117— cross-examination of defendant as to prior convictions — consideration by jury — request for instructions

Where defendant on cross-examination admits prior unrelated criminal convictions and requests the court to give the jury special instructions as to how such evidence may be considered, failure of the court to instruct the jury that admissions as to such convictions are not competent as substantive evidence but are competent only for the purpose of impeaching defendant as a witness constitutes prejudicial error.

APPEAL by defendant from *Falls, J.*, 21 October 1968 Schedule "A" Session of Superior Court of MECKLENBURG County.

Sammie Lewis Austin (defendant) was tried on three warrants and one bill of indictment. The cases were consolidated by the court upon motion of the State and without objection on the part of the defendant.

In cases numbered 53-733 and 53-734 the defendant was charged in warrants with the offense of simple assault. The victim in one case was alleged to be H. P. Hollifield, and in the other case the victim was alleged to be J. F. Durham. Both crimes were alleged to have occurred on 4 September 1968.

In case numbered 53-735 the defendant was charged in a warrant with the offense of resisting arrest. It is alleged that the officers resisted were Charlotte Police Officers J. F. Durham and H. P. Hollifield. The crime was alleged to have occurred on 4 September 1968.

In case numbered 53-736 the defendant was charged in a bill of indictment with the offense of common-law robbery. The victim was alleged to be Marie Antionette Rozzell, and the amount taken was $50 in money. The crime was alleged to have occurred on 4 September 1968.

Defendant entered pleas of not guilty to each charge. Trial was by jury. The jury found the defendant guilty of simple assault in case #53-733, of resisting arrest in case #53-735, and of common-law robbery in case #53-736. In case numbered 53-734 the State took a *nol pros.*

The judgment of the court in the common-law robbery case, #53-736, was that the defendant be imprisoned in the State's prison for not less than seven nor more than ten years.

In the resisting arrest case, #53-735, the judgment was imprisonment for two years in the common jail of Mecklenburg County, this sentence to run concurrently with the sentence imposed in the common-law robbery case.

In the simple assault case, #53-733, the judgment was imprisonment for thirty days in the common jail of Mecklenburg County, this sentence to run concurrently with the sentence imposed in the common-law robbery case.

From the judgments imposed, the defendant, assigning error, appeals to the Court of Appeals.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Trial Attorney Robert G. Webb for the state.

William L. Pender for the defendant appellant.

MALLARD, C.J.

The defendant contends that the trial court committed error in refusing defendant's request through his counsel to instruct the jury as to how they should receive evidence of defendant's previous convictions.

The following occurred, which is part of what the defendant calls his "Assignment of Error #1," while the solicitor for the State was cross-examining the defendant who testified but did not otherwise put his character in issue:

"Q. What have you been tried and convicted of, Mr. Austin? Just tell this jury what you have been tried and convicted of?

MR. PENDER: I request special instruction to the jury how they are supposed to consider any evidence . . .

THE COURT: I will."

Thereafter, the defendant in answer to questions gave testimony as to his prior convictions of the criminal law. The trial court did not then or later instruct the jury concerning the limited and restricted purpose for which such evidence was competent.

Absent a request in apt time to limit and restrict such evidence to impeachment purposes, the trial judge is not required to give such instructions. *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310.

However, the defendant contends that the above request was sufficient to require the court to limit and restrict the testimony concerning the defendant's prior criminal record.

"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." Stansbury, N.C. Evidence 2d, § 27.

We think that the above request coming at the time it did, and under the circumstances shown by this record, required the judge to instruct the jury that admissions by the defendant on cross-examination of his prior unrelated criminal record were not to be considered by the jury as substantive evidence, that they were competent only for the purpose of impeaching the defendant as a witness, if the jury should find that such did impeach him.

The case of *State v. Norkett,* 269 N.C. 679, 153 S.E. 2d 362, is similar to the present case and states the rule clearly. There, the Court said:

"Defendant testified, but did not otherwise put his character in issue. For purposes of impeachment, he was subject to cross-examination as to convictions for unrelated prior criminal offenses. However, admissions as to such convictions are not competent as substantive evidence but are competent as bearing upon defendant's credibility as a witness. Stansbury, *op. cit.,* § 112; *S. v. Sheffield,* 251 N.C. 309, 312, 111 S.E. 2d 195, 197.

Under these circumstances, defendant was 'entitled, on request, to have the jury instructed to consider (this evidence) only for the purposes for which it is competent.' Stansbury, *op. cit.,* § 79; *S. v. Ray,* 212 N.C. 725, 729, 194 S.E. 482, 484. It is noteworthy that, prior to the adoption of the rule now included in Rule 21, Rules of Practice in the Supreme Court, 254 N.C. 803, a defendant was entitled to such instruction even in the absence of request therefor. *S. v. Parker,* 134 N.C. 209, 46 S.E. 511; *Westfeldt v. Adams,* 135 N.C. 591, 47 S.E. 816."

Failure to give the requested instruction was prejudicial error for which defendant is entitled to a new trial.

New trial.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM MILES HOUSTON

No. 6926SC172

(Filed 30 April 1969)

1. Criminal Law § 13— jurisdiction to try federal prisoner

Statement by the sheriff to the presiding judge that defendant was a federal prisoner and thus could not be tried in superior court is insufficient ground upon which to challenge jurisdiction of the court to try defendant.

2. Criminal Law § 154— case on appeal — addition of items after agreed to by solicitor

The addition of items to defendant's case on appeal by defense counsel after the case on appeal was agreed to by the solicitor is highly improper, and the improperly added items will not be considered by the Court of Appeals.

3. Criminal Law § 104— motion to nonsuit — consideration of evidence

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, with contradictions and discrepancies, even in the State's evidence, being for the jury to resolve.

4. False Pretense § 1— elements of the crime

Elements of the offense of obtaining property by false pretense are that there must be a false representation by defendant, by conduct, word or writing, of a subsisting fact which is calculated and intended to deceive, which does in fact deceive, and by which defendant obtains something of value from another without compensation.

5. False Pretense § 3— sufficiency of evidence

In this prosecution for obtaining merchandise by false pretense, the evidence *is held* sufficient to be submitted to the jury where it tends to show that defendant charged certain items to his employer and signed the charge ticket, that defendant took the items with him without paying for them, that defendant's employer did not authorize him to procure the items and did not receive the items, and that defendant sold some of the items to a third party.

APPEAL by defendant from *Falls, J.*, 4 November 1968 Schedule A Session, MECKLENBURG Superior Court.

Defendant was tried upon three bills of indictment (Nos. 53-959, 53-960, and 53-961), each charging him with the felony of obtaining merchandise by false pretense from Dixie Gases, Inc. on the dates of 23 September 1968, 9 October 1968, and 10 October 1968.

The evidence for the State tended to show that defendant had been an employee of Smith Metal & Iron Company, and as such employee he had been sent by his employer on various occasions to

get merchandise from Dixie Gases, Inc. for use in employer's business. That on 23 September 1968, 9 October 1968, and 10 October 1968, defendant went to Dixie Gases, Inc. and ordered certain merchandise. That when the agent of Dixie Gases, Inc. asked defendant if the merchandise was for Smith Metal & Iron Company, defendant either did not answer, or said "That is right." That the agent for Dixie Gases, Inc. then, in the presence of defendant, charged the items to Smith Metal & Iron Company, that defendant signed the charge ticket, and took the items with him without paying for them or advising that they were not for Smith Metal & Iron Company. The State's evidence further tended to show that Smith Metal & Iron Company did not authorize defendant to get the items on 23 September 1968, 9 October 1968, or 10 October 1968; that Smith Metal & Iron Company never received the items ordered by defendant from Dixie Gases, Inc. on those dates; and that Smith Metal & Iron Company refused to pay the invoices because they were not authorized and the goods were not received. The evidence further tended to show that on 10 October 1968 defendant sold some of the items to a third party.

The defendant offered no evidence.

From verdicts of guilty as charged in each bill and the judgments entered thereon, defendant appealed, assigning error.

Robert Morgan, Attorney General, by Dale Shepherd, Staff Attorney, for the State.

Lila Bellar for the defendant.

BROCK, J.

Counsel for defendant forthrightly admits that assignments of error Nos. 2, 3 and 11 present no prejudicial error for review by this Court; we therefore deem them abandoned.

[1] Assignment of error No. 1 seeks to challenge the jurisdiction of the Superior Court over the person of the defendant for the purposes of trial upon the charges against him. This assignment of error is based upon a parenthetical statement contained in defendant's Case on Appeal as follows:

> "At this point during the trial Donald W. Stahl, Sheriff of Mecklenburg County entered the courtroom through a door adjacent to the Bench, spoke briefly with the deputy sheriff in attendance at the trial and with the deputy clerk and standing to the left-hand of the judge, just in front of the Bench (the jury

being seated to the extreme right-hand of the court) stated that the man on trial was a federal prisoner and that he could not be tried in the Superior Court for that reason."

This statement by the sheriff to the presiding judge (it is conceded that the jurors did not hear the statement) is hardly grounds upon which to challenge the jurisdiction of the court. Quite apparently the presiding judge was not greatly impressed with the sheriff's assertion, because the trial proceeded without delay.

[2] In addition to the foregoing parenthetical statement which was agreed upon by the solicitor for the State, appellant has added to the Case on Appeal (after the solicitor's acceptance of service and agreement to the Case on Appeal) two items: (1) a purported warrant for the arrest of defendant as a probationer from the United States District Court, along with a purported service of the warrant, and (2) a purported certificate by the sheriff of Mecklenburg County to the effect that at the time of trial defendant was in the Mecklenburg County jail as a result of an arrest under a warrant of the United States District Court.

It is clear that these two items were added to defendant's Case on Appeal after the Case on Appeal was agreed to by the solicitor. Since these items were not a part of the record proper, counsel had no right to insert them without consent, or order of the court. Such conduct of counsel was highly improper and is condemned, and the improperly added items will not be considered by the Appellate Court. Assignment of error No. 1 is overruled.

[3-5] Defendant assigns as error (No. 7) that the trial court erred in its refusal to grant defendant's motion for judgment of nonsuit. On a motion to nonsuit, the evidence must be considered in the light most favorable to the State; and contradictions and discrepancies, even in the State's evidence, are for the jury to resolve. 2 Strong, N.C. Index 2d, Criminal Law, § 104, p. 648. The elements of the offense of obtaining property by false pretense are that there must be (1) a false representation by the defendant, by conduct, word or writing, of a subsisting fact, (2) which is calculated to deceive and intended to deceive, (3) which does in fact deceive, and (4) by which defendant obtains something of value from another without compensation. *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686. If there is substantial evidence of each of the elements of the offense, the court must submit the case to the jury. Defendant's primary argument is that upon cross-examination the State's witness stated that he knew defendant and assumed he was ordering the goods for his employer, and therefore there was no reliance upon

any representation made by defendant. This argument overlooks the conduct of defendant in signing for the goods after they were charged to his employer. We hold that upon the evidence in this case the motion for nonsuit was properly overruled, and this assignment of error is likewise overruled.

The next portion of defendant's brief is devoted to discussing, *en masse*, assignments of error Nos. 8, 9, 12, 13, 14, 15 and 16. These assignments of error cover questions propounded to witnesses by the court, the court's explanation to the jury of the charges against defendant, the court's summary of the State's evidence, the court's failure to state to the jury defendant's contentions argued upon motion to nonsuit, and the court's explanation to the jury of the elements of the offenses charged. Although the *en masse* argument is somewhat difficult to follow, we have considered all of it and conclude that no prejudicial error has been shown.

We have considered all of defendant's remaining assignments of error and find them to be without merit. The defendant has had a fair trial, which we find to be free from prejudicial error.

No error.

CAMPBELL and MORRIS, JJ., concur.

W. A. DEAL & CLAUDE RUDISILL, T/A FOUR POINT BARGAIN CENTER
v. FREDRICKSON MOTOR EXPRESS CORPORATION

No. 6925DC90

(Filed 30 April 1969)

Carriers § 10— injury to goods in transit — prima facie case

In an action to recover for damage to a stove top delivered by defendant, the terminal carrier, to the plaintiffs, plaintiffs fail to make out a prima facie case of the defendant's negligence where their evidence merely consisted of (1) the initial shipper's bill of lading which contained the proviso that "the property described below, in apparent good condition, except as noted (contents and condition of contents of package unknown)," and (2) testimony that plaintiffs received the property from the defendant shipper and found it damaged.

APPEAL by defendant from *Evans, J.*, at the 30 September 1968 Civil Session of CATAWBA District Court.

This is an action by plaintiffs to recover for damage to a stove top delivered by defendant, a common carrier, to plaintiffs. Jury trial was waived. The evidence and stipulations are summarized as follows:

Plaintiff purchased the stove top by telephone or mail from McKenzie Supply Company (McKenzie) in Lumberton, N. C. At the time of delivery by McKenzie to Adley Express Company (Adley), the initial carrier, the stove top had been tightly crated in "real stiff" cardboard, stapled together. Adley issued its bill of lading covering "1 stove top" to be shipped by McKenzie, Lumberton, N. C., to Four Point Bargain Center, Hickory, N. C. The bill of lading was on a printed form which contained the following proviso: "The property described below, in apparent good order, except as noted (contents and condition of contents of package unknown) * * *." Adley transported the stove top to Charlotte, N. C., where it was delivered to defendant and by it transported and delivered to plaintiffs in Hickory. Plaintiff Rudisill testified that he received the property from defendant, that the carton was in good shape at the time, and that he signed defendant's receipt which contained the proviso, "received the above described property in good condition, except as noted"; he further testified that he did not note any exception on the receipt. After opening the carton, plaintiffs found that the porcelain on the stove top was chipped in several places.

Plaintiffs introduced the bill of lading in evidence but offered no other evidence as to the condition of the stove top at the time it was delivered by McKenzie to Adley in Lumberton. The trial court rendered judgment in favor of plaintiffs from which defendant appealed.

Joe P. Whitener for plaintiff appellees.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Gaston H. Gage for defendant appellant.

BRITT, J.

Defendant assigns as error the failure of the trial court to grant its motion for nonsuit interposed at the close of plaintiffs' evidence and renewed at the close of all the evidence.

Plaintiffs contend that the bill of lading issued by the initial carrier in Lumberton created a presumption that the stove top was received for shipment in good condition; that by introducing the bill of lading in evidence and offering evidence that the property was found damaged when received by the consignee, plaintiffs made out

a *prima facie* case. Our review of pertinent Supreme Court decisions impels us to disagree with this contention.

In *Precythe v. R. R.*, 230 N.C. 195, 52 S.E. 2d 360, in an opinion by Denny, J. (Later C.J.), we find the following:

> "The burden of proving the carrier's negligence was upon the plaintiff, and he made out a *prima facie* case when he introduced evidence to show delivery of the shipment to the defendant in good condition and its delivery to the consignee in bad condition. *Chesapeake & Ohio Railway Co. v. Thompson Mfg. Co.*, 270 U.S. 416, 70 L. Ed. 659; *Fuller v. R. R.*, 214 N.C. 648, 200 S.E. 403; *Edgerton v. R. R.*, 203 N.C. 281, 165 S.E. 689; *Moore v. R. R.*, 183 N.C. 213, 111 S.E. 166; *Bivens v. R. R.*, 176 N.C. 414, 97 S.E. 213. Upon such showing a plaintiff is entitled to go to the jury, and the jury may, but is not compelled to find for him. However, in such cases, the burden of going forward with the evidence shifts to the defendant and if the defendant elects to offer no evidence he merely assumes the risk of an adverse verdict. *Vance v. Guy*, 224 N.C. 607, 31 S.E. 2d 766; *Star Mfg. Co. v. R. R.*, 222 N.C. 330, 23 S.E. 2d 32; *McDaniel v. R. R.*, 190 N.C. 474, 130 S.E. 208; *Speas v. Bank*, 188 N.C. 524, 125 S.E. 398."

In *Riff v. R. R.*, 189 N.C. 585, 127 S.E. 588, two cases of sweaters were shipped from New York to plaintiff in Albemarle, N. C. The bill of lading acknowledged receipt by the initial carrier of "two cases knit goods in apparent good condition, contents and condition of contents of packages unknown." Plaintiff contended that twenty-eight of the sweaters were missing when he opened the packages in Albemarle, and he brought action to recover the value of the missing sweaters from the terminal carrier. The court held that "[p]laintiff assumed the burden of proving, by evidence, that the twenty-eight sweaters alleged to have been lost, were in the case when same was delivered to the initial carrier, and were missing when the case was delivered to plaintiff by the defendant." The court further held:

> "Where there is a general description of packages received for shipment, qualified by the statement in the bill of lading that the contents of the packages are unknown, and the contents are not subject to ordinary inspection, and there is an allegation of shortage in the number of articles in the packages at delivery, *the bill of lading, by reason of the qualification is not sufficient alone as evidence to sustain the allegation of shortage; it is, however, competent as evidence.* * * *" (Emphasis added.)

In *Brown v. Express Co.*, 192 N.C. 25, 133 S.E. 414, it is said:

"Conceding that it was incumbent upon the plaintiff to offer evidence tending to show that the property was originally delivered to the carrier in good condition, the express receipt or bill of lading is evidence of the fact that the merchandise was delivered in good condition *in the absence of notation or entry thereon to the contrary.* * * *" (Emphasis added.)

The bill of lading issued by the initial carrier in the case before us contained an acknowledgment of receipt of "the property described below, in apparent good condition, except as noted (contents and condition of contents of package unknown) * * *." Plaintiffs contend that the words "contents and condition of contents of package unknown" contained in the bill of lading does not have the effect of qualifying the declaration that the property was received in good order and cites the case of *Mfg. Co. v. R. R.*, 121 N.C. 514, 28 S.E. 474. A study of the cited case reveals that the bill of lading issued in that case contained provision almost identical to those contained in the bill of lading issued in this case. Although the court upheld a judgment in favor of the plaintiff against the terminal carrier, the decision appears to have turned on the fact that at the time the terminal carrier received the goods from the preceding carrier the terminal carrier's agent marked on the way-bill "O.K." In the opinion, the court stated that "it seems to be agreed that O.K. means all right or in good condition." There was no evidence of similar import in the instant case.

We hold that the evidence was insufficient to survive the motions for nonsuit. In view of this holding, we do not deem it necessary to pass upon the other questions raised in defendant's brief; nor do we deem it necessary to pass upon the demurrer *ore tenus* filed in this Court. The judgment appealed from is

Reversed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. HILLARD ELMER SMITH

No. 6925SC52

(Filed 30 April 1969)

Criminal Law § 148— orders appealable — interlocutory order

An appeal from an order denying defendant's motion to dismiss the bill of indictment on the ground that he was deprived of his constitutional right to a speedy trial *is held* an appeal from an interlocutory order and will be dismissed. G.S. 7A-27.

APPEAL by defendant from *Anglin, J.*, 5 August 1968 Mixed Session of Superior Court of CATAWBA County.

The defendant on 6 August 1968, upon the call for trial of six cases in each of which he is charged in a bill of indictment with the crimes of forgery and uttering a forged instrument, requested the trial court to pass upon his written motion filed 24 May 1968 to dismiss the charges against him. The substance of defendant's motion is stated by him as follows:

> "In view that these detainers were placed against the defendant in 1966 and the State of North Carolina did nothing to gain his custody and went on to deny his petitions for a speedy trial the defendant is entitled to a dismissal of the charges which he has now been indicted and returned for trial only to have this trial put off again because of an order by the Federal District Court."

After hearing the motion, the trial judge entered an order denying the motion to dismiss after making findings of fact and conclusions of law as follows:

> "Upon proofs received and from the records proper, the court makes the following
>
> FINDINGS OF FACT:
>
> 1. On 30 January 1966 the defendant, Hillard Elmer Smith, escaped from a jail in the State of Virginia.
>
> 2. On 3 May 1966 the clerk of the Municipal Court of Hickory, North Carolina issued a fugitive warrant against the defendant for an alleged breaking and entering in the State of Virginia.
>
> 3. On 24 May 1966 six warrants were issued against the defendant by the Municipal City Court of Hickory, North Carolina, each charging that the defendant forged and uttered a check on 29 April 1966 in Catawba County, North Carolina.

4. On 11 July 1966 the defendant was tried and convicted in the State of Virginia for the escape on 30 January 1966 and was sentenced to six months' imprisonment.

5. On 3 October 1966 the defendant was tried and convicted in the State of Virginia for breaking and entering and was sentenced to five years' imprisonment in the Virginia State Penitentiary.

6. On 6 October 1966 the defendant was received in the Virginia State Penitentiary to serve said five-year sentence for breaking and entering, at which time he learned that there were six forgery cases pending against him in the State of North Carolina.

7. On 11 October 1966 the Virginia Department of Welfare and Institutions acknowledged receiving from the Hickory, North Carolina Police Department six detainer warrants against defendant charging forgery.

8. In April 1967 the defendant escaped from the Virginia Penitentiary and was tried and convicted in April 1968 for such escape and sentenced to six months' imprisonment.

9. On 30 October 1967 the defendant verified a 'Motion for a Public and Speedy Trial or . . . Dismissal of Detainer Warrants,' which motion was forwarded to and received by the Hickory, North Carolina Police Department.

10. Prior to 17 January 1968 a Petition for Writ of Mandamus was filed by the defendant with the Court of Appeals of North Carolina and on that date the Court of Appeals issued an Order denying the Petition.

11. On 6 February 1968 an appeal from the denial of the Writ of Mandamus by the Court of Appeals was denied by Order of the Supreme Court of North Carolina.

12. On 26 March 1968 a 'Certificate' was issued by the Superior Court Judge holding courts in the Twenty-fifth Judicial District, including Catawba County, North Carolina, for the return of the defendant from the Virginia State Penitentiary to North Carolina for trial in the Superior Court of Catawba County on said six forgery cases.

13. On 2 April 1968 bills of indictment were returned by the Catawba County, North Carolina grand jury, each charging the defendant with forgery and uttering a forged check.

14. At the April 1968 Session of the Superior Court of Catawba

County, 'upon the call of the case for trial,' defendant made an affidavit dated 9 April 1968 requesting the appointment of counsel. Honorable William Chamblee was appointed forthwith by the presiding judge as defendant's counsel in said six cases. On 12 April 1968 the cases were continued by order of the court until the next session 'because of the length of the calendar and this being a recent case.'

15. On 24 May 1968 the defendant filed, in the Superior Court of Catawba County, North Carolina, a motion to dismiss the cases pending against him in that court.

16. The defendant has suffered no serious prejudice because of the lapse of time and in returning him to North Carolina and in calling said cases against him for trial.

Upon the foregoing Findings of Fact, the Court arrives at the following

CONCLUSIONS OF LAW

That the defendant has not been deprived of any constitutional right to a speedy trial and that his motion to dismiss the cases should be denied.

THEREFORE, the court ORDERS AND ADJUDGES that the defendant's motion to dismiss said cases against him be and hereby is denied."

From the entry of this order, the defendant appeals to the Court of Appeals.

Attorney General Robert Morgan and Assistant Attorney General Bernard A. Harrell for the State.

William H. Chamblee for the defendant appellant.

MALLARD, C.J.

The Attorney General moves to dismiss the defendant's appeal on the grounds that under the provisions of G.S. 7A-27 there is no appeal as a matter of right from interlocutory orders in a criminal case.

In *State v. Henry,* 1 N.C. App. 409, Judge Britt, speaking for the Court, said:

"Article 5 of Chapter 7A of the General Statutes deals with jurisdiction of the Court of Appeals. Pertinent portions of G.S. 7A-27 are as follows:

'Appeals of right from the courts of the trial divisions.—

* * *

'(b) From any *final judgment* of a superior court, other than one described in subsection (a) of this section or one entered in a post-conviction hearing under article 22 of Chapter 15, including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals.' (Emphasis added.)

Subsection (d) permits appeals from certain interlocutory orders in civil actions or proceedings, but there is no provision for an appeal as a matter of right from interlocutory orders in criminal actions."

This Court also said in *State v. Lance,* 1 N.C. App. 620:

"The defendant in this case attempts to appeal as a matter of right from the order denying his motion to quash and dismiss. In G.S. 7A-27 there is no provision for an appeal as a matter of right from interlocutory orders in criminal cases."

The denial of the defendant's motion to dismiss the charges contained in the bills of indictment is an interlocutory order. From the entry of such an order under the circumstances of this case, there is no appeal as a matter of right. The Attorney General contends in his brief that the Court should dismiss this action and also foreclose it on its merits.

Since we are of the opinion that the attempted appeal should be dismissed, we do not deem it appropriate to consider the matter on its merits. The attempted appeal is therefore dismissed, and the Superior Court should proceed to try the defendant upon the bills of indictment.

Appeal dismissed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES R. BYRD

— AND —

STATE OF NORTH CAROLINA v. KENNETH WAYNE PORTER

No. 6915SC8

(Filed 30 April 1969)

1. Criminal Law § 155.5— dismissal of appeal not aptly docketed

Where the record on appeal was not docketed within the time prescribed by Rule 5 and no order was entered extending the time for docketing the

record on appeal, the appeal is subject to dismissal by the Court of Appeals *ex mero motu.* Rules of Practice in the Court of Appeals No. 48.

4. Criminal Law § 155.5— rule prescribing time for docketing appeal is mandatory

Neither the judges, solicitors, attorneys nor 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.

3. Criminal Law § 153— withdrawal of appeal — jurisdiction of superior court

The superior court has no authority to permit a defendant to withdraw an appeal after the appeal is docketed in the Court of Appeals.

4. Criminal Law § 147— motion to withdraw appeal

Defendant's motion to withdraw his appeal is allowed by the Court of Appeals in its discretion.

APPEAL by each of the defendants from *Beal, S.J.,* June 1968 Criminal Session of the Superior Court of ALAMANCE County.

Defendants were indicted on two separate bills of indictment, which were consolidated for trial without objection, and tried on charges of conspiracy to commit the crime of armed robbery.

Each of the defendants pleaded not guilty. Trial was by jury. The jury returned, as to each defendant, a verdict of "(g)uilty as charged in the bill of indictment." From the imposition of judgment of imprisonment for a term of ten years, each defendant appeals, assigning error.

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

M. Glenn Pickard for the defendant James R. Byrd.

Robert R. Hayes for the defendant Kenneth Wayne Porter.

MALLARD, C.J.

[1] The judgment and notice of appeal in these cases were entered as of 7 June 1968. The trial judge allowed each defendant fifty days in which to prepare and serve his case on appeal, and the State was given thirty days thereafter to file countercase or exceptions. No order extending the time for docketing the record on appeal was entered. The record on appeal for both defendants was docketed in this Court on 8 November 1968. This was more than sixty days too late, and therefore subject to dismissal. See Rules 5 and 48 of the Rules

of Practice in the Court of Appeals. There was no order extending the time for docketing the record on appeal. For failure to docket the record on appeal within the time prescribed by the rules, this appeal should be dismissed.

[2] It is appropriate here, and therefore, we will reiterate what this Court said in *State v. Farrell,* 3 N.C. App. 196, 164 S.E. 2d 388:

> "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.*"

Under date of 4 March 1969, defendant Byrd filed in the Superior Court of Alamance County a "Motion to Withdraw Appeal" in which he requests the Superior Court to permit him to withdraw his appeal pending in the Court of Appeals and which was set for hearing in the Court of Appeals on 11 March 1969. The judge presiding in the Superior Court of Alamance County on 4 March 1969 ordered that the defendant "be allowed to withdraw his appeal from the North Carolina Court of Appeals." Under date of 6 March 1969, defendant's counsel, in a letter addressed to the Clerk of this Court, said:

> "Enclosed you will find a motion to the Superior Court Division to withdraw the appeal of James Ronald Byrd to the Court of Appeals together with an order allowing same.
>
> Mr. Byrd has instructed me to ask you to allow him to withdraw his appeal."

[3, 4] The Superior Court had no authority to permit or allow a defendant to withdraw an appeal to the Court of Appeals after the appeal is docketed here. However, we consider the letter from the defendant's attorney to the Clerk of this Court with the enclosures therein as a motion by the defendant to withdraw his appeal, and in our discretion allow it.

We do not consider the bill of indictment or the charge of the court in this case as model ones; however, we have reviewed the

record proper and are of the opinion that there appears no error sufficiently prejudicial to the defendant Porter to justify a new trial.

Appeal withdrawn as to Defendant Byrd.

No error as to Defendant Porter.

BRITT and PARKER, JJ., concur.

HAROLD EDWARD RAPPE, BY HIS NEXT FRIEND, NADINE MARIE S. RAPPE, v. SAM EARL CARR, JR., EDITH KIRBY AND THE TOWN OF BELMONT

— AND —

NADINE MARIE S. RAPPE v. SAM EARL CARR, JR., EDITH KIRBY AND THE TOWN OF BELMONT

— AND —

BOBBY J. RAPPE, JR., BY HIS NEXT FRIEND, NADINE MARIE S. RAPPE v. SAM EARL CARR, JR., EDITH KIRBY AND THE TOWN OF BELMONT

— AND —

DONNA RENE RAPPE, BY HER NEXT FRIEND, NADINE MARIE S. RAPPE v. SAM EARL CARR, JR., EDITH KIRBY AND THE TOWN OF BELMONT

— AND —

BOBBY J. RAPPE v. SAM EARL CARR, JR., EDITH KIRBY AND THE TOWN OF BELMONT

No. 6927DC226

(Filed 30 April 1969)

1. Municipal Corporations § 12— tort liability — governmental v. proprietary functions

Municipalities are not liable for tortious acts of their officers or agents when exercising their police power or their judicial, discretionary or legislative authority as conferred by charters and statutes or when discharging a duty imposed solely for the public benefit.

2. Municipal Corporations § 33— traffic control signals

While municipalities are not required to install electrical traffic control signals, they may do so as an exercise of their police power. G.S. 160-200(11) and (31).

3. Municipal Corporations §§ 5, 15— tort liability — maintenance of traffic lights

A municipality may not be held liable for negligence of its agents in the installation and maintenance of electric traffic control signals, the installation and maintenance of such signals being a governmental and not a proprietary function.

APPEAL from *Bulwinkle, J.*, 10 February 1969, Regular Civil Non-Jury Session of the General Court of Justice, District Court Division, GASTON County.

Harold Edward Rappe, by his next friend Nadine Marie S. Rappe; Bobby J. Rappe, Jr., by his next friend Nadine Marie S. Rappe; Donna Rene Rappe, by her next friend Nadine Marie S. Rappe, Bobby J. Rappe in his individual capacity and Nadine Marie S. Rappe in her individual capacity (plaintiffs), each instituted a separate civil action against Sam Earl Carr, Jr., (Carr) Edith Kirby (Kirby) and the Town of Belmont (Town) to recover for personal injuries sustained in an automobile collision. The five cases were consolidated for hearing. The plaintiffs alleged in their complaints that, at approximately 9:00 p.m. on 31 March 1968, they were passengers in a 1961 Ford automobile owned and operated by Kirby; the automobile was traveling in a northerly direction on North Main Street (Main) in Town; it was in the process of going through the intersection of Main and Todd Street (Todd); an electrical traffic control signal (signal) was located at the intersection; this signal regulated and controlled vehicular traffic; on the occasion in question, the signal was not exhibiting any light for vehicular traffic approaching on Main, but it was exhibiting a green light for vehicular traffic approaching on Todd; Carr was operating a 1967 Oldsmobile automobile in an easterly direction on Todd; upon reaching the intersection, Carr's automobile struck the left side of Kirby's automobile, thereby causing personal injuries to the plaintiffs. The plaintiffs further alleged that their personal injuries were caused by the joint and concurrent negligence of Carr, Kirby and Town. With regard to Town, the plaintiffs alleged that the signal had been malfunctioning and defective for several days prior to 31 March 1968; Town knew of this malfunction and defect; and Town was, therefore, negligent in failing to keep the signal working properly and in failing to warn motorists of same.

Town demurred to each complaint. From an order of Judge Bulwinkle sustaining these demurrers, the plaintiffs appealed to this Court.

Joseph B. Roberts, III, for plaintiff appellants.

Carpenter, Golding, Crews & Meekins by Marvin K. Gray for Town of Belmont, defendant appellee.

CAMPBELL, J.

This appeal challenges only the ruling of Judge Bulwinkle in sustaining Town's demurrers to each complaint. In passing upon the

demurrers, the facts alleged in the complaint and relevant inferences of fact necessarily deducible therefrom will be taken as true.

[1-3] When exercising their police power or their judicial, discretionary or legislative authority as conferred by charters and statutes or when discharging a duty imposed solely for the public benefit, municipal corporations are not liable for the tortious acts of their officers and agents. While municipalities are not required to install electrical traffic control signals, they may do so as an exercise of their police power. G.S. 160-200(11) and (31). The installation and maintenance of such signals in and by municipalities are governmental functions and not proprietary or corporate functions. *Hamilton v. Hamlet,* 238 N.C. 741, 78 S.E. 2d 770. Therefore, the judgment sustaining Town's demurrers is

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. KENNETH McGRAW
No. 6928SC174

(Filed 30 April 1969)

Constitutional Law § 32— right to counsel — felony prosecution — duty of court

Where a defendant charged with a felony was not represented by counsel at the time he was called upon to plead, defendant is entitled to a new trial where the trial judge failed to advise him that he was entitled to counsel before he was required to plead. G.S. 15-4.1.

APPEAL by defendant from *McLean, J.,* 23 September 1968, Criminal Session, BUNCOMBE County Superior Court.

Kenneth McGraw (defendant) was charged with a felonious escape from the State Department of Correction, this being his second offense of escape. In superior court he entered a plea of guilty as charged. From the imposition of a twelve months sentence, he appealed to this Court. Since the defendant is an indigent, the trial judge assigned counsel to represent him on the appeal.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

George Ward Hendon for defendant appellant.

CAMPBELL, J.

The defendant duly excepted to and assigned as error the following proceedings:

"SOLICITOR: 68-727. Kenneth McGraw. Stand up, please. Charged with second escape. How do you plead?

DEFENDANT: Guilty.

SOLICITOR: You plead guilty.

COURT: You understand you are entitled to have a lawyer?

DEFENDANT: Yes, sir.

COURT: Do you want to waive your right to counsel?

DEFENDANT: Yes, sir.

COURT: All right. Come over here and sign the waiver."

The General Assembly has enacted statutes, including G.S. 15-4.1, in order to protect the constitutional rights of indigent persons accused of crime. G.S. 15-4.1 provides:

"When a defendant charged with a felony is not represented by counsel, before he is required to plead the judge of the superior court shall advise the defendant that he is entitled to counsel. If the judge finds that the defendant is indigent and unable to employ counsel, he shall appoint counsel for the defendant but the defendant may waive the right to counsel in all cases except a capital felony by a written waiver executed by the defendant, signed by the presiding judge and filed in the record in the case. The judge may in his discretion appoint counsel for an indigent defendant charged with a misdemeanor if in the opinion of the judge such appointment is warranted unless the defendant executes a written waiver of counsel as above specified. A defendant with or without counsel may plead guilty but if the defendant is without counsel, the judge shall inform the accused of the nature of the charge and the possible consequences of his plea, and as a condition of accepting the plea of guilty the judge shall examine the defendant and shall ascertain that the plea was freely, understandably and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency, but a defendant without counsel cannot plead guilty to an indictment charging a capital felony. Unless the judge determines that the plea of guilty was so made, it shall not be accepted. In case of an appeal to the Supreme Court the judge shall appoint counsel for such appeal or continue the services

of counsel already appointed for the trial. The judge shall appoint counsel as soon as possible and practicable to the end that counsel so appointed may have adequate notice and sufficient time to prepare for a defense.

When an appeal is taken under this section the county shall make available trial transcript and records required for an adequate and effective appellate review."

The State argues: "We maintain that the procedure outlined in G.S. 15-4.1 is flexible" and that the trial judge did not err in failing to advise the defendant that he was entitled to counsel before he was required to plead. However, this procedure is not flexible. The statute specifically provides that "[w]hen a defendant charged with a felony is not represented by counsel, before he is required to plead the judge of the superior court shall advise the defendant that he is entitled to counsel." In *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245, the Supreme Court held:

"Thus, by statute in North Carolina, the judge of the superior court, with respect to every defendant charged with a felony and not represented by counsel, is required to (1) advise the defendant that he is entitled to counsel, (2) ascertain if defendant is indigent and unable to employ counsel, and (3) appoint counsel for each defendant found to be indigent unless the right to counsel is intelligently and understandingly waived."

Since a defendant is entitled to the full protection of his constitutional and statutory rights, it is incumbent upon a trial judge to hew not only to the spirit of a statute, but to the express provisions of the statute. This was not done in the instant case.

New trial.

BROCK and MORRIS, JJ., concur.

KATHRINE R. EVERETT v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY AND ROY S. DENKINS AND ROY S. DENKINS, JR., D/B/A ROY S. DENKINS & SON AGENCY

No. 6914DC184

(Filed 30 April 1969)

1. Appeal and Error § 39— failure to aptly docket record on appeal

Where the record on appeal was docketed in the Court of Appeals 145 days after the date of the judgment appealed from and no extension of

time was granted, the appeal is subject to dismissal for failure to comply with the requirement of Rule 5 that the record on appeal be docketed within 90 days after the date of the judgment.

2. Insurance § 129— cancellation of fire policy — return of premium refund — notification that cancellation had become effective

Cancellation of a fire insurance policy upon request of insured was not affected by failure of the insurance agent to return the premium refund until after a fire had occurred or by failure of the insurance agent to notify the insured that the cancellation had become effective.

3. Insurance § 136— fire insurance — sufficiency of evidence

In this action to recover under a policy of fire insurance, plaintiff's evidence is insufficient to be submitted to the jury where it tends to show that plaintiff was requested by the agent through which the insurance was purchased to return a fire policy on a certain house for cancellation, that this policy was returned and cancelled, that plaintiff later mistakenly returned to the agent a fire policy on a second house, stating by letter accompanying the policy that she was returning the policy in accordance with the agent's request and that she had purchased insurance on this property from another company, and that the second house was thereafter damaged by fire, plaintiff's evidence being insufficient to show that the policy was in effect at the time of the fire.

APPEAL by plaintiff from *Lee, J.*, September 1968 Jury Session, District Court of DURHAM.

Plaintiff brings this action to recover on a policy of fire insurance issued to her on 29 August 1964 by the St. Paul Fire and Marine Insurance Company (St. Paul).

Briefly, the evidence shows that prior to July 1966, plaintiff was the owner of two dwelling houses in Durham, North Carolina, located at 923 and 927 East Main Street. The houses were insured against fire by the defendant, St. Paul. On 8 July 1966 the Roy S. Denkins and Son Agency (Denkins), the agency through whom the policies were purchased, notified plaintiff by letter that the fire insurance on the property located at 923 East Main Street was being canceled, and requested that plaintiff return this policy to the Denkins Agency. This policy was returned to Denkins, either by plaintiff or some other party, on 21 July 1966, and canceled. On 26 September 1966 plaintiff returned the policy of insurance for the property located at 927 East Main Street to the Denkins Agency, stating in a letter accompanying the policy that this was done according to the request of 8 July 1966, and that she had purchased insurance on this property from another company. The policy for the property located at 927 East Main Street was canceled by Denkins on 4 October 1966.

On 7 November 1966 the property located at 927 East Main Street was extensively damaged by fire. Plaintiff received the premium due for the cancellation of the insurance on this property on 9 November 1966.

Plaintiff, at the close of her evidence, took a judgment of voluntary nonsuit as to the individual defendants. A judgment as of nonsuit was entered by the court as to defendant St. Paul. From this judgment plaintiff appeals.

Everett and Creech by Robinson O. Everett for plaintiff appellant.

Smith, Leach, Anderson & Dorsett by C. K. Brown, Jr., for defendant appellee.

MORRIS, J.

The judgment here appealed from was entered on 18 September 1968. The record on appeal was not filed in this Court until 10 February 1969.

[1] Rule 5, Rules of Practice in the Court of Appeals of North Carolina, requires that the record on appeal is to be docketed in this Court within 90 days after the date of the judgment. This rule provides that the trial tribunal may extend this time up to 60 days for good cause; however, the record in the present case does not reveal that such an extension was requested or granted. The record on appeal was docketed in this Court 145 days after the date of the judgment.

In looking to the merits of this case, we find that plaintiff contends that her letter of 26 September 1966 was not a request by her to cancel the policy on 927 East Main Street, but that she was merely acting according to the request of Denkins and that it should have been apparent to Denkins that she had sent the wrong policy. Furthermore, she claims that the policy on the damaged property was not effectively canceled until after the fire because she did not receive the refund of premiums until after the fire.

[2, 3] The evidence taken in the light most favorable to plaintiff shows that she committed an error when she mailed the policy for the property at 927 East Main Street to Denkins on 26 September 1966. However, the letter stated that other insurance had been obtained on this property. Also, on 11 November 1966, plaintiff, in a letter to St. Paul requesting the cancellation date of this policy stated, "Recently I notified the Roy Denkins Insurance Agency that

I intended to cancel the policy on 927 East Main Street . . ." We think plaintiff's evidence, taken in the light most favorable to her, was insufficient to carry the case to the jury. Assuming, *arguendo,* that Denkins was acting as the agent of St. Paul in canceling this policy, the cancellation was not affected by the failure of Denkins to return the premium refund until after the fire of 7 November 1966. *Hayes v. Indemnity Co.,* 274 N.C. 73, 161 S.E. 2d 552. Nor was Denkins required to notify plaintiff that the cancellation had become effective. *Hayes v. Indemnity Co., supra.*

We find the plaintiff's assignment of error to be without merit. However, for failure to comply with Rule 5, Rules of Practice in the Court of Appeals of North Carolina, the appeal is

Dismissed.

CAMPBELL and PARKER, JJ., concur.

IRA L. COFFEY v. JOHN A. VANDERBLOEMEN, JR.

No. 6925DC50

(Filed 30 April 1969)

Appeal and Error § 39— failure to aptly docket record on appeal

Where record on appeal was docketed in the Court of Appeals 144 days after the date of judgment appealed from, and there was no order by the trial tribunal extending the time for docketing, the Court of Appeals *ex mero motu* will dismiss the appeal for failure to comply with the Rules. Court of Appeals Rules Nos. 5 and 48.

APPEAL by plaintiff from *Evans, J.,* at the 28 June 1968 Session of CALDWELL District Court.

This is an action to recover for personal injuries allegedly sustained by plaintiff as the result of a collision between an automobile operated by plaintiff and an automobile operated by defendant. The usual issues of negligence, contributory negligence and amount of damages were submitted to the jury who answered the issues of negligence and contributory negligence in the affirmative. From judgment in favor of defendant predicated thereon, plaintiff appealed.

Ted S. Douglas for plaintiff appellant.

W. G. Mitchell for defendant appellee.

BRITT, J.

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.

The judgment entered in this action is dated 28 June 1968, and the record contains no order extending the time for docketing the record on appeal. In fact, the record discloses that at the time plaintiff's counsel gave notice of appeal, the trial judge stated, "Notice of appeal is noted and you are granted ninety days in which to appeal." The record was filed in this Court on 19 November 1968 — 144 days after the date of judgment. For failure of the plaintiff to comply with the rules, this Court, *ex mero motu,* dismisses the appeal. *Kelly v. Washington,* 3 N.C. App. 362, 164 S.E. 2d 634.

Nevertheless, we have reviewed the record, particularly with regard to the assignments of error brought forward and argued in plaintiff's brief, but find no error sufficiently prejudicial to warrant a new trial.

Appeal dismissed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. LEWIS FRANKLIN FLANDERS

No. 6926SC18

(Filed 30 April 1969)

Criminal Law § 161— the appeal — exception to the judgment

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

APPEAL by defendant from *Falls, J.,* at the 2 September 1968 Schedule "A" Criminal Session of MECKLENBURG Superior Court.

By indictment proper in form, defendant was charged with murder. When his case was called for trial, defendant, through his at-

torney, tendered a plea of guilty to the offense of voluntary manslaughter, which plea was accepted by the State. He was sentenced to State Prison for a period of seventeen years from which he appeals.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

Bailey & Davis by Nelson M. Casstevens, Jr., for defendant appellant.

BRITT, J.

Defendant's court-appointed counsel brings forward no assignment of error, frankly stating that he is unable to find error but asks the court to carefully review the record and grant such relief as may be proper.

An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper. *State v. Ruffin,* 3 N.C. App. 307, 164 S.E. 2d 503, citing 1 Strong, N.C. Index 2d, Appeal and Error, § 26, p. 152.

We have carefully reviewed the record before us and find that the defendant was charged upon a valid bill of indictment, entered a plea of guilty to a lesser offense encompassed in said bill of indictment, and was given a sentence which was within statutory limits. *State v. Hopper,* 271 N.C. 464, 156 S.E. 2d 857; *State v. Williams,* 3 N.C. App. 233, 164 S.E. 2d 404.

Having found no error upon the face of the record, the judgment of the superior court is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. VANDY B. CLEAVES

No. 6926SC108

(Filed 30 April 1969)

1. Criminal Law § 146— guilty plea — appellate review

When a defendant voluntarily pleads guilty to a charge of crime, the only questions presented on appeal are whether any error appears on the

face of the record proper and whether the sentence imposed is in excess of the statutory limits.

2. Constitutional Law § 36— cruel and unusual punishment

Punishment which does not exceed the limits fixed by statute cannot be considered cruel and unusual in a constitutional sense.

3. Criminal Law § 138— consecutive sentences

The trial court has authority to provide that sentences imposed upon defendant's pleas of guilty to separate offenses run consecutively.

APPEAL by defendant from *Falls, J.*, 30 September 1968 Session of MECKLENBURG Superior Court.

By five separate warrants, proper in form, defendant was charged with issuing worthless checks in violation of G.S. 14-107, the checks being in amounts of $16.80, $25.00, $56.94, $21.84, and $86.32 respectively. In recorder's court defendant pleaded guilty in all cases. From sentences imposed, he appealed to the superior court. In superior court he was represented by court-appointed counsel. He again pleaded guilty in all five cases. Judgments were entered imposing active prison sentences of 30 days in each of the three cases involving checks for amounts not exceeding $50.00, and two years in each of the two cases involving checks exceeding $50.00, all sentences to run consecutively and the first sentence to commence at the expiration of a sentence which had been previously imposed upon defendant in an earlier case on his plea of guilty to the crime of embezzlement. The previous sentence had originally been suspended and defendant placed on probation. Following defendant's guilty pleas and sentencing in recorder's court, probation was revoked after due notice to defendant and upon a finding that he had wilfully violated the terms and conditions of the probation judgment.

From the judgments imposed in the worthless check cases, defendant appealed. The court, on account of defendant's indigency, appointed the counsel who had represented defendant at the trial to represent him in connection with his appeal and ordered Mecklenburg County to pay the cost of obtaining a transcript of the trial proceedings and of providing the record and brief on appeal.

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

Michael G. Plumides for defendant appellant.

PARKER, J.

[1] When a defendant voluntarily pleads guilty to a charge of crime, the only questions presented on appeal are whether any error appears upon the face of the record proper and whether the sentences imposed were in excess of statutory limits. *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34; *State v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800.

[2, 3] The sole assignment of error in the record is that the punishment imposed was "cruel and unusual under the law and facts of this case." The assignment is without merit. It is 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 in a constitutional sense. *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216; *State v. Mosteller,* 3 N.C. App. 67, 164 S.E. 2d 27. The sentences imposed upon appellant here did not exceed statutory limits. G.S. 14-3; G.S. 14-107. The court's authority to provide that such sentences shall run consecutively is also well established. *State v. Dawson,* 268 N.C. 603, 151 S.E. 2d 203.

No error appears upon the face of this record; the punishment was within limits permitted by law. We find

No error.

MALLARD, C.J., and BRITT, J., concur.

STATE OF NORTH CAROLINA v. SAMMY KEE, JR.

No. 6926SC10

(Filed 30 April 1969)

1. Criminal Law § 88— cross-examination of defendant as to whereabouts of a co-conspirator

In this prosecution for armed robbery in which a witness for the State testified that defendant had told him that a certain person had helped him commit the robbery, defendant was not prejudiced when the solicitor asked him on cross-examination if he knew where that person was and if he had that person as a witness in this case where the court sustained defendant's objections to both questions.

2. Robbery § 5— instructions

In this armed robbery prosecution, the court's instructions did not weigh too heavily in favor of the State but were fair and accurate.

STATE *v.* KEE

APPEAL by defendant from *Falls, J.*, 2 September 1968 Schedule "A" Criminal Session of Superior Court of Mecklenburg County.

Defendant was tried on a bill of indictment charging him with the felony of armed robbery. Defendant's plea was not guilty. The verdict of the jury was guilty as charged in the bill of indictment.

From a judgment of imprisonment in the State's prison for not less than twenty-five years nor more than thirty years, the defendant assigns error and appeals to the Court of Appeals.

Attorney General Robert Morgan and Deputy Attorney General Harry W. McGalliard for the State.

W. Herbert Brown, Jr., for defendant appellant.

MALLARD, C.J.

[1] Defendant contends that he was prejudiced by the cross-examination of the solicitor. Defendant was asked by the solicitor on cross-examination if he knew where Celester Williams was, and the defendant replied that he did. The court sustained defendant's objection at this point. The solicitor thereupon asked the defendant the following question: "You don't have Mr. Williams here as a witness in the case, do you?" Defendant's counsel objected, and the court sustained the objection, to which the defendant excepted. A witness for the State had testified that the defendant had told him that Celester Williams had helped him commit the robbery under investigation. Defendant cites the cases of *State v. Foster,* 2 N.C. App. 109, 162 S.E. 2d 583, and *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335, in support of his contention that the two questions were prejudicial. In the *Foster* case, and also in the *Miller* case, the defendants were awarded new trials because of improper argument of the solicitor, and neither case supports the contention of the defendant. It is also noted that the court sustained defendant's objections; surely the defendant is not complaining because the court did what he asked. Also, we do not think the defendant was prejudiced by the mere asking of the questions. This assignment of error is without merit and is overruled.

[2] Defendant also complains that the court committed prejudicial error in its instruction to the jury, in that the court's charge weighed too heavily in favor of the State. We have carefully reviewed the charge, and when considered as a whole, we are of the opinion and

so hold that the court fully, fairly and accurately instructed the jury in this case, and no prejudicial error appears.

In the trial we find

No error.

BRITT and PARKER, JJ., concur.

RAYVON R. LAWS v. LAWRENCE PALMER, JR.

No. 6925DC24

(Filed 30 April 1969)

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

Where record on appeal was not docketed in the Court of Appeals within 90 days from date of judgment appealed from and no order was entered extending the time for docketing, the Court of Appeals *ex mero motu* will dismiss the appeal for failure to comply with the Rules. Court of Appeals Rules Nos. 5 and 48.

APPEAL by plaintiff from *Snyder, J.*, at the 5 August 1968 Regular Civil Session of the District Court of CALDWELL County.

Plaintiff filed a complaint on 20 July 1967. On 16 August 1967 defendant demurred. The demurrer was sustained on 12 March 1968, and plaintiff was allowed fifteen days "to serve amended complaint." The plaintiff had theretofore on 28 August 1967 filed an amended complaint which was served on 26 March 1968. Plaintiff's amended complaint, filed after the time for answering had expired, reads as follows:

"1. That the plaintiff is a resident of Caldwell County.

2. That the defendant is a resident of Caldwell County.

3. That the defendant has in his possession certain machinery consisting of a tractor, a Bush Hog, 1 Set Rippers, a Disc Harrow, a terracing blade, one set of bottom plows and small tools and attachments for the tractor, etc., of the value of Twelve Hundred Dollars, ($1200.00), the property of plaintiff. Plaintiff is entitled to immediate possession of the same, but defendant refuses on demand to deliver the same to plaintiff.

4. That defendant has wrongfully and unlawfully kept posses-

sion of the property mentioned above for some time and has thereby deprived the plaintiff of possession of use of said property to his great damage in the sum of One Hundred Dollars ($100.00).

WHEREFORE, plaintiff prays judgment against defendant for the recovery of the possession of the property above described and for the sum of One Hundred ($100.00) Dollars, together with the costs of this action and for interest."

At the close of plaintiff's evidence upon motion of the defendant, judgment of nonsuit was allowed and entered on 9 August 1968. Plaintiff excepted, assigned error, and gave notice of appeal.

L. H. Wall for plaintiff appellant.

No brief and no Counsel for defendant in this Court.

MALLARD, C.J.

This case was tried and judgment entered under date of 9 August 1968. The record on appeal was not docketed in the Court of Appeals within the time permitted under Rule 5 of the Rules of Practice in the Court of Appeals. The ninety days allowed in Rule 5 for docketing the record on appeal in this case expired on Thursday, 7 November 1968. The record on appeal was not docketed until 11 November 1968. No order was entered extending the time in which to docket the record on appeal. Under Rule 48, the case is subject to dismissal and should be and is dismissed by this Court *ex mero motu* for failure to comply with the rules.

However, we have also reviewed the record before us and find no prejudicial error. We think the judgment of the District Court is correct.

Appeal dismissed.

BRITT and PARKER, JJ., concur.

MARY W. LINEBACK, ADMINISTRATRIX OF THE ESTATE OF JAMES CHARLIE CARR, JR., DECEASED v. HAZEL DORA WOOD

No. 6925SC219

(Filed 30 April 1969)

1. Trial § 18— role of jury — weight and credit of evidence

It is for the jury, not the court, to determine the weight and credit to be given the testimony of the witnesses and to resolve the conflicts and inconsistencies in the evidence.

2. Appeal and Error § 59— review of judgment of involuntary nonsuit

On appeal from entry of judgment of involuntary nonsuit, plaintiff's evidence is to be taken as true and considered in the light most favorable to plaintiff; where plaintiff's evidence as disclosed by the record on appeal was sufficient to withstand defendant's motion, a new trial must be ordered.

APPEAL by plaintiff from *Bryson, J.*, 20 January 1969 Session, CALDWELL Superior Court.

Plaintiff brings this action for the wrongful death of her intestate, a nine-year-old male child. Plaintiff alleges that the death of the intestate was the proximate result of the negligent operation of a motor vehicle by the defendant on 18 January 1966.

At the close of the plaintiff's evidence, the trial judge, upon motion of the defendant, entered a judgment of involuntary nonsuit. Plaintiff appealed, assigning as error the entry of judgment of nonsuit.

Smathers & Ferrell, by Forrest A. Ferrell, for plaintiff appellant.

Townsend & Todd, by J. R. Todd, Jr., for defendant appellee.

BROCK, J.

[1, 2] This appeal presents no novel or new question; it presents only the question of whether plaintiff's evidence is sufficient to survive the motion for nonsuit. The plaintiff's evidence in this Record on Appeal is conflicting and inconsistent upon the question of how the accident occurred; however, it is for the jury, not the court, to determine the weight and credit to be given the testimony of the witness and to resolve the conflicts and inconsistencies in the evidence. *Brinkley v. Insurance Co.*, 271 N.C. 301, 156 S.E. 2d 225; *Tindle v. Denny*, 3 N.C. App. 567 (filed 5 February 1969). When viewed in the light of the well established rule that on a motion to nonsuit, the plaintiff's evidence is to be taken as true and be con-

sidered in the light most favorable to the plaintiff, *Brinkley v. Insurance Co., supra,* we hold that plaintiff's evidence, as disclosed by this Record on Appeal, was sufficient to withstand defendant's motion. It follows that we disagree with the trial judge upon this question, and that a new trial must be ordered.

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIE EUGENE ALEXANDER

No. 6926SC216

(Filed 30 April 1969)

1. Criminal Law § 113— the instructions — review of voir dire testimony as to probable cause of arrest

Instructions of trial court which inadvertently reviewed the *voir dire* testimony of a police officer concerning the probable cause for his arrest of defendant without a warrant, which testimony was given in the absence of the jury and consisted of accusatory statements made by persons not witnesses in the trial, *held* prejudicial to defendant.

2. Criminal Law § 168— the instructions — prejudicial error — statement of fact not in evidence

A statement in the instructions of a material fact not contained in the evidence constitutes reversible error.

APPEAL by defendant from *Falls, J.,* 2 December 1968 Schedule A Session, MECKLENBURG Superior Court.

Defendant was found guilty by a jury in case No. 68-CR-412 of a felonious breaking and entering, and in case No. 68-CR-413 of the felony of uttering a forged check. From judgments of confinement defendant appealed, assigning errors.

Robert Morgan, Attorney General, by T. Buie Costen, Staff Attorney, for the State.

Nivens & Brown, by Calvin L. Brown, for the defendant.

BROCK, J.

[1] During the course of the trial the arresting officer was examined in the absence of the jury concerning probable cause for his

arrest of defendant without a warrant. Upon this *voir dire* considerable testimony was admitted which was appropriate for the purposes for which admitted; and this evidence on *voir dire* was properly not allowed before the jury. Nevertheless, the trial judge, in his charge to the jury, inadvertently reviewed this *voir dire* testimony.

Unquestionably, the accusatory and identifying statements made to the arresting officer by persons who assisted the officer in finding and identifying the defendant, which persons were not witnesses in defendant's trial, were prejudicial to the defendant in both cases.

[2] When the trial judge, in his charge to the jury, makes an inaccurate statement of facts contained in the evidence, this inaccuracy should be called to his attention during or at the conclusion of the charge in order that the error might be corrected. But a statement of a material fact not contained in the evidence constitutes reversible error. *State v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921.

There are other assignments of error, but we refrain from discussing them because they probably will not arise upon a new trial.

New trial in both cases.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. RILEY LEE ELLISOR

No. 6914SC179

(Filed 30 April 1969)

Criminal Law §§ 155.5, 157— failure to aptly docket record on appeal and to include charge in record

Appeal is dismissed for failure to docket the record on appeal within the time prescribed by Rule 5 and for failure to include the charge in the record on appeal when exception is taken thereto as required by Rule 19(a). Court of Appeals Rule No. 48.

APPEAL by defendant from *Clark, J.,* 28 October 1968 Criminal Session of the Superior Court of DURHAM.

The defendant was charged in two separate bills of indictment with forgery and uttering a forged document. The charges were consolidated for trial, and the defendant entered a plea of not guilty. The jury found the defendant not guilty on the charges of forgery and guilty of the two charges of uttering a forged instrument. From judgment entered on the jury verdict, defendant appeals.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Trial Attorney I. B. Hudson, Jr., for the State.

Bryant, Lipton, Bryant & Battle by James B. Maxwell for defendant appellant.

MORRIS, J.

Judgment in this action was signed and entered on 1 November 1968. The record on appeal was not docketed in this Court until 10 February 1969. "Rule 5, Rules of Practice in the Court of Appeals of North Carolina, requires that the record on appeal be docketed within ninety days after the date of the judgment unless an extension of time shall have been granted by the trial tribunal. The record before us does not contain an order extending the time within which to docket." *Osborne v. Hendrix,* 4 N.C. App. 114, 165 S.E. 2d 674.

Rule 19(a), Rules of Practice in the Court of Appeals of North Carolina, requires that the record on appeal shall contain "The pleadings on which the case was tried, the issues, and the order, judgment, decree, or determination appealed from shall be included in the record on appeal in all cases, and the charge of the Court where there is exception thereto." Although defendant has excepted to portions of the charge and has argued these exceptions in his brief, the charge is not included in the record before us.

We have, nevertheless, carefully examined the questions raised by the defendant in his brief, most of which are evidentiary, and find no prejudicial error.

For failure to comply with the rules of this Court, the appeal is dismissed. Rule 48, Rules of Practice in the Court of Appeals of North Carolina.

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

STATE OF NORTH CAROLINA v. ROGER RICKEY WILLIAMS

No. 6926SC213

(Filed 30 April 1969)

1. Criminal Law § 161— appeal as exception to the judgment

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

2. Criminal Law § 23— validity of guilty plea — contention that defendant was promised probation

Defendant, who received active prison sentence upon his plea of guilty to breaking and entering and larceny, is not entitled to a new trial on contention that he was promised by his privately-retained trial counsel he would be placed on probation if he entered the plea of guilty, the certificate of the court in the record showing that defendant's written plea of guilty was freely, understandingly and voluntarily made.

APPEAL by defendant from *Copeland, S.J.*, 2 December 1968 Schedule "C" Session, Criminal Term, Superior Court of MECKLENBURG.

Defendant was charged, under proper bill of indictment, with breaking and entering and larceny. He was represented by privately retained counsel and entered a plea of guilty at the 23 September 1968 Schedule "C" Criminal Session of the Superior Court of Mecklenburg County. Judge Thornburg heard the evidence, continued prayer for judgment, and entered an order requesting the State Department of Corrections to make a pre-sentence diagnostic study of defendant and for that purpose he was committed to the State Department of Correction for 60 days. The diagnostic study was made at Polk Youth Center and defendant was returned to Mecklenburg on 25 November 1968. The defendant was before Judge Copeland for sentencing on 13 December 1968, represented by his counsel. Judge Copeland entered judgment that defendant be imprisoned for not less than three nor more than five years with the recommendation that sentence be served at Polk Youth Center. Letter of defendant dated 18 December 1968 was accepted by the court as notice of appeal. Privately retained counsel requested that he be permitted to withdraw because the basis of appeal was alleged conduct of counsel. The request was granted, and upon defendant's request, counsel was appointed to perfect the appeal and the county was directed to pay costs of original and three copies of the transcript and the costs of mimeographing.

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

T. O. Stennett for defendant appellant.

MORRIS, J.

[1, 2] The only assignment of error is the defendant's contention, contained in his letter accepted as notice of appeal, that he was promised by his counsel that if he entered a plea of guilty he would

be placed on probation. The record before us contains no exceptions taken at the time of trial. However, since an appeal is itself an exception to the judgment and to any other matter appearing on the face of the record, *State v. Barnett,* 218 N.C. 454, 11 S.E. 2d 303, we have carefully examined the record and find no error on the face thereon.

[2] The signed plea is a part of the record, and the answers to the questions are clear and unequivocal. The certificate of the court thereon is complete and finds that the plea of guilty by defendant was freely, understandingly and voluntarily made, and was made without undue influence, compulsion or duress, and without promise of leniency.

The judgment of the trial court is

Affirmed.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. SAMMY JAY WADDELL

No. 6924SC189

(Filed 30 April 1969)

1. Constitutional Law § 32— right to counsel — misdemeanor amounting to serious offense

A defendant charged with a misdemeanor amounting to a serious offense, which is one for which the authorized punishment exceeds six months' imprisonment and a $500 fine, has a constitutional right to the assistance of counsel during his trial in the superior court; G.S. 15-4.1, insofar as it purports to leave to the discretion of the trial judge the appointment of counsel for indigent defendant charged with a misdemeanor amounting to a serious offense, is unconstitutional.

2. Constitutional Law § 32— right to counsel — serious misdemeanor — duty of trial judge

Where defendant is charged with a misdemeanor amounting to a serious offense and is not represented by privately employed counsel, the presiding judge must (1) settle the question of defendant's indigency and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived; these findings and determinations should appear of record.

3. Constitutional Law § 32— serious misdemeanor — failure of court to appoint counsel or make findings as to indigency

Defendant who appeared without counsel in the superior court and entered pleas of guilty to charges of resisting an officer and assault with a deadly weapon is entitled to a new trial where the record is silent as to whether he was able to employ counsel, whether he requested appointment of counsel, and whether he waived his right to counsel, both crimes being misdemeanors amounting to serious offenses.

APPEAL by defendant from *Bryson, J.*, 25 November 1968 Session, YANCEY Superior Court.

The defendant, appearing without counsel, pleaded guilty to the charges contained in two bills of indictment; one charging him with resisting an officer (G.S. 14-223), and the other charging him with an assault with a deadly weapon.

Upon the pleas the court entered judgments of confinement for two years in each case, the terms to run consecutively and not concurrently.

Robert Morgan, Attorney General, by Millard R. Rich, Jr., Assistant Attorney General, for the State.

Cecil C. Jackson, Jr., for defendant.

BROCK, J.

[1, 3] The Record on Appeal discloses that defendant appeared in Superior Court and entered his pleas of guilty without counsel. However, the record is silent as to whether he was able to employ counsel, whether he was indigent, whether he requested appointment of counsel, or whether he waived his right to counsel. "Waiver of counsel may not be presumed from a silent record. 'The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver.'" *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245. As clearly stated by Huskins, J., speaking for our Supreme Court in *State v. Morris, supra*, ". . . defendant here, who is charged with a serious offense, has a constitutional right to the assistance of counsel during his trial in the superior court and that G.S. 15-4.1, insofar as it purports to leave to the discretion of the trial judge the appointment of counsel for indigent defendants charged with serious offenses, is unconstitutional. A serious offense is one for which the authorized punishment exceeds six months' imprisonment and a $500 fine."

[2, 3] This case cannot be distinguished in principle from the sit-

uation which was dealt with by our Supreme Court in *Morris,* and again we quote a portion of that opinion which is directly applicable to the present case. "For failure of the trial judge to determine indigency and appoint counsel to represent defendant if indigent, the judgment must be vacated and a new trial ordered. At the next trial if defendant is not represented by privately employed counsel, the presiding judge shall (1) settle the question of indigency, and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived. These findings and determinations should appear of record." *State v. Morris, supra.*

We think it appropriate to point out that the proceedings before Judge Bryson occurred approximately two months before the opinion in *Morris* was filed. Apparently Judge Bryson was exercising the discretion purportedly granted by G.S. 15-4.1.

Upon authority of *State v. Morris, supra,* a new trial must be ordered.

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. ARCHIE LEE HENDERSON

No. 6926SC192

(Filed 30 April 1969)

APPEAL from *Falls, J.*, 2 December 1968, Schedule "A" Session, MECKLENBURG County Superior Court.

Archie Lee Henderson (defendant) was charged in a proper bill of indictment with the felony of breaking and entering a warehouse building with the intent to steal merchandise therefrom. The building was occupied by Cargo Salvage Company, a sole proprietorship owned and operated by Amvan Hasson.

The defendant was represented by court-appointed counsel at his trial. The defendant personally and through his attorney entered a plea of guilty to the above charge. The trial judge then questioned the defendant at length in open court about this plea. He thereafter entered an order to the effect that the defendant freely, voluntarily, and understandingly entered a plea of guilty to the charge and that,

at the time, the defendant knew and understood the penalty which the court could impose upon such plea.

From the imposition of a sentence of not less than seven years nor more than ten years in the State prison, the defendant appealed to this Court. The trial judge authorized the defendant to take this appeal as an indigent and assigned counsel to prepare the case on appeal and to present the case to this Court.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

W. Herbert Brown, Jr., for defendant appellant.

CAMPBELL, J.

Counsel for defendant in his brief stated:

"After diligent study of the record in this case, this attorney can find no assignment of error anywhere in the proceedings of said case but submits the entire Record and this Brief to the Court for its determination as to whether or not any error heretofore has been committed to the prejudice of the defendant."

We have reviewed the record in this case and can find no error in the proceedings in the trial court.

Since the defendant had a fair and impartial trial and since no error was called to the attention of this Court or appeared on the face of the record, the judgment of the superior court is

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. KELLY DEAN CARVER

No. 6930SC69

(Filed 30 April 1969)

APPEAL by defendant from *Jackson, J.*, at the July 1968 Regular Criminal Session of HAYWOOD Superior Court.

The defendant was charged in a bill of indictment, proper in form, with store breaking and larceny. The jury found the defendant guilty as charged on the store breaking count and not guilty of larceny. From active prison sentence imposed, defendant appealed.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

Frank D. Ferguson, Jr., for defendant appellant.

BRITT, J.

In his brief, defendant's court-appointed counsel brings forward no assignment of error and states that he is unable to find error in the record. He asks that the court review the record for error and this we have done. We find that the defendant was charged under a valid bill of indictment, that he was given a fair trial free from prejudicial error, and that the sentence imposed was within statutory limits. *State v. Williams,* 3 N.C. App. 233, 164 S.E. 2d 404, and cases therein cited.

The judgment of the superior court is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. LARRY NELSON HEDRICK

No. 6926SC211

(Filed 30 April 1969)

APPEAL by defendant from *Falls, J.,* 30 September 1968 Schedule A Session, MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment with three felony counts: (1) felonious breaking and entering, (2) felonious larceny of goods of a value of $1,675.50, and (3) feloniously receiving stolen goods of a value of $1,675.50.

Defendant, through his counsel in open court, tendered a plea of guilty to the felony of receiving stolen goods of a value of more than $200.00, knowing them to have been previously stolen. The plea was accepted by the State and approved by the presiding judge, and judgment of confinement was entered. Defendant gave notice of appeal.

Robert Morgan, Attorney General, by Carlos W. Murray, Jr., Staff Attorney, for the State.

Alfred F. Welling, Jr., for the defendant.

BROCK, J.

This appeal presents the face of the record proper for review. Counsel for defendant candidly and appropriately states that his examination of the record discloses no error; with this appraisal we agree. The record on appeal shows that the Court was properly organized and had jurisdiction, the indictment was valid in form, defendant was represented by counsel, defendant entered a plea of guilty to the third count in the bill, and the sentence imposed is within authorized limits.

No error.

CAMPBELL and MORRIS, JJ., concur.

IN RE: BARBARA BURRUS (69-J-17); SARAH WHITNEY (69-J-18); DARLENE McCOY (69-J-19); NINA WHITNEY (69-J-20); DORENE HARRIS (69-J-21); PATRICIA COLLINS (69-J-22); DOLLIE GIBBS (69-J-23); MARIA HARRIS (69-J-24); TRINA SELBY (69-J-1); DORENE HARRIS (69-J-3); JULIA ANNA COLLINS (69-J-4); CHERLYN WHITNEY (69-J-5); CATHERINE GIBBS (69-J-6); DEBORAH ANN COLLINS (69-J-8); MARIA HARRIS (69-J-9); EDDIE WHITLEY (69-J-10); ALONZO EDWARD HOLLOWAY (69-J-30); EVELYN EVANGELINE GIBBS (69-J-11); ROSE MARY COLLINS (69-J-12); DEBRA ANN COLLINS (69-J-13); CATHERINE GIBBS (69-J-14); JULIE ANNA COLLINS (69-J-16); ELVIRA VASHTI WESTON (69-J-28); SUDIE BELL McCULLOR (69-J-29); BARBARA BURRUS (68-J-4) WILLIAM BLOUNT (68-J-5); NEKOLA GREEN (68-J-6); SHARON HARRIS (68-J-7); SARAH ANNETTE WHITNEY (68-J-8); WALTER ANTHONY GREEN (68-J-9); DESSIE HARRIS (68-J-10); EVELYN GIBBS (68-J-11); RONNIE LEE TOPPING (68-J-12); TYRONE DUDLEY (68-J-13); THERESA BLOUNT (68-J-14); LINDA SUE GIBBS (68-J-15); PATRICIA COLLINS (69-J-27); DONALD WHITE (69-J-25); WILMA JOYCE WHITAKER (69-J-26); JAMES LAMBERTH HOWARD (68-J-3); ROSE MARY WHITNEY (69-J-15); CHERLYN D. WHITNEY (69-J-2); TRINA SELBY (69-J-7); ALONZO EDWARD HOLLOWAY (69-J-31)

No. 692DC256

(Filed 28 May 1969)

1. Appeal and Error § 41; Criminal Law § 159— record on appeal — cases consolidated for hearing — separate appeals

Where 44 cases were divided into 9 separate groupings and consolidations for hearing in the juvenile court, it is error to lump the 44 cases together into one record upon appeal to the Court of Appeals, and the appeals are subject to dismissal for failure to present a proper record. Court of Appeals Rule No. 48.

2. Constitutional Law § 29; Courts § 15; Infants § 10— juvenile hearings — jury trial

A jury trial is not required in a juvenile court proceeding by either the United States Constitution or the North Carolina Constitution.

3. Constitutional Law § 30; Courts § 15; Infants § 10— juvenile hearing — exclusion of general public

Constitutional rights of juveniles are not violated by the exclusion of the general public from the juvenile court hearing as authorized by G.S. 110-24, a public trial not being required in a juvenile court proceeding.

4. Courts § 15; Infants § 10— Juvenile Courts Act — constitutionality

The North Carolina Juvenile Courts Act, G.S. Ch. 110, Art. 2, is not unconstitutional for vagueness and uncertainty.

5. Appeal and Error § 19; Criminal Law § 152— appeal in forma pauperis from juvenile court

In this juvenile court proceeding, it was not error for the juvenile court, upon request by counsel that the juveniles be allowed to appeal *in forma*

pauperis, to suggest to counsel that the statutory procedure pertaining to an appeal *in forma pauperis* be complied with, and failure of the court to allow the appeals *in forma pauperis* is not error where the statutory procedure for such appeals was not followed.

APPEALS from *Ward, J.*, Juvenile Session, 9 January 1969, HYDE County District Court.

Each of these forty-four cases arose out of separate petitions charging each juvenile with various wilful and unlawful acts committed in Hyde County on different dates and different occasions. The petitions requested that the district court, sitting as the juvenile court, hear and determine each case and "if need be found, to give said child such oversight and control as will promote the welfare of such child and the best interest of the State."

In some instances, more than one petition was filed charging the same juvenile with different wilful and unlawful acts committed on different dates and different occasions.

In general, these juveniles, who were under the age of sixteen, placed themselves upon the main public thoroughfares in the county seat of Hyde County for the purpose of blocking and stopping vehicular traffic on said thoroughfares. On other occasions, they disturbed the public schools and defaced and destroyed school property.

The petitions set out in particular the accusations against each juvenile, a typical charge being as follows:

> " 'That the facts and circumstances supporting this Petition for Court action as follows:
>
> That at and in the County named above on or about Dec. 6, 1968 the defendant above named did intentionally, unlawfully and willfully stand upon the traveled part or portion of a State highway and street passing through and traversing the community of Swan Quarter and did willfully, intentionally and unlawfully stand upon that portion of said highway and street used by the traveling public in the operation of automobiles, trucks and other motor vehicles in such a way and manner as to cause said motor vehicles being operated upon the traveled portion of said street and highway to stop and cease their traveling or operation and in some cases caused said motor vehicles and the operators of same to be detained, stop and cease operation and to force same, in some cases, to seek detours or other methods of traveling, all in such a way and manner as to obstruct, hinder, impair and stop the progress of said motor vehicles and their operators and to impede the regular flow and

normal traffic of said motor vehicles and their operators upon said highway and street, contrary to the statute in such cases made and provided, the same being Section 20-174.1 of the General Statutes of North Carolina, and against the peace and dignity of the State.'"

Pursuant to these forty-four separate petitions, forty-four juvenile summonses were issued, one for each child and the parents or other person having custody of the child to appear before the judge of the juvenile court for a hearing on the petition alleging delinquency. Different days for the various hearings were set and the place for the hearings was specified.

The same counsel appeared in all forty-four cases for the juveniles.

Upon motion of counsel for the juveniles, these forty-four cases were divided into nine groupings, with each grouping containing from one to thirteen cases.

At the time and place appointed, District Court Judge Ward conducted a hearing, at the commencement of which he ordered the general public excluded from the hearing room. He stated that he was going to conduct a juvenile hearing, not a criminal trial, and that no child would be found to have committed a crime. He thereupon ordered the general public excluded from the hearing room and stated that only officers of the court, the juveniles, their parents or guardians, their attorney and witnesses would be present for the hearing. Judge Ward further stated that only the juvenile cases would be heard and that no other court business would be conducted. He then stated:

"All records may be withheld from indiscriminate public inspection in the discretion of the Court but such record shall be open to inspection by the parents, guardians or other authorized representatives of the child concerned. No adjudication shall operate as a disqualification of any child for any public office and no child shall be denominated a criminal by reason of such adjudication nor shall any such adjudication be denominated a conviction. Our Supreme Court has stated that the express intention of this statute is that in all proceedings under its provisions the Court shall proceed upon the theory that a child under its jurisdiction is the ward of the State and is subject to the discipline and entitled to the protection which the Court should give such child under the circumstances disclosed in the case. Moreover, any Order of Judgment made by the Court in the case of any child should be subject to such modification from

time to time as the Court may consider to be for the welfare of the child. In other words and to summarize, this is not a criminal case but is a hearing to determine whether these children or any of them are delinquent and in need of the protection and guidance of the State."

In each instance, counsel for the juveniles requested a jury trial, but the requests were denied.

At the conclusion of the various hearings, judgments were entered, a typical judgment being as follows:

"This matter, coming on to be heard, and being heard at this regularly calendared session of Juvenile Court for the County of Hyde convened this 9th day of January, 1969; and the Court having determined that said child is under sixteen (16) years of age and is a resident of Hyde County, N. C.; and the Court having heretofore explained to the child and to Pencie Collins, her mother, the nature of this proceeding; as will appear in the minutes; and said child being represented by James E. Furgerson, II, Esq., Attorney of record; and it having been agreed to by the said James E. Furgerson, II, and Hon. Herbert Small, Solicitor for this the First Solicitorial District, that this matter should be consolidated with 69-J-11; 69-J-12; 69-J-14; 69-J-16; 69-J-28; 69-J-29, for hearing, findings and disposition and said attorneys having further agreed that such consolidation is in no way prejudicial to said child and does not violate the spirit or intent of Article 2, Chapter 110 of the General Statutes of North Carolina; and it appearing to the Court, and the Court finding as a fact, that on or about the 13th day of November, 1968, the said child did in the company of others go upon the traveled portion of a main highway in Swan Quarter, N. C., and did block and impede traffic, and after being removed from said traveled portion of said highway, did return and block and impede traffic — all said acts having been wilfully and intentionally done and designed to impede traffic, and that said acts constitute a violation of G.S. 20-174.1, an act for which an adult may be punished by law; and it further appearing to the Court and the Court being satisfied and finding as a fact that the said child is in need of the care, protection and discipline of the State, and is in need of more suitable guardianship and is delinquent; It is now, therefore, ORDERED, ADJUDGED and DECREED that Debra Ann Collins be, and she is hereby committed to the custody of the Hyde County Department of Public Welfare to be placed by said department in a suitable institution maintained by the

State for the care of delinquents (as said institutions are enumerated in G.S. 134-91), after having first received notice from the superintendent of said institution that such person can be received, and held by said institution for no definite term but until such time as the Board of Juvenile Correction or the Superintendent of said institution may determine, not inconsistent with the laws of this State; this commitment is suspended and said child placed upon probation for 12 months, under these special conditions of probation;

1. That said child violate none of the laws of North Carolina for 12 months;

2. That said child report to the Director of the Hyde County Public Welfare Department, or his designated agent, at least once each month at a time and place designated by said Director;

3. That said child be at her residence by 11:00 o'clock P.M. each evening.

4. That said child attend some school, public or private, or some institution offering training approved by the Hyde County Director of Public Welfare.

This matter is retained pending further order of the Court.

This 9th day of January, 1969.

/s/ Hallett S. Ward"

From the entry of the judgments in the forty-four cases, each juvenile appealed to this Court.

Attorney General Robert Morgan and Deputy Attorney General Ralph Moody for the State.

James E. Ferguson, II, for defendant appellants.

CAMPBELL, J.

[1] Despite the nine separate groupings and consolidations of cases in the juvenile court, the juveniles, in utter disregard of the Rules of Practice in the Court of Appeals or in any appellate court, lumped the forty-four cases together into one record which was filed with this Court. It would be entirely proper to dismiss these appeals for failure to present a proper record. Rule 48 of the Rules of Practice in the Court of Appeals. However, we have nevertheless undertaken to review and to dispose of the cases.

All of the cases stem from what may be classified as a concerted demonstration by Negroes of Hyde County to assert their defiance of law and order and to disrupt the normal economic and social life of Hyde County by a wilful, intentional and flagrant disregard and violation of laws duly enacted by the governing bodies of the State for the public welfare and orderly conduct of human affairs for all citizens of the State.

The forty-four cases have certain common features which may be considered in an effort to determine the legal questions presented. Counsel for the juveniles, both at the time of oral argument and later in writing, stated that all exceptions were withdrawn and abandoned, except for the four legal questions which are common to each case. In view of this withdrawal and abandonment, this Court agreed to hear and decide these questions, despite the failure to comply with proper appellate procedure as above stated.

The four questions are: 1. Is a jury trial required in a juvenile court proceeding? 2. Is a public trial required in a juvenile court proceeding? 3. Is the North Carolina Juvenile Courts Act unconstitutional because of vagueness? 4. Did the juvenile court commit error by preventing an appeal *in forma pauperis?*

[2] The first question presented for determination is whether a jury trial is required in a juvenile court proceeding. In support of their argument that a jury trial is required, the juveniles rely upon *Re Whittington,* 391 U.S. 341, 20 L. Ed. 2d 625, 88 S. Ct. 1507; *Duncan v. Louisiana,* 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444; *Re Gault,* 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428.

While *Duncan* involved the right to a jury trial, it did not involve juveniles or a juvenile court proceeding. Therefore, the case may be dismissed from further consideration. *Whittington* did not make any judicial determination and it merely referred the matter back to the Ohio Court for consideration in light of *Gault.* Therefore, the only authority to substantiate their argument is *Gault,* which considered in some depth juvenile court proceedings. In reviewing the history of such proceedings in the light of whether they complied with due process of law, the United States Supreme Court stated:

> "It is claimed that juveniles obtained benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process. As we shall discuss, the observance of due process standards, intelligently and not ruthlessly administered, will not compel

> the States to abandon or displace any of the substantive benefits of the juvenile process. But it is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. . . .
>
> . . .
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> . . . We do not mean by this to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion. Further, we are told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal'. The juvenile offender is now classed as a 'delinquent'. There is, of course, no reason why this should not continue. It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults. It is also emphasized that in practically all jurisdictions, statutes provide that an adjudication of the child as a delinquent shall not operate as a civil disability or disqualify him for civil service appointment. There is no reason why the application of due process requirements should interfere with such provisions."

The United States Supreme Court went on to point out that juvenile hearings must measure up to the essentials of due process and fair treatment. In so holding it was stated that such hearings need not conform to all of the requirements of a criminal trial or even of the usual administrative hearing. However, certain requirements must be followed in order to measure up to the essentials of due process and fair treatment. Proper notice must be given to both the juvenile and his parents, that is "(n)otice which would be deemed constitutionally adequate in a civil or criminal proceeding." Likewise, the United States Supreme Court held that a juvenile was entitled to counsel and "(t)he child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child." It was then held that the rights of confrontation and cross-examination and the privilege against self-incrimination must be observed in a juvenile court proceeding.

The United States Supreme Court stated:

> "We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique. . . ."

The United States Supreme Court further stated:

> ". . . a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements."

Gault was not decided by a unanimous court. There were two concurring opinions and one dissenting opinion. Another opinion concurred in part and dissented in part.

There is certainly nothing in *Gault* to support the argument that a jury trial is required in juvenile court proceedings. On the contrary, the decision clearly shows that juvenile court proceedings are not to be considered as criminal cases and they are not to be held to the requirements of a criminal case. Juvenile court proceedings are to continue as distinct and separate proceedings. While the essentials of due process and fair treatment are to be maintained, this does not by any means require a jury trial. In the instant case, all of the hearings conducted by Judge Ward measured up to the essentials of due process and fair treatment, as those terms were used and applied in *Gault*.

In *Commonwealth v. Johnson,* 211 Pa. Super. 62, 234 A. 2d 9, the Pennsylvania Superior Court reviewed the *Gault* decision and rejected the position that a jury trial must be afforded in a juvenile court proceeding. It was stated:

> "The National Crime Commission Report, supra, to which the Supreme Court frequently referred in *Gault,* contains the following significant statement: 'Most States do not provide jury trial for juveniles. Even Illinois, New York, and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these States that trial by jury is not crucial to a system of juvenile justice. As THIS REPORT HAS SUGGESTED, THE STANDARD SHOULD BE WHAT ELEMENTS OF PROCEDURAL PROTEC-

TION ARE ESSENTIAL FOR ACHIEVING JUSTICE FOR THE CHILD WITHOUT UNDULY IMPAIRING THE JUVENILE COURT'S DISTINCTIVE VALUES. (Emphasis added).

'As has been observed, "A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge." '

In summary, we are in full agreement with the holding of the Supreme Court that the constitutional safeguards of the Fourteenth Amendment guaranteed to adults must similarly be accorded juveniles. It is inconceivable to us, however, that our highest Court attempted, through *Gault,* to undermine the basic philosophy, idealism and purposes of the juvenile court. We believe that the Supreme Court did not lose sight of the humane and beneficial elements of the juvenile court system; it did not ignore the need for each judge to determine the action appropriate in each individual case; it did not intend to convert the juvenile court into a criminal court for young people. Rather, we find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques. The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children. Accordingly, we reject appellant's request for a jury trial."

[2] In passing on this specific question, the North Carolina Supreme Court has held that the constitutional guarantee of a right to trial by jury does not apply in juvenile court proceedings. *State v. Frazier,* 254 N.C. 226, 118 S.E. 2d 556. Therefore, it follows that, since neither the Constitution of the United States as interpreted by the United States Supreme Court nor the Constitution of North Carolina as interpreted by the North Carolina Supreme Court requires a jury trial in a juvenile court proceeding, the first question is answered in the negative.

[3] The second question presented for determination is whether a public trial is required in a juvenile court proceeding. As previously pointed out, Judge Ward ordered the general public excluded from the hearing room and stated that only officers of the court, the juveniles, their parents or guardians, their attorney and witnesses would be present for the hearing. He then announced that only the

juvenile cases would be heard and that no other court business would be conducted. This was in keeping with the provisions of the North Carolina Juvenile Courts Act.

Counsel for the juveniles has furnished no authority to support a holding that G.S. 110-24 is unconstitutional in that it provides for the exclusion of the general public from a juvenile hearing. The provision is certainly not unfair or lacking in due process. The objectives of the North Carolina Juvenile Courts Act are to provide measures of guidance and rehabilitation for the child and to provide protection for society. It does not seek to fix criminal responsibility, guilt and punishment. The exclusion of the general public from such a hearing is deemed to be beneficial for the rehabilitation of the child involved. In the instant case, it is true that such a provision thwarted the hopes and desires of those instigating and promoting these unfortunate children in their public demonstrations. The deprivation of a public forum to further their misguided and antisocial conduct does not make it wrong or illegal in a constitutional sense.

[3] A public trial is not required in a juvenile court proceeding. Therefore, the second question is answered in the negative.

[4] The third question presented for determination is whether the North Carolina Juvenile Courts Act is unconstitutional because of vagueness. Art. 2 of Chap. 110 of the General Statutes of North Carolina provides for juvenile courts and for the procedure therein. Exclusive original jurisdiction of a child less than sixteen years of age is provided for as follows:

"(1) Who is delinquent or who violates any municipal or State law or ordinance or who is truant, unruly, wayward, or misdirected, or who is disobedient to parents or beyond their control, or who is in danger of becoming so; or

(2) Who is neglected, or who engages in any occupation, calling, or exhibition, or is found in any place where a child is forbidden by law to be and for permitting which an adult may be punished by law, or who is in such condition or surroundings or is under such improper or insufficient guardianship or control as to endanger the morals, health, or general welfare of such child; or

(3) Who is dependent upon public support or who is destitute, homeless, or abandoned, or whose custody is subject to controversy.

When jurisdiction has been obtained in the case of any

child, unless a court order shall be issued to the contrary, or unless the child be committed to an institution supported and controlled by the State, it shall continue for the purposes of this article during the minority of the child. The duty shall be constant upon the court to give each child subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interest of the State."

The juveniles assert that the statute is void because of vagueness and uncertainty and because it requires one to guess as to its meaning. This same contention was made in *State v. Wiggins,* 272 N.C. 147, 158 S.E. 2d 37, with regard to another statute. The North Carolina Supreme Court stated:

"It is elementary that in the construction of a statute words ought to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise. . . ."

The words in Art. 2 of Chap. 110 have well-defined meanings and have been construed time and time again in decisions dealing with juvenile courts. The provisions of this article have been upheld by the North Carolina Supreme Court.

[4] Suffice it to say that the North Carolina Juvenile Courts Act is not unconstitutional because of any vagueness. *Winner v. Brice,* 212 N.C. 294, 193 S.E. 400. Therefore, the third question is answered in the negative.

[5] The fourth question presented for determination is whether the juvenile court committed error by preventing an appeal *in forma pauperis.* The record in the instant case reveals the following:

"COURT: Do you wish to note any appeal?

MR. FERGUSON: Yes, and I would like 60 days in which to prepare the case on appeal.

COURT: I am afraid that this is too much time, too much time under the rules.

MR. FERGUSON: I would also like to be allowed to proceed in forma pauperis.

COURT: I am afraid that I cannot allow that simply upon your request. We should examine the statutes, however; I am willing, if I can, to allow you to proceed without an appeal bond. EXCEPTION No. 16.

MR. FERGUSON: You might permit me to have the parents sworn and treat the testimony as an affidavit.

COURT: I am afraid that I cannot do that. EXCEPTION No. 17. I am going to suggest that you dictate your own appeal entries in whatever fashion you deem appropriate and I will sign whatever you dictate."

As the above excerpt reveals, even after Judge Ward suggested to counsel for the juveniles that the statutes be examined in order to comply with the statutory procedure for an appeal *in forma pauperis*, counsel failed to look at said statutes and did not in any way comply with the procedure provided by law for an appeal *in forma pauperis*.

It was not error for Judge Ward to suggest to counsel for the juveniles that the statutory procedure pertaining to an appeal *in forma pauperis* be complied with. Since such procedure was not complied with by the juveniles, no error was committed. Therefore, the fourth question is answered in the negative.

There being no error in the trial of these cases in the juvenile court, the various judgments in the forty-four cases are

Affirmed.

We concur

MALLARD, C.J. and MORRIS, J.

DORIS H. THRASHER v. JAMES P. THRASHER

No. 6928SC110

(Filed 28 May 1969)

1. Judgments § 16— collateral attack

A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid.

2. Constitutional Law § 26— full faith and credit to foreign judgment

Full faith and credit must be given to a judgment of a court of another state. U. S. Constitution, Art. IV, § 1.

3. Constitutional Law § 26; Judgments § 22— attack on foreign judgments

A judgment of a court of another state may be attacked in this State, but only upon the grounds of lack of jurisdiction, fraud in the procurement, or as being against public policy.

4. Judgments § 22— attack on foreign judgments — presumption of jurisdiction

When a judgment of a court of another state is challenged on the ground of jurisdiction, there is a presumption the court had jurisdiction until the contrary is shown.

5. Judgments § 33— attack on foreign judgment — burden of proof

The burden to overcome presumption of the validity of a foreign judgment rests upon the party attacking the judgment.

6. Divorce and Alimony § 25; Judgments § 22— attack on foreign decree of divorce — fraud

Where femme plaintiff instituted a divorce action in another state and testified that she and her husband were residents of that state, and the defendant was served with process and was represented at the trial by counsel, plaintiff may not attack in this State the validity of the divorce decree on grounds that she was coerced by the defendant to perpetrate a fraud on the out-of-state court by swearing falsely as to her place of residence, and the decree is valid in this State under the full faith and credit clause of the United States Constitution.

7. Judgments § 31— parties — standing to make attack on judgments

The party at whose instance a judgment is rendered is not entitled, in a collateral proceeding, to contend that the judgment is invalid.

8. Judgments § 27— attack on judgment — perjury — intrinsic fraud

Perjury is intrinsic fraud and ordinarily is not ground for equitable relief against a judgment resulting from it.

APPEAL by defendant from *McLean, J.*, 7 October 1968 Session of Superior Court of BUNCOMBE County.

Plaintiff instituted this action alleging the parties to be husband and wife. She seeks to recover permanent alimony, alimony pendente lite, and counsel fees under the provisions of Chapter 50 of the General Statutes as amended. She also seeks the custody of the three children of the parties. Personal service of process was had upon the defendant on 13 July 1968 in which notice was given of a hearing on 22 July 1968 in the Superior Court of Buncombe County on plaintiff's motion for an award of alimony pendente lite and counsel fees. Defendant failed to appear and on 22 July 1968 Judge McLean entered an order awarding plaintiff alimony pendente lite in the sum of One Thousand Dollars per month for the support and maintenance of plaintiff and her three minor children. In addition the defendant was ordered to pay One Thousand Dollars for the use and benefit of plaintiff's attorney.

On 1 August 1968 defendant filed a motion in the cause to vacate the judgment awarding counsel fees, and alimony pendente

lite alleging among other things that the Superior Court of Buncombe County was without jurisdiction of the subject matter of this action for that "the plaintiff in this action on the 22nd day of June, 1965, obtained a divorce nisi against the defendant in Barnstable County, Massachusetts;

That on the 23rd day of January, 1966, the divorce became final and so remains;

That under said divorce decree, the Massachusetts court ordered the defendant to pay to the plaintiff for the support of herself and their minor children the amount of $600 per month;

That this defendant has paid to date the $600.00 per month so ordered by the court."

Hearing was had upon this motion on 9 September 1968 before Judge Froneberger who transferred the case, without objection, to Judge McLean.

> "At the hearing before Judge P. C. Froneberger on September 9, 1968, the defendant, James P. Thrasher, submitted in evidence an authenticated copy of divorce proceedings in the case of 'Doris H. Thrasher vs. James P. Thrasher' entered in the Probate Court for the County of Barnstable, Commonwealth of Massachusetts, which was marked as Defendant's Exhibit I."

On 13 September 1968 plaintiff filed answer to defendant's motion to set aside and vacate the order awarding alimony pendente lite and counsel fees in which she alleges that the divorce decree appearing in the records of the Probate Court, Barnstable County, Commonwealth of Massachusetts is null and void.

At the hearing before Judge McLean on 3 October 1968 the court "requested additional evidence from the plaintiff." Thereupon the plaintiff offered herself as a witness and testified, after defendant had objected "to any testimony of Mrs. Thrasher that in any way serves to contradict the divorce proceedings. . . ."

Under date of 7 October 1968 Judge McLean made findings of fact, conclusions of law, and entered judgment as follows:

> "THIS CAUSE coming on to be heard and being heard before the Honorable W. K. McLean, Judge presiding and holding the regular October Civil Term of the Superior Court for Buncombe County, North Carolina, upon the motion in the cause filed by the defendant on the 1st day of August, 1968, the plaintiff and her attorney of record, Richard B. Ford, and attorney of record for the defendant, J. M. Baley, being present and before the court; and

It appearing to the court from the record and evidence presented at the hearing, and the court finding facts and conclusions of law as follows:

1. That the plaintiff and defendant were married on the 31st day of May, 1952 in Scarsdale, New York and thereafter lived together as husband and wife in New Haven, Connecticut until the year 1953 when said parties moved to Cleveland, Ohio, where the defendant was employed by American Steel and Wire Division of U. S. Steel Company and thereafter continued to live as husband and wife in Cleveland, State of Ohio until on or about the year 1960 when said parties moved to Newport, Monmouthshire, England, where the husband was employed; (that said parties continued to live in England, the defendant until the present date and the plaintiff until the month of August, 1967, when she moved to the City of Asheville, Buncombe County, North Carolina and where she is presently resident;) that while in the State of Ohio the parties owned their home and voted in said state and that said parties have never become citizens of the United Kingdom of Great Britain.

2. That there were three children born to the marriage of the plaintiff and defendant, Deborah Anne Thrasher, born June 18, 1953 in New Haven, Connecticut, Linda Carol Thrasher, born April 5, 1955 in Cleveland, Ohio and Anne Elizabeth Thrasher born December 2, 1956 in Cleveland, Ohio.

3. That this action was commenced on the 12th day of July, 1968 by the issuing of a summons and that a duly verified complaint has been filed and both the summons and verified complaint personally served on the defendant and that order for defendant to appear before the court for the determination of alimony pendente lite and counsel fees was issued on the 16th day of July, 1968 and personally served on the defendant and that pursuant thereto Order for alimony pendente lite and counsel fees entered on the 22nd day of July, 1968.

4. That on or about the 22nd day of June, 1965 this plaintiff traveled from Newport, Monmouthshire, England to Barnstable County, Massachusetts for the sole purpose of participating in a proceeding in the court of Massachusetts for the procurement of a divorce from the defendant; that prior to the plaintiff's journey from Newport, Monmouthshire, England to Barnstable County, Massachusetts the defendant threatened plaintiff that unless she made said journey and participated in said divorce proceeding that he would withhold from her and the three

children of their marriage any payments for support and maintenance and that he would not provide them with the necessary funds with which to purchase a home and provide shelter for them, the plaintiff at that time having been served with notice to vacate the house in which she and the three children were living by July of 1965 by the former employer of the defendant, Richard, Thomas and Baldwin, said employer requiring possession of the house for an executive of the company; that at said time the plaintiff and her children were without any funds or means of support except those provided by the defendant, the plaintiff and her children having no relatives or friends in England who could come to her aid or assistance and the plaintiff being unable to find work in England for the reason that she was unable to procure a work permit from the British government, being a non-resident; that the plaintiff made said journey from Newport, Monmouthshire, England to Barnstable County, Massachusetts and entered into said divorce proceedings under the coercion, threat, intimidation and fraud of the defendant.

5. That the plaintiff was not represented by counsel in the State of Massachusetts in said proceeding for divorce and that the attorney, Paul Powers, whose name appears as attorney for Doris H. Thrasher in said Massachusetts proceeding, was hired and retained by the defendant or by the defendant's father, Mr. L. James Thrasher, and that said attorney was not in fact representing the interest of said plaintiff in said proceeding and that the plaintiff was without legal counsel and that in truth and in fact said attorney was representing the defendant in said proceeding.

6. That neither the plaintiff nor defendant in June of 1965, at the time of said Massachusetts divorce proceeding, was domiciled in or resident in the State of Massachusetts and that the Massachusetts court was without jurisdiction of the marital res of said parties and without authority or power to entertain said divorce proceeding.

7. That the testimony of the plaintiff and allegations contained in the record in said Massachusetts divorce proceeding with respect to residency and domicile were untrue and false and a fraud upon the court of Massachusetts and that said false testimony and allegations were brought about by the coercion, threats, intimidation and fraud of the defendant.

8. That said interlocutory decree of divorce entered by the Massachusetts court on June 22, 1965 and the final decree of

divorce entered on the 23rd day of December, 1965 in the action entitled Doris H. Thrasher, Libellant vs. James P. Thrasher, Libellee, are null and void ab initio and without force and effect.

9. That this court has jurisdiction of the parties and the subject matter of this action, the marital res, and the power and authority to hear and adjudicate the cause.

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

1. That the interlocutory decree of June 22, 1965 and the final divorce decree of December 23, 1965 entered by the court of Massachusetts in the proceeding entitled 'Doris H. Thrasher, Libellant vs James P. Thrasher, Libellee' are null and void ab initio and without force and effect and not binding upon the courts of North Carolina.

2. That the motion in the cause filed by the defendant on the 1st day of August, 1968 is dismissed and the defendant is allowed thirty (30) days until the 3rd day of November, 1968 within which to file answer to complaint of the plaintiff in this proceeding.

3. That the order for alimony pendente lite and counsel fees entered in this cause on the 22nd day of July, 1968, is hereby reaffirmed and shall remain in full force and effect until the final determination of this cause."

The defendant objected, excepted, and assigned error to the findings of fact, the conclusions of law, the entry of the judgment, and appealed to the Court of Appeals.

Richard B. Ford for plaintiff appellee.

McGuire, Baley & Wood by J. M. Baley, Jr., and Philip G. Carson for defendant appellant.

MALLARD, C.J.

Plaintiff's complaint contains no reference to the divorce decree which she obtained from the defendant in Barnstable County, Massachusetts. In plaintiff's answer to defendant's motion to set aside and vacate the order awarding alimony pendente lite and counsel fees she alleges that the Massachusetts divorce decree is null and void because the Massachusetts court did not have jurisdiction of the parties, and that it was obtained "by connivance and coercion of the defendant and is a fraud upon the courts of Massachusetts."

[1] Thus it develops that the plaintiff's cause of action is a col-

lateral attack in the Courts of North Carolina upon a divorce decree she, as plaintiff, obtained in Massachusetts. "A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." 5 Strong, N.C. Index 2d, Judgments, § 16, p. 32. It is clear that in the case before us the plaintiff is not entitled to the alimony demanded unless the judgment in the Massachusetts divorce case is invalid. Unless the plaintiff is presently married to the defendant she is not entitled to alimony pendente lite.

[2] Under the provisions of Art. IV, § 1 of the Constitution of the United States it is required that full faith and credit be given to a judgment of a court of another state. *Thomas v. Frosty Morn Meats,* 266 N.C. 523, 146 S.E. 2d 397.

[3] However, a judgment of a court of another state may be attacked in North Carolina, but only upon the grounds of lack of jurisdiction, fraud in the procurement, or as being against public policy. 2 Strong, N.C. Index 2d, Constitutional Law, § 26, *In Re Blalock,* 233 N.C. 493, 64 S.E. 2d 848; *Howland v. Stitzer,* 231 N.C. 528, 58 S.E. 2d 104.

There is no issue raised in this case with respect to the divorce decree being against public policy.

[4, 5] It is the law in North Carolina when a judgment of a court of another state is challenged on the grounds of jurisdiction that there is a presumption the court had jurisdiction until the contrary is shown. *Thomas v. Frosty Morn Meats, supra.* These is a presumption in favor of the validity of the judgment of a court of another state, and the burden to overcome such presumption rests upon the party attacking the judgment. 1 Lee, North Carolina Family Law 3d, § 92, p. 353.

In the case of *In re Biggers,* 228 N.C. 743, 47 S.E. 2d 32, which was an action relating to the custody of the children of a marriage that had ended in a divorce obtained in Florida, the court said:

> "The petitioner, Mrs. Annie Bost Biggers, now Mrs. Bennick, having entered an appearance and filed answer in the suit instituted by her former husband, J. L. Biggers, in the State of Florida, she is bound by the judgment duly entered in that court in so far as it dissolved the marriage ties. Under the full faith and credit clause of the Constitution of the United States, Art. IV, sec. 1, the Florida divorce decree is valid here. *S. v. Williams,* 224 N.C. 183, 29 S.E. (2d), 744; *McRary v. McRary,* ante, 714; *Williams v. North Carolina,* 317 U.S. 287."

[6] In the instant case the plaintiff here was libellant (plaintiff) in the Massachusetts divorce case. Defendant did not personally appear in the Massachusetts court but was served with process and was represented at the trial by counsel. Plaintiff personally appeared in Massachusetts and testified in court that she was a resident of Barnstable County, Massachusetts. The divorce decree requires the defendant to pay the plaintiff the sum of $600.00 on the first of each month for the support of the plaintiff and the children, "all until the further order of the court." The plaintiff testified that she had received such payments from the date of a separation agreement which the parties entered into in January 1965. The divorce decree became final on 23 December 1965. The payments she was receiving from the defendant at the time of the institution of this action amounted to $710.00 per month. The divorce decree and the separation agreement provide that the plaintiff herein has the custody of the children of the marriage and grants visitation rights to defendant. It was when defendant came to North Carolina to visit his children that process was served on him in this case. In July 1967 plaintiff and the defendant entered into another agreement supplementary to the one executed in January 1965. In this supplemental agreement she is referred to as "Ex-wife" and the defendant as "Ex-Husband." The fraud and coercion that plaintiff asserts was imposed on her by the defendant was that he told her he would not provide any support and he would not agree to advance the money to buy her a home in England unless she would obtain a divorce. And because of this at her husband's request she came to Massachusetts, participated in the divorce case, testified as a witness, and on her testimony was granted a divorce from the defendant. The defendant then helped her to purchase a home in England by loaning her some money and taking a second mortgage on the property. She later sold her home in England and purchased a home in Asheville. The defendant again loaned her money and took a second mortgage on her home in Asheville as security for the loan. She is presently repaying this money to the defendant. She testified also that her father-in-law secured the services of the attorney who represented her in the divorce action.

Plaintiff contends, and the judge found that the plaintiff had given false testimony as to her residence in the Massachusetts trial. Plaintiff contends and the judge found that she was coerced by the defendant, and that because of such coercion, she perpetrated the fraud on the Massachusetts court by alleging and testifying that both of the parties were residents of Massachusetts.

In *Sherrer v. Sherrer,* 334 U.S. 343, 92 L. ed. 1429, the wife and husband lived in Massachusetts, and the wife went to Florida and

instituted a divorce suit there. The husband filed answer denying the allegations of the complaint, including that of domicil. At the trial the husband appeared and personally testified. The wife offered evidence as to her Florida residence and testified generally. After finding that the wife was a resident and that the court had jurisdiction of the parties and the subject matter a divorce decree was entered by the Florida court. Immediately after obtaining the divorce decree the wife married a man whom she had known in Massachusetts and about two months later returned to Massachusetts; thereafter the husband instituted a statutory action in Massachusetts for a declaration that he was justifiably living apart from his wife, alleging that the Florida divorce and the wife's subsequent marriage was invalid. The Massachusetts court held that the question of jurisdiction in the Florida court was open to litigation in Massachusetts. The United States Supreme Court allowed certiorari and held that since the husband had appeared and participated in the divorce proceeding without availing himself of the opportunity to raise the jurisdictional question, the Florida court's finding of jurisdiction was res judicata and entitled to full faith and credit in Massachusetts. This same doctrine is set out in the companion case of *Coe v. Coe,* 334 U.S. 378, 92 L. ed. 1451, in which the husband left Massachusetts and went to Nevada and there obtained a divorce.

In 1 Lee, North Carolina Family Law 3d, § 98, p. 379 it is stated that:

> "When both parties have appeared in the divorcing state and that state makes a judicial finding of domicile, the divorce granted is not subject to a collateral attack in the courts of any other state when the litigation is between the parties to the divorce proceeding. This is true although actually there may have been no domicile in the divorcing state. If the defendant appears and participates in the divorce proceeding, he has had his 'day in court.' He will not be permitted to retry an issue to a previously rendered divorce decree, whether the issue was contested or not. The principle of *res judicata* applies. If the question of jurisdiction is not susceptible of collateral attack after the litigation in the jurisdiction where the judgment was first rendered, it is not subject to collateral attack in another state by the spouses who appeared in the litigation. The full faith and credit clause of the Federal Constitution bars a collateral attack."

[6] In the present case we hold that the plaintiff cannot attack in this manner the divorce proceeding in Massachusetts in which she

and the defendant both participated. The divorce proceeding was not ex parte. It was one instituted by plaintiff. She now says that the reason she instituted the action was because she needed financial help from the defendant. The plaintiff has had her day in the Massachusetts court.

[7] In an annotation in 3 A.L.R. 535 the general rule is stated:

> "The party at whose instance a judgment is rendered is not entitled, in a collateral proceeding, to contend that the judgment is invalid. Neither want of jurisdiction, defect of procedure, or any other ground of invalidity can be availed of collaterally, by the party who is responsible for the existence of the judgment."

In the case of *Varone v. Varone,* 359 F. 2d 769 (7th Cir. 1966) the court in quoting the Illinois rule said: " 'The rule may now be taken as established that the constitutional requirement of full faith and credit bars either party to a divorce from collaterally attacking the decree on jurisdictional grounds in the courts of a sister state, where the defendant participated in the divorce proceedings and was accorded full opportunity to contest the jurisdictional issues. . . .' "

[6] Under the rule enunciated in *Sherrer v. Sherrer,* and *Coe v. Coe,* we are of the opinion and so hold that plaintiff, because of her participation in the Massachusetts divorce proceeding as the moving party, could not attack the validity of the divorce decree in Massachusetts on jurisdictional grounds. See also *Chittick v. Chittick,* 332 Mass. 554, 126 N.E. 2d 495.

[6] We are also of the opinion and so hold that the North Car- Carolina courts must give full faith and credit to this decree of the Massachusetts court and that this bars the plaintiff from this collateral attack in North Carolina.

In the case of *Chapman v. Chapman,* 224 Mass. 427, 113 N.E. 359 it is said: "Where one party has invoked the jurisdiction of a court and the other party has voluntarily appeared and submitted thereto, it is not consonant with ordinary conceptions of justice to countenance an attempt at repudiation of that jurisdiction, especially when the attempt would involve the receiving of considerable sums of money without consideration, the confession of bigamy and the unsettlement of other domestic relations presumably entered upon in innocent reliance upon the jurisdiction of such court."

It is not consonant with our conception of justice to countenance this attempt by the plaintiff to maintain this action for alimony

solely on her testimony under oath, when a considerable sum of money is involved, in contradiction of her testimony, under oath, in Massachusetts, when according to her testimony a considerable sum of money was involved. In Massachusetts she swore she was a resident, because money was involved. In North Carolina she now swears she was not a resident in Massachusetts at that time, and one can only speculate as to whether her testimony has changed because money is again involved. There is no other evidence in this record to corroborate plaintiff's testimony that she perpetrated a fraud upon the Massachusetts court when she testified there that she was a resident.

The case of *Donnell v. Howell*, 257 N.C. 175, 125 S.E. 2d 448, is distinguishable from the case under consideration. In *Donnell* the plaintiff and defendant stipulated that they perpetrated a fraud upon the Alabama court in representing that plaintiff was a resident of Alabama when in truth and in fact they were both residents of Surry County, North Carolina, and in addition thereto the defendant did not participate either individually or by counsel in the Alabama trial. In the *Donnell* case the Supreme Court said:

> *"In Re Biggers*, 228 N.C. 743, 47 S.E. 2d 32, relied on by plaintiff is clearly distinguishable. In that case no gross fraud was perpetrated on the court in Florida, as was done on the Alabama court by stipulation of the parties here.
>
> The judgment of the able and experienced trial judge is correct and is affirmed, although his conclusion of law upon which he based it is on the wrong ground. He should have based his judgment upon a conclusion of law that the final divorce decree rendered by the Alabama court was null and void for lack of jurisdiction under the laws of the State of Alabama by reason of the stipulation the parties made before him to the effect *feme* petitioner and the respondent were residents of Surry County, North Carolina, when she instituted the divorce action in the circuit court in Alabama and when four days later that court entered its decree of final divorce, and that the parties by such stipulation admitted they perpetrated a gross fraud upon the Alabama court."

In the case before us there is no stipulation as to any fraud on the court in Massachusetts. The defendant through an attorney and the plaintiff personally and through an attorney participated in the divorce trial. The Massachusetts court had both parties before it and in an adversary proceeding decided the same issue of residence and jurisdiction that is now before the North Carolina court.

In the case before us the defendant has filed a motion for a new hearing on the grounds of newly discovered evidence. The newly discovered evidence is a certificate from the Town Clerk of Barnstable, Massachusetts, to the effect that "There is a memo in my file, under date of April 3, 1964, signed by one James P. Thrasher, stating his legal residence on 612 Main Street, Osterville, Mass. (Osterville being a village within the town of Barnstable)." This motion has merit and would be allowed were plaintiff able to maintain this action for alimony. In this connection it is noted that in the libel (complaint) which the plaintiff admits signing to institute the divorce proceeding in Massachusetts she alleged that the defendant was of Main Street, Barnstable (Osterville) in the county of Barnstable.

[8] Plaintiff contends that she was coerced by the defendant to perpetrate a fraud on the Massachusetts court by swearing falsely as to her place of residence. Such an allegation, supported by her testimony that she did testify falsely, has been held not to constitute extrinsic fraud upon which a successful attack upon a judgment may be based. In North Carolina perjury is held to be intrinsic fraud and ordinarily is not ground for equitable relief against a judgment resulting from it. *Cody v. Hovey,* 216 N.C. 391, 5 S.E. 2d 165. *Horne v. Edwards,* 215 N.C. 622, 3 S.E. 2d 1. In *United States v. Throckmorton,* 98 U.S. 61, 25 L. ed. 93 the rule is stated that a party against whom a judgment has been rendered may be granted relief on the grounds of fraud provided the fraud practiced upon him prevented him from presenting all of his case to the court, but that a judgment will not be set aside on the grounds of perjured testimony or for any other matter that was presented and considered in the judgment under attack. Here plaintiff is attempting to set aside a judgment she obtained on the grounds that part of what she testified to in the Massachusetts court was false; this she cannot do.

We have considered all motions filed in this cause, they are denied, except those made which are consistent with this opinion.

For the reasons stated the motion to vacate the judgment awarding alimony pendente lite and counsel fees should have been allowed in the Superior Court. The judgment denying the motion to vacate is reversed.

Reversed.

BRITT and PARKER, JJ., concur.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. LOTHAR WORTMAN AND WIFE, ANITA M. WORTMAN

No. 6818SC341

(Filed 28 May 1969)

1. Registration § 3— notice — facts disclosed in instrument — duty to make inquiry

If the facts disclosed in an instrument appearing in a purchaser's chain of title would naturally lead an honest and prudent person to make inquiry concerning the rights of others, these facts constitute notice of everything which such inquiry, pursued in good faith and with reasonable diligence, would have disclosed.

2. Boundaries § 5; Deeds § 11; Registration § 1— map or plat referred to in a deed

A map or plat referred to in a deed becomes a part of the deed and need not be registered.

3. Eminent Domain § 7; Highways § 5; Registration § 3— notice of highway rights-of-way by reference in deed — duty of inquiry

In this action to condemn a right of way over defendants' land for converting an existing two-lane highway into a divided dual-lane highway, the trial court properly determined that defendants were bound by right-of-way agreements acquired by the Highway Commission from defendants' predecessors in title which covered not only the existing lane of the highway but also the proposed lane, notwithstanding the right-of-way agreements were never recorded but remained on file in the office of the Highway Commission in Raleigh, where the defendants acquired title to the property by a deed which in express terms was made subject to the highway right-of-way and which referred to a plat showing a "proposed lane" across defendants' land, defendants being charged with notice of the right-of-way agreements since ordinary prudence should have prompted them to ascertain the exact extent of the right-of-way claimed by the Highway Commission.

4. Eminent Domain § 2— right of access to highway

While an abutting landowner has a right of access to an existing highway, the manner in which that right may be exercised is not unlimited; to protect others who may be using the highway, the sovereign may restrict the right of entrance to reasonable and proper points, and if the abutting owner is afforded reasonable access, he is not entitled to compensation merely because of circuity of travel to reach a particular destination.

5. Eminent Domain § 2— reasonable access to highway — service road

Defendants have reasonable access to and from the main highway and are not entitled to compensation for loss of direct access to a highway which was changed into a controlled access dual-lane highway where they have access to both the northbound and southbound lanes of travel by means of a newly constructed service road crossing their property, defendants not being entitled to compensation merely because of the slight additional time required to reach the highway by use of the service road.

APPEAL by defendants from *Bowman, J.*, 24 June 1968 Session of GUILFORD Superior Court.

This is a condemnation proceeding instituted 18 April 1961 to condemn a right-of-way over defendants' property for Project No. 8.15364, the improvement of U. S. Highway No. 29 in Guilford County, N. C. By this project U. S. Highway No. 29 in Guilford County was converted from a two-lane highway, with one lane for northbound and one lane for southbound traffic, to a controlled access divided dual-lane highway, with two lanes for northbound and two lanes for southbound traffic. The paved portion of U. S. Highway No. 29 as it existed before construction of this project became the two southbound lanes and the two northbound lanes were entirely new construction. Defendants' property lies on the east and abuts the center line of the paved portion of what has now become the two southbound lanes. Defendants acquired their property and built a motel thereon after the original construction and pavement of U. S. Highway No. 29 as a two-lane highway but before commencement of Project No. 8.15364. The parties are in disagreement as to: (1) The extent of the right-of-way across defendants' land already owned by the plaintiff State Highway Commission prior to commencement of this proceeding; and (2) whether defendants are entitled to any compensation for loss of access to their property. To resolve these questions and for the purposes of a preliminary hearing pursuant to G.S. 136-108 before the judge without a jury, the parties stipulated facts as follows:

The defendants were grantees in a certain deed dated and recorded 24 February 1956 in the office of the Register of Deeds for Guilford County. This deed contained a description of a tract of land by metes and bounds. The west boundary line as contained in this description expressly called for and ran with the center line of the then existing pavement on U. S. Highway No. 29. Following the specific description, this deed contained the following language:

> "The metes and bounds description hereinabove set forth was taken from that plat of survey prepared by Southern Mapping and Engineering Company entitled 'Property of J. H. Weston, Guilford County, North Carolina,' dated June 23, 1955.
>
> "This conveyance is made subject to the taxes for the year 1956 and the right of way for U. S. Highway No. 29."

The parties stipulated that, subject specifically to such right-of-way to the North Carolina State Highway Commission as shall have been excepted and reserved in said deed, defendants were on the date

of institution of this action the owners of the land described in said deed and were also the owners of an adjoining tract of land.

During 1948 and 1949, as Project No. 53-54, plaintiff Highway Commission constructed ten and one-fourth miles of U. S. Highway No. 29 and assumed maintenance of it on 16 January 1950. The parties attached to their stipulation as exhibits reproductions of Sheet Nos. 1, 9 and 10 of the Plan Sheet for State Highway Project No. 53-54, Guilford County, as the same appear in the permanent records of the North Carolina State Highway Commission in Raleigh. The center line for said Highway Project No. 53-54 as shown on said plans lies 27 feet to the east of and runs parallel with the center line of what has now become the southbound lanes of State Highway Project No. 8.15364. The said southbound lanes of State Highway Project No. 8.15364 consists of that portion of the pavement which was previously constructed pursuant to State Highway Project No. 53-54. The parties also attached to their stipulation as exhibits three instruments purporting to be "Right-of-Way Agreements." These instruments were executed in 1947 and 1948 by defendants' predecessors in title. These instruments have never been recorded in the office of the Register of Deeds of Guilford County, but the same have been kept in the public records of the North Carolina State Highway Commission in Raleigh from the dates of execution until the date of institution of the present condemnation proceedings. These instruments show a right-of-way 125 feet wide on the right and 125 feet wide on the left of the survey center line.

The parties also attached to their stipulation as an exhibit a copy of the plat which was entitled "Property of J. H. Weston, Guilford County, North Carolina," dated 23 June 1955, referred to in the deed to the defendants. This map shows a plat of the property, with the lot lines having the same metes and bounds as contained in the deed to defendants. It also shows the location of the then existing paved lane of U. S. Highway No. 29, showing the center line of that lane coinciding with the western boundary line of defendants' property. This map also shows in broken lines a "proposed lane," the center line of which is indicated to be parallel to and 27 feet east of the center line of the existing lane and shows a broken line across the property running parallel to and 152 feet east of the center line of the existing lane.

The parties further stipulated that prior to construction of State Highway Project No. 8.15364 there was no limitation or control of access to or exit from the defendants' property to U. S. Highway No. 29 for traffic going either north or south. After construction of Project

No. 8.15364, defendants can exit and enter their property via a newly constructed closure or service road which crosses their property. On leaving their property they can enter the main northbound lanes of U. S. Highway No. 29 by going north on such service road a total distance of approximately 560 feet, and can enter the main southbound lanes of U. S. Highway No. 29 by traveling south on the closure road to a crossover bridge, turning up a ramp and crossing the bridge, and then turning left onto a ramp leading directly to the southbound lanes, a distance of approximately 3,000 feet. For traffic traveling in the southbound lanes of U. S. Highway No. 29 to gain ingress into defendants' property, it must travel south to a ramp leading off to the right and up to the level of the crossover bridge, cross the bridge, turn left into the closure road and then travel along the same in a northerly direction to defendants' property. The distance from a point in the southbound lanes opposite their property to and across the bridge and back to their property is approximately 4,500 feet. Ingress to defendants' property for traffic traveling the northbound lanes of U. S. Highway No. 29 can be obtained by turning directly from such northbound lanes into the service road, then traveling back south along the same until they reach defendants' property, the distance from a point in the northbound lanes opposite their property to the entrance of the closure road and back to their property being approximately 675 feet.

When the matter came on for hearing, the court entered an order making findings of fact in conformity with the foregoing stipulations and in addition, upon the oral stipulation of counsel given in open court, found as a fact that on 16 February 1956 the defendants entered into a contract with J. H. Weston and wife by which the latter agreed to sell and defendants agreed to purchase the land as subsequently described in the deed to defendants; that said contract of sale contained a metes and bounds description of the property which is identical to the description in said deed; and that following this metes and bounds description the contract contained the following reference: "The metes and bounds description hereinabove set forth was taken from that plat of survey prepared by Southern Mapping and Engineering Company entitled 'Property of J. H. Weston, Guilford County, North Carolina,' dated June 23, 1955;" that said contract of sale also contained the following wording: "Sellers shall convey to purchasers a good, marketable and indefeasible fee simple title to the above described property free and clear of all liens and encumbrances of every type and kind except as to that portion of said property which is located within the right of way of U. S. Highway No. 29 . . ."

Upon these findings of fact the court adjudged and decreed: (1) That the lands of the defendants were owned by them at the commencement of this action subject to an easement of the North Carolina State Highway Commission for right-of-way extending 152 feet to the east of and running parallel to the center line of the then existing pavement of U. S. Highway No. 29, which is now the southbound lane of U. S. Highway No. 29; and (2) that the control of access and designation of traffic lanes for northbound and for southbound traffic on U. S. Highway No. 29 and for local traffic by way of service road connections to U. S. Highway No. 29 by way of designated points of access amounts to an exercise of the police power by the North Carolina State Highway Commission and was done in furtherance of the public health, safety and welfare; that the defendants, after the date of taking, have full, unlimited and uncontrolled access to a service road which affords direct access by local traffic lanes to points designated for access to through traffic, and the defendants therefore have reasonable access from their property to U. S. Highway No. 29 and from U. S. Highway No. 29 to their property; that any impairment in the value of the defendants' remaining lands which might result from an alteration in the manner of ingress and egress from their property to U. S. Highway No. 29 is *damnum absque injuria,* and shall not be considered in the trial of this action upon the issue of damages.

To the signing and entry of this order, defendants excepted and appealed.

Attorney General Thomas Wade Bruton, Deputy Attorney General Harrison Lewis, Trial Attorney J. Bruce Morton, and Associate Counsel Eugene G. Shaw, Jr., for plaintiff appellee.

Morgan, Byerly, Post & Keziah, by J. V. Morgan, for defendant appellant.

PARKER, J.

[3] Defendants assign as error the trial court's adjudication that at the time of commencement of the present condemnation proceeding defendants' property was already subject to an easement of the North Carolina State Highway Commission for a right-of-way extending to a line located 152 feet to the east of and running parallel with the center line of the pavement of U. S. Highway No. 29 as it existed prior to construction of the new project. The stipulations of the parties and the maps and right-of-way agreements attached as exhibits thereto clearly establish that the survey center line of the

previous Highway Project No. 53-54 was 27 feet to the east of and ran parallel with the center line of the pavement on U. S. Highway No. 29 as previously constructed. The western boundary line of defendants' property coincides with this pavement center line. The stipulations and exhibits also establish that the Highway Commission acquired from defendants' predecessors in title written right-of-way agreements specifying a right-of-way 125 feet on each side of said survey center line. Under these agreements, therefore, the Highway Commission acquired a right-of-way across the property which was subsequently purchased by defendants, the center line of which was 27 feet east of and ran parallel with the western boundary line of such property and which right-of-way extended an additional 125 feet to the east of said center line. Thus, the previously acquired right-of-way covered a strip extending a total distance of 152 feet into the property subsequently purchased by defendants. Defendants contend, however, that such a claim of right-of-way was not valid as against them for the reason that the right-of-way agreements were never recorded in the office of the Register of Deeds of Guilford County but remained on file in the office of the Highway Commission in Raleigh. Because of this failure to record, defendants assert that the only right-of-way to which the plaintiff Commission had any lawful right as against them prior to the commencement of the present condemnation proceeding was a right-of-way for so much of their lands as was actually covered by the pavement of U. S. Highway No. 29 as it existed on the date defendants acquired their title.

G.S. 47-27 contains the following: "No deed, agreement for right-of-way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies." This statute was amended by Section 1 of Chapter 1244 of the 1959 Session Laws, by adding a new paragraph as follows: "From and after July 1, 1959 the provisions of this section shall apply to require the State Highway Commission to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959, in the same manner and to the same extent that individuals, firms or corporations are required to record such easements." Defendants contend that by the 1959 amendment the Legislature merely made explicit that which was already implicit in the statute and that prior to the 1959 amendment G.S. 47-27 already applied to the Highway Commission in the same manner as it did to all other persons. The same question was raised by the parties in the case of *Highway Com-*

mission v. Nuckles, 271 N.C. 1, 155 S.E. 2d 772, which involved the same highway project with which we are here concerned, but the Supreme Court found it unnecessary to decide the question in that case. Similarly, we do not find it necessary to pass upon it in the present case.

[1-3] Defendants acquired title to their property by a deed which in express terms was made subject to the right-of-way for U. S. Highway No. 29. This deed constituted the first link in their chain of title. Ordinary prudence should have prompted them to ascertain the exact extent of the right-of-way being then claimed by the Highway Commission. "If the facts disclosed in an instrument appearing in a purchaser's chain of title would naturally lead an honest and prudent person to make inquiry concerning the rights of others, these facts constituted notice of everything which such inquiry, pursued in good faith and with reasonable diligence, would have disclosed." *Jones v. Warren,* 274 N.C. 166, 173, 161 S.E. 2d 467, 472. Inquiry of the Highway Commission would have disclosed the written right-of-way agreements which it had obtained from defendants' predecessors in title. These in turn would have clearly disclosed that the Highway Commission held instruments granting them an easement for highway purposes extending into the property being acquired by the defendants for a distance of 152 feet east of the center line of the pavement of U. S. Highway No. 29 as it then existed. Furthermore, the deed to defendants expressly referred to a specifically designated plat. "A map or plat referred to in a deed becomes a part of the deed and need not be registered." *Kaperonis v. Highway Commission,* 260 N.C. 587, 133 S.E. 2d 464. Reference to this plat, a copy of which was attached as Exhibit #4 to the stipulations entered into by the parties, shows a line drawn across defendants' lot, which line is shown to be exactly 152 feet east of and parallel with the center line of the pavement of U. S. Highway No. 29. While there is no wording on the plat to designate specifically what this line represents, it is significant that it is drawn not only across the lot of the defendants but is extended north and south thereof, which would indicate that it relates to the highway rather than solely to the lot of the defendants. It is also significant that this line is shown on the plat in the exact location of the right-of-way which had previously been acquired by the Highway Commission by the written right-of-way agreements. Thus, by exercising ordinary diligence in examining those things of which they were put on notice by the express language of their own deed, defendants would have known at the time they acquired title the exact extent of the right-of-way then being asserted by the Highway Commission. We find no error in the trial

court's conclusion that the lands of the defendants were owned by them at the commencement of the present condemnation proceeding subject to an easement of the North Carolina State Highway Commission for right-of-way extending 152 feet to the east of and running parallel to the center line of the then existing pavement of U. S. Highway No. 29, which is now the southbound lane of said highway.

[4] Defendants also assign as error the trial court's conclusion that they have been provided reasonable access from their property to and from U. S. Highway No. 29 by way of the newly constructed service road and that therefore they are not entitled to be compensated for any loss of access to or from their property caused by construction of the new project. Decisions of our Supreme Court have established that while the abutting owner has a right of access to an existing highway, the manner in which that right may be exercised is not unlimited; to protect others who may be using the highway, the sovereign may restrict the right of entrance to reasonable and proper points; and if the abutting owner is afforded reasonable access, he is not entitled to compensation merely because of circuity of travel to reach a particular destination. *Highway Commission v. Nuckles, supra; Highway Commission v. Farmers Market,* 263 N.C. 622, 139 S.E. 2d 904; *Moses v. Highway Commission,* 261 N.C. 316, 134 S.E. 2d 664. The identical problem was presented to this Court in *Highway Commission v. Rankin,* 2 N.C. App. 452, 163 S.E. 2d 302. As pointed out by Mallard, C.J., in that case, the main question involved concerns the reasonableness of the substitute access provided.

[5] In the present case we agree with the trial court's conclusion that the service road constructed across defendants' property, by means of which persons using their property can exit north on U. S. Highway No. 29 by traveling approximately 560 feet and can exit south by traveling approximately 3,000 feet, and by means of which a traveler on the northbound lane of said highway can gain access to defendants' property by traveling only approximately 675 additional feet and a traveler from the southbound lane can gain access to defendants' property by traveling only approximately 4,500 additional feet, is reasonable access. These additional distances, when converted into the time required to traverse them when moving at presently customary and lawful rates of speed, amount to little more than minutes. The small inconvenience of the slight additional time required, is far more than offset by the additional safety provided the very persons entering or leaving defendants' own property. Provision of access by service roads requiring greater distances of travel were held reasonable in *Moses v. Highway Coommission,*

supra, and *Highway Commission v. Rankin, supra,* and we find these provisions reasonable in the present case.

The order appealed from is

Affirmed.

BROCK and BRITT, JJ., concur.

FRANCES DELORES FARMER v. RONALD JACK REYNOLDS, JAMES CAMERON CRUMPLER, AND ELBERT NORWOOD CRUMPLER

No. 698SC208

(Filed 28 May 1969)

1. Automobiles § 19— intersections — duty of motorist on servient road

The fact that a motorist on a servient road reaches the intersection a hairsbreadth ahead of one on the dominant highway does not give him the right to proceed, but it is his duty to stop and yield the right of way unless the motorist on the dominant highway is a sufficient distance from the intersection to warrant the assumption that he can cross in safety before the other vehicle, operated at a reasonable speed reaches the crossing. G.S. 20-158.1.

2. Automobiles § 19— intersections — motorist on servient road

The driver along the servient highway is not required to anticipate that a driver on the dominant highway will travel at excessive speed or fail to observe the rules of the road applicable to him.

3. Automobiles § 57— intersection accidents—sufficiency of evidence

In plaintiff's action against the driver of the car in which she was riding as a passenger, trial court properly refused to submit to the jury the issue of defendant-driver's negligence at an intersection accident, where plaintiff's evidence tended to show that defendant was driving on the servient street within the speed limit, that as he reached the intersection controlled by a yield sign he slowed the vehicle to approximately ten miles per hour, that as he entered the intersection an oncoming car on the dominant street was 200 to 250 feet away, and there was no evidence disclosing anything to have put defendant on notice that the oncoming car was traveling at such a speed in excess of the applicable limit that it would arrive at the intersection at approximately the same time as his own vehicle.

4. Negligence § 22— reliance on several aspects of negligence

A plaintiff is entitled to rely upon a number of aspects of negligence.

5. Negligence § 37— instructions — reliance on more than one aspect of negligence

Where plaintiff relies on more than one aspect of negligence, the jury should answer the issue of negligence in the affirmative if negligence is found in any one respect, if such negligence is a proximate cause of the injury; it is not necessary that defendant be found negligent in all of the aspects relied on.

6. Negligence § 37— instructions on aspects of negligence

Where plaintiff relied upon a number of aspects of negligence, there was error in instructions from which the jury could have understood that each negligent aspect relied on had to be *the* proximate cause and not a proximate cause of plaintiff's injury, and from which the jury could have understood that if they failed to find defendant negligent in any one aspect, it would have been their duty to answer the issue in the negative.

7. Automobiles § 19— intersection right of way

Where the driver on the servient street is already in the intersection before the vehicle approaching on the dominant street is near enough the intersection to constitute an immediate hazard, the driver on the servient street has the right of way.

8. Automobiles § 90— instructions — failure to give instruction on particular issue

Where plaintiff alleged and offered proof that the operator of a vehicle on the dominant street failed to yield the right of way at an intersection to plaintiff's vehicle which was already in the intersection, trial court erred in failing to instruct the jury that the operator of a motor vehicle has the duty to yield the right of way to another vehicle already within the intersection and that failure to do so may constitute negligence.

APPEAL by plaintiff from *Parker, J.*, 30 September 1968 Session of WAYNE Superior Court.

This is a civil action to recover damages for personal injuries received by plaintiff as result of a collision between two automobiles which occurred at approximately 7:15 p.m., on 23 December 1961, at the intersection of Pineview Avenue and Maple Street in the city of Goldsboro, N. C. Plaintiff was a passenger riding in the rear seat of a 1960 Studebaker Lark automobile owned by her father and at the time in question being operated by defendant Reynolds in a northerly direction on Pineview Avenue. The defendant Elbert Norwood Crumpler was the owner and his son, the defendant James Cameron Crumpler, was the driver of a 1955 Chevrolet which was being operated in a westwardly direction on Maple Street. The parties stipulated: That at the date of the collision Pineview Avenue and Maple Street were paved streets approximately 30 feet wide; that Pineview Avenue runs generally in a north-south and Maple Street runs generally in an east-west direction; that northbound

traffic on Pineview Avenue was designated for the eastern lane of travel and westbound traffic on Maple Street was designated for the northern lane of travel; that the speed limit on Pineview Avenue and on Maple Street in the area where the collision occurred was 25 miles per hour; that there was a duly erected "yield right-of-way" sign controlling the traffic moving northwardly on Pineview Avenue as it entered the intersection with Maple Street; that the Crumpler automobile was a family purpose car and was being driven by a member of the owner's immediate family. Plaintiff alleged in her complaint particular acts of negligence on the part of the two drivers and that the individual negligent conduct of the defendants combined to become the proximate cause of the collision and of her injuries. Each driver answered, denying negligence on his part and alleging negligence on the part of the other.

Plaintiff presented the testimony of her brother, Donald Farmer, who testified: He was riding on the passenger side in the front seat of the four door straight shift Studebaker Lark being driven by Reynolds. His sister, the plaintiff, was riding in the rear seat and was lying with her head resting on a coat on the left side of the rear seat behind the driver. Defendant Reynolds was operating the automobile in a northerly direction on Pineview at a speed of approximately 20 to 25 miles per hour. The weather was misty and chilly, the streets were damp, and visibility was very poor. The only light was a street light at the northeast corner of the intersection. As they passed the midway point of the block approaching Maple Street, the witness began to wonder if Reynolds was familiar with the intersection and whether he was going to see the yield sign, which was approximately twelve feet from the southern curb line of Maple Street. Reynolds did not apply his brakes and slow the automobile until it was within 20 feet of the yield sign and around 30 or 35 feet from the intersection. At this point the witness could see some lights east on Maple Street but could not see the car from which the lights came, which car the witness said "could have been parked at the corner with bright lights on." His view to the right was obstructed by a big Holly tree which was in the corner of the yard, as well as by some hedges, and the witness saw the lights through the hedges to the right, which was east on Maple Street. The witness did not actually see the car to which the lights were attached until after the Reynolds car cleared the big tree and the witness himself was at the curb line on the southeast corner of Maple Street. At that time he first saw the Crumpler car, which was at least a half block down Maple Street and between 200 and 250 feet away. He realized the Crumpler car was coming very fast and said: "You better step on

it, that car is flying." At that point the Studebaker was already in the intersection and the driver Reynolds shifted to a lower gear, into second, and accelerated the Studebaker. The Studebaker had never come to a complete stop and was going around ten miles per hour when it started picking up speed. It was going fourteen or fifteen miles per hour at the time of the collision. When the rear of the Studebaker was five feet past the center line of the intersection, it was struck around the right rear wheel by the front of the Crumpler car. In the witness's opinion, the Crumpler car was approaching at a speed of at least 45 miles per hour or better, and did not decrease speed nor change direction until the time of impact. Prior to the impact, the witness did not hear any horn and did not see any other traffic. Up to the time the vehicles collided, the Reynolds car had remained on its proper right-hand side of Pineview as it approached and entered and was in the act of leaving the intersection. After the impact, the Reynolds car swung clockwise and proceeded to the northwest corner of the intersection where it hit the curb and a telephone pole, and then came back counterclockwise across the street and hit a parked car, moving about one and a half car lengths in the direction it was traveling from the point of impact. The Crumpler car came to rest fronting north on Pineview and at a point along the curb line further north from the intersection than the Reynolds car. The witness thought the Reynolds car was going to make it through the intersection, and he was still of the opinion that they could have made it had the Crumpler car not been speeding.

Plaintiff also presented the testimony of the police officer who investigated the accident, who testified that he found no skid marks on the road, but did observe debris from the impact just north of the center line of Maple Street and east of the center line of Pineview. Plaintiff also presented evidence as to the extent of her injuries.

At the close of plaintiff's evidence, the court allowed defendant Reynold's motion for nonsuit. The defendants Crumpler then presented evidence, and the case was submitted to the jury on issues as to their negligence and as to damages. The jury answered the first issue in the negative, and the court rendered judgment thereon in favor of defendants Crumpler. From the judgment of nonsuit as to defendant Reynolds and the judgment in favor of defendants Crumpler, plaintiff appealed.

H. Jack Edwards and George K. Freeman, and Futrelle & Baddour, by Philip O. Baddour, for plaintiff appellant.

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

Dees, Smith & Powell, by William W. Smith, for defendant appellees Crumpler.

PARKER, J.

Appellant's first assignment of error is directed to the judgment of nonsuit entered as to the defendant Reynolds. In this judgment we find no error. Plaintiff's evidence, even when viewed in the light most favorable to her, disclosed no negligence on the part of defendant Reynolds.

[1] G.S. 20-158.1, which authorizes the erection of "yield right-of-way" signs, provides in part: "(W)henever any such yield right-of-way signs have been so erected, it shall be unlawful for the driver of any vehicle to enter or cross such main traveled or through highway or street unless he shall first slow down and yield the right-of-way to any vehicle in movement on the main traveled or through highway or street which is approaching so as to arrive at the intersection at approximately the same time as the vehicle entering the main traveled or through highway or street." In the case of *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554, Barnhill, J. (later C.J.), interpreting a companion statute, G.S. 20-158, said: "(T)he fact a motorist on a servient road reaches the intersection a hairsbreadth ahead of one on the dominant highway does not give him the right to proceed. It is his duty to stop and yield the right of way *unless the motorist on the dominant highway is a sufficient distance from the intersection to warrant the assumption that he can cross in safety before the other vehicle, operated at a reasonable speed,* reaches the crossing." (Emphasis added.)

[2, 3] In the present case, defendant Reynolds was on the servient street. Under plaintiff's evidence, he was driving within the speed limit and slowed his vehicle to approximately ten miles per hour as he reached the intersection. As he entered the intersection, the Crumpler car on the dominant street was still 200 to 250 feet away, certainly a sufficient distance from the intersection to warrant the assumption that he could cross in safety before the Crumpler vehicle, operated at a reasonable speed, could reach the crossing. He was under no duty to anticipate that the operator of the Crumpler car, while approaching the intersection, would fail to observe the

applicable speed regulations. *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17. The driver along the servient highway is not required to anticipate that a driver on the dominant highway will travel at excessive speed or fail to observe the rules of the road applicable to him. 1 Strong N. C. Index 2d, Automobiles, § 19, p. 424. In the present case plaintiff's evidence did not disclose anything which should have put defendant Reynolds on notice, in the exercise of due care, that the Crumpler vehicle would travel at such a speed in excess of the applicable limit that it would arrive at the intersection at approximately the same time as his own vehicle. Plaintiff's evidence disclosed that as the Reynolds car approached the intersection the lights of the Crumpler car on the dominant street were visible, but it was not then possible to know if the car from which the lights were shining was parked or moving. Certainly this evidence would disclose nothing which would have placed Reynolds on notice as to the speed of the Crumpler vehicle. Had that vehicle been moving at the posted speed limit of 25 miles per hour, there would have been ample time for the Reynolds vehicle to have proceeded through the intersection in safety before the Crumpler car reached it. By the time Reynolds, in the exercise of due care, could have become aware of the speed of the approaching car, he was already in the intersection, moving at a speed of only ten miles per hour. Had he then attempted to stop, he might well have been struck broadside by the approaching car. Plaintiff's own witness apparently felt that the safest course for Reynolds to take was to speed up, rather than to slow down, for he so advised. By following that course, Reynolds very nearly succeeded in avoiding the collision. Viewing all of plaintiff's evidence in the light most favorable to her, we find no sufficient evidence of any negligence on the part of defendant Reynolds to warrant submission of an issue on that question to the jury.

Appellant's second assignment of error relates to the court's charge to the jury on the issue of negligence on the part of the operator of the Crumpler vehicle. In this connection, plaintiff had alleged and offered evidence tending to establish negligent acts on the part of such operator in a number of respects. On this issue the court charged the jury:

> "The Court further instructs you that if the plaintiff, who has the burden of proof on this Issue #1, has satisfied you from the evidence and by its greater weight that the defendant operated his automobile in which he was riding, belonging to his father, at a speed greater than 25 miles per hour, that that within

itself would be negligence, and if the plaintiff has further satisfied you from the evidence and by its greater weight that such negligence was the proximate cause of the injury complained of by the plaintiff, it would be your duty to answer this first issue YES. If you fail to so find, you would answer it No.

"The Court further instructs you that if the plaintiff has satisfied you from the evidence and by its greater weight that the defendant James Cameron Crumpler, operating the automobile of his father, operated the same at a speed greater than reasonable and prudent, although less than that allowed by law, and the plaintiff has further satisfied you from the evidence and by its greater weight that such operation was the proximate cause, the cause without which the injury and damage to the plaintiff would not have occurred, it would be your duty to answer the first issue YES. If the plaintiff has failed to so satisfy you on that point, you would answer it No.

"The Court further instructs you that if the plaintiff has satisfied you from the evidence and by its greater weight that the defendant in the operation of the automobile owned by his father, failed to keep a proper lookout, or that he failed to operate his vehicle by keeping it under reasonable control; and you further find from the evidence and by its greater weight that one or more of such acts was the cause without which the collision would not have occurred, it would be your duty to answer the first issue YES. If you fail to so find in each instance, you would answer the first issue No."

[4-6] In this charge there was error. A plaintiff is entitled to rely upon a number of aspects of negligence. The jury should answer the issue of negligence in the affirmative if negligence is found in any one respect, if such negligence is a proximate cause of the injury. It is not necessary that defendant be found negligent in all of the aspects relied on. 6 Strong N. C. Index 2d, Negligence, § 37, p. 79. The error in the above charge lies in the fact that from it the jury could well have understood that the negligent aspect had to be *the* proximate cause and not *a* proximate cause of plaintiff's injury and further the jury could well have understood that had they failed to find defendant negligent in any one aspect, it would have then been their duty to answer the issue in the negative.

[7, 8] Appellant's third assignment of error is that the court failed to charge the jury that the operator of a motor vehicle has the duty to yield the right-of-way to another motor vehicle which is already within an intersection and that failure to do so may constitute neg-

ligence. In this connection plaintiff in her complaint had alleged that the operator of the Crumpler vehicle was negligent in that he failed to yield the right-of-way to a vehicle already within an intersection. This allegation was supported by evidence introduced at the trial. Plaintiff's principal witness had testified that the Reynolds car had already passed the midportion of the intersection and its rear had cleared the center line by five feet at the time of the collision. Where the driver on the servient street is already in the intersection before the vehicle approaching on the dominant street is near enough the intersection to constitute an immediate hazard, the driver on the servient street has the right-of-way. 1 Strong N. C. Index 2d, Automobiles, § 19, p. 424. It was error for the court to fail to charge on this aspect of negligence on the part of the driver of the Crumpler vehicle.

In the judgment of nonsuit as to defendant Reynolds we find

No error.

For error in the charge in appellant's action against defendants Crumpler there must be a

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES EARL BLOUNT

No. 692SC258

(Filed 28 May 1969)

1. Jury § 6— competency of jurors — discretion of trial court

The question of whether a juror is competent is one for the trial judge to determine in his discretion, G.S. 9-14, and his rulings thereon are not reviewable on appeal unless accompanied by some imputed error of law.

2. Jury § 6— motion to excuse juror acquainted with State's witness

In this prosecution for armed robbery, the trial judge did not abuse his discretion in the denial of defendant's motion to excuse a juror who indicated during the trial that he was acquainted with a State's witness, the juror having stated that his acquaintance with the witness would not affect his verdict in the case.

3. Criminal Law § 66; Robbery § 3— motion to strike testimony — credibility

In this prosecution for armed robbery, the court did not err in denying

defendant's motion to strike testimony by the prosecuting witness to the effect that he had known defendant ever since he was growing up when, in fact, the witness had not seen defendant for several years during which defendant had changed in appearance, it being for the jury to determine the weight to be given to such testimony.

4. Criminal Law § 88; Witnesses § 8— argumentative and repetitious cross-examination

In this prosecution for armed robbery, the court did not abuse its discretion in sustaining the State's objections to questions asked the prosecuting witness on cross-examination which were clearly repetitious and argumentative, particularly in view of the otherwise extensive cross-examination.

5. Robbery § 5— instructions — expression of opinion — failure to instruct on subordinate feature of case

In this prosecution for armed robbery in which certain testimony of one State's witness conflicted with that of another State's witness, the trial court expressed no opinion in the charge as to which version the jury should accept, and failure of the court to give specific instructions as to the contradictory nature of the State's evidence is not error where no request for such instructions was made.

APPEAL from *Fountain, J.*, January 1969 Criminal Session, BEAUFORT County Superior Court.

James Earl Blount (defendant) was charged in a proper bill of indictment with the felony of armed robbery. He entered a plea of not guilty and a jury was impaneled.

Jimmy Griffin (Griffin), the State's first witness, testified that he was sixty years of age; on Sunday, 11 February 1968, he was operating a combination filling station and grocery store located about six miles from the Town of Washington, Beaufort County; at approximately 1:15 p.m., he was alone in his store; a 1959 or 1960 model Pontiac automobile drove up and parked in front of his store; one of the four occupants, Willie Robert Mills (Mills), got out of the automobile and entered the store; Mills had a pistol, which he pointed at Griffin's stomach, and he pushed Griffin against a freezer; two other occupants, William Charles Mourning (Mourning) and the defendant, then entered the store; each had a pistol; the defendant helped tie Griffin's arms behind his back with his belt; the fourth occupant, Rudolph Langley (Langley) entered the store; Langley, who did not have a gun, was immediately recognized by Griffin; Mills and the defendant shoved Griffin down behind a soft drink box; a rifle was taken from the store, and money was taken from the cash register and Griffin's billfold; the four stayed in the store 25 to 30 minutes before leaving; Griffin freed himself in time to see the auto-

mobile departing in the direction of the Town of Washington; Griffin had not seen the defendant, who had previously lived in the community, for three to five years prior to 11 February 1968.

Mourning, the State's second witness, testified that he was 22 years old; on 11 February 1968 he was in New York and he did not participate in any robbery; the defendant talked with him on Monday, 12 February 1968, in Brooklyn, New York; the defendant said that he had gone to North Carolina with Mills, who was driving a 1959 Pontiac automobile; the defendant said that he had gone to Griffin's store and had committed the crime in question; the defendant had a pistol at that time; James Little, James Whitaker and Jesse Holliday had accompanied defendant to Griffin's store.

The defendant took the stand in his own behalf and testified that he had traveled from his home in Patterson, New Jersey, to North Carolina with Mills and several other persons; he arrived at his mother's home in the Town of Washington on Saturday morning, 10 February 1968; on Sunday, 11 February 1968, he got out of bed between 8:30 and 9:00 a.m.; he did not leave the house until approximately 4:00 p.m., at which time he went to visit his grandmother a few blocks away; he did not see Mills on Sunday until 5:30 or 6:00 p.m. when it was time to return to New Jersey; he did not know Griffin; the first time he had ever seen Griffin was the day of the trial; he was 23 years old, six feet eleven inches in height, and weighed 185 pounds; he had recently grown a mustache; if Griffin had seen him three to five years prior to the robbery, he had seen a teenage boy who weighed 130 to 135 pounds and who did not have a mustache. The defendant further testified that he had not committed the robbery, and he had not spoken with Mourning after his alleged participation in the crime.

Russell Graddy testified that he was the defendant's employer and that the defendant had a very good reputation in his community.

Carrie Blount, the defendant's mother, corroborated her son's testimony. However, she testified that he had visited Mills on Sunday morning, but that he stayed away only about 10 or 15 minutes.

Mills took the witness stand and corroborated the defendant's testimony. Langley then took the witness stand and denied his participation in the robbery or his presence in North Carolina on 11 February 1968.

Martha Stokes, the defendant's grandmother and the last defense witness, testified that he had visited her Saturday evening and that she did not see him Sunday.

From a verdict of guilty as charged and a sentence of not less than twelve years nor more than fifteen years, the defendant excepted and appealed to this Court.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Trial Attorney J. Bruce Morton for the State.

John A. Wilkinson for defendant appellant.

CAMPBELL, J.

The record indicates that the evidence was submitted under Rule 19(d)(2) of the Rules of Practice in the Court of Appeals. However, the evidence in its present form should have been submitted under Rule 19(d)(1), because a reading of the transcript reveals that the evidence has been reduced to narrative form, except where "a question and answer, or a series of them, (have been) set out when the subject of a particular exception." Rule 19(d)(1). It is further noted that, contrary to Rule 19(d)(2), no appendix was set forth by the defendant in his brief.

[2] The defendant's first assignment of error is that the trial judge abused his discretion in failing to excuse a juror who indicated his acquaintance with Mourning, the State's second witness. After a plea of not guilty was entered and the jury impaneled, the following occurred during the direct examination of Griffin, the State's first witness:

"(GRIFFIN:) Mourning had a pistol too. One of them looked like —

JUROR: (Speaking from Jury Box) This fellow right here, I know him. When you said William Mourning, I didn't know him by that name. I have always known him by his nick name.

THE COURT: Are you well acquainted with him?

A Yes, he knows me.

The Court: I asked if you know him well.

A Fairly well. In other words, I say, 'old friends', actually I see him every once in a while. We get together for a little chat, something like that.

THE COURT: Mr. Juror, what is your name, please?

A James T. Williams.

The Court: You have just indicated you recognized the per-

son by the name of Mourning that you did not identify by that name a few moments ago?

A Yes, sir.

The Court: It may be that he will be a witness in the case. I don't know. His name has been mentioned, of course, by this witness.

A Right.

The Court: I want to ask you if the fact that you know him, the fact you know this man named Mourning, if that would have any bearing on your verdict in this case?

A Is he related to the other fellows?

The Court: I don't know. I never heard of him before. I don't know. I am asking, from your knowledge of him if it would cause you to have any feeling against the defendant, or against the State?

A If there was any way of not serving in this case I really would not want to serve on it because I do know the persons.

The Court: Well, that person is not on trial. You understand that, don't you?

A I understand that he is not on trial.

The Court: He is not on trial at this time. I can tell you that.

A Oh, well, that is all right then.

The Court: In view of that, would your knowledge of him, even if he becomes a witness, cause you to have any feeling against the defendant or against the prosecution, just because of your knowledge of this man named Mourning, that is what I want to know?

A I don't think so.

The Court: Have you got any doubt about it?

A I believe I could make a sound judgment on the case.

The Court: You say you believe you can, I want to be sure about it?

A I can.

MR. WILKINSON: I ask Your Honor, in your discretion to excuse this juror.

The Court: Well, I deny your request."

In his brief, the defendant argued that it was an abuse of discretion to compel him "to be tried by a juror whose connection with the case had been concealed". However, this connection was immediately brought to the attention of the trial court when discovered, and the concealment, if any, was clearly not deliberate, intentional or prejudicial. The defendant further argued that he "was given no opportunity to inquire into the extent or depth of" this connection. However, the record reveals no attempt by defense counsel to make any inquiry.

[1, 2] The question of whether a juror is competent is one for the trial judge to determine in his discretion. G.S. 9-14. "(H)is rulings thereon are not subject to review on appeal, unless accompanied by some imputed error of law." *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670. In the instant case, there is neither an imputed error of law nor an abuse of discretion in the denial of the defendant's motion to excuse the juror.

This assignment of error is without merit.

[3] The defendant's second assignment of error is that the trial judge erred in denying his motion to strike the following answer of Griffin on direct examination:

"Q How long have you known him altogether?

A Well, I been knowing of (the defendant) ever since he was growing up, when he was growing up.

MOTION TO STRIKE OVERRULED"

In his brief, the defendant argued that this answer was unresponsive. However, the question was proper and the answer was clearly responsive. It was also argued that the answer was highly prejudicial, because it "emphasized the alleged familiarity of the witness with" the defendant when, in fact, Griffin had not seen him for several years. During this time, the defendant "had changed from a boy of seventeen to a man of twenty-two, grown a moustache, and gained sixty pounds". However, this answer was admissible, and it was for the jury to determine what weight should be given to it. *State v. Orr,* 260 N.C. 177, 132 S.E. 2d 334; *State v. Perry,* 3 N.C. App. 356, 164 S.E. 2d 629. No prejudice has been made to appear.

This assignment of error is without merit.

[4] The defendant's third, fourth, fifth, sixth and seventh assignments of error all relate to the contention that the trial judge abused his discretion in sustaining the State's objections to the following

questions propounded by defense counsel on the cross-examination of Griffin:

"Q You tell this Jury you can identify a person after five years, a man wearing a beard, five years later, and a mustache, and identify him from somebody you can not even remember had a mustache or not?

OBJECTION SUSTAINED

. . .

Q I thought you had testified that is where it was?

OBJECTION SUSTAINED

. . .

Q Certainly, Mr. Griffin, you know what a beard is?

OBJECTION SUSTAINED

The Court: Mr. Wilkinson, start off, ask the witness a question. Don't tell him what he knows or does not know, please.

Mr. Wilkinson: It is cross-examination, Your Honor.

The Court: You may examine him but don't tell him.

. . .

Q Do you tell this Jury, Mr. Griffin, that you can recognize somebody after he is grown by his appearance as a boy?

OBJECTION SUSTAINED

. . .

Q The truth of the matter is, you don't have any recollection of having seen him at any particular period before then, do you?

OBJECTION SUSTAINED"

It is noted in passing that, contrary to Rule 28, the defendant's brief does not include references to the pages of the record for all of his assignments of error.

"One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses." Stansbury, N. C. Evidence 2d, § 35. However, "(i)t is the duty of the trial court to protect a witness on cross-examination from being unfairly dealt with, and cross-examining counsel should not be permitted to browbeat, bulldoze, or intimidate a witness. . . ." 98 C.J.S., Witnesses, § 410, p. 211. Therefore, "the allowing of . . . questions (calling for a repetition of testimony already given) ordinarily rests in the discretion of the trial court, and the court acts properly within its discretion when it refuses to permit further

cross-examination, where unduly repetitious. . . ." 98 C.J.S., Witnesses, § 414, p. 217. "Other questions disallowed are those which are argumentative. . . ." 98 C.J.S., Witnesses, § 411, p. 211. See *In re Will of Kemp,* 236 N.C. 680, 73 S.E. 2d 906.

The questions *supra* were clearly repetitious and argumentative, and there was no abuse of discretion by the trial judge in sustaining the State's objections, particularly in view of the otherwise extensive cross-examination.

These assignments of error are without merit.

[5] The defendant's eighth, ninth, tenth and eleventh assignments of error relate to the contention that the trial judge erred in his charge to the jury.

The defendant argues that the testimony of the two witnesses for the State was diametrically opposed, since Griffin testified to the involvement of the defendant, Mourning, Mills and Langley, while Mourning testified to the involvement of the defendant, Little, Whitaker and Holliday. The defendant says it was incumbent upon the trial judge to make no "election" between the two versions, but that the trial judge did make an "election" and hence committed error by the expression of an opinion. A careful review of the charge reveals that the trial judge did not make such an "election" and he expressed no opinion. He gave the contentions of both the State and the defendant and left the determination of guilt or innocence to the jury. If the defendant desired any further instruction as to the contradictory nature of the State's evidence, a request should have been made. "Failure to charge on a subordinate — not a substantive — feature of a trial is not reversible error in the absence of request for such instruction." *State v. Pitt,* 248 N.C. 57, 102 S.E. 2d 410. Under the circumstances "(i)t was not inappropriate for the court to leave to counsel for the State and counsel for defendant, respectively, the making of contentions relating to the credibility of the witnesses and the probative value of their testimony." *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513.

These assignments of error are without merit.

The charge when taken as a whole and in context was not prejudicial to the defendant.

No error.

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

STATE OF NORTH CAROLINA v. WILLIAM CHARLES MOURNING, RUDOLPH LANGLEY, AND WILLIE ROBERT MILLS, ALIAS THE BISHOP

No. 692SC41

(Filed 28 May 1969)

1. Indictment and Warrant § 14; Extradition— motion to quash indictment on ground of invalid extradition

In this armed robbery prosecution, the trial court did not err in denying defendants' motions to quash the indictments on the ground that the extradition proceedings under which they were returned to this State for trial were invalid, notwithstanding the State did not produce the records pertaining to the extradition proceedings and affirmatively show that they were regular, since the extradition proceedings may not be challenged after the alleged fugitive has been delivered into the jurisdiction of the demanding state.

2. Indictment and Warrant § 14— grounds for quashing indictment

An indictment may be quashed for want of jurisdiction, irregularity in the selection of the grand or petit jury, or for defect in the bill of indictment.

3. Indictment and Warrant § 14— failure of indictment to show year returned

In this armed robbery prosecution, the trial court properly denied defendants' motion to quash the indictment on the ground that the caption did not show the year in which it was returned, the caption not being part of the indictment, and the Clerk of Superior Court having testified as to the session at which the indictment was returned.

4. Criminal Law § 92— consolidation of cases for trial

The trial court is authorized by statute to order that prosecutions of several defendants for offenses growing out of the same transaction be consolidated for trial.

5. Criminal Law § 92— consolidation of armed robbery prosecutions for trial

The trial court did not err in consolidating for trial prosecutions against three defendants for armed robbery where the defendants were charged in separate indictments with identical crimes.

6. Criminal Law § 167— burden of showing prejudicial error

Appellants have the burden not only to show error but also that the error complained of affected the result adversely to them.

7. Robbery § 4— nonsuit — sufficiency of evidence

The evidence *is held* sufficient to be submitted to the jury as to the guilt of each of the defendants of the crime of armed robbery.

APPEAL by defendants from *Cohoon, J.*, at the 12 August 1968 Session of BEAUFORT Superior Court.

By separate indictments, proper in form, defendants were charged

with the armed robbery of Mrs. Evelyn Brown on 10 February 1968. The indictments against defendants Mourning and Langley, case Nos. 6508 and 6510, indicate that they were returned at the March 1968 Session of Beaufort Superior Court. The indictment against defendant Mills, case No. 6511, indicates that it was returned at the "March Term 19....." of Beaufort Superior Court. The same grand jury foreman signed all three indictments.

Defendants Langley and Mills were extradited from the State of New Jersey. When they were arraigned in Beaufort Superior Court, they moved to quash the bills of indictment against them on the grounds that they were illegally held by reason of improper extradition. After a hearing, the motions were overruled. Defendant Mills moved to quash the bill of indictment against him on the grounds that it was dated "March Term 19....." This motion was denied. The solicitor moved that the cases be consolidated for purpose of trial and the court allowed the motion.

Principal evidence for the State was given by Mrs. Evelyn Brown and her mother, Mrs. Mary Hyatt. Their evidence is summarized as follows: On 10 February 1968, Mrs. Brown was at her home in Washington, N. C., where she was being visited by her mother and three young children. From 1949 until 1966, Mrs. Brown was employed as a caseworker with the Beaufort County Welfare Department. On and prior to 10 February 1968, she was employed as a social worker with the Washington city schools. Much of her work had been with Negroes, and quite frequently Negroes would come to her home in the evening to see her in connection with her work. Around 7:00 on the evening of 10 February 1968, she went to her front door which contained glass windows and saw a young male Negro on the outside. She unlocked the door, after which the man pushed the door open and he and two other Negroes rushed into Mrs. Brown's living room. Although she did not know the names of the men at that time, she recognized each of them as persons that she had seen before in connection with her employment. She later identified the defendants as the three men. Mills had a pistol which he pointed towards her and asked if her husband was at home; she advised that her husband was not at home and Mills told her if she did not do as he said he would kill her. Langley and Mourning also had pistols and pointed them at her. Mrs. Hyatt was sitting on a sofa in the living room and Mrs. Brown's nine-year-old nephew was sitting beside her. Two little girls, ages nine and ten, were in the bathroom. Mills asked Mrs. Brown where she had her money hidden and she told him that she did not have any money in the house, that

she kept her money in the bank. At first Mourning stayed at the front door and kept watch on Mrs. Hyatt and the outside; Mills and Langley went into various rooms of the house searching closets, drawers, etc. Mills pushed Mrs. Brown from one room to another and Langley pushed her around the living room; Langley threatened to shoot Mrs. Brown and one of the children. Mills took a small purse with money in it and also took money and other things from pocketbooks belonging to Mrs. Brown and Mrs. Hyatt. Langley took Mrs. Brown's watch from a shelf in the kitchen, snatched the telephone from the wall and told Mrs. Brown if she called the police he would kill her, that they had not found what they were looking for and would be back. Among other things, Mourning entered Mrs. Brown's bedroom, took jewelry from her jewelry box, took her engagement ring, college ring, silver bracelet, a string of pearls, and other jewelry including her husband's watch. After staying in the house for a period of some twenty minutes, defendants left by way of the front door. Shortly thereafter, Mrs. Brown left by a rear door, went to a neighbor's house and called the police.

The jury found defendants guilty as charged and from judgments imposing lengthy prison sentences, defendants appealed.

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

John A. Wilkinson for defendant appellant Mills, W. B. Carter for defendant appellant Langley and Leroy Scott for defendant appellant Mourning.

BRITT, J.

The first question posed by this appeal is: Did the trial court commit error in failing to quash the indictments against the defendants Langley and Mills?

Said defendants contend that the extradition proceedings under which they were arrested in New Jersey and returned to North Carolina were invalid. The record is silent regarding the proceedings except for the order entered by the New Jersey Court, which order is summarized as follows: A hearing was held on application of North Carolina Solicitor Herbert Small for the extradition of Rudolph Langley and Willie Robert Mills, charged with the crime of armed robbery in North Carolina; defendants were represented by Mr. Gikas and the State of New Jersey was represented by the assistant county prosecutor; testimony of two witnesses was heard, said witnesses identifying the defendants as having been in the jurisdiction

of North Carolina on the date of the alleged offense; pursuant to the hearing, it was ordered that Langley and Mills be delivered by the Sheriff of Bergen County to the Sheriff of Beaufort County, North Carolina. The order was signed by a judge of the Bergen County Court.

[1] Defendants Langley and Mills contend that when they made their motions to quash in the superior court, it became incumbent upon the State to produce all records pertaining to the extradition proceeding and affirmatively show that they were regular. The only authority cited by said defendants in support of their contention is "American Jurisprudence 2d, Extradition, Sections 64, 65 and 66."

A review of the American Jurisprudence sections cited reveals that they do not support the contention of defendants. To the contrary, 31 Am. Jur. 2d, § 74, at p. 980, declares:

> "In interstate extradition proceedings, the prisoner is held under the extradition process only until such time as he reaches the jurisdiction of the demanding state, and is thenceforth held under the process issued out of the courts of that state. Consequently, the regularity of extradition proceedings may be attacked only in the asylum state; after an alleged fugitive has been delivered into the jurisdiction of the demanding state, the proceedings may not be challenged."

[2] Our research does not disclose that this identical question has been answered by the Supreme Court of our State. In 4 Strong, N. C. Index 2d, Indictment and Warrant, § 14, pp. 359 and 360, we find the following: "An indictment may be quashed for want of jurisdiction, irregularity in the selection of the grand jury or petit jury, or for defect in the bill of indictment." We find no support for the contention submitted by defendants Langley and Mills, therefore, the assignment of error is overruled.

[3] The next assignment of error relates to defendant Mills' motion to quash the indictment against him on the ground that the indictment did not show the year in which it was returned. The record discloses the following caption on the Mills indictment:

> "INDICTMENT (#6511) — VARIOUS CASES. (Mills)
> STATE OF NORTH CAROLINA SUPERIOR COURT
> BEAUFORT COUNTY. March Term, A.D. 19....."

A similiar question was raised in the case of *State v. Davis*, 225 N.C. 117, 33 S.E. 2d 623, where, in a bill of indictment returned in the Superior Court of Rowan County, the caption erroneously stated Randolph County as follows:

"STATE OF NORTH CAROLINA SUPERIOR COURT
RANDOLPH COUNTY September Term, 1944"

A motion to arrest the judgment was made, but the Supreme Court held that "the caption is not part of the indictment and its omission is no ground for arresting judgment." In the case before us, the record discloses that when defendant Mills made his motion to quash, the Clerk of Superior Court of Beaufort County was sworn and testified that during the 11 March 1968 Session of Superior Court for Beaufort County the grand jury considered a bill of indictment in case No. 6511 and returned a true bill.

We hold that the bill of indictment was sufficient and the assignment of error is overruled.

In their next assignment of error, defendants contend that the trial court improperly consolidated their cases for trial.

Defendants Mourning and Langley strenuously contend that it was prejudicial to them to be tried jointly with defendant Mills inasmuch as Mills was a person of bad reputation in Beaufort County and possessed a long criminal record. The record before us reveals that defendants Mourning and Langley also had long criminal records. Mourning's previous convictions were for breaking and entering, larceny, assault with a knife, affray, and drunk and disorderly conduct; Langley's previous convictions included three separate breaking and entering cases. It appears that Mills had been convicted for breaking and entering, receiving stolen property, forgery and escape in several cases.

[4] It is well settled in this jurisdiction that the trial court is authorized by statute to order that prosecutions of several defendants for offenses growing out of the same transaction be consolidated for trial. 2 Strong, N. C. Index 2d, Criminal Law, § 92, pp. 623, 624.

In *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506, (cert. den. 384 U.S. 1020, 16 L. Ed. 2d 1044), three defendants were charged in separate indictments with larceny of specified personalty from a specified store, with breaking and entering the store, and safebreaking. In an opinion by Denny, C.J., it is said:

> "The defendants' first assignment of error is to the granting of the solicitor's motion to consolidate the cases for trial.
>
> * * *
>
> In *S. v. Combs,* 200 N.C. 671, 158 S.E. 252, in considering the identical question presented by this assignment of error, the Court said:

'The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. C.S. 4622 (now G.S. 15-152). *S. v. Cooper,* 190 N.C. 528, 130 S.E. 180; *S. v. Jarrett,* 189 N.C. 516, 127 S.E. 590; *S. v. Malpass,* 189 N.C. 349, 127 S.E. 248.'

The three defendants were charged in separate bills of indictment with identical crimes. Therefore, the offenses charged are of the same class, relate to the same crime, and are so connected in time and place that evidence at the trial upon one of the indictments would be competent and admissible at the trial on the others. In such cases there is statutory authority for a consolidation. [Citing numerous authorities.]"

[5] We hold that the trial court did not err in consolidating the cases for trial and the assignment of error relating thereto is overruled.

Defendants' next assignment of error relates to exceptions taken to rulings of the trial court on the admission of evidence.

[6] It is well-settled law in this State that the burden is on defendants not only to show error but also to show that the error complained of affected the result adversely to them, as the presumption is in favor of the regularity of the trial below. 3 Strong, N. C. Index 2d, Criminal Law, § 167, pp. 126, 127. We do not deem it necessary to discuss each of the exceptions relating to the testimony; suffice to say, we have carefully reviewed the record pertaining to the testimony complained of and conclude that no prejudicial error was committed by the trial court with respect to said testimony. The assignment of error is overruled.

[7] At the close of the State's evidence, defendants moved for judgment as of nonsuit and renewed their motions at the conclusion of all the evidence. Although they excepted to the failure of the court to grant their motions, they do not bring the exceptions forward in their brief, therefore, they are deemed abandoned. Nonetheless, we hold that the evidence was sufficient to withstand the motions of nonsuit by each defendant and the assignments of error relating thereto are overruled.

Although defendants are indigent, they were ably represented in the superior court and in this Court by capable and experienced at-

torneys. Their trial was presided over by an experienced and eminently qualified judge. We conclude that defendants received a fair trial, free from prejudicial error, and the sentences imposed were within statutory limits.

No error.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. WILLIE GASTON

No. 697SC127

(Filed 28 May 1969)

1. Burglary and Unlawful Breakings § 7; Rape § 18; Criminal Law § 115— instructions as to possible verdicts

In a prosecution upon two indictments charging defendant with (1) first-degree burglary and (2) assault upon a female with intent to commit rape, wherein the solicitor announced that the State would seek no greater verdict than felonious breaking and entering on the burglary indictment, the evidence justified submission of the case to the jury on the issues of defendant's guilt of felonious breaking and entering and of assault with intent to commit rape; and there is no merit in defendant's contention that his motion to nonsuit should have been granted on the ground that all the evidence adverse to him tended solely to show his guilt of first-degree burglary and rape.

2. Burglary and Unlawful Breakings § 2— felonious breaking and entering — lesser degree of burglary

A felonious breaking and entering in violation of G.S. 14-54 is a less degree of the felony of burglary in the first degree.

3. Criminal Law § 117— instructions — interested witness rule

Where it appears that one of defendant's witnesses was the boyfriend of defendant's sister and that the friendship between defendant and the witness was such that defendant had invited the witness to spend a night with him, the trial court properly instructed the jury to scrutinize the testimony of the witness.

4. Burglary and Unlawful Breakings § 7— felonious breaking and entering — form of verdict

In a prosecution for felonious breaking and entering, a verdict that defendant is guilty of felonious "B. & E" is disapproved.

APPEAL by defendant from *Crissman, J.*, at the August 1968 Session of NASH Superior Court.

The defendant was charged in two bills of indictment with (1) first-degree burglary and (2) assault on a female with intent to commit rape, he being a male person over 18 years of age.

Principal evidence for the State was given by the prosecutrix, Tempie Williams, whose testimony is summarized as follows: On Saturday night, 23 March 1968, prosecutrix, who was 63 years old, was living in part of a house in or near the City of Rocky Mount. The other part of the house was vacant and a door led from the vacant portion to the portion occupied by prosecutrix and her six-year-old granddaughter. Around 12:00 that night, prosecutrix and her grandchild had retired for the night, had locked the doors and closed the windows. Defendant entered the unoccupied portion of the house and went to the door leading to the prosecutrix's apartment. She had a "barn lock" on her side of the door and had a fork on the door to keep it from coming open. On direct examination she testified that defendant kept "yanking it and yanking it until he popped it open." When defendant first tried to open the door, prosecutrix asked, "Who is that?" and defendant replied, "It's James Mercer." Prosecutrix turned on a light in her bedroom and defendant finally gained entry. After defendant entered the room, he told prosecutrix to get over on a long chair. She refused and told him that "he was a stranger to her" and she was not going to have anything to do with him. Defendant threatened her with a knife, pushed her over a long, folding chair and had sexual intercourse with her. "He laid there with the knife right around my neck and told me to lay still and I laid still." Defendant was drinking but was not drunk and threatened to kill prosecutrix if she made an outcry. After defendant finished, he laid down on the bed and remained there until Sunday morning when he left. Prosecutrix did not go back to sleep that night and did not leave the house for fear that defendant would harm her granddaughter. During the time that defendant was there, prosecutrix determined that his real name was Willie Gaston; she was personally acquainted with defendant's mother and brother and observed the family resemblance. Defendant is considerably younger than the prosecutrix. After defendant left on Sunday morning, prosecutrix prepared breakfast for herself and her granddaughter, then went to her brother's house where she remained until Monday morning when she went to the police station.

Defendant introduced evidence tending to show that he was elsewhere during the Saturday night in question. He did not testify, but his evidence disclosed that he had been released from prison on the day before the occurrence.

The trial court submitted the case to the jury on felonious breaking and entering (G.S. 14-54) and assault with intent to commit rape. The jury found the defendant guilty of the charges as submitted by the court and from judgment imposing active prison sentences, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Millard R. Rich, Jr., for the State.

R. Conrad Boddie and Fields, Cooper & Henderson by Leon Henderson, Jr., for defendant appellant.

BRITT, J.

Defendant first assigns as error the failure of the trial court to grant his motion for nonsuit.

[1] When the cases were called for trial, the solicitor announced that the State would seek no greater verdict than felonious breaking and entering on the burglary indictment and would seek a verdict of assault with intent to commit rape on the other indictment. Defendant contends that all the evidence adverse to him tended to show that he was guilty of first-degree burglary and rape; that under *State v. Locklear,* 226 N.C. 410, 38 S.E. 2d 162, his motion to nonsuit interposed at the close of the evidence should have been granted.

In *State v. Locklear, supra,* in an opinion by Denny, J. (later C.J.), it is said:

> "The defendant was charged with burglary in the first degree in the bill of indictment. And when the solicitor stated that he would not ask for a verdict of first degree burglary, but would only ask for a verdict of second degree burglary on the indictment, it was tantamount to taking a *nolle prosequi* with leave on the capital charge. *S. v. Spain,* 201 N.C., 571, 160 S.E., 825; *S. v. Hunt,* 128 N.C., 584, 38 S.E., 473.
>
> In the case of *S. v. Jordan, ante,* 155, 37 S.E. (2d), 111, *Stacy, C.J.,* in speaking for the Court, said: 'It is permissible under our practice to convict a defendant of a less degree of the crime charged, G.S. 15-170, or for which he is being tried, when there is evidence to support the milder verdict, *S. v. Smith,* 201 N.C., 494, 160 S.E., 577, with G.S., 15-171, available in burglary cases, *S. v. McLean,* 224 N.C., 704, 32 S.E. (2d), 227.' But on this record there is no evidence to support a milder verdict. Moreover, when a *nolle prosequi* was taken as to the capital charge,

there remained no charge in the bill of indictment to support a verdict of burglary in the second degree.

The motion to set aside the verdict should have been sustained."

In our opinion, there are facts on the burglary charge in the instant case which would distinguish it from the facts in *State v. Locklear, supra;* therefore, the principles of law above quoted would not apply here. It is noted that the instant case was not submitted on second-degree burglary but was submitted on violation of G.S. 14-54. Although the testimony of Tempie Williams, the prosecutrix, on direct examination tended to show first-degree burglary, her testimony on cross-examination could be interpreted otherwise. The following is quoted from her cross-examination: "I did let him in the door. He told me to open the g.d. door. After he got it half open and he could not open the other part he asked me to pull the door open or he was going to cut my throat. * * * I did let him through the door. * * * I did let him in the house. * * * I didn't open it because I wanted to; he made me open it."

As to the assault with intent to commit rape charge, we think there was evidence to support a verdict milder than the capital offense of rape. The prosecutrix testified that after defendant had intercourse with her, he spent the remainder of the night in her room — slept on her bed — and that she sought no help from anyone until the next day and did not consult the police until Monday morning following the occurrence on Saturday night. There were other statements in her testimony that were inconsistent with the capital offense.

In *State v. Mumford,* 227 N.C. 132, 41 S.E. 2d 201, defendant was prosecuted under two bills of indictment consolidated for the purpose of trial, charging (1) an assault with intent to commit rape and (2) a felonious nonburglarious breaking and entering of the residence of one J. N. Street in violation of G.S. 14-54. In an opinion by Barnhill, J. (later C.J.), we find the following:

"Burglary is a common law offense. To warrant a conviction thereof it must be made to appear that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. That the building was or was not occupied at the time affects the degree. G.S., 14-51.

But defendant is not charged with the crime of burglary. He is indicted under G.S., 14-54. The offense there defined, commonly referred to as housebreaking or nonburglarious breaking, is a statutory, not a common law, offense. *S. v. Dozier,* 73 N.C., 117.

* * *

> * * * G.S., 14-54 * * * makes it a crime for any person, with intent to commit a felony therein, to break or enter the dwelling of another, otherwise than by a burglarious breaking; * * *.
>
> Thus from the beginning, in respect to a dwelling, it is the entering otherwise than by a burglarious breaking, with intent to commit a felony, that constitutes the offense condemned by the Act. * * .*
>
> Under the statute it is unlawful to break into a dwelling with intent to commit a felony therein. It is likewise unlawful to enter, with like intent, without a breaking. * * *"

[2] In *State v. Fikes,* 270 N.C. 780, 155 S.E. 2d 277, defendant was indicted for first-degree burglary. In a *per curiam* opinion, we find the following:

> "When the State had completed its evidence, defendant moved for a judgment of compulsory nonsuit. The court ruled that it would not submit the case to the jury on the charge of burglary in the first degree, but would submit to the jury the charge of a felonious entering into a house otherwise than burglariously with intent to commit larceny, a violation of G.S. 14-54, which is a less degree of the felony of burglary in the first degree as charged in the indictment. G.S. 15-170. * * *"

G.S. 15-170 provides that "[u]pon 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." A violation of G.S. 14-54 is a less degree of the felony of burglary in the first degree as charged in the indictment. *State v. Fikes, supra.*

Since we have quoted from *State v. Locklear, supra,* we might mention the holding of the Supreme Court in *State v. Miller,* 272 N.C. 243, 158 S.E. 2d 47, as follows:

> "* * * When, upon arraignment, or thereafter in open court, and in the presence of the defendant, the Solicitor announces the State will not ask for a verdict of guilty of the maximum crime charged but will ask for a verdict of guilty on a designated and included lesser offense embraced in the bill, and the announcement is entered in the minutes of the Court, the announcement is the equivalent of a verdict of not guilty on the charge or charges the Solicitor has elected to abandon. *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918."

We do not find it necessary here to say that the rule stated in *State v. Locklear, supra,* has been changed or modified by *State v. Miller,* supra.

[1] We hold that under the evidence presented the trial court was justified in submitting the case on the offense provided by G.S. 14-54 and on the charge of assault with intent to commit rape. Defendant's first assignment of error is overruled.

[3] Defendant's next assignment of error relates to the court's charge to the jury regarding the testimony of James Avent, a witness for the defendant. The evidence disclosed that Avent was the boyfriend of the defendant's sister and that the friendship between defendant and Avent was such that defendant had invited Avent to spend a night with him. The court charged the jury that it should "look carefully into and scrutinize his testimony, but that if after you have done so you believe he is telling the truth about this matter, then you should give the same weight and credence to his testimony as you found that of any disinterested witness." In *State v. Morgan,* 263 N.C. 400, 139 S.E. 2d 708, one of defendant's witnesses testified to the effect that he was a personal friend of the defendant. Another witness said he had known the defendant for three or four years, that he was in the oil business and the defendant was a customer of his; that defendant's sister lived next door to his station. Defendant's witness Anderson testified that he and the defendant worked "together some on farms"; that they did not "visit much socially, sometimes once a week." In his charge the trial court charged the interested witness rule and the Supreme Court affirmed. See also *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769. We hold that the trial court did not err in this case in charging the interested witness rule and the assignment of error relating thereto is overruled.

Defendant assigns as error a portion of the trial court's charge on the question of alibi. We hold that the charge, when considered contextually, was in harmony with the decisions of our Supreme Court. *State v. Allison,* 256 N.C. 240, 123 S.E. 2d 465; *State v. Stone,* 241 N.C. 294, 84 S.E. 2d 923. The assignment of error is overruled.

[4] The record discloses that the verdict returned in this case was "that the defendant is guilty of felonious B. & E. and guilty of assault with intent to commit rape." We do not know if this is the exact manner in which the jury returned the verdict or if it is merely the manner in which the clerk recorded the verdict; the record would indicate both. No exception was taken to the form of the verdict, hence, no assignment of error relating thereto is before us. Nevertheless, we state that as to form a verdict of "B. & E." is not approved.

The importance of verdicts is so great that abbreviations for offenses should not be encouraged; the possibility of error is much greater when abbreviations are used.

We have carefully considered each assignment of error brought forward in defendant's brief, but finding no merit in any of them, they are overruled.

No error.

MALLARD, C.J., and PARKER, J., concur.

REITA G. CAMPBELL v. RAY O'SULLIVAN AND BUNCOMBE COUNTY

No. 6928SC47

(Filed 28 May 1969)

1. Trial § 21— nonsuit — consideration of evidence

The evidence must be taken in the light most favorable to the plaintiff in ruling upon the motion for judgment of nonsuit.

2. Automobiles § 57— exceeding speed at intersections — ambulance — sufficiency of evidence

In plaintiff's action to recover for personal injuries received in a collision between an automobile operated by her and an ambulance owned by defendant county and driven by defendant employee of the county, defendants' motion for judgment of nonsuit was properly denied where plaintiff's evidence tended to show that plaintiff, who was proceeding in a southerly direction on a city street, began a left turn across the northbound lane of travel in order to enter an intersecting street, that plaintiff then saw the ambulance come over the crest of a hill in the northbound lane at a speed of 55 to 60 miles per hour with its emergency light flashing, that plaintiff and her passenger, as well as an additional witness, heard no siren, that plaintiff returned to the southbound travel lane, and that the ambulance veered towards plaintiff and collided with her automobile in the southbound lane.

3. Automobiles § 38— speed restrictions — exemptions — ambulances — instructions

Where defendants alleged and offered proof that at the time of the accident their ambulance was an authorized emergency vehicle being operated on the city streets on an authorized emergency mission with its lights and siren on, trial court committed prejudicial error when it instructed the jury that if they should find that defendant was operating the ambulance at a speed in excess of 35 miles per hour, that finding would constitute negligence, since the instruction made a determination of the controverted issue as to whether the ambulance was traveling in an

emergency and effectively deprived defendants of their defense of being exempted from the speed limit.

4. Automobiles § 38— speed restrictions — exemptions — ambulances

The speed limitations set forth in G.S. Ch. 20 do not apply to public or private ambulances when traveling in emergencies. G.S. 20-145.

5. Automobiles § 38— speed restrictions — exemptions — ambulances — form of instructions

Where defendants alleged and offered proof that their ambulance was traveling on a city street in an emergency at the time of the accident, jury should have been specifically instructed that if they should find that defendant was operating a public ambulance and was traveling in an emergency at a speed in excess of 35 miles per hour on a public street where the maximum limit was 35 miles per hour, that such was not negligence *per se* and that in such event the common-law rule of ordinary care applies.

APPEAL by defendants from *Thornburg, S.J.*, 20 May 1968 Session of Superior Court of BUNCOMBE County.

Plaintiff seeks to recover damages of defendants for alleged personal injuries received on 31 December 1966 resulting from a collision of motor vehicles on Merrimon Avenue in the City of Asheville. It is alleged in the complaint that the injuries were caused by the negligence of defendant Ray O'Sullivan (O'Sullivan) in the operation of a 1966 model Chevrolet automobile (ambulance) owned by Buncombe County (County) while O'Sullivan was acting as agent, servant and employee of the defendant County.

Plaintiff alleged that the collision and resulting injuries were proximately caused by the negligence of O'Sullivan in that he operated the "Chevrolet automobile" without due caution and circumspection and without keeping a proper lookout, without keeping the same under proper control, at an excessive and unlawful rate of speed, and at a speed that was greater than was reasonable and prudent under the conditions and circumstances then and there existing; in that he failed to operate it on the right side of the highway, operated it on the wrong side of the highway, failed to yield one-half of the highway to plaintiff, and failed to yield the right-of-way to the plaintiff's vehicle which had already entered the intersection and was in the process of executing a left turn after giving a proper signal of her intention to make a left turn; by running into and colliding with the Buick "under the conditions and circumstances then and there existing"; and by failing to reduce speed while approaching an intersection.

In their answer defendants admitted the agency, denied negligence on the part of O'Sullivan, and alleged contributory and sole

negligence of Reita G. Campbell (plaintiff). Defendants each asserted a counterclaim against the plaintiff. O'Sullivan's claim was for personal injuries, and County's claim was for damages to its vehicle. Defendants alleged that the motor vehicle operated by O'Sullivan was an authorized emergency vehicle being operated at the time "on an authorized emergency mission with emergency warning devices, including blinking red light and siren."

Defendants alleged that the collision and resulting injury and damage to them proximately resulted from the negligence of the plaintiff, or that plaintiff was contributorily negligent in that she operated the Buick automobile negligently in wanton and reckless disregard for the rights and safety of others, without maintaining a proper lookout, without having same under proper control, and at a fast, reckless and unlawful rate of speed; in that she failed to yield one-half of the main traveled portion of the highway; in that she operated her vehicle on the left or wrong side of the highway; in that she violated G.S. 20-156(b) in failing to yield the right-of-way to the ambulance which was on official business and on an authorized emergency mission when the driver thereof was sounding audible signal by siren; in that she blocked the lane of travel of the ambulance which was traveling on an authorized emergency mission; and in that she collided with the ambulance which was proceeding lawfully on the highway.

Appropriate issues of negligence, contributory negligence, and damages were submitted to the jury. The jury answered the issues in favor of the plaintiff and against the defendants and awarded plaintiff damages in the sum of $307.54.

Defendants assign error and appeal to the Court of Appeals.

Van Winkle, Buck, Wall, Starnes & Hyde by O. E. Starnes, Jr., and Williams, Morris & Golding by William C. Morris, Jr., for plaintiff appellee.

Uzzell & Dumont by Harry Dumont, and Robert D. Lewis for defendant appellants.

MALLARD, C.J.

At the close of the evidence the defendants moved for judgment as of nonsuit and assign as error the failure of the court to allow the motion.

[1, 2] The evidence must be taken in the light most favorable to the plaintiff in ruling upon the motion for judgment of nonsuit. The

evidence when thus viewed tends to show that on 31 December 1966 at about 5:00 or 5:30 p.m. while it was still daylight, the plaintiff was operating a 1962 model Buick automobile (Buick) in a southerly direction on Merrimon Avenue within the City of Asheville. O'Sullivan was operating the ambulance northerly on Merrimon Avenue. Merrimon Avenue is 45 to 50 feet wide, runs generally north and south, and is intersected along its east line by Annandale Avenue. Annandale Avenue is 24 feet wide and intersects with Merrimon Avenue but does not cross it. The roadway was dry. When the Buick and the ambulance collided, they were both in the southbound traffic lane on Merrimon Avenue just a few feet south of the center of the intersection of Annandale Avenue with Merrimon Avenue. Hillside Street intersects with Merrimon Avenue one block south of Annandale Avenue. From Hillside Street northward on Merrimon Avenue, there is an upgrade to a point about 112 feet to 200 feet south from the intersection of Annandale and Merrimon. The operator of another vehicle proceeding north on Merrimon Avenue testified that as he stopped for a traffic light at the intersection of Hillside Street and Merrimon Avenue, the light turned green and the ambulance passed him going north at a speed of about 60 miles per hour, that he heard no siren at any time but did see a flashing light on the top of the ambulance and that after the ambulance got about 200 feet in front of him, it "went sideways" and he saw the impact. This witness also testified "until you get almost to the crest of the hill you can't see over the crest of the hill." As the ambulance approached and crossed the crest of the hill, it was traveling at a speed of 60 miles per hour. The posted speed limit where the collision occurred was 35 miles per hour. Plaintiff, approaching the intersection with the intention of turning left into Annandale Avenue, gave a left turn signal, slowed down and stopped, and after looking and seeing no vehicles approaching started a left turn into Annandale Avenue. After the front wheels of plaintiff's vehicle had traveled into the northbound lane, she saw the ambulance come over the crest of the hill in the northbound lane at a speed of 55 to 60 miles per hour with its flashing light on top. Plaintiff and her passenger heard no siren. When the ambulance was about 100 to 150 feet away, it veered towards plaintiff and collided with the Buick being operated by plaintiff in the southbound lane of travel. After having begun the left turn, plaintiff's automobile had returned to the southbound lane of travel at the time of the collision. The right front of the ambulance struck the left front fender and wheel of the Buick. Plaintiff's face was cut, and she sustained other injuries in the collision.

[2] Defendants' evidence in most of the essential details is in sharp

conflict with that of the plaintiff; however, we think there is ample evidence of O'Sullivan's alleged negligence to require submission of the case to the jury. Although defendant's offered evidence of negligence on the part of the plaintiff, we do not think the evidence shows contributory negligence as a matter of law. *Williams v. Funeral Home,* 248 N.C. 524, 103 S.E. 2d 714. It was a case for decision by the jury. Neither does the evidence fail to support the allegations of the complaint to such extent as to constitute a material variance. Defendants' assignment of error to the failure of the court to allow their motion for judgment as of nonsuit is overruled.

[3] Defendants contend that the trial court committed error in instructing the jury as follows:

> "(T)he defendant has stated and argued that the maximum speed permitted by the law on Merrimon Avenue at its point of intersection with Annandale Avenue for vehicles such as the two involved in the accident in question is 35 miles an hour.
>
> So, if you should find that on the occasion in question the defendant was operating his motor vehicle at a speed in excess of 35 miles per hour, that would constitute negligence on the part of the defendant."

It is noted that in mimeographing the record in this case the letter "E" appearing in the original record docketed in this Court in front of the word "So" to delineate the portion excepted to was omitted. This is mentioned here so that the record will show that defendants made proper exception to this portion of the charge.

The vice in the above instructions consists, in part, of the statement by the court that the defendant has stated and argued that the maximum speed there for vehicles such as the two involved is 35 miles an hour. This statement was contradictory to the defendants' pleadings and evidence. There does not appear in the record any statement by the defendants that the maximum speed limit of 35 miles per hour was applicable to the ambulance. The record does not reveal what defendants' counsel argued to the jury.

[3, 4] In defendants' pleadings it is alleged that the ambulance was an "authorized emergency vehicle" being operated on an "authorized emergency mission." Defendants' evidence tended to show that it was a public ambulance on an emergency mission and that it was being driven with a blinking red light on top and the siren operating. Under the provisions of G.S. 20-145, the speed limitations set forth in the statute do not apply to public or private ambulances when traveling in emergencies; therefore, the court committed prej-

udicial error when it instructed the jury that if they should find that "the *defendant was* operating *his* motor vehicle at a speed in excess of 35 miles per hour, that would constitute negligence on the part of the *defendant.*" This instruction made a determination of the controverted issue as to whether it was an ambulance traveling in an emergency and effectively deprived the defendants of their defense alleged under the exclusionary rule set forth in G.S. 20-145.

Plaintiff had not alleged the defendants' vehicle was an ambulance traveling in an emergency, but the defendants had so alleged and had offered evidence thereof. This made it a question for the jury. In the challenged instructions the trial court, without submitting it to the jury, determined the question adversely to the defendants.

[5] With respect to speed the jury should have been, but was not, specifically instructed that if they should find that the defendant O'Sullivan was operating a public ambulance and was traveling in an emergency at a speed in excess of 35 miles per hour on a public street where the maximum speed limit was 35 miles per hour that such is not negligence *per se* and that in such event the common-law rule of ordinary care applies, and a speed in excess of 35 miles per hour is only evidence to be considered with other facts and circumstances in determining whether he used due care. The jury should have been further instructed that if they should find that defendant O'Sullivan was not operating an ambulance traveling in an emergency but was operating a motor vehicle on a public street at a speed in excess of 35 miles per hour where the maximum speed limit was 35 miles per hour that such would constitute negligence.

Later in the charge to the jury the court instructed the jury as follows:

> "The Court, however, instructs you that, in regard to the speed limitation which the Court has discussed was 35 miles an hour, we also have a statute which reads in pertinent part as follows: 'The speed limitation set forth shall not apply to public ambulances when operated with due regard to safety and traveling in an emergency. This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard for the safety of others.'
>
> So, if you find from the evidence that on the 31st day of December, 1966, the defendant was exercising due care in the operation of a public ambulance north on Merrimon Avenue toward its point of intersection with Annandale Avenue and was operating it with due regard for the rights and safety of others when traveling in response to an emergency call for his ser-

vices, then the speed limit of 35 miles an hour as discussed by the Court would not apply in this case."

This instruction seems to be correct, but it does not cure the error committed when the court charged the jury that if "the defendant was operating his motor vehicle at a speed in excess of 35 miles per hour, that would constitute negligence on the part of the defendant." The general instruction to the jury that "then the speed limit of 35 miles an hour as discussed by the Court would not apply in this case" did not serve to correct what the court had specifically said as to the effect of the defendant "operating his motor vehicle at a speed in excess of 35 miles per hour."

Later, in response to a question from the jury after they had had the case under consideration for some time, the trial court again instructed the jury in connection with speed in a different manner, as follows:

"Now, the first portion of the charge the Court gave as the Court recalls relating to an emergency vehicle was in relation to speed. As indicated by the Court, it was introduced into evidence by the plaintiff and stated in argument by one of the defense counsel that the posted speed limit was 35 miles per hour for vehicles approaching the intersection of Annandale and Merrimon. And the Court instructed you that on the occasion in question if the defendant was operating his motor vehicle at a speed in excess of 35 miles per hour that this would constitute negligence on his part, subject to the statutory provisions that the speed limitation set forth would not apply to private ambulances when operated with due regard for safety and traveling in an emergency."

The main difference in these latter instructions is that the court, after repeating that "if the defendant was operating his motor vehicle at a speed in excess of 35 miles per hour that this would constitute negligence on his part," added that this was "subject to the statutory provisions that the speed limitation set forth would not apply to private ambulances" under certain conditions. No "statutory provisions" concerning speed limitations with respect to "private ambulances" had been set forth by the court. The jury could not know to what statutory provisions the court referred. Also, the court refers in these latter instructions to a "private ambulance," whereas, in the prior instructions the court in reading what it referred to as pertinent parts of a statute had only referred to "public ambulances" in connection with a limitation upon speed.

We think that these different instructions tended to confuse the jury and that this is evidenced by the fact that the jury found it

necessary to return and ask the court for additional instructions with respect to "the law governing emergency vehicles."

Defendants have made other contentions, all of which have been carefully examined. Some are without merit and some may have merit but will probably not recur on a new trial. We do not deem it necessary to discuss all of defendants' contentions since there must be a new trial.

New trial.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. LYDIA ANN REID BATTLE

No. 697SC159

(Filed 28 May 1969)

1. Criminal Law §§ 87, 175— leading questions by solicitor

The allowance of leading questions by the solicitor is a matter entirely within the discretion of the trial judge, and his rulings thereon will not be reviewed on appeal in the absence of an abuse of discretion.

2. Criminal Law § 42; Homicide § 20— admission of knife found near crime scene

In this prosecution for second degree murder by stabbing the deceased, the court did not err in the admission of a knife found near the crime scene some eight days after the incident occurred where there was testimony that it looked like the knife seen in defendant's possession shortly before deceased was killed, a weapon being admissible if there is evidence tending to show that it was used in the crime.

3. Criminal Law §§ 95, 113— evidence competent for corroboration — request for instructions

The trial court is not required to instruct the jury that evidence competent solely for the purpose of corroboration be so restricted where defendant makes no request for such an instruction.

4. Criminal Law § 89— slight variances in corroborating testimony — admissibility

The trial court did not err in the admission for corroborative purposes of testimony by the sheriff as to what certain of the State's witnesses had told him during his investigation of the crime where the sheriff's testimony was substantially the same as the direct testimony of the witnesses, notwithstanding the testimony of the sheriff and the witnesses differed in some respects.

5. Homicide § 24— instructions — presumptions arising from use of deadly weapon

In this second degree murder prosecution, the trial court did not err in charging the jury as to the presumptions raised by a killing with a deadly weapon where the State's evidence tended to show that deceased was stabbed to death, that defendant had a knife shortly before deceased was killed, and that defendant stated that she had cut deceased's throat.

6. Homicide § 28— failure to instruct on self-defense

In this homicide prosecution, the trial court did not err in failing to instruct the jury on the issue of self-defense where the evidence shows that although deceased slapped defendant, defendant thereafter became the aggressor and deceased attempted to avoid a confrontation, and the evidence fails to show that defendant was in real or apparent apprehension of great bodily harm.

7. Criminal Law § 118— instructions — contentions of the parties

In this homicide prosecution, the court did not err in stating the contentions of the parties; had defendant desired that further or different statements of her contentions be presented to the jury, she should have requested such instructions in apt time.

APPEAL by defendant from *Bundy, J.*, 7 October 1968 Criminal Session, Superior Court of NASH.

Defendant was charged in a bill of indictment with murder in the first degree. Upon the call of the case the solicitor announced in open court that he would not seek a verdict of murder in the first degree, but would seek a verdict of guilty of murder in the second degree or manslaughter. The defendant entered a plea of not guilty and trial was held.

On 13 May 1968, the defendant, Johnny Witherspoon and several other parties were together at Hamp Eatman's, a "piccolo joint" in Wilson County. The defendant and Johnny Witherspoon, along with seven other people, left Hamp Eatman's and traveled to the home of one Daisy Bell Lucas who lives in Nash County. When the parties arrived at Daisy Bell Lucas', the defendant got out of the car first, and then Johnny Witherspoon followed. As Witherspoon got out of the car he dropped his knife which was picked up by a young boy named Cornel High. The defendant took the knife from the young boy, and an argument ensued between the defendant and Witherspoon, apparently over the knife. The defendant then went inside Daisy Bell Lucas' house. Witherspoon came in behind her, and while inside the house he asked the defendant to "be with him" and "to go outside with him", but defendant refused. A few minutes after the parties had gone into Daisy Bell Lucas' home, Roy Lucas came into the house and told those inside that someone had fallen off of

the back porch and was hurt. Everyone went out on the porch and the defendant began to wipe the man's face with a towel whereupon Witherspoon cursed her. Defendant stopped wiping the injured man's face and pulled Witherspoon off of the porch and held him on the ground. Roy Lucas separated Witherspoon and defendant, and immediately after doing so, Witherspoon slapped defendant. Defendant picked up a board and was going to hit the deceased when Roy Lucas took the board away from her. Lucas told Witherspoon to leave the yard and he would pick him (Witherspoon) up in a few minutes and take him home. Witherspoon started to leave but turned around and came back. Defendant told Lucas that she was going to get Witherspoon because he had no business slapping her. Witherspoon stated "I know she will hurt me", and requested Roy Lucas not to let the defendant hurt him. Witherspoon then left and went around the house with the defendant in pursuit. He ran down the road with the defendant behind him. A few minutes later Witherspoon came back to Daisy Bell Lucas' house and sat down beside a bush in the yard. Sometime later, the defendant came up behind Witherspoon and hit him over the head with a jar. Witherspoon and the defendant then began to fight. Roy Lucas testified that as he backed his car up, he saw the defendant, by the reflection of his headlights, hitting Witherspoon with a brick. Curtis Vick testified that "Witherspoon was trying to get up and she was hitting him in the face with her fists." Roy Lucas stated, "Witherspoon was not doing anything; he couldn't do anything. He was lying flat out." Roy Lucas also stated that the defendant was hitting Witherspoon with a brick. Kinzie Allen stated that the defendant returned to the back of the house approximately 15 or 20 minutes after she had left following Witherspoon and stated, "I cut the . . . s.o.b.'s throat." Allen stated that the defendant had a knife in her hand when she made this statement.

Witherspoon was taken to the Wilson Memorial Hospital by James High. He was dead upon arrival at the hospital. W. R. Williams, the Nash County Coroner, testified that in his opinion Witherspoon came to his death because of the loss of blood from a wound on the left side of the lower part of his neck. Approximately one week later, Daisy Bell Lucas found a knife in her front yard located approximately 20 feet from where defendant and Witherspoon were last fighting. Witnesses stated that it looked like the same knife Johnny Witherspoon had dropped when he got out of the car that night.

The jury returned a verdict of guilty of manslaughter. From a sentence of imprisonment for 12 years, defendant appealed.

Attorney General Robert Morgan by Staff Attorney Mrs. Christine Y. Denson for the State.

Farris and Thomas by Robert A. Farris for defendant appellant.

MORRIS, J.

Defendant brings forward several assignments of error, all of which we find to be without merit. The evidence taken 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, was clearly sufficient to withstand a motion for nonsuit.

[1] The defendant argues that the trial judge erred in allowing the solicitor to ask leading questions. "The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be reviewed on appeal, at least in the absence of a showing of abuse of discretion." Stansbury, N. C. Evidence 2d, § 31.

[2] Defendant argues that the knife found by Daisy Bell Lucas, some eight days after the incident in question was not admissible as evidence because it was not sufficiently identified. Luther Deans testified that State's exhibit No. 1 looked like the same knife that Johnny Witherspoon dropped when he got out of the car that night. There was evidence that the defendant took possession of this knife. Cornel High stated that the State's exhibit No. 1 looked like the knife he found, and which the defendant took out of his hand. Daisy Bell Lucas stated that State's exhibit No. 1 looked like the knife she found under the bush. In order to be admissible into evidence, testimony need not show, specifically, that this was the weapon used in the crime. It is sufficient if there is evidence tending to show that this weapon was used. Stansbury, N. C. Evidence 2d, § 118; *State v. Macklin*, 210 N.C. 496, 187 S.E. 785. This assignment of error is overruled.

[3, 4] The next question relates to exceptions taken to the testimony of Sheriff G. O. Womble concerning statements made to him by Daisy Bell Lucas, Kinzie (Cokey) Allen, Emma Jane Crumel, and Curtis Vick during the course of his investigation. When Sheriff Womble first started to testify as to statements made to him by Daisy Bell Lucas, the trial judge correctly instructed the jury that this testimony was not to be considered as substantive evidence. but only as evidence corroborating Daisy Bell Lucas, if, in fact, the jury found that this evidence did corroborate her. When Sheriff Womble began to testify as to what the other witnesses had told him during

the course of his investigation, the trial judge told the jury that this same instruction would apply, but he did not repeat the instruction in full. We note that the defendant did not request that this testimony be restricted; therefore, the trial judge was not required to restrict the evidence. See *Humphries v. Coach Co.* 228 N.C. 399, 45 S.E. 2d 546, where the Court stated, "The evidence to which these exceptions relate is competent for purpose of corroboration, and the record fails to show that appellant asked, at the time, that its purpose be restricted. In such case the admission of the statements will not be ground for exception. Rule 21 of Rules of Practice in the Supreme Court, 221 N.C., 544." Also see *State v. Petry,* 226 N.C. 78, 36 S.E. 2d 653; *State v. Perry,* 226 N.C. 530, 39 S.E. 2d 460; *Harris v. Burgess,* 237 N.C. 430, 75 S.E. 2d 248; and *State v. Lee,* 248 N.C. 327, 103 S.E. 2d 295.

The testimony of Sheriff Womble relating to what the witnesses told him during his investigation of the crime, and the testimony of the witnesses themselves was different in some respects. However, we do not think this variance was fatal. The testimony of Sheriff Womble was substantially the same as the direct testimony of the witnesses. His testimony did not tend to impeach the testimony of the witnesses whom he was corroborating; therefore, the case of *State v. Bagley,* 229 N.C. 723, 51 S.E. 2d 298, is distinguishable. A slight variance in the direct testimony and the corroborating testimony will not render the latter inadmissible. The credibility of the testimony was for the jury. *State v. Walker,* 226 N.C. 458, 38 S.E. 2d 531; and *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429.

[5] Defendant has taken several exceptions to the instructions given to the jury by the trial court. He argues that the trial court erred in charging the jury as to the presumptions raised by the use of a deadly weapon because the State failed to prove that the defendant used a deadly weapon or had in fact killed the deceased. We disagree. The defendant was seen with Witherspoon's knife on the night in question. She was seen beating Witherspoon while he was lying on the ground. Witherspoon appeared to be dying when the defendant left him, and it appeared that he had been stabbed in the neck. Kinzie Allen testified that the defendant came to the back of the house after the fight was over with a knife in her hands and stated, "I cut the . . . s.o.b.'s throat." We think that the trial court correctly charged the jury on the presumptions raised by a killing with a deadly weapon. 4 Strong, N. C. Index 2d, Homicide, § 14, p. 207. The court correctly charged the jury on the question of provocation. 4 Strong, N. C. Index 2d, Homicide, § 6, p. 197.

[6, 7] The trial court did not err in failing to charge the jury on the issue of self-defense. The evidence shows that the deceased slapped the defendant. But, following this, the defendant stated that she was "going to get" the deceased. Deceased asked Roy Lucas not to let the defendant hurt him. The defendant then followed the deceased as he left the yard, and then back into the yard. She then came up behind the deceased while he was behind a bush and hit him over the head with a jar. She was seen hitting the deceased with a brick. One witness stated that the deceased was trying to get up, and another stated that he was not moving. Both stated that the defendant was beating him. All the evidence shows that after the defendant was slapped by the deceased, she became the aggressor and the deceased was attempting to avoid a confrontation. The State's evidence fails to disclose that the defendant was in real or apparent apprehension of great bodily harm. The defendant offered no evidence. "In other words, there must be evidence from which the jury may find that the party assailed believed at the time that it was necessary to kill his adversary to prevent death or great bodily harm, before he may seek refuge in the principle of self-defense, and have the jury pass upon the reasonableness of such belief." *State v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620. Also, see *State v. Deaton,* 226 N.C. 348, 38 S.E. 2d 81. The trial court did not err in stating the contentions of the parties. The trial court's statement of the contentions of the parties need not be of equal length, *Durham v. Realty Co.,* 270 N.C. 631, 155 S.E. 2d 231, although, in the present case, they were approximately the same length. We find the charge to be fair and impartial, and in compliance with G.S. 1-180. If the defendant desired that further or different statements of her contentions be presented to the jury, she should have called this to the court's attention in apt time. *Peterson v. McManus,* 210 N.C. 822, 185 S.E. 462.

In the trial below we find

No error.

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

SARAH MARGARET SAWYER, BY HER NEXT FRIEND MIRIAM S. SAWYER, AND WALTER W. SAWYER, III v. GWENDOLYN BRINKLEY SAWYER

No. 691SC222

(Filed 28 May 1969)

1. Pleadings § 19— effect of demurrer — legal conclusions of pleader

A demurrer to a complaint for failure to state facts sufficient to constitute a cause of action admits only those facts which are properly pleaded, and the legal inferences and conclusions of the pleader are to be disregarded.

2. Judgments § 8— consent judgment

A consent judgment is a contract between the parties entered upon the records of the court with the approval and sanction of a court of competent jurisdiction.

3. Judgments § 8— validity of consent judgment

The validity of a consent judgment depends upon the consent of the parties, without which it is void.

4. Pleadings § 19— demurrer — construction of an instrument incorporated in pleadings

A demurrer does not admit the alleged construction of an instrument when the instrument itself is incorporated in the pleadings and the construction alleged is repugnant to the language of the instrument.

5. Pleadings § 26— demurrer — allegations of repugnant statement of facts

Where a complaint stating a single cause of action alleges two repugnant statements of fact, the repugnant allegations destroy and neutralize each other, and demurrer will lie where the remaining averments are insufficient to state a cause of action.

6. Contracts § 25; Pleadings § 26— breach of contract — repugnant allegations — statement of defective cause of action

In an action for breach of contract, the complaint contains a statement of a defective cause of action where plaintiffs allege that defendant bound herself by contract to provide for the support and college education of plaintiffs and the contract attached to and incorporated into the complaint shows affirmatively that defendant made no such agreement.

7. Pleadings § 29— judgment on demurrer — defective cause of action

A judgment dismissing the action is proper where the complaint contains a statement of a defective cause of action.

8. Contracts § 31— wrongful inducement of breach of contract

An action in tort lies against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach the contract to the damage of the other party.

9. Contracts § 31— wrongful inducement of breach of contract — "outsider" to the contract

A person who was a party to a contract in the form of a consent judgment only for the purpose of setting aside a conveyance to her of the

property in question is an "outsider" who may be sued for wrongfully inducing one party to the contract to breach the contract to the damage of the other parties.

10. Contracts § 32— wrongful inducement of breach of contract — necessary allegations

The complaint in an action for wrongfully inducing a breach of contract is subject to demurrer where it fails to allege that the contract would have been performed but for the conduct of the defendants.

APPEAL by plaintiffs from *Fountain, J.,* December 1968 Session of Superior Court of CAMDEN County.

Upon the call of this case for trial the jury was impaneled and before any evidence was offered the defendant demurred *ore tenus* on the grounds that the complaint, as amended, did not state a cause of action. To the entry of the judgment allowing the demurrer the plaintiffs excepted, assigned error and appealed to the Court of Appeals.

Small, Small & Watts by Thomas S. Watts for plaintiffs appellant.

Forrest V. Dunstan for defendant appellee.

MALLARD, C.J.

This case has been here before upon an appeal by plaintiffs from an order setting aside a judgment of default and inquiry. The opinion in that case is reported in 1 N.C. App. 400, 161 S.E. 2d 625.

Plaintiffs allege that they are residents of Pennsylvania, and that the defendant is a resident of Virginia. However, the question of jurisdiction is not presented on this appeal. In the original complaint there was an allegation that certain lands situate in Camden County and described in the complaint had been attached. This allegation was stricken by plaintiffs in an amendment to the complaint as a matter of right pursuant to G.S. 1-161.

In the amended complaint filed 7 July 1967, it is alleged that a contract dated 3 March 1958 in the form of a consent judgment was entered into by the two plaintiffs, their mother, Miriam Sawyer King, now called Miriam S. Sawyer, and Walter W. Sawyer, Jr., their father, and his wife, Gwendolyn B. Sawyer, in an action instituted by the then minor plaintiffs and their mother against their father and stepmother. The marriage of the mother and father of the plaintiffs had theretofore ended in a divorce. Plaintiffs allege that Walter W. Sawyer, Jr. died testate on 8 October 1965 a resident of Norfolk, Virginia, and that in his will he devised and bequeathed all of his

property to the defendant, Gwendolyn B. Sawyer. The will has been probated in Virginia but has not been probated or offered for probate in North Carolina "although said decedent owned both real and personal property situate in North Carolina at the time of his death." Plaintiffs allege that Walter W. Sawyer, Jr., breached the contract and consent judgment in that no support payments have been paid for the benefit of Sarah Margaret Sawyer since June 1965, and that she would not become 18 years of age until 13 September 1967; in that he failed to assume the burden of a four year college education for the plaintiff Walter W. Sawyer, III; "in that he devised the lands described in the consent judgment to Gwendolyn Brinkley Sawyer," thereby failing to retain sufficient property to satisfy the duty of support owed to his children. Plaintiffs also allege that Gwendolyn Brinkley Sawyer has breached the contract and consent judgment in that she has failed and refused to pay plaintiffs money "as therein specified," and in that she "counselled and advised her late husband, the natural father of the plaintiffs to breach said contract" and "actively assisted, conspired in and promoted" the breaches of it on the part of Walter W. Sawyer, Jr.

Plaintiffs also allege that the consent judgment impresses an equitable trust or charge on the lands described in the complaint and seek to enforce their lien or charge on such lands.

The pertinent parts of the judgment dated 3 March 1958 which was consented to by Miriam Sawyer King, "individually, and as next friend and guardian to the minor children," and Walter W. Sawyer, Jr., and Gwendolyn B. Sawyer, read as follows:

> "NOW, THEREFORE, BY CONSENT, IT IS ORDERED, ADJUDGED AND DECREED that the defendant Walter W. Sawyer, Jr., be, and he hereby is directed to pay to the plaintiff Miriam Sawyer King and her attorneys, LeRoy & Goodwin, at the law offices of said LeRoy & Goodwin, the sum of $1600, in full and final settlement of all controversies heretofore existing whether emanating from plaintiff or as a result of matters and things pertaining to Walter W. Sawyer, III, and Sarah Margaret Sawyer, minor children of the said Walter W. Sawyer, Jr. and Miriam Sawyer King.
>
> It is further ORDERED that within three days following the execution of this judgment the said Walter W. Sawyer shall forward to the said Miriam Sawyer King, at an address furnished by her attorneys, LeRoy & Goodwin, a check for $100 for the use and support of the two said minor children for the month of February, 1958, and on or prior to the 10th day of each succeed-

ing month through the calendar year 1958, shall in like manner forward said plaintiff, Miriam Sawyer King, and for such purpose, an additional check in the sum of $100; that, beginning in January, 1959, and extending through December, 1959, the said defendant will pay the said plaintiff for like purpose the sum of $125 per month on or before the 10th day of each month; that, beginning in January, 1960, the said defendant will pay the said plaintiff, for like purpose the sum of $150 per month on or before the 10th day of each month through the calendar year 1960; that, beginning in January, 1961, the said defendant will pay the said plaintiff for like purpose the sum of $200 per month on or before the 10th day of each succeeding month, which said payments shall continue monthly until the eldest child reaches the age of eighteen years, at which time said payments shall be cut in half and shall continue until the younger of said children reaches the age of eighteen years, at which time all such payments due hereunder shall cease.

It is further ORDERED that the defendant Walter W. Sawyer, Jr. assume the burden of a four-year college education for each of said children at the college of his choosing and that (sic) such time he shall deal directly with said minor children in supplying the necessary funds for their scholastic requirements, but in the event at any period during said four years of such college education aforementioned either or both of said children should refuse to go or to continue with college at any interim period, or should either or both of said children fail to pass their work, or by misconduct be refused by the college authorities reentry thereto, then in such event the said defendant is relieved of further educational responsibilities.

It is further ORDERED that the conveyance by the male defendant, to the femme defendant, recorded in Book 36, page 389, in the Public Registry of Camden County, N. C., pertaining to that certain tract of land designated in paragraph Seven of the Complaint be, and the same hereby is vacated and set aside, but that the conveyances as to the remainder of the property conveyed by the male defendant to the femme defendant as set forth in said complaint shall remain valid and in full force and virtue, that requisite entries be made in the Office of the Register of Deeds in Camden County for the purpose of showing the vacation of said conveyance, and the restoration of title thereto in the name of Walter W. Sawyer, Jr.

It is further ORDERED that should the said Walter W. Sawyer, Jr. mortgage or convey said property, he shall be required to

retain, subject to the jurisdiction of this Court, sufficient properties to satisfy the remaining amounts to be due for the support of said children until they reach the age of eighteen years, or, in lieu thereof, shall be required to execute a bond approved by the Clerk of the Superior Court of Pasquotank County guaranteeing the performance of such obligation.

It is further ORDERED that until each of said children reach the age of eighteen years, consecutively, general custody shall be in the plaintiff Miriam Sawyer King, but that the male defendant shall have temporary custody of said children for and during the month of July, 1958, the months of July and August, 1959, and that beginning with the calendar year 1960, he shall have custody of said children in alternate years for and during the months of July and August, as is heretofore set forth in the factual findings, and during such periods of temporary custody the payments to the plaintiff Miriam Sawyer King, for the use and benefit of said minor children, shall be suspended and that the male defendant shall provide adequate transportation and chaperonage for the purpose of carrying out such temporary custody."

[1] "A demurrer to a complaint for failure to state facts sufficient to constitute a cause of action admits the truth of every material fact properly alleged. . . . However, it is to be noted that on demurrer only facts properly pleaded are to be considered, with legal inferences and conclusions of the pleader to be disregarded." *Lindley v. Yeatman,* 242 N.C. 145, 87 S.E. 2d 5.

[2, 3] A consent judgment is a contract between the parties entered upon the records of the court with the approval and sanction of a court of competent jurisdiction. *Stanley v. Cox,* 253 N.C. 620, 117 S.E. 2d 826. The validity of a consent judgment depends upon the consent of the parties, without which it is void. *Overton v. Overton,* 259 N.C. 31, 129 S.E. 2d 593.

[4-8] In their complaint, the plaintiffs allege that the defendant and Walter W. Sawyer, Jr., "agreed to support said plaintiffs and provide for their respective college educations . . ." and further that the defendant "has breached said contract in that she has failed and refused since the death of Walter W. Sawyer, Jr., to pay to the plaintiffs the sums therein specified and heretofore alleged as past due under the provisions of said contract, although the plaintiffs have demanded said sums." The plaintiffs cause of action is based upon a contract which was attached to and incorporated by reference into the complaint. "A demurrer does not admit the alleged construction

of an instrument when the instrument itself is incorporated in the pleadings and the construction alleged is repugnant to the language of the instrument." *Wright v. Casualty Co. and Wright v. Insurance Co.*, 270 N.C. 577, 155 S.E. 2d 100. A reading of the consent judgment in question reveals that the defendant in this case did not assume the burdens of support alleged in the complaint, but rather that they were upon Walter W. Sawyer, Jr. ". . . where in stating a single cause of action the complaint alleges two repugnant statements of facts, the repugnant allegations destroy and neutralize each other, and where, with the repugnant allegations thus eliminated, the remaining averments are insufficient to state a cause of action, demurrer will lie." *Lindley v. Yeatman, supra.* In the present case, the plaintiffs allege that the defendant bound herself by contract, and the contract shows affirmatively that she did not. These two contradictory statements destroy and neutralize each other, and it is plain that what remains as to the contract action is merely a statement of a defective cause of action. A judgment dismissing the action is the proper procedure to deal with a statement of a defective cause of action. *Mills v. Richardson,* 240 N.C. 187, 81 S.E. 2d 409. However, in paragraph Ten of their complaint, the plaintiffs allege further that the defendant "counselled and advised her late husband, the natural father of the plaintiffs, to breach said contract. . . ." Ordinarily, "an action in tort lies against an *outsider* who knowingly, intentionally, and unjustifiably induces one party to a contract to breach it to the damage of the other party." (emphasis added) 2 Strong, N. C. Index 2d, Contracts, § 31. Joinder of the contract action and the tort action probably could be allowed in the present case under the provisions of G.S. 1-123 since they both arise out of the same transaction which is the subject of this action.

[9, 10] The question arises as to whether or not defendant was an outsider to the contract sued upon. In their brief the plaintiffs have used the following language:

> "The present defendant was an interested party to the performance of such consent judgment and a valuable consideration passed to her, namely, the relinquishing by the present plaintiffs of their efforts to set aside certain conveyances to the stepmother, defendant."

In spite of this language, we are of the opinion that defendant was an outsider insofar as the performance by Walter W. Sawyer, Jr. was concerned. The consent judgment shows by its wording that the only reason the present defendant was a party to it at all was for the purpose of setting aside a deed previously deeding the prop-

erty in question to her. However, the words of Parker, J. (now C.J.) in *Equipment Co. v. Equipment Co.*, 263 N.C. 549, 140 S.E. 2d 3 are pertinent here:

> "The allegations in plaintiff's second cause of action are deficient, *inter alia,* in that they do not allege that its prospective sale to Meredith Swimming Pool Company would have been consummated but for the malicious interference of defendant's agent Kelly. . . . Plaintiff's second cause of action does not state sufficient facts to permit the Court to say on *demurrer ore tenus* that, if the facts stated are proved, plaintiff is entitled to recover."

In the present case, there is no allegation that Walter W. Sawyer, Jr., would have performed the contract but for the conduct of the defendant.

In the absence of allegations sufficient to state a cause of action against the defendant in her individual capacity, either in tort or contract, the judgment sustaining the *demurrer ore tenus* is affirmed.

Affirmed.

BRITT and PARKER, JJ., concur.

HAROLD ADLER v. FIRST-CITIZENS BANK AND TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MILTON SIDNEY ADLER; WOLFE THOMAS ADLER, MINOR; JUDITH RACHAEL ADLER, MINOR; AND OTHO L. GRAHAM, GUARDIAN AD LITEM FOR WOLFE THOMAS ADLER AND JUDITH RACHAEL ADLER

No. 693SC166

(Filed 28 May 1969)

1. Wills § 57— designation of bequest — description — "personal effects" — houseboat

Testator's bequest to his brother of "my personal effects, (exclusive of automobile) including jewelry, clothing, household furniture and any china, silver and crystal not desired by my two cousins," does not include a houseboat owned by testator at the time of his death, since it is apparent from the language of the will that testator intended to include as "personal effects" only things *ejusdem generis* with those articles specifically named.

2. Wills § 28— rules of construction — intention of testator

When a will is presented for construction, the intention of the testator is to govern and this is to be ascertained from the language used by him,

giving effect, if possible, to every clause, phrase, and expression in the entire instrument.

3. Wills § 28— rules of construction — interpretation of other wills

A will is the most personal and individual of all legal documents, and therefore the constructions arrived at by the courts in interpreting other wills written by other testators under other circumstances and affecting other properties and beneficiaries serve only as useful guides.

4. Wills § 55— description of devise — realty or personalty — "effects"

Ordinarily, the word "effects" used *simpliciter* or in a general or unlimited sense and unaffected by the context signifies all that is embraced in the words "personal property," but is not sufficiently comprehensive to include real estate.

5. Wills § 57— bequest of "personal effects" — amount of bequest

Where testator owned no real estate but did own personal property of substantial value, testator's bequest of his "personal effects" to a brother will not be construed to include all of his personal property of every nature, since such a construction would render completely meaningless a bequest to a trust fund of "all the rest and residue of my estate of whatsoever nature and wheresoever situated," as contained in the next succeeding article of his will.

6. Wills § 28— rules of construction

Every expression in a will ought to be considered with a view to the circumstances of its use.

7. Wills § 55— "personal effects" defined

The words "personal effects" have been defined as property especially appertaining to one's person and having a close relationship thereto.

APPEAL by plaintiff from *Martin, Robert M., J.*, October 1968 Civil Session of CARTERET Superior Court.

This is a civil action for declaratory judgment to construe the last will of Milton Sidney Adler, deceased. Plaintiff is the brother of the testator and defendants are respectively the executor and residuary beneficiaries under his will. The parties waived jury trial and agreed that the judge might hear the evidence and make findings of fact, conclusions of law, and enter judgment thereon.

For purposes of the question presented by this appeal, the pertinent portions of the will are as follows:

"ARTICLE IV

"I give and bequeath any motor boat or yacht owned by me at the time of my death (exclusive of the houseboat 'HEAVEN') together with any fishing equipment or tackle used in connection

therewith to my good friend, W. D. Aman, Sr. of Swansboro, North Carolina.

"ARTICLE V

"I give and bequeath unto my first cousins, Muriel Cherney Schloss and Judith Cherney Schwaber, all of my china, silver, and crystal to be divided by them equally.

"ARTICLE VI

I give and bequeath all the rest and residue of my personal effects, (exclusive of automobiles) including jewelry, clothing, household furniture and any china, silver and crystal not desired by my two first cousins, unto my brother, Harold Adler, if he is living at the time of my death."

By Article VII the testator devised and bequeathed "(a)ll the rest and residue of my estate of whatsoever nature and wheresoever situated" unto First-Citizens Bank and Trust Company, in trust, and directed said trustee to divide the trust property into separate and equal shares so as to provide a trust fund for each of testator's neices and nephews, children of his brother, Harold Adler, who is plaintiff in this action. Article VII went on to provide detailed directions to the trustee as to the payment and application of net income and principal of each beneficiary's trust "for the health, education, general welfare or general benefit of each such beneficiary," until such beneficiary should attain the age of 30 years, at which time such beneficiary should receive the entire principal of his or her trust and the same should terminate. Article VII directed a partial distribution of principal as each beneficiary became 25 years old. Article VII also contained provisions directing the disposition of the trust property in the event any beneficiary should die prior to termination of the trust for his or her benefit. Paragraph (E) of Article VII then provided:

"If all the beneficiaries hereinabove enumerated shall die, I direct that any portion remaining shall be assembled into one trust by my Trustee and held for the use and benefit of my brother, Harold Adler. Until my said brother reaches sixty (60) years of age, the Trustee may use any part or all of the income or principal of said trust for his maintenance and support with right to apply same for his benefit if said Trustee deems same in his interest. If my said beneficiary attains the age of sixty (60) years this trust shall terminate and the Trustee shall deliver to him the entire principal and any income then held by it and said trust shall terminate."

By Article VIII the testator granted his executor and trustee broad discretionary powers in dealing with any properties held in his estate or in any trust.

The parties stipulated that the estate of the testator consisted entirely of personalty in the value of $254,527.03. Following the death of the testator, by consent of all parties the executor sold the houseboat "Heaven," realizing $6,131.07 in net proceeds from such sale.

Plaintiff contends that by Article VI of the will the testator bequeathed the houseboat "Heaven" to him, and prayed for declaratory judgment construing the will in conformity with this contention and for an order directing the executor to pay to him $6,131.07, representing the net proceeds from the sale of the houseboat, with interest from the date of sale.

The trial judge entered judgment adjudging that Article VI of the will of Milton Sidney Adler did not bequeath the houseboat "Heaven" to the plaintiff. To this judgment, plaintiff excepted and appealed.

William T. McCuiston for plaintiff appellant.

Stevens, Burgwin, McGhee & Ryals, by Richard M. Morgan for First-Citizens Bank and Trust Company, Executor of the last will of Milton Sidney Adler, deceased, appellee.

Boshamer & Graham, by Otho L. Graham for Guardian Ad Litem of Wolfe Thomas Adler, and Judith Rachael Adler, minor defendant appellees.

PARKER, J.

[1] The sole question presented by this appeal is whether testator bequeathed his houseboat named "Heaven" to his brother, plaintiff in this action, by Article VI of his will which provides: "I give and bequeath all the rest and residue of my personal effects, (exclusive of automobiles) including jewelry, clothing, household furniture and any china, silver and crystal not desired by my two first cousins, unto my brother, Harold Adler, if he is living at the time of my death." We agree with the trial court that he did not.

[2, 3] When a will is presented for construction the intention of the testator is to govern and this is to be ascertained from the language used by him, giving effect, if possible, to every clause, phrase, and expression in the entire instrument. *Trust Co. v. Wolfe,* 245 N.C. 535, 96 S.E. 2d 690; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356. Moreover, a will is the most personal and individual of all legal

documents. Through its language each individual testator seeks to express his own intentions as to the disposition after his death of his own properties among his own chosen beneficiaries. For him, his properties and his beneficiaries are unique. Therefore, the construction arrived at by the courts in interpreting other wills written by other testators under other circumstances and affecting other properties and other beneficiaries, serve only as useful guides. Ultimately, the ascertainment of the true intention of each testator as expressed in his will and as affecting his individual properties and beneficiaries, must be approached afresh in each individual case. Much depends on the wording of each particular will as it relates to the circumstances of each individual testator. "In the construction of a will, therefore, 'Every tub stands upon its own bottom,' except as to the meaning of words and phrases of a settled legal purport." Clark, C.J., in *Patterson v. McCormick*, 181 N.C. 311, 107 S.E. 12.

[4] The word "effects," standing alone, has anything but a "settled legal purport." See Annotation, 80 A.L.R. 941. As pointed out by Adams, J., in the case of *In Re Wolfe*, 185 N.C. 563, 117 S.E. 804, "the individual cases construing 'effects' are of value only for the purpose of illustration, each case being a law unto itself; but there seems to be a practical unanimity of judicial decision, with the exception of certain English cases, that the word 'effects' used *simpliciter* or in a general or unlimited sense and unaffected by the context, signifies all that is embraced in the words 'personal property,' but is not sufficiently comprehensive to include real estate. 'Effects,' however, may include land when used as referring to antecedent words which describe real estate, or when used in written instruments in which the usual technical terms are not controlling, as in *University v. Miller*, 14 N.C. 188; *Graves v. Howard*, 56 N.C. 302, and *Page v. Foust*, 89 N.C. 447."

[5] In the present case testator did not use the word "effects" *simpliciter*, but used it in the phrase "personal effects." The ascertainment of the correct meaning of these words in varying contexts has occasioned considerable difficulty. *In Re Burnside's Will*, 185 Misc. 808, 59 N.Y.S. 2d 829. In the present case, however, it is apparent that the testator did not intend these words as used by him in Article VI of his will to include all of his personal property of every nature. Such a construction would render completely meaningless the bequest of "(a)ll the rest and residue of my estate of whatsoever nature and wheresoever situated," as contained in the next succeeding Article of his will. Testator owned no real estate. He did own personal property of substantial value. He made elaborate and

detailed provisions in Article VII for separate trust funds for the benefit of the children of his brother. In Article VIII he granted his trustee broad discretionary powers in the administration of these trust funds. The very care with which these provisions in Articles VII and VIII were drawn clearly negatives any idea that the testator had the draftsman of his will insert them merely to indulge in an academic exercise in futility. Such would have been the case had he already disposed of his entire personal property of every nature by the provisions of Article VI. It is clear, therefore, that testator by using the words "all the rest and residue of my personal effects," in Article VI, did not intend thereby to dispose of all of his personal property of every nature. On the contrary, it is clear that he was using the words "personal effects" in a more limited sense.

[1, 6, 7] "Every expression to be correctly understood ought to be considered with a view to the circumstances of its use." *Poindexter v. Trust Co.*, 258 N.C. 371, 128 S.E. 2d 867; *Heyer v. Bulluck, supra.* The words "personal effects" have been defined as "property especially appertaining to one's person and having a close relationship thereto." Webster's Third New International Dictionary (1968). In the present case, however, the testator further clarified his intention by using these words in connection with others. He went on to exclude from the operation of these words any automobiles, thereby avoiding the interpretation which some courts have given when interpreting other wills. (See, e.g., *In Re Jones' Estate,* 128 Misc. 244, 218 N.Y.S. 380; *In Re Winburn's Will,* 139 Misc. 5, 247 N.Y.S. 584; *contra, Jones v. Callahan,* 242 N.C. 566, 89 S.E. 2d 111.) He expressly included jewelry, clothing, and his household furniture, as well as such of his china, silver and crystal as should not be desired by his two cousins. By using the words "personal effects" in conjunction with these other terms, it is apparent that testator intended to include only things *ejusdem generis* with those covered by the other terms. A houseboat is clearly not *ejusdem generis* with articles of jewelry, clothing, household furniture, china, silver or crystal.

That testator was advertent to the fact that he owned the houseboat "Heaven" is apparent from his reference to it by name in Article IV of his will. The houseboat was of substantial value, as evidenced by the fact that it brought more than $6,000.00 when sold by his executor shortly following his death. The very fact that testator at the time of executing his will was advertent to his ownership of a houseboat of such value further strengthens our conclusion that he did not intend to dispose of it by relying upon a strained construction of the words "personal effects" to accomplish such purpose. Had

he really intended to bequeath his houseboat to his brother, it is more reasonable to assume he would simply have said so.

The judgment appealed from is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

R. C. SEXTON v. JAMES DANIEL LILLEY

No. 692SC197

(Filed 28 May 1969)

1. Pleadings § 15; Torts § 7— release from liability — burden of proof

Defendant who pleads a release in bar of plaintiff's claim has the burden of proving such defense by the greater weight of the evidence.

2. Pleadings § 15; Torts § 7— release from liability — plea in bar — trial prior to trial of main action

A plea of a release is a plea in bar which may be tried prior to the trial of plaintiff's cause of action.

3. Torts § 7— avoidance of a release — burden of proof

The burden of proof with respect to avoiding a release after the execution thereof is admitted or established is on the party seeking to set the release aside.

4. Cancellation of Instruments § 2; Torts § 7— release from liability — setting aside for fraud

A release from liability is vitiated by fraud in the same manner as any other instrument, and fraud vitiates the entire instrument and not merely that part to which the fraudulent misrepresentation relates.

5. Cancellation of Instruments § 2— setting aside contract for fraud

In order to obtain relief from a contract on the ground of fraud, the complaining party must show a false factual representation known to be false or made in culpable ignorance of its truth with a fraudulent intent, which representation is both material and reasonably relied upon by the party to whom it is made to such party's injury.

6. Cancellation of Instruments § 2— *failure to read written contract*

One who signs a written contract without reading it when he can do so understandingly is bound thereby unless the failure to read is justified by some special circumstances and he acted with reasonable prudence in signing the contract without reading it.

7. Cancellation of Instruments § 10; Torts § 7— release from liability — setting aside for fraud — sufficiency of evidence

In an action for personal injuries and property damage resulting from a collision between plaintiff's truck and defendant's automobile, plaintiff's evidence *is held* sufficient to be submitted to the jury on the issue of whether a release executed by plaintiff was fraudulently obtained by defendant's agents where it tends to show that plaintiff had a sixth grade education and could read a little when he had his glasses, that plaintiff signed the release at his store while his glasses were at his home, and that plaintiff failed to get his glasses and read the release before signing it because defendants' agents, one of whom was also plaintiff's insurance agent, falsely told him that he was signing a release only for paying for his truck to be repaired.

APPEAL by plaintiff from *Cowper, J.*, November 1968 Session of Superior Court of MARTIN County.

Plaintiff seeks to recover of the defendant for property damage and personal injuries alleged to have been sustained by him as a result of collision between a pickup being operated by plaintiff and an automobile being operated by defendant. Plaintiff alleged that the defendant was actionably negligent in the operation of his automobile in that he was operating it in a careless and reckless manner without keeping it under proper control, without keeping a proper lookout, on the wrong side of the road, by failing to yield the right of way to plaintiff, at a speed greater than that allowed by law, to wit, 70 miles per hour, and that the defendant drove his vehicle into his left lane of travel in attempting to pass three or four automobiles which were traveling in the same direction in which he was proceeding when the left side of the highway was not free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety.

Defendant, in his answer, denies the material allegations of the complaint and as a further answer and affirmative defense says that the plaintiff executed a release to the defendant in complete release and discharge of all of his damages, both to property and to person. Defendant attached a copy of the alleged release to his answer marked Exhibit "A".

Plaintiff filed a reply to the "Answer of the defendant" in which he "admits that he signed a paperwriting on or about the 14th day of March, 1966, without reading the same"; that the agent of the defendant fraudulently induced him to sign it without reading it; and "that the agent of the defendant made representations which were false and known to be false with a fraudulent intent, which representations were both materially and reasonably relied upon by the plaintiff and that the plaintiff suffered injury thereby."

Plaintiff offered evidence which in substance tended to show that he suffered personal injuries and that his automobile was damaged on 4 March 1966 by the actionable negligence of the defendant.

"At the close of plaintiff's evidence the defendant moved for a judgment as of nonsuit except as to the property damage." The court allowed the motion and plaintiff excepted.

The court entered the following judgment:

> "This cause coming on to be heard and being heard before the undersigned Judge Presiding and a Jury, at the November, 1968 Term of the Superior Court of Martin County and at the close of the plaintiff's evidence, the defendant having made a motion for judgment of involuntary nonsuit as to all claims for damages except those set out in the release, to-wit, $1093.06 and the Court being of the opinion that the said release is a bar as to all claims for damages except those set out in the said release in the amount of $1093.06, and that said motion should be allowed;
> It is now, therefore, ORDERED, ADJUDGED and DECREED that the plaintiff be and he is hereby nonsuited as to all claims for damages except those set out in the release in the amount of $1093.06."

To the signing and entry of the judgment the plaintiff objected, excepted, assigned error, and appealed to the Court of Appeals.

Peel and Peel by Elbert S. Peel for plaintiff appellant.

Griffin and Martin by Clarence W. Griffin for defendant appellee.

MALLARD, C.J.

Each party in his brief assumes that the release alleged by defendant is properly in evidence in this case. A careful reading of the pleadings reveal that defendant pleaded the release attached to his answer, marked Exhibit "A", but the plaintiff did not admit in his reply or in his testimony that he signed or executed this particular release. The plaintiff admits in his reply that he signed "a paper-writing on or about the 14th day of March, 1966." The defendant did not offer any evidence. Plaintiff upon being examined as a witness testified, among other things, about signing a release for fixing the car; and "when this paper was signed"; and "Mr. Lovelace and Mr. Mobley was present when I signed the paper"; and "Mr. Mobley was over there at the filling station when I signed this document"; and "I doubt if I had had my glasses there in the store that I would have signed this paper which I signed because of what he said." But

there is nothing in the record to indicate to what paper the witness was referring.

Defendant, in his brief, asserts that the basis of his motion for judgment as of nonsuit was not that the defendant was not at fault, but was based upon a release signed by the plaintiff, appellant, on March 14, 1966.

[1, 2] When defendant pleaded a release in bar of plaintiff's claim, absent an admission with respect thereto, the burden of proof rested upon him to establish such affirmative defense by the greater weight of the evidence. 3 Strong, North Carolina Index 2d, Evidence § 9. Defendant's plea of a release is a plea in bar to plaintiff's cause of action, which could be tried prior to the trial of plaintiff's cause of action. *Cowart v. Honeycutt,* 257 N.C. 136, 125 S.E. 2d 382. The record is silent as to whether only the plea in bar was being heard or whether the case was being heard on its merits. The offering of expert medical testimony as to permanent injuries sustained by plaintiff would indicate the case was being tried on its merits. The form of the judgment however, would seem to indicate it was being heard only on the plea in bar asserted by defendant. Assuming that the plea in bar was being tried prior to the trial of the cause on its merits, we are of the opinion and so hold that the admission in the pleadings and the testimony offered by plaintiff do not establish defendant's plea in bar so as to support the judgment entered herein.

The judgment entered herein indicates that the trial judge was of the opinion that there was ample evidence of defendant's negligence and of damages sustained by plaintiff to require submission of the case to the jury.

[3, 4] The burden of proof with respect to avoiding a release after the execution thereof is admitted or established, is on the party asserting the affirmative. The rule is stated in 7 Strong, North Carolina Index 2d, Torts, § 7, p. 227 as follows:

> "A release from liability is vitiated by fraud in the same manner as any other instrument, and fraud vitiates the entire instrument and not merely that part to which the fraudulent misrepresentation relates. The burden is on the injured party, if he seeks to set aside a release for fraud, mistake, or other vitiating element, to prove the matters in avoidance."

While the judgment entered herein must be reversed and a new trial awarded, we feel that in the exercise of our discretion we ought to discuss and express an opinion on the question the parties attempted to raise on this appeal.

[5, 6] Assuming that the execution of the release attached to defendant's answer and marked Exhibit "A" had been admitted or proven we think the question of whether there was sufficient evidence to require submission of this case to the jury on the issue of fraud in the giving and securing of the release is controlled by the principles of law set forth in *Davis v. Davis,* 256 N.C. 468, 124 S.E. 2d 130, where it is said:

> "To obtain relief from a contract on the ground of fraud, the complaining party must show: a false factual representation known to be false or made in culpable ignorance of its truth with a fraudulent intent, which representation is both material and reasonably relied upon by the party to whom it is made, who suffers injury as a result of such reliance. . . .
>
> The law imposes on everyone a duty to act with reasonable prudence for his own safety. So one who contracts with another cannot ignore the contract merely because he becomes dissatisfied upon learning of the obligation assumed when, without excuse, he made no effort to ascertain the terms of the contract at the time he executed it. One who signs a written contract without reading it, when he can do so understandingly is bound thereby unless the failure to read is justified by some special circumstance. *Harris v. Bingham,* 246 N.C. 77, 97 S.E. 2d 453; *Harrison v. R. R.,* 229 N.C. 92, 47 S.E. 2d 698; *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5; *Presnell v. Liner,* 218 N.C. 152, 10 S.E. 2d 639; *Breece v. Oil Co.,* 211 N.C. 211, 189 S.E. 498; *Bank v. Dardine,* 207 N.C. 509, 177 S.E. 635; *Aderholt v. R. R.,* 152 N.C. 411, 67 S.E. 978.
>
> To escape the consequences of a failure to read because of special circumstances, complainant must have acted with reasonable prudence."

[7] Plaintiff's evidence is as follows: He had a 6th grade education and could read a little when he had his glasses. He operated a store and farm, but his wife did the book work. That on March 14, 1966 he carried his insurance with Mr. Hildreth Mobley and had been doing so for about 15 years, and had known him for about twenty years. On that date Mr. Mobley together with a Mr. Lovelace (whom he did not know prior to that) came to his store and asked him to go out and talk to them. One of them started talking to him about his damaged car and told him that their adjuster had adjusted the damage to his car and had "made it nearly two hundred more than the Chevrolet people did." Then he was told by them about the patrolman's report of how the collision occurred and after they

asked plaintiff about his injuries one of them said, "Well, go ahead and sign this report to go get your check for the car." Plaintiff testified "I thought I was signing a release for fixing the car. It is what he said it was anyway. I did not read it. He did not ask me to read it. . . . I cannot read that writing. I can read it, or most of it, with my glasses, but I still can't understand after I read it. Lots of words I cannot understand. I did not have any glasses that day. They were home, in Jamesville, about 300 or 400 yards from where I was. . . . I knew Mr. Mobley and carry my insurance with Mr. Mobley, most of it. I have been doing that for 15 years. I had confidence in Mr. Mobley, knew him, or thought I knew him well. I did not have any glasses with me. . . . I thought I was signing a patrolman's report because he said that is where he got it from. He said it was a release so that they would pay the bill at the Chevrolet place. What he was reading he told me was the patrolman's report. He told me I was signing a release, a release to pay for the truck. He said the check will be here in a few days. When I signed it I knew I was signing a release only for paying for the car. This is all he talked about."

We think plaintiff's evidence would permit, but not compel, the jury to find: (1) Plaintiff's failure to go to his home and get his glasses and read the release before signing it was due to Mr. Mobley and Mr. Lovelace telling him that he was signing a release so they would pay the bill on the truck at the Chevrolet place, and that he was signing a release only for paying for the pickup being repaired. (2) That this was a false representation of a material fact, which was known by Mr. Mobley and Mr. Lovelace to be untrue. (3) That such statement was reasonably calculated to deceive the plaintiff. (4) That such statement was made by them with intent to deceive the plaintiff and to induce him to sign the release. (5) That such statement did in fact deceive the plaintiff, and that the plaintiff actually relied upon the false representation of such material fact in the manner contemplated or manifestly probable, and thereby suffered damage by signing the release for an inadequate consideration. (6) That plaintiff acted with reasonable prudence in relying upon the actual and implied assurances of his own insurance agent, Mr. Mobley, and was justified in signing the release without going and getting his glasses and reading it under the special circumstances revealed by this evidence. See *Cowart v. Honeycutt, supra;* and *Davis v. Davis, supra.*

For the reasons stated the judgment of nonsuit is reversed.

Reversed.

BRITT and PARKER, *JJ.*, concur.

STATE OF NORTH CAROLINA v. ROBIE C. ALLEN

No. 695SC267

(Filed 28 May 1969)

1. Criminal Law §§ 150, 154; Constitutional Law § 30— defendant's right of appeal — lack of stenographic trial record

That defendant was not furnished a stenographic transcript of his trial in that the court reporter died without having transcribed his shorthand notes of the trial and no one was found who was capable of transcribing the notes *is held* not to deny defendant an adequate and effective review on appeal, where (1) defendant's counsel was able to prepare without unusual difficulty a statement of the evidence and the proceedings at the trial "from the best available sources, including his recollection," as provided by Court of Appeals Rule 19(f), (2) defendant presented no reason that the unavailability of a stenographic transcription of the reporter's notes deprived him of an opportunity of adequate appellate review, (3) the testimony of the witnesses was brief and related to a simple factual situation, (4) defendant did not contend that any error actually occurred at his trial, and (5) the evidence of defendant's guilt was overwhelming and uncontradicted.

2. Criminal Law § 154— case on appeal — reporter's stenographic notes — Rule 19(f)

Where court reporter died before transcribing his notes of defendant's trial and no one was found who was capable of transcribing these notes, Rule of Practice in the Court of Appeals No. 19(f) authorized the appellant to prepare and serve on the solicitor "a statement of the evidence and proceedings from the best available source, including his recollection," and in so doing, no constitutional or other substantial right of appellant was infringed.

3. Criminal Law § 150— right of defendant to appeal — transcript — indigency

The State may not deny defendant in a criminal proceeding in its courts adequate appellate review of his trial solely because of his inability to pay for a transcript.

APPEAL by defendant from *Bundy, J.*, 12 December 1968 Session of NEW HANOVER Superior Court.

The defendant, Robie C. Allen, was tried on his plea of not guilty to an indictment, proper in form, charging him with felonious breaking and entering, larceny, and receiving. The charges against defendant Allen were consolidated for purposes of trial with identical charges, which arose out of the same events, against one William Franklin Tyler.

At the trial the State presented the testimony of two police officers of the Wilmington Police Department who testified that at

about 10:45 p.m. on 19 October 1968 the police received a call to go to the Southside Lunch, at the corner of Front and Castle Streets; upon arrival, they noticed the top part of a padlock on the ground outside the front door; the door was closed but was not locked; the police entered the premises with drawn revolvers; on entering they noticed a cardboard box on the counter containing cigarettes and other items; on looking around with their flashlights they found defendant Robie C. Allen, and William Franklin Tyler, crouched down behind the ice cream freezer; the police ordered the two men to get up with their hands in the air; Tyler had a crowbar in his hands and a pair of gloves; as defendant Allen got up off the floor, the police observed the bottom part of the padlock lying under where he had been crouched; the police told defendants Allen and Tyler they were under arrest for breaking and entering; on searching defendant Allen, the police found a rubber hammer under his shirt.

The State also offered the testimony of the owner of the Southside Lunch who testified that she had closed her place of business and padlocked the front door around 6:30 p.m.; at about 12:00 midnight she was informed by the police that they had apprehended two persons inside her cafe; she immediately dressed and went to the cafe and upon arrival observed the two defendants in custody of the police officers; she did not know either of the defendants but identified defendant Allen as having eaten lunch in the place that same afternoon; she identified the lock, which was found broken on the ground, as being the lock with which she had padlocked the door previously that evening; she identified cigarettes and other items that were found in a box on the counter as being her property and that she did not box this merchandise herself.

Neither defendant took the stand or offered any evidence. The court allowed defendants' motion for nonsuit as to the counts in the bill of indictment charging larceny and receiving, and submitted the case to the jury solely on the count of felonious breaking and entering. The jury returned a verdict of guilty as charged of felonious breaking and entering. From judgment sentencing defendant Allen to prison for a term of ten years, defendant appealed.

Attorney General Robert Morgan, Deputy Attorney General Ralph Moody, and Staff Attorney Carlos W. Murray, Jr., for the State.

Yow & Yow, by Lionel P. Yow, for defendant appellant.

PARKER, J.

[1] Appellant's sole assignment of error is that the trial court erred "in that it is unable to furnish the defendant with a transcript of his trial so that he may be able to effectively perfect his appeal." Following the trial the judge of superior court, upon finding defendant to be indigent, appointed the same attorney who had represented him at his trial to represent defendant in connection with this appeal. At the same time the court ordered the court reporter to furnish defendant's counsel with a transcript of the trial to be paid for at public expense. These orders were entered 20 December 1968. On 27 December 1968 the court reporter was killed without having transcribed his shorthand notes of the trial. Subsequently the clerk of superior court advised appellant's counsel that no one had been found who was able to transcribe from the court reporter's shorthand notes. Appellant contends that because he has not been furnished with a transcription of the stenographic notes of his trial he has thereby been deprived of due process in that he has been denied an adequate and effective review on appeal. We do not agree.

The record and statement of case on appeal as docketed in this Court and as agreed to by stipulation signed by the solicitor and by the attorney for appellant, contains the following: "The following is a statement of the evidence and proceedings that were obtained from the best available sources in view of the fact that the stenographic record that was made could not be read." There then follows a narrative statement, in considerable detail, of the testimony as given by the State's witnesses, of the motions made by attorneys for the defendant, and the court's rulings thereon, and a statement of the substance of the court's charge to the jury.

The record on appeal also contains the following:

> "At the regular and open session of court, the defendant named above appeared in person, was confronted by his accusers and was given a full opportunity to cross-examine all of the State's witnesses, to testify, to procure and present the testimony of his own witnesses, to present other competent evidence, and to speak and argue in his own behalf, in person and by attorneys."

Rule 19(f) of the Rules of Practice of this Court provides:

> "In the event no stenographic record of the evidence or proceedings at a hearing or trial was made, the appellant shall, within ten days of the filing of the notice of appeal, prepare and serve on the respondent a statement of the evidence and proceedings *from the best available sources, including his rec-*

ollection, for use instead of a stenographic transcript. The respondent may serve objections or propose amendments thereto within ten days after service upon him. Thereupon the statement with the objections or proposed amendments, shall be submitted within ten days by the appellant to the trial tribunal for settlement and as settled and approved shall be included in the record on appeal. The trial tribunal shall settle the statement within ten days after its submission." (Emphasis added.)

[2] While in the present case a stenographic record in the form of shorthand notes was made at the trial, because of the death of the court reporter before transcribing his notes and because no one was found who was capable of transcribing these notes, in effect no stenographic record in intelligible form of the evidence or proceedings at the trial of this case was prepared. Therefore the provisions of Rule 19(f) apply, and the counsel for appellant and the solicitor properly followed its provisions in preparing the record on appeal. In so doing, no constitutional or other substantial right of appellant has been infringed.

In *Rogers v. Asheville,* 182 N.C. 596, 109 S.E. 865, our Supreme Court denied a petition for certiorari which had been sought on the ground that the stenographer at the trial, because of her other duties as court reporter, had not been able to transcribe her notes in time to permit timely preparation of the case on appeal. Clark, C.J., speaking for the Court, said:

"But, however that might be, the stenographer's notes are not the compelling and supreme authority as to what transpired during the trial. The judge in charging the jury, always tells them that their recollection, and not that of the court itself, must govern them as to what was the testimony of the witnesses. And in settling the cases on appeal the first authority is that of counsel themselves in agreeing as to what occurred at the trial as to the evidence, as to the charge, and otherwise, and when they do not agree the judge must settle what really occurred.

"Efforts have been made heretofore to make the stenographer's notes of higher authority than the agreement of counsel, or even the statement of facts as settled by the judge. But on the very first occasion when this view was advanced the Court held, in *Cressler v. Asheville,* 138 N.C. 485, that when the parties cannot agree the judge must settle it, saying: 'The stenographic notes will be of great weight with the judge, but are not conclusive, if he has reason to believe there was error or mistake. The stenographer cannot take the place of the judge

who is alone authorized and empowered by the Constitution to try the cause, and who alone (if counsel disagree) can settle for this Court what occurred during the trial. . . . Of course, if such notes were conclusive as to the evidence, they should be equally so as to what exceptions were taken and rulings made, and all other matters occurring in the progress of the trial. This would simply depose the judge and place the stenographer in his place for all purposes of an appeal. All the care taken to secure men of high integrity and impartiality to discharge the functions of the important office of judge of the Superior Court . . . becomes of secondary importance if a stenographer appointed by the clerk of the court, and not the judge elected by the people of the State, is to decide what were the exceptions, rulings, evidence, and other incidents of a trial. Now, as always, these matters must be settled by the judge when counsel disagree. The stenographer's notes will be of valuable aid to refresh his memory, but the stenographer does not displace the judge in any of his functions.'

* * *

"We must repeat again that stenographers are a helpful aid, but are not indispensable. They have not been indispensable heretofore, and are not absolutely indispensable now."

[3] It is, of course, clear that a State may not deny a defendant in a criminal proceeding in its courts adequate appellate review of his trial solely because of his inability to pay for a transcript. *Griffin v. Illinois,* 351 U.S. 12, 76 S. Ct. 585, 100 L. ed. 891. In *Griffin,* however, counsel for the State had conceded that petitioners needed a transcript in order to get adequate review of their trial. Furthermore, the court in that case made clear that a stenographic transcript might not be required in every case when it stated:

"We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The (Illinois) Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases."

[1] We recognize that there may be cases of such length or complexity that an adequate record on appeal cannot be prepared without a stenographic transcript. See, Annot., 19 A.L.R. 2d, 1098. Such was not true in the present case. Here, only three witnesses were presented. Their testimony was brief and related to a simple factual

situation. Appellant's counsel does not contend that any unusual difficulty was encountered in following the provisions of Rule 19(f) when he prepared the statement of the evidence and the proceedings at defendant's trial "from the best available sources, including his recollection." He cites no fact and advances no reason to bolster his unsupported assertion that the mere fact that he did not have available a stenographic transcription of the court reporter's notes deprived him of an opportunity to obtain adequate and effective appellate review. He does not contend that any error actually occurred at his trial. Examination of the narrative statement of the testimony in the record before us, agreed to as accurate by the appellant, reveals that there was overwhelming and uncontradicted evidence of defendant's guilt of the crime for which he was convicted. The judgment appealed from was supported by the verdict.

In the entire trial we find

No error.

MALLARD, C.J., and BRITT, J., concur.

BENVENUE PARENT-TEACHER ASSOCIATION AND CHARLES L. JOHNSON v. THE NASH COUNTY BOARD OF EDUCATION AND NASH COUNTY

No. 697SC248

(Filed 28 May 1969)

1. Schools §§ 1, 7— public school system — county technical institute — expenditure of county funds

A county technical institute which provides adult vocational and general educational training is a part of the public school system of the State, and the expenditure of funds by a county as authorized by G.S. 115-234 et seq. for maintenance of a building used by such technical institute does not violate N. C. Constitution Art. IX, § 5.

2. Schools §§ 1, 7; Taxation § 6— expenditure of county funds for operation of technical institute — necessity for vote of electorate

The expenditure of funds by a county for operation of a technical institute for adult vocational and general educational training without a vote of the people does not violate N. C. Constitution Art. VII, § 6, since in expending such funds the county acts as an agency of the State in carrying out the mandate of N. C. Constitution Art. IX, § 2 requiring the General Assembly to provide for a general and uniform system of public instruction.

3. Schools § 7; Taxation § 6— public school system — necessary expense — necessity for vote

The operation of the public school system is a necessary expense which does not require a vote of the people.

4. Constitutional Law § 4— standing to question constitutionality of statute

A party must demonstrate that an enactment will prejudice his rights before he can question the constitutionality of the enactment.

5. Schools § 6— use of former high school for technical institute — injunction — sufficiency of evidence

In this action to restrain a county and the county board of education from using a former high school building for a technical institute, the trial court properly granted defendants' motions for nonsuit where the evidence shows that in assisting with the creation and support of the technical institute the defendants followed procedures provided by constitutional statutes.

APPEAL by plaintiffs from *Mintz, J.*, at the 9 December 1968 Session of NASH Superior Court.

Plaintiffs filed complaint 1 August 1966 against the defendant Board of Education alleging, *inter alia*, the following: That the plaintiff Parent-Teacher Association (Association) was a duly organized and existing unincorporated association of the parents and teachers of children attending Benvenue School in Nash County and that the Association was authorized to bring this action by G.S. 1-69.1; that plaintiff Johnson was a "tax paying resident of Nash County, North Carolina, and is the parent of children now assigned to attend the Benvenue School * * *."

The plaintiffs then alleged that a study of the Nash County School System had been made, the adoption of the study by defendant Board of Education as a plan of reorganization, and various steps taken pursuant to this plan culminating in leasing the relatively new building formerly known as the Benvenue High School to the State Board of Education, Department of Community Colleges, for use as an extension unit of Wilson Technical Institute. The plaintiffs alleged that irreparable harm would be done if the defendant Board of Education was not restrained from converting the facility from its former use to use as a technical institute.

A temporary restraining order was granted at the time of filing the complaint but was dissolved on 8 August 1966 when the matter was heard on the question of whether it should be made permanent.

On 9 August 1968, pursuant to appropriate petition and order, plaintiffs filed amendments to their complaint, alleging that the

former high school building had been converted and the Nash Technical Institute was being operated in it; that tax funds of Nash County were being used for maintenance of the building. Plaintiffs alleged that operation of the Nash Technical Institute is not a necessary expense within the meaning of Article VII, § 6 of the North Carolina Constitution and that the use of public funds for operation of the Institute is contrary to Article IX, § 5 of said Constitution.

On 8 August 1966, defendant Board of Education filed its original answer alleging numerous facts in explanation of its conduct and on the same day moved to dismiss plaintiff Association from the action. On 16 August 1968, defendant Board of Education answered plaintiffs' amendments, denying that any of its actions exceeded its authority.

On proper motion by defendant Board of Education, and pursuant to G.S. 1-69, Nash County was made a party by order dated 9 September 1968. It answered on 4 November 1968, substantially adopting the answer filed earlier by defendant Board of Education.

By consent the case was heard by Mintz, J., sitting without a jury. The judgment, dated 8 January 1969, allowed defendants' motions made at close of all evidence to dismiss as to the Benvenue Parent-Teacher Association and for judgment as of involuntary nonsuit. Plaintiffs and defendants gave notice of appeal; however, appeal was perfected only by the plaintiffs.

Don Evans for plaintiff appellants.

I. T. Valentine, Jr., for defendant appellee Nash County Board of Education, and James W. Keel, Jr., for defendant appellee Nash County.

BRITT, J.

The first question posed is whether the Nash Technical Institute is a part of the public school system of North Carolina.

Although the educational unit discussed is referred to in the record and briefs by several names — Nash Technical Institute, Nash Technical Institute Extension Unit, etc. — the pleadings and evidence indicate that it is actually an extension unit of the Wilson Technical Institute. Nevertheless, we will refer to the unit by the name that defendants, for obvious reasons, choose to call it.

[1] Plaintiffs contend that the lease of the facility formerly occupied by Benvenue High School to the State Board of Education

for adult education and vocational training, and the expenditure of funds by the Nash County Board of Education for this purpose, violates Article IX, § 5 of the North Carolina Constitution, which provides in pertinent part: "All moneys, stocks, bonds, and other property belonging to a county school fund * * * shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State * * *." Plaintiffs contend that the Nash Technical Institute is not a "public school."

"A school is an institution consisting of a teacher and pupils, irrespective of age, gathered together for instruction in any branch of learning, the arts or the sciences." *Weisse v. City of New York,* 32 N.Y.S. 2d 258, 178 Misc. 118. A school is public when it is open and public to all in the locality. 78 C.J.S., Schools and School Districts, § 1, p. 606. It is true that the "public schools" are normally envisioned as institutions for the instruction of the young, and that institutions for education beyond the high school level are not usually thought of as part of the "public schools"; however, this mode of thought does not amount to a constitutional prohibition of use of the terms "public schools" to include adult or technical education.

The expenditure of funds by Nash County for maintenance of the building used by Nash Technical Institute is fully authorized by statutes (G.S. 115-234, et seq.) and is not at odds with the meaning or purpose of Article IX, § 5 of the North Carolina Constitution. *Harris v. Board of Commissioners,* 274 N.C. 343, 163 S.E. 2d 387.

Plaintiffs introduced in evidence certain stipulations entered into between counsel for plaintiffs and counsel for defendants; among these were the following:

> "14. The aforesaid adult educational unit provides vocational, technical, and general adult training for persons 18 years old or older. Persons are now enrolled in that school who are over 21 years of age.
>
> 15. There are 730 students enrolled at Nash Technical Institute Extension Unit. Of that number, 93 pay tuition of $32.00 per quarter. The others pay only a nominal 'supplies fee,' or nothing at all."

The record contains other evidence as to persons served or proposed to be served by the unit.

We conclude from the record before us that the Nash Technical Institute is a part of the public school system of North Carolina.

[2, 3] Plaintiffs next contend that the expenditure of funds by

defendant county for operation of the Nash Technical Institute without a vote of the people violates North Carolina Constitution Article VII, § 6. We disagree.

Though not determinative of legal necessity, a glance at the appropriations of practically all governmental units indicates the understanding by the general public of the practical necessity of educational expenditures.

Necessity in this case is within the purview of the discussion in *Harris v. Board of Commissioners, supra.* The Constitution of North Carolina requires the General Assembly to provide for a general and uniform system of public instruction. Article IX, § 2. In fulfilling this purpose, the General Assembly may act through the agency of the county. When the county acts as agent of the State in carrying out legislative enactments, its actions fall within the authority granted by Article IX, § 2 of the Constitution. Moreover, operation of the public school system has been held to be a necessary expense, not requiring a vote of the people. *School District v. Alamance County,* 211 N.C. 213, 189 S.E. 873. As noted above, adult and technical education may reasonably be considered a part of the public school system.

[4] Plaintiffs contend that the superior court erred in dismissing the Benvenue Parent-Teacher Association from the action. This contention is overruled. It is a well-established principle that a party must demonstrate that an enactment will prejudice his rights before the party can question its constitutionality. 2 Strong, N. C. Index 2d, Constitutional Law, § 4, p. 186. 16 Am. Jur. 2d, Constitutional Law, § 119, p. 310. The Parent-Teacher Association made no showing of a direct injury in this case.

[5] Finally, plaintiffs contend that the trial court erred in granting defendants' motion for judgment of involuntary nonsuit.

The burden was on plaintiffs to prove that the acts of defendants complained of in the complaint and amendments thereto were wrongful or unlawful. When the parties had rested their cases, the evidence of plaintiffs, together with the evidence of defendants not in conflict therewith but which tended to make clear or explain plaintiffs' evidence, showed that defendants in assisting with the creation and support of Nash Technical Institute carefully followed procedures provided by the statutes, which statutes do not offend the State Constitution. Therefore, we hold that the allowance of the motion was proper and the judgment appealed from is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

GLENNON W. SWAIN v. GEORGE WAYNE WILLIAMSON AND GEORGE C. WILLIAMSON, JR.

No. 691SC54

(Filed 28 May 1969)

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

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.

2. Automobiles § 62— intersection accident — motorcyclist—pedestrian — sufficiency of evidence

Evidence that plaintiff pedestrian was attempting to cross an intersection at a point not a crosswalk, that the speed limit was 55 miles per hour and the highway was straight for a considerable distance on either side of the intersection, that plaintiff, who saw defendant's oncoming motorcycle about 300 feet away, stepped off the curb and proceeded to cross directly in front of defendant, that plaintiff did not again look in defendant's direction but instead focused his attention in the opposite direction, and that a collision resulted despite defendant's attempt to stop, *held* insufficient to withstand defendant's motion to nonsuit.

3. Automobiles § 40— intersection — pedestrian's duty at place not a crosswalk

A pedestrian crossing an intersection at a point which is neither a marked nor an unmarked crosswalk has the duty to yield the right of way to all vehicles upon the highway. G.S. 20-174(a).

4. Automobiles § 40— pedestrian at crossing — duty of oncoming motorcyclist

Motorcyclist approaching an intersection was not required to warn pedestrian of his presence where pedestrian had already seen the motorcycle and was conscious of its presence and knew of its approach.

APPEAL by plaintiff from *Fountain, J.*, 7 October 1968, Civil Session, PASQUOTANK County Superior Court.

Glennon W. Swain (plaintiff) instituted this civil action on 11 October 1966 to recover for personal injuries allegedly sustained as the result of the actionable negligence of George Wayne Williamson (operator), the driver of a Honda motorcycle, the title to which was registered in the name of George C. Williamson, Jr., (owner) the father of the operator.

The evidence on behalf of the plaintiff tends to show that Hughes Boulevard (Boulevard) is a four-lane highway running in a north-south direction in Elizabeth City, Pasquotank County; it constitutes U. S. Highway No. 17 Bypass of Elizabeth City and is the main north-south highway between Norfolk, Virginia, and Elizabeth City

and points south; there are two lanes for northbound vehicular traffic and two lanes for southbound vehicular traffic; each lane is approximately eleven feet in width; there is a double white line in the middle of the highway and a single white line dividing the northbound lanes; there are no sidewalks along the easterly side of Boulevard or along the northerly side of Church Street, which intersects Boulevard.

The evidence on behalf of the plaintiff further tends to show that about 4:36 p.m. on Sunday, 8 May 1966, the plaintiff attempted to walk across Boulevard; he entered the highway from the easterly side of Boulevard at a point some 23 to 25 feet north of the northerly curb line of Church Street where said curb line intersects Boulevard; the plaintiff was knocked down within the westerly or inside northbound lane by a Honda motorcycle being driven by operator; immediately after the accident, the operator was lying in the highway south of where the plaintiff was lying in the highway; there was glass and other debris located at approximately the center of the westerly northbound lane; this glass and debris was located 25 feet north of the projected northerly curb line of Church Street and 15½ feet from the easterly curb of Boulevard; the motorcycle came to rest in the highway south of where the operator was lying; at that point, there were approximately 2 feet of scuffed up or skid marks, which were referred to in the testimony as sideways skid marks; proceeding in a southerly direction for a distance of 30 feet, there were no marks; then a single skid mark continued in a southerly direction from the westerly or inside northbound lane into the easterly or curb northbound lane for a distance of 43 feet. The plaintiff sustained a fractured pelvis.

At the close of the evidence for the plaintiff, the motion of the defendants for judgment as of nonsuit was sustained and the action dismissed. The plaintiff thereupon appealed to this Court.

Leroy, Wells, Shaw & Hornthal by L. P. Hornthal, Jr., for plaintiff appellant.

Aydlett & White by Gerald F. White for defendant appellees.

CAMPBELL, J.

[1] "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. . . ." 7 Strong, N. C. Index 2d, Trial, § 21, p. 294.

[2] The evidence considered in the light most favorable to the plaintiff reveals that the afternoon of Sunday, 8 May 1966, was sunshiny; Boulevard was straight and a person could see both to the north and to the south for many hundreds of feet; there were no sidewalks in the vicinity; before stepping off the curb, the plaintiff looked to the south and "saw these boys coming, about three hundred feet"; at that time, the motorcyclists were near Rhodes' Trailer Court, which was located about three hundred feet from the scene of the accident; these motorcyclists were traveling north and "(t)hey were in the lane next to the curb" of Boulevard; the plaintiff testified, "I thought I could get across, and so I stepped down and went on across, walking, and I got as far as the second lane, and I didn't know no more"; he further testified, "before I started walking across, I looked north, and then I was struck down"; as he was crossing the highway, the plaintiff was looking to the north to see if anything was coming from that direction; he did not again look to the south, from whence the operator's motorcycle was coming, and he did not again see these motorcycles; the plaintiff crossed the easterly northbound lane, but he was struck after reaching the westerly northbound lane; he did not again see the motorcycle which struck him after stepping off the curb. The plaintiff testified, "Well, I wasn't walking real fast, and not walking real slow. Kinda medium, I should say."

The investigating police officer testified that Boulevard constitutes U. S. Highway No. 17 Bypass and is the main artery of traffic around Elizabeth City; when he arrived at the scene of the accident, he observed a single skid mark in the easterly northbound lane of Boulevard extending for a distance of 43 feet and crossing the single white line into the westerly northbound lane; then after a space of 30 feet with no marks, there was another skid mark in the westerly northbound lane about 2 feet long and sideways; this latter mark was at a point 15½ feet from the easterly curb of Boulevard; at that point there was glass and debris; the glass and debris was at a point 25 feet north of the projected northerly curb line of Church Street; the motorcycle was lying in the highway; the operator was lying in the highway to the north of the motorcycle, and the plaintiff was lying in the highway to the north of the operator.

There was no evidence indicating any special speed restrictions. Therefore, the permitted speed limit would be 55 m.p.h. G.S. 20-141.

[3] The plaintiff was a pedestrian crossing Boulevard from east to west at a point which was neither a marked crosswalk nor an unmarked crosswalk. Therefore, the plaintiff did not have the right of

way, and it was incumbent upon him to yield the right of way to all vehicles upon the highway. G.S. 20-174(a).

The plaintiff relies heavily upon *Wanner v. Alsup,* 265 N.C. 308, 144 S.E. 2d 18. However, the case is readily distinguishable from the instant case. The Supreme Court stated:

> "The plaintiff's evidence . . . was to the effect that testatrix was plainly visible for 'a long distance', but that defendant made no attempt to avoid striking her or to warn her of his approach; nor did he slow down, stop, or try to turn away from the testatrix when he came in close proximity to her when she had reached within a very short distance of the curb on the eastern side of the street."

[4] In the instant case, it was not necessary for the operator to warn the plaintiff of his presence, because the plaintiff had already seen the motorcycle and because he was conscious of its presence and knew of its approach. The plaintiff simply misjudged the speed of the motorcycle and the relative time required for him to walk across the highway in front of the motorcycle. *Wanner* is also distinguishable since there the plaintiff had almost crossed the street, whereas here the plaintiff had just started.

> "The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury. It was plaintiff's duty to look for approaching traffic before she attempted to cross the highway. Having started, it was her duty to keep a lookout for it as she crossed. . . . It behooved her to keep his approaching vehicle under constant surveillance. Instead, she continued into the path of an automobile which had been approaching on a thoroughfare, straight for a mile in the direction from which it came. Apparently, she paid it no heed until she entered its lane of travel when it was only forty-five feet away. Had defendant been going twenty miles per hour when plaintiff stepped into his path, he could not have stopped in time to avoid the accident. Plaintiff by simply standing still in the inside lane could have done so.
>
> Plaintiff is an adult woman. So far as this record discloses she was under no disability, and there was nothing to put defendant on notice that she was oblivious to his approach or that she would fail to stop and yield him the right of way. Under those circumstances he was not required to anticipate negligence on her part." *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214.

[2] In the instant case, the plaintiff was *sui juris* and under no dis-

ability. He saw and observed the oncoming motorcycle. However, he did not yield the right of way to the motorcycle as was his duty. On the contrary, he discontinued looking at it, stepped off the curb, and proceeded to cross directly in front of the motorcycle without again looking to the south when he knew of its approach. He deliberately focused his attention to the north. The evidence discloses that, when the operator realized that the plaintiff was not going to yield the right of way to him, he endeavored to bring his motorcycle to a stop and began skidding the motorcycle's wheels at a distance of some 75 feet from the plaintiff. However, the plaintiff could have stopped and yielded the right of way at any time and thus avoided the collision.

Under this evidence, the plaintiff was basically in the same position as the plaintiff in *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357. In that case, the plaintiff, who was operating a motor vehicle, misjudged the speed of an oncoming automobile and proceeded out in front of this automobile, thus bringing on a collision. The Supreme Court stated:

> "Manifestly, her decision to start across the intersection lacked reasonable assurance of safety and the operation of the automobile by her in traversing the intersection without keeping a reasonably careful lookout, establishes lack of ordinary care."

In the instant case, the plaintiff, who was *sui juris* and under no disability, misjudged the speed of the oncoming motorcycle and proceeded into its path without keeping any lookout at all toward the south.

The judgment below is

Affirmed.

BRITT and MORRIS, JJ., concur.

IN THE MATTER OF THE BOARD OF COMMISSIONERS OF CALDWELL COUNTY, TO WIT, E. M. DUDLEY, CHAIRMAN; EARL LAND; W. L. TYSINGER, JR.; E. C. McCALL; FLOYD C. WILSON

No. 6925SC45

(Filed 28 May 1969)

Contempt of Court § 5— proceedings — order to show cause — sufficiency of notice

Order adjudicating county commissioners in contempt for failure to provide adequate office space for the clerk of superior court must be set

aside for lack of notice where the subpœnæs directing the commissioners to appear in court did not advise them they were to appear and show cause why they should not be held in contempt for failure to supply adequate office space, but instead merely directed them to appear for the purpose of giving evidence on behalf of the State in what appeared from the subpœnæs to be a criminal action against each of the commissioners, and no such criminal action was pending.

APPEAL by County Commissioners from *Falls, J.*, 19 August 1968 Session, CALDWELL Superior Court.

Beginning in August 1965 the grand jury reported the office space of the Clerk of Superior Court to be deficient in several respects. Reports of similar import were submitted December 1965, February 1966, May 1966, August 1966, December 1966, February 1967, May 1967, August 1967, December 1967, February 1968, and May 1968.

In February 1968, Judge Falls discussed with the Chairman of the Board of Commissioners the matter of the insufficiency of the Clerk's office space; and again in March 1968, along with the Director of the Administrative Office of the Courts, Judge Falls met with the County Commissioners to discuss solutions to the problem of the insufficiency of the Clerk's office space.

At the May 1968 Session, Judge Falls entered the following order:

"TO: THE BOARD OF COUNTY COMMISSIONERS OF CALDWELL COUNTY.

"WHEREAS, this Court finds as a fact that the Grand Jury in and for Caldwell County has for several terms of Superior Court called attention to the Court that the office space is totally inadequate for the orderly and proper functions of said office. At the February session 1968 of Caldwell Criminal Court, the Grand Jury again returned a report setting forth that the office space was totally inadequate and that subsequent thereto this Presiding Judge called the Chairman of the Board of County Commissioners and the County Manager into open court and called this to their attention and suggested that this situation be remedied on or before the May session 1968 of Criminal Superior Court; that on or about March 28, 1968, Honorable Bert Montague, Administrative Officer of the Courts, together with this Presiding Judge and the Clerk of the Superior Court for Caldwell County, met informally with the County Commissioners about this matter, and it was tentatively agreed at that time and understood by this Court that the offices on the south side of the courthouse building first floor and east of the present Clerk of Superior Court's offices (a room occupied by some di-

vision of the Accounting Department) would be made available as additional space for the Clerk of Superior Court;

"That at the May 1968 Session of Caldwell Criminal Superior Court the Grand Jury again reported that nothing had been done with regard to the additional space for the Clerk of Superior Court; and the Chairman of the Board of County Commissioners and the County Manager appeared in open court and stated that architects were being consulted with the view to cutting a stairway to the basement in the present office of the Clerk of Superior Court to make available offices in the basement; that the same Grand Jury report indicated that the basement space underneath the Clerk of Superior Court's office was damp and wet due to leakage in the pipes and unless the basement were to be made dry, that arrangement the Court finds to be totally unsatisfactory and unacceptable.

"The court further finds as a fact that there are adequate facilities in the present courthouse building and that the County Commissioners have ignored previous Grand Jury recommendations and have ignored the Presiding Judge's suggestion that adequate facilities be provided for the Clerk of Superior Court and that G.S. 7A-302 requires the Counties and Municipalities to be responsible for physical facilities for the operation of the General Court of Justice.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Board of County Commissioners of Caldwell County be and they are hereby ordered and directed to provide adequate office space for the more orderly and efficient operation of the Clerk of Superior Court on or before July 1, 1968.

"This the 24th day of May, 1968.

"B. T. FALLS, JR.
"Judge Presiding"

The Order was personally served on Mr. E. M. Dudley, Chairman of the Board of County Commissioners of Caldwell County, on 29 May 1968. No appeal was taken from the entry of the foregoing Order.

At the August 1968 Session Judge Falls caused subpœnæs to be issued and served upon each member of the Board of County Commissioners, commanding them to appear and give evidence on behalf of the State. Each of the subpœnæs was exactly the same with the exception that the names in the caption and in the body of the subpœnæs carried the name of the commissioner upon which it was served. The subpœna served upon the chairman is illustrative.

"STATE OF NORTH CAROLINA
County of Caldwell

In The General Court
of Justice SUPERIOR
COURT DIVISION

STATE OF NORTH CAROLINA
VS.
E. M. DUDLEY

"To the Sheriff or other lawful officer of Caldwell County — GREETING: YOU ARE COMMANDED to summon E. M. Dudley, Chairman Board of County Commissioners, Caldwell County personally to be and appear before the Judge of the Superior Court at Courthouse, Lenoir, N. C. on the 29th day of August 1968, at 9:30 o'clock A.M., to give evidence in the above entitled action on behalf of the State.

"Issued this 26 day of August, 1968.

"MARY HOOD THOMPSON
"Clerk Superior Court"

In response to the subpœnæs each of the commissioners, along with their county manager, their auditor, and their attorney, appeared before Judge Falls at the appointed time.

At the conclusion of the testimony and arguments Judge Falls entered an Order in which he concluded that the commissioners had failed to act in good faith and had refused to comply with the Order of 24 May 1968; and that their refusal to comply was contemptuous conduct. Judge Falls thereupon ordered that each of the commissioners be confined in the county jail for 48 hours. The commissioners appealed, assigning as error the entry of the 24 May 1968 Order, the lack of notice to show cause, the finding of contempt, and the entry of the order of confinement.

Robert Morgan, Attorney General, by (Mrs.) Christine Y. Denson, Staff Attorney, for the State.

Wilson & Palmer, by Hugh M. Wilson, for contemnors-appellants.

BROCK, J.

Without expressing any opinion of the regularity of the proceedings which led to the entry of the Order of 24 May 1968, we are confronted with the content of the Order itself. Although there was no appeal from the Order, by its terms the county commissioners are ordered and directed to provide *adequate* office space. The generality of the Order leaves much to be desired, and it is questionable whether

the Order is capable of full understanding. It may well be that Judge Falls and the commissioners reached some consensus of thought as to what would constitute *adequate* office space, but that does not appear anywhere in the record before us.

However, irrespective of the apparent vagueness of what is required by the Order, the subpœnæs in no way advised the commissioners that they were to appear and show cause why they should not be held in contempt for failure to supply *adequate* office space. The subpœnæs merely directed them to appear for the purpose of giving evidence on behalf of the State in what appeared from the subpœnæs to be a criminal prosecution against each of the commissioners; no such criminal actions were pending. The evidence shows that, based upon the subpœnæs, the commissioners appeared prepared only to offer evidence relative to their disbursements of the "facilities fees" (G.S. 7A-304(a)(2)) paid over to the county from court costs.

In view of the apparent vagueness of the order of 24 May 1968 and the lack of notice to show cause before entry of the Order appealed from, we reverse the adjudication of contempt and the Order for confinement. And we remand this cause to the Superior Court of Caldwell County for appropriate proceedings as may appear necessary.

Reversed.

BRITT and PARKER, JJ., concur.

MRS. DOVA MACKEY v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 6930IC29

(Filed 28 May 1969)

1. Master and Servant § 96— Industrial Commission — findings of fact

The findings of fact by the Industrial Commission are conclusive if there is any competent evidence to support them. G.S. 143-293.

2. State § 8; Highways § 9— tort claims action — highway employee — negligent act v. omission

Where State Highway employee removed large posts from the shoulder of a highway and left unfilled the holes created by the removal, recovery may be had under the Tort Claims Act for injuries resulting to a plain-

tiff who stepped in one of the holes, since the creation of the hole is a negligent act and not a negligent omission.

3. State § 8— Tort Claims Act — recovery for negligent act

Under the State Tort Claims Act recovery is permitted for injuries resulting from a negligent act, but not those resulting from a negligent omission on the part of State employees. G.S. 143-291.

4. Negligence § 1— negligent act defined

One who undertakes to do something and does it negligently commits a negligent act, not a negligent omission.

APPEAL by defendant Highway Commission from an opinion and award of the North Carolina Industrial Commission filed 11 September 1968.

This is a proceeding under the State Tort Claims Act first heard by Commissioner William F. Marshall, Jr. An order denying plaintiff's claim was entered on 18 April 1968. Plaintiff appealed to the Full Commission, which reversed the order of Commissioner Marshall and made an award to the plaintiff.

Plaintiff Dova Mackey filed an affidavit in which she alleged that her claim was against the North Carolina State Highway Commission for personal injuries resulting from the negligence of Elmer Head. She further alleged that her injury was caused solely and proximately by the negligent conduct of the named employee in removing large posts which had been placed along the shoulder of the State highway, leaving unfilled holes, one of which she stepped into and was injured.

Defendant answered, denying the plaintiff's material allegations, and, for a further answer and defense to the cause of action, alleged that plaintiff was contributorily negligent in failing to exercise due care for her own safety as she walked along the highway "in that she failed and neglected to observe and heed the conditions then and there existing as it was her duty to do so."

The Full Commission, among other things, made findings of fact that:

"1. Sometime in 1961 or prior thereto Elmer Head, who was employed as a foreman by defendant caused and supervised the removal of some posts from the south side of the 'Old Clyde Highway' between Canton and Clyde. The removal of the posts created holes on the shoulder of the road. Such holes were approximately 10 inches in diameter and over two feet in depth. Some of the holes were filled with dirt under the supervision of

Mr. Head. However, at least 18 holes were left open, thus creating a dangerous condition on the shoulder of the road. Weeds and grass grew around and across the holes, thus creating hidden pitfalls for anyone who should step onto the shoulder of the road at the exact place where one of the holes had been left open.

"2. On 16 September 1963 at approximately 2:30 P.M. the plaintiff walked along the south side of the 'Old Clyde Highway' as she had done on many previous occasions. She walked upon the paved portion of the highway facing oncoming traffic and would step upon the south shoulder of the highway in order to avoid vehicles on the highway. While so walking upon the paved portion of the highway plaintiff stepped onto and walked upon the south shoulder of the highway upon the approach of several vehicles. Plaintiff stepped to a place approximately 44 inches from the paved surface. Despite the fact that plaintiff was looking where she was stepping, her left foot went into one of the holes which had been created by the actions of Mr. Head as described in Finding of Fact No. 1. Such hole was 44 inches off the paved surface of the highway and was eight to 10 inches in diameter and approximately two feet in depth.

"A search by the son of plaintiff thereafter revealed 18 similar type holes on the shoulder of the highway at the same place that Mr. Head had supervised the removal of posts.

"3. Mr. Head, the employee of defendant, by causing holes to be created on the shoulder of the highway at a place where a pedestrian had a right to be did other than a reasonably prudent person would have done under the same or similar circumstances. This constituted a negligent act upon his part while acting within the scope and course of his employment as a foreman for defendant and such negligence was the proximate cause of the accident giving rise hereto and the damages sustained by plaintiff.

"4. The plaintiff acted the same as a reasonably prudent person would have done under the same or similar circumstances and there was no contributory negligence upon her part."

From these facts the Full Commission concluded that there was a *negligent act* on the part of the named employee of defendant within the scope and course of his employment and such negligence was the proximate cause of the damages sustained by plaintiff; that there was no contributory negligence upon the part of plaintiff; and that plaintiff was entitled to an award of $3,500.00.

The defendant Highway Commission duly excepted to these findings and conclusions and appealed to this Court.

Robert Morgan, Attorney General, by Harrison Lewis, Deputy Attorney General, for Highway Commission, defendant appellant.

Bennett, Kelly & Long, by E. Glenn Kelly, for plaintiff appellee.

BROCK, J.

Defendant assigns as error, and in its brief strenuously argues, that there was no evidence of record to support the determination of the Full Commission that the named employee of the defendant committed a *negligent act* so as to allow plaintiff to recover under the State Tort Claims Act.

[1] "The findings of fact by the Industrial Commission are conclusive if there is any competent evidence to support them. G.S. 143-293." *Mitchell v. Board of Education,* 1 N.C. App. 373, 161 S.E. 2d 645.

[2] We hold that the facts found by the Full Commission are supported by competent evidence and that they are sufficient to support the action of the Full Commission in concluding that there was a *negligent act* on the part of defendant's employee Elmer Head and that such *negligent act* was the proximate cause of the injury and damages sustained by plaintiff.

[3] Under the State Tort Claims Act recovery is permitted for injuries resulting from a *negligent act,* but not those resulting from a *negligent omission* on the part of State employees. G.S. 143-291; *Flynn v. Highway Commission,* 244 N.C. 617, 94 S.E. 2d 571. In *Flynn* the claim denied was based upon the alleged negligent failure of named employees of the State to repair a hole or break in the surface of a State road *caused by public travel over it.* "In order to authorize the payment of compensation, the Industrial Commission's findings must include (1) a negligent act, (2) on the part of a State employee, (3) while acting in the scope of his employment, etc. The first requirement is that the claimant show a *negligent act.* Is a failure to repair a hole in the highway caused by ordinary public travel a negligent act? The requirement of the statute is not met by showing negligence, for negligence may consist of an act or an omission. Failure to act is not an act." *Flynn v. Highway Commission, supra.*

[2, 4] We think the case at bar is clearly distinguishable on its facts from *Flynn.* The Full Commission found upon competent evi-

dence that Elmer Head left at least eighteen holes open when he removed the posts therefrom and that such *negligent act* proximately caused plaintiff's injury and resulting damages. The removal of the posts created holes on the shoulder of the road. There was no *negligent omission* involved as the creation of a hole is an *act,* not an *omission.* One who undertakes to do something and does it negligently commits a *negligent act,* not a *negligent omission.*

In this case we are not concerned with a failure by defendant to maintain the shoulders of the highway in a safe condition for pedestrian travel; we are concerned here with the act of an agent of the Commission in negligently creating a trap, or pitfall, upon a shoulder of the highway which is apparently safe for pedestrian travel.

The opinion and award of the Full Commission is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

RUBY C. MORRIS, ADMINISTRATRIX OF THE ESTATE OF DAVID CLAUDE CANNON, DECEASED v. ARCHIE LEE MINIX, HAROLD WESLEY MASON, KING BROTHERS FARM CENTER, INC., AND ELMER GREY DUDLEY

No. 693SC73

(Filed 28 May 1969)

Automobiles § 62— negligence in striking pedestrian — sufficiency of evidence

In this action for personal injuries received when plaintiff pedestrian was struck by defendant's automobile, the evidence is sufficient to be submitted to the jury on the issue of defendant's negligence in failing to exercise due care to avoid colliding with a pedestrian in violation of G.S. 20-174(e) and does not disclose contributory negligence by plaintiff as a matter of law where it tends to show that plaintiff crossed the westbound lane of a highway at a point other than a crosswalk and started to cross the eastbound lane, that plaintiff stepped back into the westbound lane to allow a truck which had just entered the highway to pass, that while standing in that lane plaintiff was struck by defendant's automobile, that the visibility from the direction defendant was traveling to the point of impact was three-fourths of a mile, that defendant failed to blow his horn, and that no skid marks were found at the accident scene.

APPEAL by plaintiff from *Cohoon, J.,* at the 16 September 1968 Session of PITT Superior Court.

Plaintiff David Claude Cannon (Cannon) instituted this action by issuance of summons and filing of complaint on 9 August 1965. Cannon died 11 August 1965 and Ruby C. Morris, as administratrix, was substituted as plaintiff on 3 November 1965.

The complaint alleged that Cannon was injured by the concurring negligence of the defendants as he attempted to walk across N. C. Highway #102 near Ayden, N. C. Defendant Mason, operating a 1956 Ford, as agent for defendant Minix, was alleged to have been negligent in that he failed to sound his horn or slow his vehicle, as a reasonable and prudent man would have done, when he had observed Cannon on a road where visibility was unimpeded for more than 1,000 yards. Further, defendant Mason was negligent in failing to keep a proper lookout, operating his car at a speed unreasonable under the circumstances, and failing to decrease his speed when approaching an intersection at which special hazards existed. In an amended reply, plaintiff pled last clear chance.

Defendant Dudley, operating a truck as agent of the Farm Center, was alleged to have been negligent in driving the truck on the left-hand side of the road, failing to keep a proper lookout, and failing to keep his vehicle under proper control.

Defendants Minix and Mason answered 12 October 1965, denying the material allegations of the complaint, pleading the sole negligence of Cannon and, in the alternative, the contributory negligence of cannon.

Defendants Farm Center and Dudley answered 18 October 1965, denying the allegations of negligence and involvement in the collision, pleading the sole negligence of Cannon and contending that Cannon entered the road in front of defendant Mason after defendant Dudley had proceeded beyond the point of the accident.

Plaintiff offered evidence which, when taken in the light most favorable to her, tended to show the following: The accident occurred near the intersection of N. C. 102 and Rural Paved Road 1724, this intersection being located some three miles east of Ayden and being known as Cannon's Crossroads. N. C. 102 runs generally east and west while R.P.R. 1724 runs generally north and south. At the southwest corner is located Stokes' Grill. Near the southeast corner was located Cannon's Store and approximately opposite the store, northeast of the intersection, was the residence of Cannon. The front of Cannon's Store was some 100 feet from the intersection. Cannon, 77 years old, had walked across the westbound lane of N. C. 102 and had started to cross the eastbound lane. At that point, Cannon noticed the defendant Dudley, who had just pulled

away from the grill in the dump truck belonging to the Farm Center, heading east on N. C. 102. Cannon stepped back over the center line to allow the truck to pass and, while standing in the westbound lane, was struck by the car operated by defendant Mason. Plaintiff's evidence indicated that the defendant Dudley had just gotten past Cannon when he was struck by defendant Mason.

The evidence indicated that the accident happened around 9:45 a.m. on a cloudy day. The road from the east was straight and level, with visibility on this particular day of one-half to three-quarters of a mile. The road was a well-traveled road, but there was no evidence of other vehicles on this occasion. The shoulder of the road was wider than normal on both sides of the road, as there was an abandoned store yard on the north side of N.C. 102 and the yard of Cannon's Store on the south side.

One witness testified that he heard skidding tires; none of the witnesses heard a horn blow.

At the close of plaintiff's evidence, defendants' motions for nonsuit were granted. Plaintiff appealed from the judgment dismissing the action as to defendants Minix and Mason.

Everett & Cheatham by James T. Cheatham and C. W. Everett, Jr., for plaintiff appellant.

Gaylord & Singleton by L. W. Gaylord, Jr., for defendant appellees Minix and Mason.

BRITT, J.

The sole question presented is whether the superior court committed error in allowing the motions for nonsuit as to defendants Minix and Mason. This question requires a determination of the sufficiency of the evidence, considering the evidence in the light most favorable to the plaintiff, resolving contradictions in the evidence in her favor, and giving her the benefit of all reasonable inferences.

Statement of the principles governing this case is not difficult; however, application of these principles to the facts is extremely difficult, perhaps because of the lack of clarity in the facts.

The key statute is G.S. 20-174. Subsection (a) of that statute 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." Subsection (e) provides: "Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due

care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

In *Price v. Miller,* 271 N.C. 690, 157 S.E. 2d 347, the Supreme Court quoted the following from *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462:

> "'A motorist operates his vehicle on the public highways where others are apt to be. His rights are relative. Should he lapse into a state of carelessness or forgetfulness his machine may leave death and destruction in its wake. Therefore, the law imposes upon him certain positive duties and exacts of him constant care and attention. He must at all times operate his vehicle with due caution and circumspection, with due regard for the rights and safety of others, and at such speed and in such manner as will not endanger or be likely to endanger the lives or property of others. G.S. 20-140; . . .'
>
> 'He must operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, *Cox v. Lee, ante* (230 N.C. 155), decrease his speed when any special hazard exists with respect to pedestrians, (G.S. 20-141(c), and, if circumstances warrant, he must give warning of his approach by sounding his horn. G.S. 20-174(e); . . .'"

In the case at hand, the evidence favorable to the plaintiff indicates that Cannon had stepped back into defendant Mason's path in order to allow defendant Dudley to pass. The road may have been as narrow as eighteen feet, in which case a prudent man would be justified in stepping back beyond the center line to allow a large truck to pass, especially if unaware of any traffic in the other lane. Of necessity, the truck would not have attained great speed in the distance from the grill to the place where Cannon was standing. Since the jury could find that Cannon had stood in the northern lane the entire time while defendant Dudley approached and passed him, the jury would be reasonable in concluding that defendant Mason had ample opportunity to observe Cannon and to take evasive action. Defendant Mason had an adequate "escape route" via the northern shoulder of the road, while Cannon had none. Moreover, none of the witnesses heard a horn and no skid marks were found. The evidence favorable to the plaintiff presents a question for the jury on the negligence of defendant Mason. The parties stipulated that any negligence on the part of Mason is imputed to defendant Minix.

The evidence favorable to plaintiff does not disclose contributory negligence so clearly as to render any other reasonable conclusion impossible. Cannon may have been entirely reasonable in stepping back, depending partially on the width of the road and truck and on the location of the truck in relation to Cannon. The jury should decide the issue.

For the reasons stated, we hold that the trial court erred in entering judgment of involuntary nonsuit and dismissing the action as to defendants Minix and Mason, necessitating a

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. LEROY STILLEY

No. 6921SC119

(Filed 28 May 1969)

Constitutional Law § 34; Criminal Law § 26— former jeopardy — trial continued in municipal court — appeal to superior court

In this prosecution in the superior court upon defendant's appeal from a conviction in the municipal court for the crime of driving on a public highway while under the influence of intoxicants, the superior court properly denied defendant's motion to dismiss the charge on the ground of double jeopardy in that after defendant's trial had begun in the municipal court it was continued at the solicitor's request until the next day, which defendant contends was a new session of court, when it was resumed and completed, since upon defendant's appeal to the superior court the trial is *de novo* without regard to the plea, trial, verdict or judgment of the municipal court. G.S. 15-177.1.

APPEAL by defendant from *Beal, S.J.*, at the 18 November 1968 Schedule C Special Criminal Session of FORSYTH Superior Court.

A warrant, proper in form, issued from the Municipal Court of the City of Winston-Salem, charged that defendant did on or about 28 October 1967 within the corporate limits of the City of Winston-Salem unlawfully and wilfully operate a motor vehicle upon a public highway while under the influence of intoxicating liquor. Defendant was found guilty in said court and from judgment imposed appealed to the Superior Court of Forsyth County.

When the case was called for trial in superior court and before

pleading to the charge, defendant's counsel informed the court "that he had a motion to make prior to the entering of the plea for the purpose of preserving a motion made in the trial of this case in the Municipal Court of the City of Winston-Salem, Traffic Division." Defense counsel proceeded to move that the action be dismissed on the ground of double jeopardy; the court denied the motion. Defendant then pleaded not guilty to the charge and the case proceeded to trial. After a jury was empaneled, defendant again made a motion to dismiss the action on the ground of double jeopardy and introduced evidence in support of the motion. The court denied the motion, the trial proceeded, and the jury found the defendant guilty as charged. From judgment imposed, defendant appealed.

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

Wilson & Morrow by John L. Morrow for defendant appellant.

BRITT, J.

The sole question presented by this appeal is whether the superior court erred in refusing to allow defendant's motion for dismissal on the ground of double jeopardy.

The record discloses that the case was called for trial in the Municipal Court of the City of Winston-Salem on 19 December 1967. After defendant pleaded not guilty, witnesses for the State were called and sworn and a police officer of the City of Winston-Salem proceeded to take the witness stand and testify. During the officer's direct examination by the solicitor, he testified that a breathalyzer test was administered to the defendant and started to relate the results of said test. At that point, counsel for defendant objected and the judge sustained the objection. Thereupon, the solicitor requested that the case be continued until the next day, which request was granted over objection of defense counsel. When the case was called for trial on the following day and witnesses for the State were again called and placed under oath, defense counsel made a motion to dismiss the charges on the ground of former jeopardy. On a hearing of the motion, defense counsel was allowed to examine witnesses for the State who testified to the effect that they were prepared and available to testify on the preceding day. The municipal court judge overruled defendant's motion and proceeded to hear and dispose of the case as above stated.

At the hearings on the motions in municipal court and superior court, defendant introduced in evidence a provision of the Code of

the City of Winston-Salem which states: "The regular (chief) judge or one of the assistant (associate) judges of the municipal court shall preside over the sessions of the municipal court. Sessions of the court shall be held daily, Saturdays, Sundays and legal holidays excepted; provided, however, that the regular (chief) judge of the court may, in his discretion, order the holding of sessions on Saturdays."

Defendant contends that each day in the Municipal Court of Winston-Salem constituted a "session" of the court and that he was subjected to double jeopardy when the court began his trial on one day and then proceeded to continue his case until the next day when trial was resumed and completed. Inasmuch as defendant *appealed* to the superior court, we deem it unnecessary to pass upon the type or character of "session" employed by the court in which defendant was tried initially.

The Municipal Court of the City of Winston-Salem was established by the 1927 Session of the General Assembly; see Article XV of chapter 232 of the 1927 private laws. No provision was made for jury trials in criminal cases in the court and section 88 provides that "any person convicted in said court shall have the right of appeal to the Superior Court of Forsyth County, and upon such appeal the trial in Superior Court shall be *de novo.*" Said court was superseded by the implementation of the District Court in Forsyth County on the first Monday in December 1968 pursuant to G.S. 7A-131.

In *State v. Goff,* 205 N.C. 545, 172 S.E. 407, it is said: "When the effect of an appeal is to transfer the entire record to the appellate court, and to cause the action to be retried in that court as if originally brought therein, as is the case when appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and is not thereafter available for any purpose. (Citations.)"

G.S. 15-177.1, enacted by the 1947 General Assembly, provides: "In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon." In *State v. Meadows,* 234 N.C. 657, 68 S.E. 2d 406, in an opinion by Ervin, J., the court declared that by virtue of this statute "* * * whenever the accused in a criminal action appeals to the Superior Court from an inferior court, the action is to be tried anew from the beginning to the end in the Superior Court on both the law and the facts,

without regard to the plea, the *trial,* the verdict, or the judgment in the inferior court." (Emphasis added.) See also *Spriggs v. N. C.,* 243 F. Supp. 57 (M.D.N.C. 1965), and *Doss v. N. C.,* 252 F. Supp. 298 (M.D.N.C. 1966), where quoted principle was followed.

We hold that defendant was not subjected to double jeopardy in violation of the Federal and State Constitutions and that the superior court did not err in overruling the motion for dismissal of the case.

No error.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER COLUMBUS WILLIS

No. 692SC143

(Filed 28 May 1969)

1. Criminal Law § 155— failure to aptly docket record on appeal

The appeal is subject to dismissal where the record on appeal was not docketed in the Court of Appeals within 90 days from the date of the judgment appealed from and the time for docketing was not extended. Court of Appeals Rules 5 and 48.

2. Criminal Law § 159— evidence submitted under Rule 19(d)(2) — failure to attach appendix to brief

The appeal is subject to dismissal where appellant submits the complete transcript of evidence under Rule 19(d)(2) but fails to attach an appendix to his brief setting forth in succinct language with respect to those witnesses whose testimony he deems pertinent to the questions raised on appeal what he says the testimony of such witnesses tends to establish. Court of Appeals Rules 19(d)(2) and 48.

3. Criminal Law § 29— motion to determine mental competency — necessity for ruling before plea

In this homicide prosecution, failure of the trial court to rule on defendant's motion to determine his mental competency to stand trial before requiring him to plead to the indictment constitutes prejudicial error.

4. Homicide § 15; Criminal Law § 42— identity of stains as blood stains

In this homicide prosecution, the court did not err in permitting the sheriff, a witness for the State, to identify certain stains or discolorations as blood stains.

APPEAL by defendant from *Cowper, J.,* 7 October 1968 Session of the Superior Court of HYDE County.

The defendant was charged in a bill of indictment with the crime of murder in the first degree of one Flossie M. Selby on 5 December 1962.

At the May 1963 Session, Hyde Superior Court, counsel for the defendant called the attention of the court to the fact that defendant had previously been committed to a mental institution in the State of New York. An order was entered on 21 May 1963 committing defendant to the State Hospital at Goldsboro, North Carolina, under the terms of G.S. 122-91 for observation and a phychiatric report. On 20 June 1963 a report from the State Hospital was forwarded to the Clerk of Superior Court which contained the diagnosis that defendant had a schizophrenic reaction, paranoid type, and directed that defendant be returned to the court as unable to stand trial.

The cause came on for hearing during the October 1963 Session, and, after the reading of the psychiatric report to the jury, an issue was submitted as follows: "Is the defendant, Christopher Columbus Willis, unable to plead to the bill of indictment and unable to stand trial at this term of Court by virtue of his present mental incompetency?" The issue was answered by the jury, "Yes." The court then ordered that defendant be committed to the State Hospital for further treatment and remain confined therein until such time as the authorities of the hospital shall report to the Clerk of Superior Court that defendant is mentally capable to plead to the bill of indictment, to confer with his counsel regarding his defense and to stand trial upon the charge against him.

In a report dated 9 October 1967 authorities at the hospital concluded that defendant's condition had improved and that he should be returned to court as able to stand trial. Thereafter, and before arraignment when the case came on for trial on 7 October 1968 defendant moved through his counsel that the court rule on the competency of the defendant to stand trial. The court did not at that time rule on this motion but "reserved its ruling", to which the defendant excepted. Defendant then tendered a plea of not guilty to second degree murder and the trial proceeded. Upon convening court on 10 October 1968, after all of the evidence had been completed and argument of counsel for both the State and defendant had been presented to the jury, the court entered an order in which, among other things, appears the following: "That, during the overnight recess, the Court was successful in finding the ruling of the Supreme Court in *State v. Propst (1968)*, 274 N.C. 62, which authority the Court showed to defense counsel and to the Solicitor." The court then made

an order finding defendant was competent to stand trial and proceeded to charge the jury, which thereafter found defendant guilty of murder in the second degree.

To the judgment of the court that defendant be committed to the State's Prison to serve 22 years with a recommendation that he be committed to a mental institution for service of the sentence, defendant excepted and appealed.

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

John A. Wilkinson for defendant.

MALLARD, C.J.

[1] It appears from the record that the judgment appealed from was entered 10 October 1968; thus absent an order extending the time for docketing, the record on appeal should have been docketed in this Court on or before 8 January 1969. Rule 5, Rules of Practice in the Court of Appeals of North Carolina. Counsel for the defendant did not docket the record on appeal in this Court until 20 January 1969, and for failure to docket on time this appeal is subject to dismissal. Rule 48, Rules of Practice, *supra.*

[2] In addition to failure to docket on time, counsel for defendant submitted the complete transcript of the evidence under Rule 19(d)(2), but contrary to the provisions of that rule, he did not attach an appendix to his brief setting forth in succinct language with respect to those witnesses whose testimony he deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish. The appeal is thus further subject to dismissal. Rule 19(d)(2), Rules of Practice, *supra;* Rule 48, Rules of Practice, *supra.*

In addition to the foregoing counsel for the defendant, in the preparation of his brief did not comply with that portion of Rule 28 of the Rules of Practice in the Court of Appeals of North Carolina which requires "Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record . . ."

[3] Despite the failure of defendant through his counsel to comply with the rules of this Court, we have considered the record here as a petition for writ of certiorari, allowed it, and considered the case on its merits. We are of the opinion that the failure of the trial

court to rule on defendant's motion to determine his mental competency to stand trial before requiring him to plead to the indictment places this case within the doctrine of *State v. Propst, supra.* We hold the court's failure to rule on the motion at that time to be prejudicial error requiring that the verdict and judgment be vacated and this cause remanded for further proceedings.

[4] Defendant contends it was error to permit the State's witness Sheriff Cahoon to identify certain stains or discolorations as blood stains. We hold that it was not error to permit the witness Cahoon, the Sheriff of Hyde County, to identify certain stains or discolorations as blood stains. See 23 C.J.S., Criminal Law, § 876(c), page 452. See also *State v. Smith,* 223 N.C. 457, 27 S.E. 2d 114. In the case of *People v. Preston,* 341 Ill. 407, 173 N.E. 383, it is said:

> "Witnesses who were at the scene of the crime the next morning testified to finding blood stains on the car and blood on the grass on the roadside near where the body was found. It is claimed that this evidence was incompetent as being the conclusions of nonexpert witnesses. The existence of blood in large quantities, where the stains are recent and marked, may be distinguished by most persons, and, while it is more difficult to discover the character of a few drops or a smaller quantity, it does not necessarily follow that nonexperts cannot testify to its reality as a matter of fact. *Greenfield v. People,* 85 N.Y. 75, 39 Am. Rep. 636. It was for the jury to determine the weight to be given to the testimony. *People v. Korak,* 303 Ill. 438, 135 N.E. 764."

Defendant's exceptions to the charge are without merit. When the charge is read as a whole no prejudicial error appears.

Some of defendants exceptions and assignments of error were not discussed in his brief and are therefore deemed abandoned.

Error and remanded.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. OTIS CHARLES BAYNARD

No. 6929SC266

(Filed 28 May 1969)

1. Criminal Law § 142— suspended sentences — appeal

An appeal from the imposition of a suspended sentence presents only error of law.

2. Criminal Law § 142— suspended sentence — duration of five years

Suspension of sentence for a period of five years is within the limits provided by law. G.S. 15-200.

3. Criminal Law § 142— suspended sentence — reasonableness of conditions

Upon defendant's conviction of operating a motor vehicle upon the highways of the State while under the influence of intoxicating beverages, suspension of sentence on conditions that (1) defendant shall not go upon premises where intoxicating liquors are manufactured or sold for a period of five years and (2) defendant shall not ride in any motor driven vehicle except in his business for a period of two years *is held* reasonable both as to substance and time.

APPEAL by defendant from *McLean, J.*, 5 February 1969 Session, TRANSYLVANIA County Superior Court.

In March 1968 the defendant was indicted for operating a motor vehicle upon one of the public highways of the State of North Carolina in Transylvania County while under the influence of intoxicating liquor. At the October 1968 Session of the Superior Court of Transylvania County, the defendant was convicted of this offense and the prayer for judgment was continued until the February 1969 Session of the Superior Court of Transylvania County.

On 5 February 1969 Judge McLean entered judgment as follows:

"In open court, the defendant appeared for trial upon the charge or charges of operating a motor vehicle upon the public highways of the State, while under the influence of intoxicating beverages, and prayer for judgment being continued until this time. It is the judgment of the Court that the defendant be confined in the common jail of Transylvania County for a period of 2 years to be assigned to work under the supervision of the State Dept. of Corrections, as provided by law.

Upon motion of the defendant, through his counsel and by and with his consent and at his request, the foregoing prison sentence is suspended for a period of 5 yrs. and defendant placed on probation, upon the following terms and conditions, together with

the terms and conditions of the Probationary Judgment, signed simultaneously herewith:

(1) That the defendant shall not own, possess or drink any intoxicating liquors for a period of 5 yrs.

(2) That the defendant shall not go in, upon or about any premises wherein intoxicating liquors are manufactured or sold, either legally or illegally for a period of 5 yrs.

(3) That the defendant pay into the Office of the Clerk of Superior Court of Transylvania County the sum of $300.00.

(4) That he not ride in upon or about any motor driven vehicle except in his business for a period of 2 yrs.

(5) That he not violate any of the criminal laws of this State or any other State of the Union or Federal Government for a period of 5 yrs.

Upon breach of any of the foregoing conditions or the conditions of the Probationary Judgment, signed simultaneously herewith, Capias and Commitment to issue to place the prison sentence into effect.

ORDER:

Out of the monies ordered to be paid in under the foregoing Judgment, the Clerk shall first retain the cost of this action and pay the balance to the school fund, as provided by law.

This 5 Feb. 1969.

W. K. McLEAN
Judge Presiding"

The defendant appealed to the Court of Appeals from this judgment and assigned error in that special conditions No. 2 and No. 4 are unreasonable.

The defendant having been found to be an indigent, an attorney was appointed for him to perfect his appeal, and the county was ordered to pay the costs of the appeal.

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

Garren & Stepp by W. Hailey Stepp, Jr., for defendant appellant.

CAMPBELL, J.

The only question presented for decision is whether the conditions attached to the suspension of the sentence are reasonable.

[1] The imposition of sentences with provision for suspension thereof and probation are provided for by statute. G.S. 15-197, et seq.

G.S. 15-180.1 provides for an appeal from a suspended sentence:

> ". . . The purpose of this section is to provide that by giving notice of appeal the defendant does not waive his acceptance of the terms of suspension of sentence. Instead, by giving notice of appeal, the defendant takes the position that there is error of law in his conviction."

It is to be noted that in the judgment entered by Judge McLean in the trial court, it is specifically set out:

> "Upon motion of the defendant, through his counsel and by and with his consent and at his request, the foregoing prison sentence is suspended for a period of 5 yrs. . . ."

The appeal therefore presents only: ". . . error of law. . . ."

[2] The period of 5 years or the duration of the suspension is within the limits provided by law. G.S. 15-200; *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508.

The only remaining ground for attack in the instant case is based upon the fact that the conditions are unreasonable and this in turn is based upon the proposition that the conditions are unrelated to and did not grow out of the offense for which the defendant was convicted.

[3] The defendant contends that conditions No. 2 and No. 4 are unreasonable and therefore void.

In the case of *State v. Smith,* 233 N.C. 68, 62 S.E. 2d 495, the defendant had been convicted on a charge of larceny of 900 pounds of seed cotton. The defendant in that case was sentenced to two years and placed on probation with a special condition that the defendant "be denied the right to operate a motor vehicle on the highways of North Carolina during the first 12 months of probation." In that case, Barnhill, J., (later C.J.) speaking for the Court stated:

> "While at first blush larceny and the operation of a motor vehicle would seem to be wholly unrelated, such is not necessarily the case here. The defendant was charged with the larceny of 900 pounds of seed cotton. The 'taking and carrying away' of such a heavy and bulky quantity of seed cotton no doubt involved the use of a vehicle. If, in committing the larceny the defendant used an automobile, the crime and the operation are directly related. It is presumed, in the absence of proof to the

contrary, that the proceeding was legal and the court acted with proper discretion. *S. v. Hilton,* 151 N.C. 687, 65 S.E. 1011; *S. v. Everitt,* 164 N.C. 399, 79 S.E. 274.

Furthermore, the primary purpose of a suspended sentence or parole is to further the reform of the defendant. There is strong suggestion in the record that defendant is addicted, at least to some extent, to the use of alcoholic beverages. The judge may have considered that the primary need of defendant was to be kept off the public roads while under a steering wheel. Certainly there is nothing in the record to induce a contrary view. *S. v. Ray,* 212 N.C. 748, 194 S.E. 472."

In the case at bar, the defendant had been convicted of driving a motor vehicle while under the influence of intoxicating beverages. It is obvious from the conditions imposed that the Judge considered that the primary need of defendant was to be kept away from alcoholic beverages and to be kept off the public roads when in a motor vehicle whether as passenger or as driver unless it was a matter of business.

"Certainly there is nothing in the record to induce a contrary view. . . ."

So far as this record discloses, the conditions imposed were reasonable, both in substance and time. Therefore, the judgment of the Court below must be

Affirmed.

MORRIS and PARKER, JJ., concur.

C. G. BERRY v. CITY OF WILMINGTON, NORTH CAROLINA

No. 695SC224

(Filed 28 May 1969)

1. Pleadings § 21— necessity for stating grounds of demurrer

G.S. 1-128 applies to all demurrers, written or oral, and if the grounds for demurrer are not distinctly specified, the demurrer may be disregarded.

2. Pleadings § 21— demurrer for failure to state cause of action — pointing out defect in complaint

A demurrer for failure of the complaint to state a cause of action is properly overruled when the demurrer does not point out any defect in the complaint which would entitle defendants to a dismissal of the action.

3. Pleadings § 26— demurrer — failure to point out defect in complaint

Defendant's demurrer is properly overruled where it merely alleges that the complaint does not state facts sufficient to constitute a cause of action and sets forth abstract principles of law which do not distinctly specify any grounds of objection to the complaint.

ON certiorari to Superior Court of NEW HANOVER County, on petition of defendant to review order of *Bundy, J.*, dated 17 December 1968 overruling demurrer interposed by defendant. Defendant excepted to the overruling of the demurrer.

McClelland & Barefoot by R. S. McClelland, and Rountree and Clark by George Rountree, Jr., for plaintiff appellee.

Yow and Yow by Cicero P. Yow and Lionel L. Yow, and James L. Nelson for defendant appellant.

Donald L. Smith for City of Raleigh, Amicus Curiæ.

MALLARD, C.J.

The complaint filed herein by the plaintiff reads as follows: "The plaintiff, complaining of the defendant, says:

1. That plaintiff is and has been at all material times a citizen and resident and taxpayer in the City of Wilmington, North Carolina; and the defendant is and has been at all material times a municipal corporation organized and existing under the laws of the State of North Carolina.

2. That the plaintiff is and was at all material times the owner and occupant of the premises in Forest Hills identified as 127 Forest Hills Drive within the City of Wilmington; that the City of Wilmington has owned, operated and controlled its waterworks, sewerage system and drainage system for many years and has complete control of the drainage system of the street known as Forest Hills Drive running generally in a southwardly direction from Market Street on U. S. Highway #17 to Wrightsville Avenue.

3. That the defendant City of Wilmington controls and operates the drainage system on Forest Hills Drive which it uses to drain the surface waters collecting in rainy weather from Forest Hills Drive to the natural drainage system of Burnt Mill Creek, which runs generally athwart Forest Hills Drive in an eastwest direction.

4. That regularly every year heavy rains occur in the Forest Hills area; and the plaintiff's premises are flooded by surface waters running southwardly down Forest Hills Drive because of the insufficiency of the drainage system operated and controlled by the defendant City, and this fact has been made known to the governing authorities of the City of Wilmington time and again, but they have continued to maintain without correction the same insufficient drainage system to the hurt, injury and damage of the plaintiff's property due to flooding by surface waters in the amount of Two Thousand Dollars; and such an insufficient drainage system, maintained, even after notice, constitutes a private nuisance causing damage to this plaintiff; and this plaintiff is advised, believes and therefore alleges that he is entitled to have such a nuisance abated.

WHEREFORE, Plaintiff prays judgment that the nuisance herein referred to be abated, and that the defendant be required by mandatory injunction to install and maintain in proper working order a sufficient drainage system in and along Forest Hills Drive to prevent flooding of plaintiff's property from normal rainy weather conditions to be expected annually."

Before answering the complaint defendant filed a written demurrer reading as follows:

"That plaintiff's Complaint does not state facts sufficient to state a cause of action against the defendant, in that the duties of a municipal corporation in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi-judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general conveniences throughout a municipality; and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a lot of land.

WHEREFORE, the defendant prays that this action be dismissed."

On 17 December 1968 Judge Bundy signed an order overruling defendant's demurrer.

[1, 2] In G.S. 1-128 it is provided, among other things, "The demurrer must distinctly specify the grounds of objection to the complaint, or it may be disregarded." This section applies to all demurrers, written or oral. *Adams v. College,* 247 N.C. 648, 101 S.E.

2d 809; *Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 131 S.E. 2d 900. A demurrer which merely charges that the complaint does not state a cause of action is broadside and will be disregarded. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E. 2d 597. "Also, a demurrer for failure of the complaint to state a cause of action is properly overruled when the demurrer does not point out any defect in the complaint which would entitle defendants to a dismissal of the action." 6 Strong, N. C. Index 2d, Pleadings § 21, p. 337. *McPherson v. Burlington*, 249 N.C. 569, 107 S.E. 2d 147.

In the case of *Ledwell v. Proctor*, 221 N.C. 161, 19 S.E. 2d 234, a demurrer interposed in the Superior Court was held to have been properly overruled because it failed to point out any defect in the complaint which would entitle the defendant to a dismissal of the action. The defendant Proctor also interposed a demurrer *ore tenus* in the Supreme Court, asserting that it appeared upon the face of the complaint that it failed to state or set out a cause of action or to state or set out facts sufficient to constitute a cause of action. This demurrer *ore tenus*, which was allowed, was reduced to writing and specifically listed and asserted seven different grounds of objection to the complaint.

[3] In the case before us there has been no demurrer *ore tenus* filed. The written demurrer filed herein after alleging that the complaint does not state facts sufficient to constitute a cause of action does not thereafter mention the complaint or point out or list any deficiency therein. The abstract principles of law set out in the demurrer do not distinctly specify any grounds of objection to the complaint. We are of the opinion that the written demurrer interposed in the Superior Court does not *point out any defect in the complaint* as required by the statute, G.S. 1-128, and for that reason the demurrer was properly overruled.

It is interesting to note that the City of Raleigh, *Amicus Curiæ*, in its brief filed herein asserts that the trial judge was in error in overruling the demurrer of the defendant, but also asserts that the court in doing so should have given the plaintiff leave to amend his complaint, if he so desires.

The other questions appellant attempts to raise in its brief are not properly presented on this record.

The order overruling the demurrer is affirmed.

Affirmed.

BRITT and PARKER, JJ., concur.

ALBEMARLE EDUCATIONAL FOUNDATION, INC. v. A. B. BASNIGHT

No. 691DC202

(Filed 28 May 1969)

1. Schools § 2; Contracts § 27— private school — action for tuition — sufficiency of evidence

In an action by a private school to recover tuition on a contract of enrollment, evidence that plaintiff sent to the parents of each child in attendance an enrollment application for the next school year, that the application contained the statement, "READ CAREFULLY, THIS IS A CONTRACT AGREEMENT," and provided that once submitted the application was not subject to withdrawal or cancellation by applicants, that the defendant parent signed the enrollment application on behalf of his daughter, that the application was subsequently approved by plaintiff's board of directors, and that plaintiff purchased textbooks and hired teachers upon the expectation of tuition from defendant, *held* sufficient to support a jury finding that the parties had created a binding agreement.

2. Contracts § 2— communication of acceptance

An acceptance, unless otherwise specified, may be communicated by any means sufficient to manifest assent.

3. Contracts § 4— consideration

Consideration consists of some benefit or advantage to the promisor, or some loss or detriment to the promisee.

4. Contracts § 4— consideration

There is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.

APPEAL by plaintiff from *Privott, J.*, at the 25 November 1968 Civil Session of PASQUOTANK District Court.

Plaintiff filed its complaint 19 June 1968 alleging that the parties had entered into a contract for enrollment of the defendant's daughter in the school operated by plaintiff. Plaintiff further alleged acts in reliance upon the contract, demand on the defendant for the tuition in the amount of $370.00, and refusal of the defendant to pay.

Defendant answered 18 July 1968 denying the existence of a contract and alleging that his daughter attended the school during the school year 1966-1967 but not during 1967-1968, that plaintiff has rendered no services of value to the defendant for which it has not been paid, and that plaintiff was notified in May or June of 1967 that defendant's daughter would not attend.

Plaintiff replied 29 July 1968 denying the allegations of defend-

ant's further answer, except admitting that defendant's daughter did not attend the school during the school year 1967-1968.

Plaintiff's evidence tended to show the following: Defendant's daughter attended Albemarle Academy and took an active part in its programs during the year 1966-1967. On 15 February 1967, the course offerings and programs were established for the following year. Immediately thereafter, a form letter was sent to the parents of each child in attendance during 1966-1967, advising them of the grades and courses to be offered, and the amounts of the tuition. A form labeled APPLICATION BLANK was enclosed. This form provided blanks to be filled in by the applicant, including birthdate, grade to be entered and various biographical and educational background information. Following this was the statement, "READ CAREFULLY, THIS IS A CONTRACT AGREEMENT." After this statement was the following paragraph:

> "We understand that parents or guardians whose children are accepted by the Albemarle Academy are obligated to the school for the full tuition for that year of school should they withdraw or be withdrawn by school authorities before the end of the year. When a student enrolls, space is reserved and certain expenses incurred on behalf of the student. We understand that no records are released until all obligations of the student and parent or guardian to the school are satisfied in full. After submission, the application is not subject to withdrawal or cancellation by applicants.
>
> Date March 3, 1967 SIGNED: /s/ A. B. Basnight
> Parent or Guardian
> /s/ Cindy Basnight
> Student"

The application was approved by plaintiff's Board of Directors on 11 April 1967. The application was initialed at the top and the approval was noted in the minutes of the Board. Plaintiff presented evidence of employment of teachers based on the number of approved applications and evidence relating to purchase of textbooks and supplies.

In June 1967, defendant's daughter, Cynthia, called the school and informed plaintiff's secretary that she had decided not to return to the Academy the next year.

On 17 August 1967, plaintiff wrote the defendant advising him that a binding contract had been signed by him and that the school wished to have a definite answer from him as to whether Cynthia

would be in attendance. Prior to mailing the letter to defendant, there had been no communication by him to the plaintiff other than the application.

At the close of plaintiff's evidence, defendant's motion for nonsuit was granted. Plaintiff appealed.

E. Ray Etheridge for plaintiff appellant.

John T. Chaffin for defendant appellee.

BRITT, J.

[1] The question presented is whether plaintiff's evidence, taken in the light most favorable to it, presents facts sufficient to justify a jury in finding that the parties had created a binding contract.

[2] Defendant does not contest the existence of an offer. It is established law that an acceptance, unless otherwise specified, may be communicated by any means sufficient to manifest assent. 1 Corbin on Contracts, 1963 Ed., § 67, p. 275; American Law Institute, Restatement of Contracts, §§ 61, 64, pp. 67, 70. On this basis, the letter of 17 August 1967 could be found to constitute an acceptance of the offer made by the application.

[3, 4] Defendant insists that the purported contract relied on by plaintiff was not supported by sufficient consideration. In *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362, we find the following: "* * * 'It may be stated as a general rule that "consideration" in the sense the term is used in legal parlance, as affecting the enforceability of simple contracts, consists of some benefit or advantage to the promisor, *or* some loss or detriment to the promisee. *Exum v. Lynch*, 188 N.C. 392, 125 S.E. 15; *Cherokee County v. Meroney*, 173 N.C. 653, 92 S.E. 616; *Institute v. Mebane*, 165 N.C. 644, 81 S.E. 1020; *Findley v. Ray*, 50 N.C. 125. It has been held that "there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not." 17 C.J.S. 426. *Spencer v. Bynum*, 169 N.C. 119, 85 S.E. 216; *Basketeria Stores v. Indemnity Co.*, 204 N.C. 537, 168 S.E. 822; *Grubb v. Motor Co.*, 209 N.C. 88, 183 (sic) S.E. 730.' *Stonestreet v. Oil Co.*, 226 N.C. 261, 37 S.E. 2d 676; *Bank v. Harrington*, 205 N.C. 244, 170 S.E. 916."

[1] In the present case, plaintiff offered evidence of the purchase of textbooks and hiring of teachers based upon the expectation of

receipt of the tuition from defendant. This could be found sufficient to indicate an increase in the plaintiff's expenses as a result of defendant's actions.

Nothing appears from the plaintiff's evidence to indicate that the defendant's daughter acted for anyone but herself in her actions in June 1967. Moreover, it is not clear that the plaintiff was put on notice by the daughter's telephone call that it should not expect to receive the tuition, since the application had specifically provided that it could not be withdrawn or cancelled after submission.

Considering the evidence in the light most favorable to the plaintiff, we conclude that the plaintiff offered evidence sufficient, if believed, to entitle it to relief. Therefore, the motion for nonsuit should have been overruled.

Reversed.

MALLARD, C.J., and PARKER, J., concur.

JASPER PHILLIPS v. UTICA MUTUAL INSURANCE COMPANY

No. 693SC26

(Filed 28 May 1969)

1. Automobiles § 105— registration as evidence of ownership and responsibility

G.S. 20-71.1 applies only when plaintiff, upon sufficient allegations, seeks to hold the owner liable for the negligence of a non-owner operator under the doctrine of *respondeat superior.*

2. Insurance § 88— suit upon garage liability policy — sufficiency of evidence

In an action by an injured third party against an insurer under a garage liability policy after recovery of an unsatisfied judgment for personal injuries against the operator and the purchaser of the vehicle, defendant's motion for nonsuit is properly allowed where plaintiff's evidence fails to show that the vehicle was covered by the garage liability policy issued by defendant on the date of the accident.

APPEAL by plaintiff from *Cohoon, J.,* 23 September 1968 Session, Superior Court of PITT.

Plaintiff, in a former action, had obtained a judgment against John Henry Green and George Cates for damages for personal in-

juries sustained by him as the result of the negligent operation of an automobile operated by Cates with the permission of and under the control and supervision of Green. Execution had been issued and returned unsatisfied and no part of the judgment had been paid. This suit was instituted to recover on that judgment. Plaintiff alleges that defendant issued its policy of insurance to Elliott Chevrolet Company, Inc.; that the vehicle being operated by Cates with the permission of Green was covered by the policy; that the policy was in full force and effect on the date of the collision, to wit: 18 August 1963; and that defendant had denied liability and refused to pay the amount of the judgment. Defendant answered, admitting the issuance of the policy and the existence of the unsatisfied judgment but denying coverage and liability. By way of further answer and defense, defendant alleged that Elliott Chevrolet Company, on 12 August 1963, sold the car to Green and delivered possession thereof to him; that no agency existed between Elliott Chevrolet Company and Green and no permission was ever given, either expressly or impliedly, by Elliott Chevrolet for Cates to use or operate said car.

At trial, plaintiff introduced into evidence the judgment, execution, copy of the insurance policy, and certified record of Department of Motor Vehicles showing transfer of titles to said car by Elliott Chevrolet Company to John Henry Green on 26 August 1963.

Defendant's motion for judgment as of involuntary nonsuit was allowed and plaintiff appealed.

Gaylord and Singleton by A. Louis Singleton for plaintiff appellant.

James, Speight, Watson and Brewer by W. W. Speight for defendant appellee.

MORRIS, J.

Appellant contends that the motion for judgment as of nonsuit should not have been granted for that the application of G.S. 20-71.1 required submission of the case to the jury.

G.S. 20-71.1 reads as follows:

> *"Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.* — (a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be

prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.

(b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment."

[1] This statute applies when plaintiff, upon sufficient allegations, seeks to hold the owner liable for the negligence of a non-owner operator under the doctrine of *respondeat superior.* Chief Justice Barnhill, speaking for the Court in *Roberts v. Hill,* 240 N.C. 373, 82 S.E. 2d 373, said:

"A careful consideration of the original Act, ch. 494, S.L. 1951 (of which G.S. 20-71.1 is a codification), including its caption, leads us to the conclusion that it was designed and intended to apply, and does apply, only in those cases where the plaintiff seeks to hold an owner liable for the negligence of a non-owner operator under the doctrine of *respondeat superior.* 'Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309. *It does not and was not intended to have any other force or effect.' Hartley v. Smith,* 239 N.C. 170. (Emphasis added.) This language appearing in the *Hartley case* was used advisedly. We adhere to what is there said."

In this action the complaint contains no allegations of agency or *respondeat superior.* The suit is not against the insured, Elliott Chevrolet Company, but against the insurer. The complaint simply alleges that the car was insured under a policy issued by defendant to Elliott Chevrolet Company and was being driven by one Cates with the permission of and under the control and supervision of John Henry Green. There is no allegation that the automobile was owned by Elliott Chevrolet or anyone else.

The policy of insurance, introduced into evidence by plaintiff, under which plaintiff contends defendant is liable is a garage liability policy. It does not list or describe any specific automobile. It covers,

under AUTOMOBILE HAZARDS: "1. . . . (a) The ownership, maintenance or use of any automobile for the purpose of garage operations, and the occasional use for other business purposes and the use for non-business purposes of any automobile owned by or in charge of the named insured and used principally in garage operations," and under PERSONS INSURED: "(3) . . . (a) any person while using, with the permission of the named insured, an automobile to which the insurance applies under paragraph 1(a) or 2 of the Automobile Hazards, provided such person's actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission." The policy further provides under the same section: "None of the following is an insured: . . . '(iii) any person or organization other than the named insured with respect to any automobile . . . possession of which has been transferred to another by the named insured pursuant to an agreement of sale;".

[2] Plaintiff's evidence fails to show that the injuries received for which he recovered judgment are covered by defendant's policy. Failure to show coverage requires nonsuit. *Bailey v. Insurance Co.*, 265 N.C. 675, 144 S.E. 2d 898, and cases there cited.

The judgment entered in the Superior Court of Pitt County is Affirmed.

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

STATE OF NORTH CAROLINA v. FRED RONALD MANESS
No. 6919SC241

(Filed 28 May 1969)

Constitutional Law § 32— right to counsel — misdemeanor amounting to a serious offense

In prosecution in the superior court for driving a motor vehicle on a public highway while under the influence of intoxicating liquor, a misdemeanor amounting to a serious offense, defendant is entitled to a new trial where it appears that he was tried and found guilty without the assistance of counsel, and the record is silent on the questions of whether defendant was an indigent and whether he voluntarily and understandingly waived his right to counsel.

APPEAL by defendant from *Crissman, J.*, at the 25 November 1968 Criminal Session of RANDOLPH Superior Court.

Defendant was charged in a warrant issued from the Asheboro Recorder's Court with driving a motor vehicle on a public highway while under the influence of intoxicating liquor. Defendant was found guilty in the recorder's court and was given a twelve-months prison sentence from which he appealed to the Superior Court of Randolph County.

In superior court, defendant appeared without counsel, pled not guilty, was found guilty by a jury, and was given an eight-months prison sentence from which he appealed to this Court.

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

John Randolph Ingram for defendant appellant.

BRITT, J.

The record before us leaves much to be desired. Defendant's exception No. 1, which is the basis for the first assignment of error, states "the Court erred in ruling that Defendant, who was indigent and unable to employ Counsel, was not entitled to Court appointed Counsel in a misdemeanor case." The only proof we have regarding defendant's exception No. 1 is the following sentence contained in the Statement of Case on Appeal: "Defendant appeals assigning error in the conduct of the trial and in particular in that he was indigent and counsel was not appointed for him, the Court having ruled that in a misdemeanor case defendant was not entitled to have Court appointed Counsel." Evidently the record on appeal, including the Statement of Case on Appeal, was prepared by defendant's present counsel, but the record contains an agreement signed by said counsel and the district solicitor stipulating and agreeing on the record on appeal.

The record also contains a "Certificate of Judge" which purports to be a certificate signed by Crissman, J., on 27 November 1968 to the effect that defendant was fully informed in open court of the charges against him and of his right to have counsel appointed by the court to represent him in this case, but that defendant elected in open court to be tried without counsel and has executed "the above waiver" after its meaning and effect had been fully explained to him. The record contains no waiver. On 15 April 1969, defendant's counsel filed in this Court a "motion and affidavit to expunge record." The motion relates to the "Certificate of Judge" above-referred to and alleges that said certificate is not a part of the record in this case but is a part of the record in another case tried in Randolph

Superior Court and was not intended to be included in the record in this case. The attorney general accepted service of the motion on 14 April 1969 but has filed no answer to the motion. On 5 May 1969, defendant's counsel filed in this Court a stipulation signed by him and the district solicitor to the effect that the "Certificate of Judge" contained on page 4 of the record in the instant case is not a part of the record in *State v. Fred Ronald Maness*. Pursuant to the stipulation signed by the district solicitor, and in the absence of any answer by the attorney general to defendant's motion to expunge the record, we have allowed the motion.

When the "Certificate of Judge" is deleted from the record before us, we conclude that the defendant appeared in Randolph Superior Court without counsel, that he pled not guilty, was tried without the assistance of counsel, was found guilty as charged by a jury, and was sentenced to eight months in prison.

In *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245, filed 21 January 1969, the defendant was tried in superior court on a charge of driving a motor vehicle on a public street while under the influence of intoxicants; he was not represented by counsel in his trial in the superior court, was found guilty by a jury, and was sentenced to prison for eighteen months. Defendant appealed to the Court of Appeals where he was represented by privately-employed counsel; this Court upheld the conviction and sentence. Defendant then appealed to the Supreme Court of North Carolina, asserting violations of his constitutional rights. In an opinion by Huskins, J., the Supreme Court ordered a new trial, holding that by virtue of the Sixth and Fourteenth Amendments to the Constitution of the United States, a defendant who is charged with a misdemeanor amounting to a serious offense has a constitutional right to the assistance of counsel during his trial; that a serious offense is one for which the authorized punishment exceeds six months imprisonment and $500 fine; and waiver of counsel may not be presumed from a silent record. The court further held, as stated in headnote 8, that where defendant is charged with a misdemeanor amounting to a serious offense and is not represented by privately-employed counsel, the presiding judge must (1) settle the question of defendant's indigency and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived; these findings and determinations should appear of record.

The attorney general concedes that if the "Certificate of Judge" is deleted from the record in this case, we are confronted with virtually the same situation the Supreme Court considered in *Morris*.

We perceive no material distinction in the two cases and conclude that the instant case is controlled by *Morris*.

For the reasons stated, it is ordered that defendant be awarded a New trial.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. BOBBY LEE WALLS

No. 6926SC131

(Filed 28 May 1969)

1. Escape § 1— prosecution for second escape — proof of custody — admissibility of commitment

In a prosecution for a second offense of escape, a commitment signed by the clerk of a city recorder's court and impressed with the seal of the clerk is admissible to show that defendant was in lawful custody at the time of the escape.

2. Criminal Law § 68— identity of person by name — prima facie proof

Identity of name is prima facie evidence of identity of person, and is sufficient proof of the fact, in the absence of all evidence to the contrary.

3. Escape § 1— evidence of defendant's identity — name — commitment

In a prosecution for a second offense of escape, where the name set out in the commitment is the same name as the defendant on trial, this identity of names, nothing else appearing, is *prima facie* evidence that the defendant on trial is the same person named in the commitment.

4. Criminal Law § 141; Escape § 1— prosecution for second escape — proof of first conviction — commitment

In a prosecution for a second offense of escape, a more formal proof of the prior escape conviction is required than the commitment issued as the result of the prior conviction.

5. Criminal Law § 141— prosecution for repeated offenses — evidence of prior conviction — transcript

Where a person is charged in a bill of indictment with an offense which, on conviction thereof, is punishable with a greater penalty than on the first conviction, and the indictment properly alleges a prior conviction, a duly certified transcript of the record of the first conviction shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction. G.S. 15-147.

6. Criminal Law § 176— review of denial of motion to nonsuit

On appeal from a denial of defendant's motion to nonsuit, all of the evidence actually admitted, whether competent or incompetent, including that offered by defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon the motion.

APPEAL by defendant from *Falls, J.*, 2 December 1968 Schedule A Session, MECKLENBURG Superior Court.

Defendant was tried upon a bill of indictment charging him with a second offense of escaping from the custody of the State Prison.

From a verdict of guilty as charged, and judgment entered thereon, defendant appealed.

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

T. O. Stennett for the defendant.

BROCK, J.

[1] For the purpose of showing that defendant was in lawful custody at the time of the alleged escape, the State offered in evidence the commitment of Bobby Lee Walls, which commitment was signed by the Clerk of the City Recorder Court of Charlotte and which was impressed with said Clerk's official seal. This commitment recites the judgment of the Recorder Court to be for a term of two years upon conviction of temporary larceny of an automobile. The commitment is dated 20 September 1967, and the date of the alleged second escape is 13 September 1968; therefore the prison term specified in the commitment had not expired on the date of the alleged escape. Defendant assigns as error the admission of this commitment into evidence.

In *State v. Beamon*, 2 N.C. App. 583, 163 S.E. 2d 544, we held that a commitment signed by a deputy clerk of superior court and bearing the official seal of the clerk of superior court was admissible for the purpose of showing that defendant was in lawful custody at the time of the alleged escape. See also *State v. Cooper*, 3 N.C. App. 308, 164 S.E. 2d 550. It seems only reasonable that this rule should apply equally to a commitment bearing the signature of the clerk (or an assistant or deputy clerk) and the official seal of the clerk of any court of competent criminal jurisdiction in North Carolina.

[2, 3] The defendant further argues that the admission into evidence of the commitment was error because the State did not offer

evidence that the defendant on trial was the same person named in the commitment. The defendant did not take the stand.

The name as set out in the challenged commitment is exactly the same as the name of the defendant on trial. "This identity of names, nothing else appearing, furnishes evidence of the identity of person. Identity of name is *prima facie* evidence of identity of person, and is sufficient proof of the fact, in the absence of all evidence to the contrary." *State v. Mitchner,* 256 N.C. 620, 124 S.E. 2d 831; *State v. Herren,* 173 N.C. 801, 92 S.E. 596. See also 65 C.J.S., Names, § 15b(2), p. 41.

The challenged commitment was properly admitted to show that defendant was lawfully in custody at the time of the alleged escape and the identity of names was evidence of the identity of person requiring the jury to pass upon whether defendant on trial was the same person designated in the commitment. This assignment of error is overruled.

[4] For the purpose of showing a prior offense of escape, the only evidence offered by the State was a commitment issued by the clerk of Mecklenburg County Recorder Court reciting that Bobby Walls was convicted of escape at the 23 January 1968 Session of that court. The defendant assigns as error the admission of this commitment to establish a prior escape.

[5] Where a person is charged in a bill of indictment with an offense which, on conviction thereof, is punishable with a greater penalty than on the first conviction, and the indictment properly alleges a prior conviction, G.S. 15-147 provides that "a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction." cf. *State v. Powell,* 254 N.C. 231, 118 S.E. 2d 617.

[4] There seem to be cogent reasons for requiring, as the statute does, a more formal proof of a prior conviction than that required for showing lawful custody. The use of only the commitment issued as the result of the prior conviction of escape for the purpose of establishing the prior conviction was error. This assignment of error is sustained.

[6] Defendant assigns as error the denial of his motion for nonsuit. "All of the evidence actually admitted, whether competent or incompetent, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon the motion." *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; accord, *State v. Walker,* 266 N.C. 269,

145 S.E. 2d 833; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777. The defendant's motion for nonsuit was properly overruled.

For the error in admitting a commitment to establish a prior offense of escape there must be a

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM JAMES SUTTON

No. 6916SC198

(Filed 28 May 1969)

1. Criminal Law § 34; Incest— testimony of other instances of incest with defendant

In this prosecution for incest, testimony by the prosecutrix as to other instances of sexual intercourse with defendant and by the sister of the prosecutrix as to acts of sexual intercourse between herself and defendant is competent in evidence in corroboration of the offense charged.

2. Incest— nonsuit — sufficiency of evidence

The evidence in this prosecution for incest *is held* sufficient to be submitted to the jury.

3. Criminal Law § 113— failure to charge on nature of corroborative evidence

Where the court admitted certain testimony as corroborative evidence and so instructed the jury at the time of its admission, it was not error for the court to fail to again instruct the jury in the charge as to the nature of such evidence in the absence of a request by defendant for such an instruction.

APPEAL by defendant from *Bailey, J.,* November 1968 Criminal Session, ROBESON County Superior Court.

William James Sutton (defendant) was charged in a proper bill of indictment with the crime of incest on 21 July 1968, a violation of G.S. 14-178. The case was called for trial on 20 November 1968, at which time the defendant entered a plea of not guilty and a jury was empaneled. The State thereupon introduced evidence which tended to show that the defendant had sexual relations with his daughter, Brenda Mae Sutton (Brenda), over a period of several years; he had sexual relations with her on the day in question; on

23 July 1968 Brenda gave birth to a child; before giving birth to this child, she told her school teacher that the defendant had made her pregnant; on 24 July 1968 Brenda, while a patient at Southeastern General Hospital, told an investigator for the Robeson County Welfare Department that the defendant was the father of her child.

The defendant offered no evidence and the jury returned a verdict of guilty as charged. From the imposition of a fifteen years' sentence, the defendant appealed to this Court.

Attorney General Robert Morgan and Deputy Attorney General Harry W. McGalliard for the State.

W. Earl Britt for defendant appellant.

CAMPBELL, J.

[1] The defendant's first assignment of error is that the trial judge erred in permitting Brenda to testify as to other instances of sexual intercourse with the defendant and in permitting Theresa Sutton, Brenda's younger sister, to testify as to acts of sexual intercourse between herself and the defendant. This testimony was introduced for purposes of corroboration, and the Supreme Court has long approved such testimony. In *State v. Broadway,* 157 N.C. 598, 72 S.E. 987, which was an incest case, Clark, C.J., stated:

> "The exception to proof of other acts of the same nature cannot be sustained. They are competent in corroboration. . . ."

In *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740, the admissibility of corroborative testimony was thoroughly reviewed by Parker, C.J., and nothing would be gained by a further review at this time.

The first assignment of error is without merit.

[2] The defendant's second assignment of error is that the trial judge erred in overruling the motion for judgment as of nonsuit. In his brief, it is frankly stated:

> "Counsel for defendant does not wish to argue this exception. It was preserved and brought forward in the Record and Brief for defendant's protection, he being an indigent defendant and counsel being court-appointed."

We have reviewed the record, and the evidence was plenary to take the case to the jury. Nothing would be gained by a recitation of all of the sordid details.

The second assignment of error is without merit.

[3] The defendant's third assignment of error is that the trial judge erred in the instructions to the jury. It is argued that it was incumbent upon the trial judge, when recapitulating the evidence introduced by the State, again to inform the jury that certain evidence of some of the State's witnesses was admitted solely for the limited purpose of corroboration.

At the time of its introduction, the trial judge unequivocally instructed the jury as to the limited purpose for which the corroborative evidence was admitted. In the absence of a request for special instructions, it was not error for the trial judge not to inform the jury again of the difference between corroborative and substantive evidence or of the limited purpose for which the corroborative testimony was admitted. Such an instruction would have pertained to a subordinate feature of the case. In the absence of a request for a special instruction, it was not necessary to charge on this subordinate feature. *State v. Pitt,* 248 N.C. 57, 102 S.E. 2d 410.

In *State v. McKeithan,* 203 N.C. 494, 166 S.E. 336, Stacy, C.J., stated for the Supreme Court:

> ". . . It is now the rule of practice with us that when testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge does not in his charge again instruct the jury specifically upon the nature of such exidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground for exception that evidence competent for some purpose, but not for all purposes, is admitted generally, unless the appellant asks, at the time of its admission, that its purpose be restricted for the use for which it is competent. . . ."

The third assignment of error is without merit.

The defendant was given a fair trial free of any prejudicial error.

Affirmed.

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

STATE OF NORTH CAROLINA v. SHUFORD HOYLE CLONTZ, JR.
No. 6928SC163

(Filed 28 May 1969)

1. False Pretense § 2— sufficiency of indictment

In this prosecution for obtaining property by false pretense, the indictment is not ambiguous in alleging that defendant presented to the prosecuting witness a check which defendant had endorsed in the name of another person, it being clear from the entire indictment that defendant was charged with obtaining property by false pretense and not with forgery.

2. False Pretense § 1— elements of the offense

In a criminal prosecution for false pretense the State must prove beyond a reasonable doubt (1) that the representation was made as alleged, (2) that property or something of value was obtained by reason of the representation, (3) that the representation was false, (4) that it was made with intent to defraud, and (5) that it actually did deceive and defraud the person to whom it was made.

3. Criminal Law § 162— failure to object to or move to strike evidence

Assignment of error to the admission of evidence concerning defendant's character is overruled where the record does not show that defendant objected to the evidence or made a motion to strike or that the evidence was solicited by the State.

APPEAL by defendant from *McLean, J.*, November 1968 Criminal Session, Superior Court of BUNCOMBE.

Defendant is charged in the bill of indictment with obtaining property by means of false pretenses from Lowe's of Asheville, North Carolina. Defendant entered a plea of not guilty.

Defendant entered Lowe's of Asheville on 21 June 1968 at approximately 8 a.m. for the purpose of purchasing paint. Ray Ferguson, a salesman for Lowe's waited on the defendant. In writing a sales ticket for the purchase, Ferguson asked defendant for his name and defendant gave his name as Thomas Crabtree, Enka, North Carolina. Defendant paid for the merchandise by check, which he signed as Thomas Crabtree, and offered a driver's license which had been issued to Thomas E. Crabtree for identification. Ferguson identified the defendant, Shuford Hoyle Clontz, Jr., as being the same person who had on the morning of 21 June 1968 represented himself as being Thomas Crabtree. The check given to Lowe's by the defendant was not paid by the drawee bank.

From a verdict of guilty as charged and a judgment of confinement for a period of six years with credit given for the time spent in jail awaiting trial, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General George A. Goodwyn for the State.

Floyd D. Brock for defendant appellant.

MORRIS, J.

Defendant assigns as error the refusal of the trial court to quash the indictment. The indictment charges that defendant

> ". . . unlawfully, knowingly, designedly and feloniously did unto Ray Ferguson, agent, servant and employee of Lowe's of Asheville, falsely pretend that he was Thomas E. Crabtree and presented to the said Ray Ferguson, agent, servant and employee of Lowe's of Asheville, a North Carolina Driver's License No. 2991601 bearing the name of Thomas E. Crabtree as identification in presenting to the said Ray Ferguson a personal check to which the said Shuford Hoyle Clontz, Jr. endorsed in the name of Thomas E. Crabtree.
>
> Whereas, in truth and in fact the said Shuford Hoyle Clontz, Jr. was not one and the same person as Thomas E. Crabtree and the aforesaid Driver's License which the said Shuford Hoyle Clontz, Jr. presented for purposes of identification did not belong to the said Shuford Hoyle Clontz, Jr.
>
> By means of which said false pretense he, the said Shuford Hoyle Clontz, Jr., knowingly, designedly and feloniously, did then and there unlawfully obtain from the said Ray Ferguson the following goods and things of value, the property of Lowe's of Asheville to wit: 8 gallons Holland Porcelain Enamel, 4 gallons Interior Vinyl Latex, 1 six inch Nylon Brush, 1 four inch Nylon Brush, and 1 three inch Bristle Brush, of the value of $90.25, with intent then and there to defraud, against the statute in such case made and provided, and against the peace and dignity of the State."

[1, 2] Defendant argues that the bill of indictment was ambiguous because it used the words ". . . in presenting to the said Ray Ferguson a personal check to which the said Shuford Hoyle Clontz, Jr. endorsed in the name of Thomas E. Crabtree." Defendant contends that by the use of these words in the indictment, it was unclear whether he was charged with forgery or obtaining property by false pretenses. We do not agree. In a criminal prosecution for false pretense, the State must prove the following elements beyond a reasonable doubt:

"(1) that the representation was made as alleged; (2) that

property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made." *State v. Carlson,* 171 N.C. 818, 89 S.E. 30.

While we do not regard the indictment as a model, we are of the opinion that in the present case the indictment fulfilled each of these requirements.

G.S. 15-153 provides:

"Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment."

"We have repeatedly held that all that is required in an indictment, since the adoption of G.S. 15-153, is that it be sufficient in form to express the charge against the defendant in a plain, intelligible, and explicit manner, and to contain sufficient matter to enable the court to proceed to judgment and thus bar another prosecution for the same offense." *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596.

The trial court did not commit error in refusing to grant the defendant's motion to quash the indictment.

[3] It is argued that certain evidence concerning the defendant's character was improperly admitted into evidence. However, the record does not reveal that this evidence was objected to, or that a motion to strike was made. Moreover, the record does not show that this evidence was solicited by the State. This assignment of error is overruled. 1 Strong, N. C. Index 2d, Appeal and Error, § 24.

The judgment below is

Affirmed.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. EVELYN W. SHEPPARD

No. 6921SC209

(Filed 28 May 1969)

Gambling § 2— illegal possession of gambling devices — sufficiency of evidence

In a prosecution under G.S. 14-302 for unlawful possession of gambling devices, defendant's motion for nonsuit should be allowed where the State introduces evidence of defendant's possession of devices condemned by the statute but fails to offer evidence that such devices were in operation or that they were in defendant's possession for the purpose of being operated.

APPEAL by defendant from *Seay, J.*, at the 6 January 1969 Three-Week Criminal Session of FORSYTH Superior Court.

In a warrant issued in the Municipal Court of the City of Winston-Salem, it was alleged that on or about 6 September 1968 defendant "within the corporate limits of the City of Winston-Salem, did unlawfully and wilfully, have and keep in her possession, *for the purpose of being operated,* gambling devices, to-wit: tip boards, that do not give persons patronizing same with the use of money the same return in market value each and every time said gambling device is patronized by the paying of money or other thing for the privilege thereof, against the Statute in such cases made and provided and against the peace and dignity of the State and in violation of Section 302, Chapter 14." (Emphasis added.)

Defendant was found guilty in the municipal court and from judgment imposed therein appealed to the superior court. There she pleaded not guilty, the jury found her "guilty as charged" and from sentence imposed on the verdict, she appealed to this Court.

Attorney General Robert Morgan and Staff Attorney Mrs. Christine Y. Denson for the State.

Wilson & Morrow by John F. Morrow for defendant appellant.

BRITT, J.

Defendant assigns as error the failure of the trial court to grant her motion for judgment of nonsuit made at the close of the State's evidence, there being no evidence introduced by defendant.

Provisions of G.S. 14-302 pertinent to this appeal are as follows:

"It shall be unlawful for any person, firm or corporation to operate or keep in his possession, or the possession of any other person, firm or corporation, *for the purpose of being operated,*

> any punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, that shall not produce for or give to the person operating, playing or patronizing same, whether personally or through another, by paying money or other thing of value for the privilege of operating, playing or patronizing same, whether through himself or another, the same return in market value, each and every time such punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played or patronized by paying of money or other thing of value for the privilege thereof. * * *" (Emphasis added.)

The State's evidence tended to show the following: Police officers of the City of Winston-Salem went to defendant's home located in the city. No one was at the home when they first went there, but shortly thereafter defendant and her two small children drove up in an automobile. The officers proceeded to search the home and found seventy-four tip boards in a shipping case under a bed in one of the bedrooms of the home. At least one of the officers explained how a tip board could be used and the boards were introduced in evidence. There was no evidence that either of the boards had been used, was being used, or was possessed for purpose of "being operated."

In *State v. Jones,* 218 N.C. 734, 12 S.E. 2d 292, the Supreme Court held that an indictment under C.S. 4437(b) [now G.S. 14-302] charging possession of gambling devices, but failing to charge that defendant operated the devices or had them in his possession for the purpose of being operated, was fatally defective and defendant's motion in arrest of judgment was allowed. In the opinion we find the following:

> "* * * There is no charge that the defendant operated the gambling devices, or that he kept such devices in his own or the possession of other persons for the purpose of being operated. The omission of such charge was a fatal defect in the indictment, since an essential element of the offense created by the statute is the operation of the gambling device or the keeping in possession of such device for the purpose of being operated, *the mere having in possession of gambling devices, and nothing more, is not made a criminal offense.* * * *" (Emphasis ours.)

In the case before us, the State introduced evidence of possession of devices condemned by G.S. 14-302, but the State failed to offer

evidence that said devices were in operation or that they were in defendant's possession for the purpose of being operated.

The judgment of the superior court is

Reversed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. HENRY CLIFFORD BYRD

No. 6918SC141

(Filed 28 May 1969)

1. Constitutional Law § 28; Criminal Law § 18— jurisdiction of superior court to try defendant on warrant of inferior court

The superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for such misdemeanor in the inferior court and appeals to the superior court from sentence pronounced against him by the inferior court.

2. Criminal Law § 157— failure of record to show jurisdiction

The Court of Appeals will take notice *ex mero motu* of the failure of the record to show jurisdiction in the court entering the judgment appealed from.

3. Criminal Law § 154— record on appeal — duty of appellant

It is the duty of defendant appellant to see that the record on appeal is properly made up and transmitted to the Court of Appeals.

4. Criminal Law §§ 146, 157— failure of record to show jurisdiction

Appeal from conviction of a misdemeanor in the superior court is dismissed for failure of the record to show jurisdiction in the superior court to try defendant for the offense, where the record shows that defendant was tried in superior court on a warrant issued in the municipal-county court, but fails to show that defendant was first tried and convicted in the municipal-county court and appealed to the superior court.

APPEAL by defendant from *Gwyn, J.*, at the October 1968 Criminal Session of the Superior Court of GUILFORD County.

The record shows that the defendant was tried in this case number 7521 in the Superior Court of Guilford County on a *warrant*, purporting to have been issued by the Clerk of the "Municipal-County Court" which was returnable to the "Judge of the Municipal-

County Court, City Hall, Greensboro, North Carolina." It does not appear in the record that the defendant was ever tried in that court, but the record shows the following on page three thereof, "(No plea and no judgment shown on warrant in Municipal-County Court.)"

In addition the record shows that the defendant was also charged in cases number 7519, 7520, and 7522 with other misdemeanors. The defendant pleaded guilty in two of these cases and nolo contendere in the other.

In case number 7521 the defendant was charged in the warrant with the misdemeanor of larceny. At the time of the defendant's arraignment in Superior Court he pleaded not guilty to the larceny charge and the Solicitor for the State took a *nol pros* as "to the receiving count."

Trial was by jury and the verdict in the Superior Court was "Guilty as charged of Larceny." From a judgment imposing an active prison sentence in case number 7521 the defendant appealed and assigned errors which relate to the jury trial in the Superior Court.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Staff Attorney James E. Magner for the State.

Gerald C. Parker for defendant appellant.

MALLARD, C.J.

[1] "The Superior Court has no jurisdiction to try an accused for *a specific misdemeanor* on the warrant of an inferior court unless he is first tried and convicted for *such misdemeanor* in the inferior court and appeals to the Superior Court from sentence pronounced against him by the inferior court on his conviction for *such misdemeanor.*" *State v. Hall,* 240 N.C. 109, 81 S.E. 2d 189. See also *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283, and *State v. Banks,* 241 N.C. 572, 86 S.E. 2d 76.

[2, 3] The question of jurisdiction is not raised or discussed by the defendant or by the Attorney General in the briefs. The Court of Appeals will take notice *ex mero motu* of the failure of the record to show jurisdiction in the court entering the judgment appealed from. *State v. Johnson,* 251 N.C. 339, 111 S.E. 2d 297. In this case it was the duty of the defendant appellant to see that the record on appeal was properly made up and transmitted to the Court of Appeals. *State v. Stubbs,* 265 N.C. 420, 144 S.E. 2d 262.

[4] The record on appeal itself calls attention to the fact that

there is a failure to show that the defendant was tried in, sentenced by, and appealed from the Municipal-County Court.

We have carefully examined the exceptions and assignments of error presented on this record and are of the opinion that they present no prejudicial error in the trial in the Superior Court. If they did disclose error, because of an incomplete record, they are not properly before this court. *State v. Hunter,* 245 N.C. 607, 96 S.E. 2d 840.

For the reasons herein stated and for the failure of the record to show jurisdiction, the appeal must be dismissed. *State v. Banks, supra.*

Appeal dismissed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. FRED PARKER, JR., JIMMIE PARKER, AND McHARVEY McCLAIN

No. 697SC51

(Filed 28 May 1969)

Criminal Law § 76— admissibility of confessions — voir dire hearing — failure to find facts

Where there is conflicting evidence offered at a *voir dire* hearing to determine the admissibility of defendants' purported confessions, failure of the trial judge (1) to make findings of fact with respect to whether the confessions were freely and voluntarily made and (2) to rule on the question as to whether such were made freely and voluntarily constitutes prejudicial error.

APPEAL by defendants from *Mintz, J.,* 15 July 1968 Session of Superior Court of WILSON County.

Each defendant was tried and was either convicted or pleaded guilty in the Recorder's Court of the City of Wilson on a separate warrant charging that each did unlawfully, wilfully, wantonly and maliciously injure and destroy real property of V. W. Hall, to wit, the plate glass windows in the Super Duper Market on E. Nash St. in the City of Wilson. From a judgment imposing a prison sentence each defendant appealed to the Superior Court.

The State offered in evidence statements of the defendants made after they were picked up and talked to by the officers. The evidence

tended to show that on the night of 6 April 1968 the windows in the building occupied by the prosecuting witness, V. W. Hall, were broken by rocks, sticks, or other objects being thrown through them. The State offered evidence tending to show that each defendant admitted to the officers, while they were being talked to by the officers, that they participated in breaking the windows in the Super Duper Market. The defendants offered evidence which in substance tended to show that the statements they made to the officers were made after they were arrested without a warrant while they were in custody and that said statements were not voluntarily made. The defendants also offered evidence which in substance tended to show that they did not make any inculpatory statements to the officers.

The evidence was contradictory as to whether the defendants were actually arrested without a warrant for misdemeanors not committed in the presence of the officers. The jury returned a verdict of guilty as to each defendant and from judgment of imprisonment each defendant appealed to the Court of Appeals.

Attorney General Robert Morgan and Assistant Attorney General Bernard A. Harrell for the State.

Chambers, Stein, Ferguson and Lanning by James E. Ferguson, II, for defendants.

MALLARD, C.J.

The defendants did not docket the record on appeal within the time required by Rule 5 of the Rules of Practice in the Court of Appeals. The defendants filed a petition for a writ of certiorari which is allowed, and the case is decided on its merits.

The evidence of the State on a voir dire examination as to whether the statements of the defendants were freely and voluntarily made was sharply contradicted by the defendants. The trial judge without making any findings of fact as to whether the statements were voluntarily made, and without ruling thereon, permitted the officers to testify with respect thereto.

The defendants assign as error the admission into evidence, over their objection, of the testimony of the police officers concerning the inculpatory statements made by each of the defendants. Each defendant asserts that the statement was coerced, and was made after he was arrested without a warrant, and was made while each defendant was in custody, if in fact it was made at all.

It has been held by the Supreme Court of North Carolina in the

recent case of *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53, that when there is conflicting evidence offered at a voir dire hearing to determine the admissibility of a confession, the trial judge must make findings of fact, not just conclusions, to show the basis of his ruling on the admissibility of the evidence offered.

In the case before us, after the voir dire was held, testimony of the police officers concerning the purported confessions was received into evidence over the objection of the defendants. The failure of the trial judge to make findings of fact with respect to whether the confessions were freely and voluntarily made and the failure to rule on the question as to whether such were made freely and voluntarily constitutes prejudicial error, entitling the defendants, and each of them to a new trial.

New trial.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. RALPH WINSTON HITCHCOCK
No. 6921SC178

(Filed 28 May 1969)

1. Criminal Law § 161— necessity for exceptions

Where no exceptions appear in the record, defendant's assignments of error are ineffectual since an assignment of error must be based on an exception duly noted.

2. Criminal Law §§ 158, 163— exception to the charge — inclusion of charge in record

The charge of the trial court must be included in the record on appeal in all cases where there is exception thereto. Court of Appeals Rule No. 19(a).

3. Criminal Law § 161— appeal as exception to judgment

An appeal itself is an exception to the judgment which presents for review error appearing on the face of the record.

4. Criminal Law § 161— review of record proper

Where defendant's assignments of error are ineffectual and no error appears on the face of the record proper, the judgment below must be affirmed.

APPEAL by defendant from *Bailey, J.*, 9 December 1968, Two-Week Criminal Session of Superior Court of FORSYTH County.

The defendant was tried in the Municipal Court of Winston-Salem on a warrant which charged that he "did unlawfully and willfully drive a motor vehicle upon the public highway of N. C. . . . while under the influence of intoxicating liquor. . . ." From a verdict of guilty and sentence imposed, the defendant appealed to the Superior Court. In Superior Court the defendant entered a plea of not guilty and trial was by jury. The evidence for the State tended to show that while being pursued by a deputy sheriff the car which the defendant was driving left the road at a high rate of speed and finally came to rest against a telephone pole; that the defendant could not stand up after getting out of the car; that there was a strong smell of alcohol on the defendant's breath; that the defendant's speech was unclear; and that the defendant could not walk without assistance. In the opinion of the arresting officer, the defendant "was under the influence of an intoxicating beverage to the extent that his mental and physical faculties were appreciably impaired." The evidence for the defendant tended to show that he had had only "two beers" on the day of the accident; that striking a "chuck hole" was the cause of the accident; and that his appearance was caused by the fact that he was "stunned" and "dazed" as a result of the accident. The jury found the defendant guilty as charged in the warrant.

From the judgment imposing a prison sentence of thirty days the defendant appealed to the Court of Appeals, assigning error.

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

Badgett and Calaway by Richard G. Badgett for defendant appellant.

MALLARD, C.J.

[1, 2] No exceptions appear in the record, and none were noted or taken by the defendant except under the assignments of error. Such exceptions are ineffectual since an assignment of error must be based on an exception duly noted. *Darden v. Bone,* 254 N.C. 599, 119 S.E. 2d 634; *State v. Dilliard,* 223 N.C. 446, 27 S.E. 2d 85. See also Rule 21 of the Rules of Practice in the Court of Appeals of North Carolina. "It would require a tedious and time-consuming voyage of discovery for us to ascertain upon what the appellant is relying to show error, and our Rules and decisions do not require us to make any such voyage." *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223. In addition, Rule 19(a) of the Rules of Practice in this Court require that the charge of the trial court be included in the

record on appeal in all cases "where there is exception thereto." In the present case, the charge of the trial court is not set forth in the record on appeal as required by the rules. The Attorney General on behalf of the State has made a motion to dismiss this appeal for failure to comply with the rules and the case is subject to such dismissal.

[3, 4] Apart from the foregoing, an appeal itself is an exception to the judgment which presents for review error appearing on the face of the record. *London v. London,* 271 N.C. 568, 157 S.E. 2d 90; *State v. Ayscue,* 240 N.C. 196, 81 S.E. 2d 403; *State v. Williams,* 235 N.C. 429, 70 S.E. 2d 1. We have carefully examined the record proper. The Superior Court had jurisdiction. The warrant charges in proper form a criminal offense. The verdict is in correct form and the sentence imposed is within the limits fixed by statute. In the absence of any prejudicial error of which this Court may or will take notice, the judgment below must be affirmed. *State v. Williams, supra.*

No error.

BRITT and PARKER, JJ., concur.

A. DEAN OVERMAN AND WIFE, MARY E. OVERMAN v. CURTIS W. SAUNDERS

No. 691DC115

(Filed 28 May 1969)

1. Trial § 33— instructions — application of law to the evidence

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.

2. Trespass to Try Title § 5— instructions — adverse possession — trespass

In an action to recover damages for trespass and to have plaintiffs declared owners of the land in dispute, wherein plaintiffs claimed, *inter alia,* continuous adverse possession of the land under color of title, trial court erred (1) in failing to give instructions on adverse possession under color of title and on what would constitute color of title, (2) in failing to instruct what would occur if the jury did not answer in the affirmative the issue as to plaintiffs' ownership of the lands, and (3) in failing to explain the meaning of "trespass" and to charge on what facts, if any, would constitute a trespass. G.S. 1-180.

APPEAL by defendant from *Privott, J.*, September-October 1968 Civil Session, PASQUOTANK County District Court.

A. Dean Overman and his wife, Mary E. Overman, (plaintiffs) instituted this civil action on 12 May 1967 against Curtis W. Saunders (defendant) to recover damages for trespass upon a tract of land located in Pasquotank County and to have the plaintiffs declared owners of said tract of land.

The following issues were submitted to the jury:

"1. Are the plaintiffs the owners of the lands described in the Complaint?

ANSWER: Yes.

2. If so, did the defendant trespass upon said lands, as alleged in the Complaint?

ANSWER: Yes.

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

ANSWER: None."

From a judgment entered in conformity with the verdict, the defendant appealed to this Court.

Hall & Hall by John H. Hall for plaintiff appellees.

Gerald F. White and John T. Chaffin for defendant appellant.

CAMPBELL, J.

The plaintiffs introduced a deed under date of 1 July 1944 from M. L. Davis and others to T. C. Whitehurst (grantee). The deed was filed for registration in Pasquotank County Public Registry on 1 July 1944 and was recorded in Deed Book 111 at page 196. This deed purported to convey a tract of land containing 7.48 acres and the evidence for the plaintiffs showed that the land in dispute was included within the boundary of this 7.48 acres. The plaintiffs connected themselves to the deed by *mesne* conveyances. In addition, they claimed continuous adverse possession of the land in dispute through the grantee and the successors in title from said grantee to and including the plaintiffs.

Much of the evidence pertaining to the question of possession simply expressed conclusions and did not reveal facts from which to establish such possession. However, we will refrain from further discussion of the evidence, since it may not be the same on a new trial.

[1] The defendant, by proper exceptions and assignments of error, challenged the trial judge's charge for failure in specified respects to comply with the following requirements:

> "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. This requirement obtains as respects both the statutory law and the common law when both are applicable. A charge which fails to submit one of the material aspects of the case presented by the allegation and proof, is prejudicial." 7 Strong, N. C. Index 2d, Trial, § 33, p. 324. See G.S. 1-180; *Smart v. Fox,* 268 N.C. 284, 150 S.E. 2d 403.

[2] The trial judge charged the jury that the plaintiffs claimed ownership by virtue of adverse possession and that:

> "Adverse possession consists of actual possession for a period of at least seven years with an intent to hold solely for the possessor to the exclusion of others and is denoted by the exercise of absolute dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show who have been the declarative owners in opposition to right or the claim of any other person, and not merely as an occasional trespasser."

However, the trial judge failed to give instructions on adverse possession with color of title and adverse possession without color of title. The jury was given no explanation of color of title or what would constitute color of title. He also failed to instruct about what would occur if the jury did not answer the first issue "yes", as contended for by the plaintiffs. The jury was given no alternative answer.

With regard to the second issue, the trial judge simply gave that issue to the jury without any explanation whatsoever as to the meaning of the word "trespass" or to what facts, if any, would constitute a trespass. At no place in the charge did the trial judge apply the law to the evidentiary facts, as required by G.S. 1-180.

The Supreme Court reviewed the establishment of a *prima facie* case pertaining to a real estate title in *Gahagan v. Gosnell,* 270 N.C. 117, 153 S.E. 2d 879. However, even assuming that the plaintiffs can establish such a *prima facie* case, the defendant is entitled to a new trial because of errors committed in the charge.

New trial.

We concur

BRITT and MORRIS, JJ.

STATE OF NORTH CAROLINA v. WILLIAM LEON JOHNSON

No. 698SC234

(Filed 28 May 1969)

1. Criminal Law § 166— the brief — contentions — exceptions

A contention in the brief not based on any exception or assignment of error will not be considered on appeal.

2. Criminal Law § 143— revocation of suspended sentence — findings of fact

Revocation of defendant's suspended sentence on ground that defendant failed to comply with condition of probation that he work faithfully at suitable employment as far as possible and save his earnings above his reasonable necessary expenses, *held* supported by the findings of fact.

APPEAL by defendant from PARKER, J., December 1968 Regular Session, WAYNE County Superior Court.

On 16 November 1966 William Leon Johnson (defendant) entered a plea of guilty in Wayne County Superior Court to the crime of unauthorized use of an automobile. Judge Peel sentenced him to 24 months in the common jail of Wayne County. The sentence was then suspended and the defendant was placed on probation for a period of three years under certain conditions. One condition of probation was that he "(w)ork faithfully at suitable, gainful employment as far as possible and save his earnings above his reasonable necessary expenses."

On 16 December 1968 Judge Parker entered an order revoking probation, which set out:

> "THAT the defendant has wilfully violated the terms and conditions of the probation judgment as hereinafter set out;
>
> That the said defendant has failed and refused to work faithfully at suitable and gainful employment since September 1st, 1968, in violation of the condition of probation that he shall work faithfully at suitable and gainful employment and save his earnings above reasonably necessary expenses."

On 20 December 1968 Judge Parker entered a judgment and commitment upon revocation of suspension of sentence, which recited:

> "The defendant appeared before the court this day after due notice upon an inquiry into an alleged violation of condition of suspension of the prison sentence imposed in that certain JUDGMENT SUSPENDING SENTENCE appearing of record in this case issued on the 16 day of Nov., 1966.

From evidence presented, the court finds as fact that within the specified period of suspension, the defendant has failed to comply with the terms of probation judgment."

The defendant excepted to this judgment and appealed to the Court of Appeals.

Attorney General Robert Morgan and Deputy Attorney General Harrison Lewis for the State.

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

CAMPBELL, J.

The defendant had only one exception and in the assignments of error the defendant set out:

"THAT ERROR OF LAW APPEARS ON THE FACE OF THE RECORD PROPER IN THAT THE FINDINGS OF FACT MADE BY THE COURT DO NOT SUPPORT THE JUDGMENT OF REVOCATION:"

[1] In his brief, the defendant attempted to raise other errors, namely, that he did not receive proper notice of the hearing on the revocation of probation; he was not represented by counsel; and the evidence was insufficient to support the findings of fact.

"A contention in the brief not based on any exception or assignment of error will not be considered. . . ." 1 Strong, N. C. Index 2d, Appeal and Error, § 45, p. 187. *Anderson v. Luther,* 249 N.C. 128, 105 S.E. 2d 293.

[2] The findings of fact clearly support the judgment entered by Judge Parker, and the record on appeal does not show any error in the trial court.

Affirmed.

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

STATE OF NORTH CAROLINA v. WILLIAM FRANK TYLER

No. 695SC268

(Filed 28 May 1969)

Criminal Law § 154— appeals from consolidated trial — one record on appeal

Where two or more cases are consolidated and tried together as one case and there are two or more appeals arising from the action, ordinarily

only one copy of the record and the proceedings in the trial tribunal should be filed in the Court of Appeals. Court of Appeals Rule No. 19(b).

APPEAL by defendant from *Bundy, J.*, 12 December 1968 Session, NEW HANOVER Superior Court.

The defendant appellant, William Franklin Tyler, and one Robie C. Allen were tried jointly upon identical bills of indictment, except for the name of the defendant, charging felonious breaking and entering, larceny, and receiving, and also except as to the receiving charge in the *Tyler* case where the defendant Tyler's name erroneously appears as the owner of the property.

The State offered evidence which tended to show that William Franklin Tyler and Robie C. Allen on 19 October 1968 broke into and entered the Southside Lunch at the corner of Front and Castle Streets in Wilmington, North Carolina. The evidence is fully set out in *State v. Allen* (filed 28 May 1969).

Neither defendant took the stand or offered any evidence. The court allowed defendants' motions for nonsuit as to the counts in the bills of indictment charging larceny and receiving, and submitted the case to the jury solely on the count of felonious breaking and entering. The jury returned verdicts of guilty as charged of felonious breaking and entering. From judgment sentencing each to prison for a term of ten years, both defendants appealed.

Robert Morgan, Attorney General, by Ralph Moody, Deputy Attorney General, and Carlos W. Murray, Jr., Staff Attorney, for the State.

Yow & Yow, by Lionel L. Yow for defendant appellant.

MALLARD, C.J.

In spite of the fact this case and the case of *State v. Robie C. Allen* were tried together and treated as one case in the trial court, two separate records were filed in this Court and each case was docketed as a separate appeal. Where two or more cases are consolidated and tried together as one case and there are two or more appeals arising from the action, ordinarily only one copy of the record and the proceedings of the trial in the trial tribunal should be filed in this Court. Rule 19(b), Rules of Practice in the Court of Appeals of North Carolina; see *State v. Hamilton*, 1 N.C. App. 99, 160 S.E. 2d 79; *Hoke v. Greyhound Corp.*, 227 N.C. 412, 42 S.E. 2d 593.

We deem it expedient to point out that we feel it was not neces-

sary that counsel for defendant appellant docket a separate record on appeal for each defendant. Each defendant makes the same assignment of error, and each defendant is represented in this Court by the same attorney. For the reasons stated in *State v. Allen, supra,* opinion by Parker, J., filed this date, we hold that the judgment appealed from was supported by the verdict, and, in the entire trial we find no prejudicial error.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE v. JERRY OSCAR PERRYMAN

No. 6922SC196

(Filed 28 May 1969)

1. Burglary and Unlawful Breakings § 8— felonious breaking and entering — punishment

The maximum punishment for the felony of breaking and entering is ten years' imprisonment. G.S. 14-54.

2. Constitutional Law § 36— cruel and unusual punishment

Punishment within the statutory maximum is not cruel and unusual in the constitutional sense.

APPEAL by defendant from *Seay, J.,* December 1968 Session, IREDELL County Superior Court.

Jerry Oscar Perryman (defendant) was charged in a proper bill of indictment with the felony of breaking and entering a building occupied by Niemand Industries, a corporation in Iredell County, a violation of G.S. 14-54.

Defendant, an indigent, was represented by court-appointed counsel. After the defendant was questioned extensively by the trial judge as to his understanding of the nature of the offense, his opportunity to confer with counsel and his knowledge of the offense charged and the punishment therefor under the statute, the defendant's plea of guilty as charged was entered in open court. After making this inquiry of the defendant in open court, the trial judge found as a fact that the defendant's plea was freely, understandingly and voluntarily

made, and that the plea was made without undue influence, compulsion or duress and without promise of leniency.

From the imposition of a prison sentence of not less than five years nor more than eight years, the defendant appealed to this Court. Counsel was appointed by the trial court to represent the defendant on the appeal. The county was ordered to defray all of the expenses incurred in connection with the appeal.

Attorney General Robert Morgan and Deputy Attorney General Harry W. McGalliard for the State.

W. H. McMillan for defendant appellant.

CAMPBELL, J.

Counsel for the defendant concedes that he has found no error in the proceedings in the trial court. He nevertheless desires this Court to review the record and the sentence.

[1] We have carefully examined the record and find no prejudicial error therein. The maximum punishment for the felony of breaking and entering is ten years' imprisonment. G.S. 14-54. The sentence imposed in this case does not exceed the statutory maximum.

[2] It has been held time after time that "(w)hen punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense." *State v. Davis,* 267 N.C. 126, 147 S.E. 2d 570. *State v. Reed,* 4 N.C. App. 109, 165 S.E. 2d 674.

In the trial, we find

No error.

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

STATE OF NORTH CAROLINA v. BOBBY ALLEN, ALIAS BOBBIE ALLEN

No. 6918SC205

(Filed 28 May 1969)

APPEAL by defendant from *Martin (Robert M.), S.J.,* 6 January 1969 Session, Greensboro Division, GUILFORD County Superior Court.

Bobby Allen, alias Bobbie Allen, (defendant) was charged under a proper bill of indictment with the felonious breaking and entering of a building occupied by A & W Meat Company, Incorporated, in the City of Greensboro, Guilford County; in a second count with the felonious larceny of 840 pounds of beef; and in a third count with the felonious receiving of stolen merchandise knowing same to have been stolen.

On 14 October 1968 Judge Gwyn entered an order adjudging that the defendant was an indigent and appointing counsel to represent him. At the trial the defendant entered a plea of not guilty to each charge. The State introduced evidence which tended to show that, on the night of 6 October 1968, the defendant and three companions went to the building occupied by A & W Meat Company, Incorporated, on Patton Avenue in Greensboro; they were in an automobile belonging to one of the companions; the automobile was driven to the rear of the building; the defendant got out of the automobile and went to the front of the building; in a short period of time, the building's rear door opened and the defendant began removing large pieces of beef; this beef was hanging on hooks which were connected to a rail and the defendant pushed the beef out of the rear door by using this rail; the companions then took the beef and placed it in the rear of the automobile; while thus occupied, the lights of a police car were observed in the front of the building, whereupon the defendant and his companions ran from the scene; they were subsequently apprehended by police officers; the three companions told the police officers about the defendant and his implication in the episode; the companions likewise testified in the trial court.

The defendant introduced no evidence. The jury returned a verdict of guilty of the felony of breaking and entering, whereupon the trial judge sentenced him to be imprisoned for a term of not less than five years nor more than seven years in the State Department of Correction. The defendant excepted and appealed to this Court.

Counsel was assigned to the defendant to perfect his appeal, and the county was ordered to pay all necessary expenses in perfecting the appeal.

Attorney General Robert Morgan and Staff Attorney (Mrs.) Christine Y. Denson for the State.

Shreve and Carrington by Kenneth M. Carrington for defendant appellant.

CAMPBELL, J.

Counsel for defendant candidly and frankly states that he can find no errors committed during the trial.

We have reviewed the record and we find no errors in the trial. The record reveals that the defendant had a fair and impartial trial, and his attorney protected his rights diligently.

Affirmed.

BRITT and MORRIS, JJ., concur.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

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.

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

Accord and satisfaction defined. *Lumber Co. v. Kincaid Carolina Corp.*, 342.

An account is liquidated when the amount thereof has been fixed by agreement or can be exactly determined by the rules of arithmetic or by law. *Ibid.*

In action to collect for goods sold and delivered, the facts are held insufficient to show an accord and satisfaction of the undisputed account between the creditor and debtor; consequently, the creditor could enforce collection of the unpaid balance of the account. *Ibid.*

A compromise and settlement must be based on a disputed claim; an accord and satisfaction may be based on an undisputed or liquidated claim. *Ibid.*

Consideration must in some form or other be present in an accord. *Ibid.*

§ 2. Rights and Remedies Under Agreement

The debtor has the burden of proving the existence of accord and satisfaction. *Lumber Co. v. Kincaid Carolina Corp.*, 342.

ADMINISTRATIVE LAW

§ 2. Exclusiveness of Statutory Remedy

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§ 5. Appeal, Certiorari and Review as to Administrative Orders

Application for review in superior court of orders suspending beer permit is dismissed for failure to exhaust administrative remedies by requesting hearing before full ABC Board. *Porter v. Board of Alcoholic Control*, 284.

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court and Matters Necessary to Determination of Appeal

An appeal from order granting a motion to strike brings up the entire case. *Johnson v. Petree*, 20.

§ 6. Judgments and Orders Appealable

An immediate appeal is available from an order granting a motion to strike which has the effect of granting a demurrer. *Johnson v. Petree*, 20.

An appeal lies immediately from refusal to dismiss a cause for want of jurisdiction. *Kilby v. Dowdle*, 450.

Denial of motion for nonsuit will not be reviewed on appeal when trial court has set aside the verdict as against the greater weight of the evidence. *Michaels v. Carson*, 417.

§ 14. Appeal and Appeal Entries

Appeal from judgment rendered out of term must be entered on the judgment docket within 10 days after notice thereof. *Summey v. McDowell*, 62.

§ 16. Jurisdiction and Powers of Lower Court After Appeal

Trial judge who has fixed time for serving case on appeal thereafter has no authority to enlarge time for serving case on appeal. *Elmore v. Elmore*, 192.

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§ 19. Appeals in Forma Pauperis

Failure of court to allow appeal in forma pauperis is not error where statutory procedure was not followed. *In re Burrus*, 523.

§ 26. Exceptions and Assignments of Error to Signing of Judgment

Exception to signing of judgment presents face of record proper for review. *Highway Comm. v. Realty Corp.*, 215.

§ 36. Service of Case on Appeal

Where case on appeal is not served within apt time, appellate court will review only face of record proper. *Elmore v. Elmore*, 192.

§ 39. Time of Docketing Record on Appeal

Provision of Court of Appeals Rule No. 5 requiring that record on appeal must be docketed at least twenty-eight days before the call of the district to which the case belongs in order to be heard at the next ensuing call of the district does not abrogate requirement that record on appeal be docketed within ninety days of signing of judgment. *Ross v. Sampson*, 270.

Authority of trial court 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 appellant additional time to serve his case on appeal upon the appellee. *Ibid.*

Appeal is dismissed for failure to docket the appeal within the time prescribed by Rule 5. *Ellis v. Guilford County*, 111; *Randleman v. Stevenson*, 113; *Osborne v. Hendrix*, 114; *Rector v. Rector*, 240; *Ross v. Sampson*, 270; *Coffey v. Vanderbloemen*, 504; *Everett v. Ins. Co.*, 501.

§ 41. Form and Requisites of Transcript

Rule of practice relating to necessity for only one copy of record where there are two or more appeals in one action. *Summey v. McDowell*, 62.

It is error to combine 44 cases into one record on appeal where the cases were divided into nine separate groupings for hearing in juvenile court. *In re Burrus*, 523.

Appeal is dismissed where appellant fails to affix appendix to brief summarizing testimony relied upon to support exceptions. *Parsons v. Ussery*, 96.

§ 44. Time for Filing Brief and Effect of Failure to File

Assignments of error deemed abandoned where appellant files no brief. *Land v. Land*, 115.

Appellant's motion to be allowed to amend her brief on appeal is denied. *Parsons v. Ussery*, 96.

§ 45. Form and Contents of Brief, and Effect of Failure to Discuss Exceptions and Assignments of Error.

Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. *Land v. Land*, 115; *Rector v. Rector*, 240; *Piney Mountain Properties v. Supply Co.*, 334.

§ 46. Presumptions and Burden of Showing Error

Appellant has the burden to show prejudicial error. *Arant v. Ransom*, 89.

§ 54. Discretionary Matters

Action of trial court in setting aside verdict as against greater weight of

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the evidence is not reviewable on appeal in absence of abuse of discretion. *Michaels v. Carson*, 417.

§ 57. Findings or Judgments on Findings

Findings of fact supported by competent evidence are binding on appeal. *Kilby v. Dowdle*, 450.

§ 59. Judgments on Motions to Nonsuit

On appeal from entry of judgment of involuntary nonsuit, the evidence is to be considered in the light most favorable to plaintiff. *Lineback v. Wood*, 512.

§ 67. Force and Effect of Decisions in General

Where there are two appeals in a case, decision of the Court of Appeals as to one appeal, which decision was filed prior to time the other parties were required to docket their case on appeal, is not res judicata. *Summey v. McDowell*, 62.

ARREST AND BAIL

§ 4. Territory in Which Officer May Arrest

Chief of Police of Town of Maxton is authorized to serve warrants in the town issued by a magistrate. *S. v. Cooper*, 210.

§ 6. Resisting Arrest

When a person has been lawfully arrested and understands that he is under arrest, it is his duty to submit peaceably to the arrest. *S. v. Cooper*, 210.

ARSON

§ 6. Verdict and Judgment

Provision of G.S. 14-62 giving trial judge absolute discretion to impose sentence ranging from two to forty years for crime of statutory arson held constitutional. *S. v. Stewart*, 249.

ASSAULT AND BATTERY

§ 4. Criminal Assault in General

The marital relationship does not afford a license to commit assault. *S. v. Sherron*, 386.

§ 14. Sufficiency of Evidence

Evidence of defendant's guilt of assault on a female held sufficient for jury. *S. v. Sherron*, 386.

ASYLUMS

Action under G.S. 143-121 to recover for maintenance of incompetent at State Hospital may be brought after the patient has left the hospital, and sufficient funds need not be set aside for future support of the incompetent and his family. *Hospital v. Hollified*, 453.

ATTORNEY AND CLIENT

§ 7. Compensation and Fees

Unless provided by statute, attorneys' fees are not recoverable as an item of damages or as court costs. *Perkins v. Ins. Co.*, 466.

AUTOMOBILES

§ 2. Grounds and Procedures for Suspension or Revocation of Drivers' Licenses

Department of Motor Vehicles properly cancelled petitioner's license issued in this State upon finding that license was in a state of revocation in Florida as result of driving under the influence of intoxicants. *Parks v. Howland*, 197.

§ 7. Safety Statutes in General

Operation of automobile while intoxicated is negligence per se. *Arant v. Ransom*, 89.

§ 9. Turning and Turning Signals

Failure to give turn signal is not negligence per se. *Kinney v. Goley*, 325.

§ 19. Right of Way at Intersection

Motorist on servient highway is not required to anticipate that motorist on dominant highway will travel at excessive speed in approaching an intersection. *Farmer v. Reynolds*, 554.

Driver on servient street has right of way where he is already in the intersection before vehicle on dominant street is near enough to the intersection to constitute an immediate hazard. *Ibid.*

§ 21. Sudden Emergencies

A party cannot invoke the sudden emergency doctrine in exculpation of his own negligent conduct. *Johnson v. Petree*, 20.

§ 38. Exemptions from Speed Restrictions

Where ambulance owner and driver alleged and proved that at time of the accident the ambulance was on an emergency mission with its lights and siren on, trial court should instruct jury as to defendants' exemption from the applicable speed limit. *Campbell v. O'Sullivan*, 581.

§ 40. Pedestrians

Motorcyclist approaching an intersection was not required to warn pedestrian of his presence where pedestrian had already seen the motorcycle and was conscious of its presence and knew of its approach. *Swain v. Williamson*, 622.

Pedestrian crossing intersection at a point not a crosswalk has the duty to yield right of way to vehicle on highway. *Ibid.*

§ 43. Pleadings and Parties in Actions for Negligent Operation of Motor Vehicles

It is the better practice to try separately actions brought by driver and his passengers against another driver since issue of contributory negligence arises in action of one driver against the other but does not arise in action brought by the passengers. *Kinney v. Goley*, 325.

In action against two automobile drivers, pleadings are held not to disclose that sole proximate cause of collision was negligence of one of the drivers. *Arant v. Ransom*, 89.

In action arising out of three-car collision, cross claim by one defendant against other for contribution pursuant to Uniform Contribution Among Joint Tortfeasors Act is allowed. *Johnson v. Petree*, 20.

The fact that the factual allegations supporting defendants' pleas of in-

AUTOMOBILES—Continued

sulating negligence and sudden emergency might have been more concisely stated is not sufficient cause for a motion to strike. *Ibid.*

§ 57. Sufficiency of Evidence of Exceeding Reasonable Speed at Intersection

In action arising out of a collision between plaintiff's automobile and defendant's ambulance, evidence of defendant's negligence in exceeding speed limit was properly submitted to jury. *Campbell v. O'Sullivan*, 581.

In intersection collision, evidence of negligence by driver on dominant highway in exceeding safe speed limit held sufficient to go to jury. *Farmer v. Reynolds*, 554.

§ 60. Sufficiency of Evidence of Skidding

Evidence held sufficient for jury in action for personal injuries sustained by guest passenger when defendant's automobile skidded on ice through intersection. *Clark v. Jackson*, 277.

§ 62. Sufficiency of Evidence of Striking Pedestrian

In pedestrian's action against motorcyclist for injuries received in a collision, evidence of motorcyclist's negligence was insufficient to be submitted to jury. *Swain v. Williamson*, 622.

Evidence held sufficient for jury on issue of defendant's negligence in failing to exercise due care to avoid colliding with a pedestrian in violation of G.S. 20-174(e). *Morris v. Minix*, 634.

Insufficient evidence of defendant-motorist's negligence in striking pedestrian in this case. *Parsons v. Ussery*, 96.

§ 90. Instructions in Automobile Accident Cases

Trial court erred in instructing jury that failure to give turn signal constitutes negligence per se. *Kinney v. Goley*, 325.

Trial court erred in failing to instruct that operator of motor vehicle has duty to yield right of way to another vehicle already in the intersection. *Farmer v. Reynolds*, 554.

§ 94. Contributory Negligence of Guest or Passenger

Evidence held not to disclose contributory negligence as matter of law by automobile passenger in riding with defendant who was upset over having been arrested for reckless driving shortly before the accident occurred. *Jackson v. Jackson*, 153.

§ 105. Sufficiency of Evidence on Issue of Respondeat Superior

G.S. 20-71.1 applies only when plaintiff seeks to hold automobile owner liable for negligence of nonowner operator under doctrine of respondeat superior. *Phillips v. Ins. Co.*, 655.

BILLS AND NOTES

§ 7. Endorsement, Transfer and Ownership

To constitute a qualified endorsement it is necessary to add to the endorsers' signature the words "without recourse" or words of similar import. *Yates v. Brown*, 92.

BILLS AND NOTES—Continued

§ 9. Endorsers

Persons who sign their names on the back of a note are endorsers. *Yates v. Brown*, 92.

Endorsement containing the words "this note is transferred and assigned to Y" constitutes an unqualified endorsement. *Ibid.*

§ 19. Defenses and Competency of Parol Evidence

Parol evidence is inadmissible to allow endorsers to vary the terms of their written contemporaneous endorsement on a note. *Yates v. Brown*, 92.

Assignee of a nonnegotiable note is not a holder in due course and takes the note subject to all defenses which might have been asserted against payee. *Piney Mountain Properties v. Supply Co.*, 334.

In plaintiff's action to recover on a note executed to a third party by defendant's agent, the defense of fraudulent misrepresentation in the procurement of the note is available to defendant. *Jarvis v. Parnell*, 432.

BOUNDARIES

§ 5. Description by Reference to Map

A map or plat referred to in a deed need not be registered. *Highway Comm. v. Wortman*, 546.

BURGLARY AND UNLAWFUL BREAKINGS

§ 2. Breaking and Entering Other Than Burglariously

Felonious breaking and entering is a less degree of burglary in the first degree. *S. v. Gaston*, 575.

Felonious intent is an essential element of breaking and entering with intent to commit a felony; the felonious intent proven must be the felonious intent alleged. *S. v. Jackson*, 459.

§ 5. Sufficiency of Evidence and Nonsuit

Evidence held sufficient for jury in prosecution for breaking and entering and larceny. *S. v. Bertha*, 422; *Chapman v. State*, 438; *S. v. Garnett*, 367.

There is no fatal variance where indictment alleges building broken and entered was occupied by named person and evidence shows business conducted in the building was managed by another but was owned by person named in indictment. *S. v. Smith*, 261.

Recent possession of merchandise stolen from store by breaking and entering raises presumption that possessor is guilty of the breaking and entering. *Ibid.*

§ 6. Instructions.

Trial court erred in failing to require jury to find that the TV sets found in defendant's possession were the same TV sets taken from store broken and entered. *S. v. Jackson*, 459.

In prosecution for breaking and entering and larceny, instruction that State's witness had testified that she saw defendants with "this" TV set in their possession constitutes prejudicial error. *S. v. Bertha*, 422.

§ 7. Verdict and Instructions as to Possible Verdicts

In prosecution charging that defendant broke and entered a store with intent to steal, an instruction that defendant would be guilty of a misde-

BURGLARY AND UNLAWFUL BREAKINGS—Continued

meanor if the breaking and entering was done without intent to commit felonious larceny or "other infamous crime" held error. *S. v. Jackson*, 459.

In prosecution for first degree burglary, evidence justifies submission of the case to the jury on issue of felonious breaking and entering. *S. v. Gaston*, 575.

Verdict of guilty of felonious "B and E" is disapproved. *Ibid.*

§ 8. Sentence

The maximum punishment for the felony of breaking and entering is ten years imprisonment. *S. v. Reed*, 109; *S. v. Perryman*, 684.

CANCELLATION OF INSTRUMENTS

§ 2. Cancellation for Fraud or Mistake Induced by Fraud

Release from liability is vitiated by fraud. *Sexton v. Lilley*, 606.

One who signs written contract without reading it is ordinarily bound thereby unless failure to read is justified by some special circumstance. *Ibid.*

No presumption of fraud arises out of the parent and child relationship. *In re Will of Goodson*, 257.

§ 4. Cancellation and Rescission for Mutual Mistake

Ordinarily a mistake of law, as distinguished from a mistake of fact, does not affect the validity of a contract. *Gerdes v. Shew*, 144.

§ 10. Sufficiency of Evidence

Evidence held sufficient for jury on issue of whether release executed by plaintiff was fraudulently obtained by defendant's agents where it tends to show that plaintiff's failure to read the release before signing it resulted from misrepresentation by defendant's agents that purpose of release was for paying for vehicle to be repaired. *Sexton v. Lilley*, 606.

CARRIERS

§ 2. State License and Franchise, and Petitions to Increase Service

In hearing upon common carrier's application for a franchise certificate, the Utilities Commission erred in failing to make findings of fact as to whether the granting of the application would endanger or impair the operation of an existing carrier contrary to the public interest. *Utilities Comm. v. Coach Co.*, 116.

§ 10. Loss of or Injury to Goods in Transit

Plaintiff's evidence fails to establish prima facie case of shipper's negligence in delivering damaged goods to plaintiff. *Deal v. Motor Express Corp.*, 487.

COMPROMISE AND SETTLEMENT

§ 1. Nature, Elements, Validity, and Effect

A compromise and settlement must be based on a disputed claim. *Lumber Co. v. Kincaid Carolina Corp.*, 342.

CONSPIRACY

§ 3. Nature and Elements of Criminal Conspiracy

Criminal conspiracy defined. *S. v. Conrad*, 50.

§ 4. Warrant and Indictment

Defendants in conspiracy prosecution were not prejudiced by denial of their motion for bill of particulars setting forth names of "divers others" referred to in the indictment where solicitor advised court he did not know names of any others against whom he could prove conspiracy. *S. v. Conrad*, 50.

§ 6. Sufficiency of Evidence and Nonsuit

Evidence held sufficient for jury as to defendants' guilt of conspiracy to commit murder. *S. v. Conrad*, 50.

A criminal conspiracy need not be established by direct proof but may be established by circumstantial evidence. *Ibid.*

CONSTITUTIONAL LAW

§ 4. Persons Entitled to Raise Constitutional Questions; Waiver and Estoppel

Parties must be prejudiced by statute in order to question its constitutionality. *Parent-Teachers Assoc. v. Bd. of Education*, 617.

Where constitutional issue was not raised in post-conviction hearing in superior court, the Court of Appeals will not consider such issue on appeal. *Aldridge v. State*, 297.

§ 11. Police Power in General

Validity of the exercise of the police power depends upon whether under all existing circumstances it is reasonably calculated to accomplish a purpose falling within the legitimate scope of the power without unduly burdening persons or corporations affected. *Raleigh v. R. R. Co.*, 1; *R. R. Co. v. Winston-Salem*, 11.

Changed conditions may bring the subject matter in question within the approved testing principle of reasonableness or may remove it therefrom. *Ibid.*

§ 13. Safety

Municipal ordinance requiring railway to install automatic warning signals at two grade crossings and allocating the cost of the signals between the municipality and the railway is held constitutional. *R. R. Co. v. Winston-Salem*, 11.

§ 15. Public Convenience and Prosperity

Attempt by municipality to impose upon a railway company the entire cost of rebuilding a railway bridge to accommodate increased width of the city street is held unconstitutional. *Raleigh v. R. R. Co.*, 1.

§ 26. Full Faith and Credit to Foreign Judgments

Full faith and credit must be given to a judgment of a court of another state. *Thrasher v. Thrasher*, 534.

A judgment of a court of another state may be attacked in this State, but only upon the grounds of lack of jurisdiction, fraud in the procurement, or as being against public policy. *Ibid.*

CONSTITUTIONAL LAW—Continued

§ 28. Necessity for and Sufficiency of Indictment

Superior Court has no jurisdiction to try accused for misdemeanor on a warrant unless he is first tried and convicted for the offense in an inferior court and appeals to superior court. *S. v. Byrd*, 672.

§ 29. Right to Indictment and Trial by Duly Constituted Jury

Constitutional right of defendant charged with misdemeanor to have jury trial is not infringed by fact he has first to submit to trial without jury in district court. *S. v. Sherron*, 386.

Jury trial is not constitutionally required in a juvenile court proceeding. *In re Burrus*, 523.

§ 30. Due Process in Trial in General

Constitutional rights of juveniles are not violated by exclusion of the general public from a juvenile court hearing. *In re Burrus*, 523.

§ 31. Right of Confrontation and Access to Evidence

In joint trial of three defendants, decision of *Bruton v. United States* does not prohibit admission of testimony for consideration against only one defendant where witnesses were testifying to something said or done in their presence and testimony related only to defendant against whom it was introduced and did not implicate either of the others. *S. v. Conrad*, 50.

§ 32. Right to Counsel

A defendant who is charged with a misdemeanor amounting to a serious offense has the right to assistance of counsel during his trial. *S. v. Maness*, 658; *S. v. Waddell*, 517.

A defendant charged with a felony is entitled to a new trial where the judge failed to advise him that he was entitled to counsel before he was required to plead. *S. v. McGraw*, 499.

Employment of counsel does not excuse an accused from giving proper attention to his case. *S. v. Murphy*, 457.

Defendant has no constitutional right to appointed counsel at his preliminary hearing. *Chapman v. State*, 438.

Defendant was not effectively apprised of right to have counsel appointed prior to in-custody interrogation where statement read to defendant by police officer contained statement "We have no way of giving you a lawyer but one will be appointed for you when you go to Court." *S. v. Robbins*, 463.

Out-of-court lineup identification of defendant was not rendered unconstitutional by fact defendant was not represented by counsel and did not waive his right to counsel where defendant was not suspect in the crime at the time of lineup. *S. v. Griffin*, 397.

Evidence on voir dire supports trial court's finding that in-court identification of defendant was not tainted by any illegal lineup. *Ibid.*

Defendant's constitutional rights were not violated when he was brought to scene of crime for identification by a State's witness while seated in a police car and under arrest without benefit of counsel. *S. v. Bertha*, 422.

Where defendant is charged with a misdemeanor amounting to a serious offense and is not represented by privately employed counsel, the presiding judge must (1) settle the question of defendant's indigency and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived; these findings and determinations should appear of record. *S. v. Waddell*, 517.

CONSTITUTIONAL LAW—Continued

§ 34. Double Jeopardy

On appeal from municipal court, superior court properly denied defendant's plea of former jeopardy on ground that after defendant's trial had begun in municipal court it was continued at solicitor's request until the next day. *S. v. Stilley*, 638.

§ 36. Cruel and Unusual Punishment

Punishment within statutory maximum is not cruel and unusual in the constitutional sense. *S. v. McKinney*, 107; *S. v. Reed*, 109; *S. v. Stewart*, 249; *S. v. Kotofsky*, 302; *S. v. Cleaves*, 506; *S. v. Perryman*, 684.

CONTEMPT OF COURT

§ 5. Orders to Show Cause

Order adjudicating county commissioners in contempt for failure to provide adequate office space for clerk of superior court is set aside for lack of notice to the commissioners. *In re Board of Comrs.*, 626.

§ 6. Hearings on Orders to Show Cause

In a contempt proceeding in this State, the contemnor is not entitled to a jury trial. *Blue Jeans Corp. v. Clothing Workers of America*, 245.

§ 7. Punishment for Contempt

Punishment for criminal contempt is based on an act already accomplished which tends to interfere with the administration of justice. *Blue Jeans Corp. v. Clothing Workers of America*, 245.

Punishment imposed in contempt proceeding for violation of a court order restraining picketing activities on behalf of striking workers is lawful where it does not exceed $250 fine or thirty days imprisonment, or both. G.S. 5-4. *Ibid.*

CONTRACTS

§ 2. Offer and Acceptance; Mutuality

Acceptance may be communicated by any means sufficient to manifest assent. *Foundation v. Basnight*, 652.

§ 4. Consideration

Consideration defined. *Foundation v. Basnight*, 652.

§ 18. Modification, Rescission, Abandonment, and Waiver

Written contract may be modified by subsequent parol agreement, and party who contends contract has been so modified has burden to show modification. *Electro Lift v. Equipment Co.*, 203.

In action for breach of contract, defendant's evidence is held insufficient to show defendant had requested the change in contract specifications or that plaintiff had assented thereto. *Ibid.*

§ 25. Pleadings, Burden of Proof, and Issues

Complaint contained statement of a defective cause of action where it alleged that defendant bound herself by contract to do certain acts and contract incorporated in the complaint shows that defendant made no such agreement. *Sawyer v. Sawyer*, 594.

CONTRACTS—Continued

Pleader may abandon his allegations of recovery for personal services on theory of express contract and proceed on the principle of quantum meruit. *Stout v. Smith*, 81.

Trial court properly submitted only one issue as to what amount, if any, plaintiff was entitled to recover from defendant where parties stipulated price and terms of contract sued upon, and evidence was insufficient to show contract had been modified. *Electro Lift v. Equipment Co.*, 203.

§ 26. Competency and Relevancy of Evidence

Where the terms of a contract are established, evidence of prior negotiations are not competent as evidence in an action to enforce contract. *Gerdes v. Shew*, 144.

§ 27. Sufficiency of Evidence and Nonsuit

In action by private school to recover tuition on a contract of enrollment, evidence held sufficient to show that school and parents of one of its pupils had created a binding contract. *Foundation v. Basnight*, 652.

§ 28. Instructions

Trial court properly gave jury peremptory instruction in plaintiff's favor where all evidence tended to establish performance of contract by plaintiff and breach by defendant. *Electro Lift v. Equipment Co.*, 203.

In this action upon a contract, the trial judge did not express an opinion in violation of G.S. 1-180 when he asked plaintiff's attorney: "What about demand of payment on this? You'd better ask him a question on that." *Ibid.*

§ 31. Interference with Contractual Rights by Third Persons

Action in tort lies against an outsider who wrongfully induces a breach of contract. *Sawyer v. Sawyer*, 594.

Person who was party to a contract only for purpose of setting aside a conveyance to her of the property in question is an outsider who may be sued for wrongfully inducing a breach of the contract. *Ibid.*

§ 32. Actions for Wrongful Interference

Complaint in action for wrongfully inducing breach of contract must allege that contract would have been performed but for conduct of defendant. *Sawyer v. Sawyer*, 594.

COSTS

§ 4. Items of Costs and Amount of Allowances

The court or the jury may not increase costs fixed by statute. *Perkins v. Ins. Co.*, 466.

Unless provided by statute, attorneys' fees are not a part of court costs. *Ibid.*

COURTS

§ 2. Jurisdiction of Courts in General

Superior court has jurisdiction to pass upon defendant's plea in bar that Industrial Commission had exclusive jurisdiction of the case. *Kilby v. Dowdle*, 450.

COURTS—Continued

§ 4. Minimum Amount Within Original Jurisdiction of Superior Court

Contention that court erred in removing action from High Point Municipal Court to Guilford County Superior Court is moot. *Kilby v. Dowdle*, 450.

§ 15. Criminal Jurisdiction of Juvenile and Domestic Relations Courts

Jury trial is not constitutionally required in a juvenile court proceeding. *In re Burrus*, 523.

Constitutional right of juvenile is not violated by exclusion of general public from a juvenile court hearing. *Ibid.*

The N. C. Juvenile Courts Act is constitutional. *Ibid.*

§ 21. What Law Governs: As Between Laws of This State and Other States

In action brought under Tort Claims Act for collision occurring in another state, substantive law of the other state and procedural law of this State apply. *Parsons v. Board of Education*, 36.

CRIMINAL LAW

§ 3. Attempt to Commit Crime

An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission. *S. v. Bailey*, 407.

§ 5. Mental Capacity in General

Trial court properly instructed jury that fact that episode produced shock or trauma which created a mental block so that defendant did not subsequently recall what happened would not entitle her to an acquittal in homicide prosecution. *S. v. Kirby*, 380.

§ 9. Aiders and Abettors

One who aids and abets in a crime committed by another is equally guilty with the principal. *S. v. Garnett*, 367.

§ 13. Jurisdiction in General

Superior court has jurisdiction to try federal prisoner. *S. v. Houston*, 484.

§ 15. Venue

Motion for change of venue or for special venire is addressed to discretion of trial judge. *S. v. Ledbetter*, 303.

Trial court did not abuse its discretion in denying defendants' motion for change of venue because of newspaper publicity of the crime. *S. v. Conrad*, 50.

§ 18. Jurisdiction on Appeals to Superior Court

Superior court has no jurisdiction to try accused for misdemeanor on a warrant unless he is first convicted in inferior court and appeals to superior court. *S. v. Byrd*, 672.

Upon appeal from inferior court to superior court, defendant is entitled to trial de novo without regard to plea, trial, verdict or judgment in inferior court. *S. v. Overby*, 280.

Right of defendant charged with misdemeanor to have jury trial is not infringed by fact he has first to submit to trial without jury in district court. *S. v. Sherron*, 386.

CRIMINAL LAW—Continued

§ 21. Preliminary Proceedings

Defendant has no constitutional right to court-appointed counsel at preliminary hearing. *Chapman v. State*, 438.

§ 23. Plea of Guilty

Defendant's plea of guilty will not be disturbed on appeal where the record reveals that upon examination of defendant in open court the trial judge determined that the plea was freely, understandingly and voluntarily made. *S. v. McKinnon*, 299.

Appeal from guilty plea presents only question of whether facts charged constitute an offense punishable under laws and Constitution. *Ibid.*

Defendant who received active prison sentence upon his guilty plea is not entitled to a new trial on contention he was promised by his counsel he would be placed on probation. *S. v. Williams*, 515.

§ 26. Plea of Former Jeopardy

In appeal from municipal court, superior court properly denied defendant's plea of former jeopardy on ground that after defendant's trial had begun in municipal court it was continued at solicitor's request until the next day. *S. v. Stilley*, 638.

Order of mistrial entered with consent of the parties during defendant's trial because of the sudden illness of a juror will not support a plea of former jeopardy. *S. v. Ledbetter*, 303.

Failure of trial court to make formal ruling on plea of former jeopardy is not error. *Ibid.*

§ 29. Suggestion of Mental Incapacity to Plead

Failure of trial court to rule on defendant's motion to determine his mental competency to stand trial before requiring him to plead to the indictment constitutes prejudicial error. *S. v. Willis*, 641.

§ 34. Evidence of Defendant's Guilt of Other Offenses

In incest prosecution, testimony by prosecutrix as to other instances of intercourse with defendant held competent. *S. v. Sutton*, 664.

Where defense counsel asked the State's witness on cross-examination, "You say you scared of these two defendants here?", defendant cannot complain of the witness' reply in explanation, "If anybody had a record like them, you'd be scared of them too." *S. v. Neely*, 475.

§ 40. Evidence and Record at Former Trial.

Evidence as to plea of guilty entered by defendant in inferior court is not competent against him in trial de novo upon appeal to superior court. *S. v. Overby*, 280.

§ 42. Articles and Clothing Connected with the Crime

Court properly allowed sheriff to identify certain stains or discolorations as bloodstains. *S. v. Willis*, 641.

In homicide prosecution, court properly admitted a knife found near the crime scene eight days after the incident occurred. *S. v. Battle*, 588.

§ 60. Evidence in Regard to Fingerprints

State is not required to establish that fingerprints taken by arresting offi-

CRIMINAL LAW—Continued

cer were authorized by sheriff or chief of police to render such prints admissible on trial. *Chapman v. State*, 438.

Although police officer had not been qualified as fingerprint expert, defendant was not prejudiced by his testimony that in his opinion latent fingerprints could not have been lifted from a particular place. *S. v. McClain*, 265.

§ 66. Evidence of Identity by Sight

Defendant's constitutional rights were not violated when he was brought to scene of crime for identification by State's witness while seated in police car and under arrest without benefit of counsel. *S. v. Bertha*, 422.

Lineup identification of defendant was not rendered unconstitutional by fact defendant was not represented by counsel and did not waive his right to counsel where defendant was not a suspect in crime at the time of the lineup. *S. v. Griffin*, 397.

In-court identification of defendant was properly allowed where it was based upon what the witness observed at the time of the robbery and was not the result of an illegal lineup. *Ibid.*

Where there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury. *S. v. McClain*, 265.

The court did not err in denying defendant's motion to strike testimony by the prosecuting witness to the effect that he had known defendant ever since he was growing up when, in fact, the witness had not seen defendant for several years during which defendant had changed in appearance. *S. v. Blount*, 561.

§ 68. Other Evidence of Identity

Identity of name is prima facie evidence of identity of person. *S. v. Walls*, 661.

§ 71. Shorthand Statement of Fact

Statement that defendant had his hand in his pocket and "it looked like he had a gun" held competent as a shorthand statement of fact. *S. v. Bailey*, 407.

§ 75. Test of Voluntariness of Confession

Defendant's confession is rendered incompetent by failure of police officer to effectively apprise him of his right to have counsel appointed prior to in-custody interrogation. *S. v. Robbins*, 463.

§ 76. Determination and Effect of Admissibility of Confession

When there is conflicting evidence at a voir dire hearing to determine admissibility of defendant's confession, failure of trial judge to make findings of fact and ruling on question whether confession was freely and voluntarily made constitutes prejudicial error. *S. v. Parker*, 674.

Admission in joint trial of nontestifying defendant's confession implicating a codefendant violates the codefendant's right of cross-examination. *S. v. Conrad*, 50.

§ 86. Credibility of Defendant and Parties Interested

Where defendant took the stand in his own behalf in a prosecution for driving under the influence of intoxicants, it was competent for the solicitor

to cross-examine defendant about his conviction of "cross burning." *S. v. Stallings*, 184.

Defendant who testified in a criminal case may be cross-examined as to his prior convictions for purpose of impeachment. *S. v. Sherron*, 386; *S. v. Warren*, 441.

Failure of trial court to limit jury's consideration of defendant's testimony as to prior unrelated criminal convictions upon request of defendant held prejudicial error. *S. v. Austin*, 481.

Trial court did not commit prejudicial error in allowing solicitor to ask defendant a question concerning charge against defendant in another state after defendant has stated that the charge had been dismissed. *S. v. Warren*, 441.

§ 87. Direct Examination of Witnesses

Trial court has discretion to allow solicitor to ask leading questions. *S. v. Battle*, 588.

§ 88. Cross-examination

Defendant was not prejudiced by solicitor's cross-examination of him as to whereabouts of a co-conspirator. *S. v. Kee*, 508.

The solicitor has wide latitude to cross-examine the witness for purposes of impeachment as to whether the witness was involved in a "cross burning." *S. v. Stallings*, 184.

Trial court properly sustained State's objection to cross-examination of prosecuting witness which was repetitious and argumentative. *S. v. Blount*, 561.

§ 89. Credibility of Witness; Corroboration and Impeachment

Trial court properly admitted for corroboration testimony by sheriff as to what certain of State's witnesses had told him during investigation of crime. *S. v. Battle*, 588.

§ 91. Time of Trial and Continuance

Continuances are not favored and ought not to be granted unless the reasons therefor are fully established. *S. v. Murphy*, 457.

Application for a continuance should be supported by an affidavit showing sufficient grounds for the continuance. G.S. 1-176. *Ibid.*

Motion for continuance by defense counsel on ground that defendant had "just at this minute" informed him of the existence of a material witness is properly denied where counsel had been employed some four and one-half months prior to trial. *Ibid.*

§ 92. Consolidation of Counts

Trial court did not abuse its discretion in consolidating for trial an indictment charging three defendants with conspiracy to commit murder and indictments charging two of the defendants with feloniously damaging real and personal property. *S. v. Conrad*, 50.

Trial court properly consolidated for trial prosecutions against three defendants charged in separate indictments with identical offenses of armed robbery. *S. v. Mourning*, 569.

§ 95. Admission of Evidence Competent for Restricted Purpose

The court is not required to instruct the jury that evidence competent for

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the purpose of impeachment be so restricted where defendant makes no request for such an instruction. *S. v. Sherron*, 386.

In joint trial of three defendants, decision of *Bruton v. United States* did not prohibit admission of testimony for consideration against only one defendant where testimony in no way implicated either of the others. *S. v. Conrad*, 50.

§ 97. Introduction of Additional Evidence

Trial court has discretion to allow State to introduce additional evidence after defendants have argued their motions for nonsuit at the close of the State's evidence. *S. v. Neely*, 472.

§ 98. Presence of Defendant; Custody of Defendant

The trial court has the inherent power to assure itself of the presence of the accused during the course of the trial, and for this purpose has the discretion to direct that an accused previously free under bond be taken into custody during the trial, subject to the limitation that this must not be done in such manner or under such circumstances as to convey to the jury the impression that the court is expressing an opinion as to the probable guilt of the accused or as to his credibility if he becomes a witness. *S. v. Barnes*, 446.

Defendants were not prejudiced by fact they were taken into custody during noon recess by court order where there is nothing in record to show that the jury heard or observed anything from which they could gain the impression that trial judge was indicating any opinion as to defendants' guilt. *Ibid.*

§ 102. Argument and Conduct of Counsel or Solicitor

Control of argument of solicitor and counsel rests largely in trial court's discretion. *S. v. Smith*, 261.

§ 104. Consideration of Evidence on Motion to Nonsuit

Rules for consideration of evidence on motion to nonsuit. *S. v. Houston*, 484; *S. v. Kirby*, 380; *S. v. Garnett*, 367.

§ 105. Necessity for and Functions of Motion to Nonsuit

Although trial judge should rule on each motion for judgment as of nonsuit, there is no prejudicial error in this case where trial judge failed to rule on defendant's motion for nonsuit at the close of all the evidence. *S. v. Garnett*, 367.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

Test of sufficiency of evidence to withstand motion for nonsuit. *S. v. Kirby*, 380; *S. v. Ledbetter*, 303.

§ 111. Form and Sufficiency of Instructions in General

Failure of trial court to instruct jury as to defense of intoxication is not error where there was no evidence that defendant was intoxicated. *S. v. Bailey*, 407.

§ 112. Instructions on Burden of Proof and Presumptions

Instruction which is open to interpretation that defendant has the burden to rebut the presumption of his guilt is erroneous. *S. v. Jackson*, 459.

§ 113. Statement of Evidence and Application of Law Thereto

Instruction of trial court which inadvertently reviewed voir dire testimony

of a police officer concerning probable cause for defendant's arrest is prejudicial. *S. v. Alexander*, 513.

Instruction containing a statement of a material fact not shown in evidence must be held prejudicial even though not called to the court's attention at the time. *S. v. Bertha*, 422; *Ibid.*

Trial court is not required to instruct jury that evidence competent solely for purpose of corroboration be so restricted where defendant makes no request for such instruction. *S. v. Battle*, 588; *S. v. Sutton*, 664.

Instruction of trial judge which assumed that the offense charged had been committed is held to constitute an expression of opinion. *S. v. Cooper*, 210.

§ 115. Instructions on Lesser Degrees of Crime

Necessity for instructing jury as to included crime of lesser degree arises only when there is evidence from which jury could find that such included crime was committed. *S. v. Bailey*, 407.

§ 116. Charge on Failure of Defendant to Testify

Instruction that failure of defendant to testify does not raise any presumption against him is proper. *S. v. Bailey*, 407.

§ 117. Charge on Character Evidence and Credibility of Witness

Trial court properly instructed jury to scrutinize testimony of defendant's witness where the witness was the boy friend of defendant's sister. *S. v. Gaston*, 575.

Failure of court to give defendant's requested instructions limiting jury's consideration of admission by defendant as to prior convictions is held prejudicial error. *S. v. Austin*, 481.

§ 124. Sufficiency and Effect of Verdict in General

In prosecution for involuntary manslaughter, court did not err in accepting verdict of guilty of "manslaughter" when indictment charged defendant with involuntary manslaughter and the charge related only to involuntary manslaughter. *S. v. Ledbetter*, 303.

§ 126. Unanimity of Verdict and Acceptance of Verdict

Where jury's verdict of guilty of "manslaughter" is unambiguous when interpreted with indictment, evidence and charge, defendant was not prejudiced when jury was recalled and rendered verdict of "involuntary manslaughter". *S. v. Ledbetter*, 303.

§ 132. Setting Aside Verdict as Being Contrary to Weight of Evidence

Motion to set aside verdict as contrary to the weight of the evidence is addressed to discretion of trial court. *S. v. Kirby*, 380.

§ 134. Form and Requisites of Judgment or Sentence in General

Trial court erred in directing that defendant be confined for his safety in Central Prison pending appeal to Court of Appeals absent proper findings. *S. v. Sherron*, 386.

A defendant may be sentenced to Central Prison only upon conviction of a felony. *Ibid.*

§ 138. Severity of Sentence, and Determination Thereof

There is no merit in defendant's contention that trial judge in imposing

CRIMINAL LAW—Continued

sentence was motivated by matters other than the actual crime. *S. v. McKinney*, 107.

In determining sentence of imprisonment, trial court may consider the conduct and appearance of defendant in court. *S. v. Stallings*, 184.

Provisions of G.S. 14-62 giving trial judge absolute discretion to impose sentence ranging from two to forty years for crime of statutory arson held constitutional. *S. v. Stewart*, 249.

Factors which may be considered by trial judge in determining sentence. *Ibid.*

Sentence within statutory maximum may be reviewed on appeal only in case of manifest abuse of discretion. *Ibid.*

Increased sentence imposed in superior court following defendant's appeal from conviction in district court does not place unconstitutional burden on defendant's right to appeal from distrist court. *S. v. Sherron*, 386.

Defendant is not entitled to credit upon his sentence for time spent in custody in default of bond while awaiting trial de novo in superior court. *Ibid.*

Trial court has authority to provide that sentences imposed upon pleas of guilty to separate offenses run consecutively. *S. v. Cleaves*, 506.

Request for reduction of a sentence claimed to be excessive should be presented to the Board of Paroles, not the Court of Appeals. *Ibid.*

§ 141. Sentence for Repeated Offenses

In prosecution for second offense of escape, proof of the prior escape conviction should be by duly certified transcript of the first conviction. *S. v. Walls*, 661.

§ 142. Suspended Sentences and Judgments

Upon conviction of driving while under the influence of intoxicants, suspension of sentence on condition defendant does not go on premises where intoxicating liquors are sold for period of five years is held reasonable. *S. v. Baynard*, 645.

Suspension of sentence for a period of five years is within the limits provided by law. G.S. 15-200. *Ibid.*

§ 143. Revocation of Suspension of Sentence

Revocation of defendant's suspended sentence on ground that defendant failed to comply with condition of probation that he work faithfully at suitable employment as far as possible and save his earnings above his reasonable necessary expenses, *held* supported by the findings of fact. *S. v. Johnson*, 681.

§ 146. Nature and Grounds of Appellate Jurisdiction in Criminal Cases in General

An appeal may be dismissed if the Rules are not complied with. *S. v. Cooper*, 210.

Appeal is dismissed where record on appeal was not docketed within 90 days from date of judgment appealed from. *S. v. Willis*, 641.

Voluntary plea of guilty presents only question as to whether error appears on face of record proper and whether sentence imposed is within statutory limits. *S. v. Cleaves*, 506.

§ 148. Judgments Appealable

An appeal from an order denying defendant's motion to dismiss bill of indictment is an appeal from interlocutory order and will be dismissed. *S. v. Smith*, 491.

CRIMINAL LAW—Continued

§ 150. Right of Defendant to Appeal

Fact that defendant was not furnished a stenographic transcript of his trial in that court reporter died before transcribing his notes did not deny defendant adequate review on appeal. *S. v. Allen*, 612.

§ 152. Appeals in Forma Pauperis

Failure of court to allow appeal in forma pauperis is not error where statutory procedure was not followed. *In re Burrus*, 523.

§ 153. Jurisdiction of Lower Court Pending Appeal

Superior court has no authority to permit defendant to withdraw an appeal after appeal is docketed with Court of Appeals. *S. v. Byrd*, 494.

§ 154. Case on Appeal

It is the duty of defendant appellant to see that the record on appeal is properly made up and transmitted to the Court of Appeals. *S. v. Byrd*, 672.

Addition of items to defendant's case on appeal by defense counsel after case on appeal is agreed to by the solicitor is highly improper. *S. v. Houston*, 484.

Where court reporter died before transcribing his notes of defendant's trial, Court of Appeals rule authorized appellant to prepare statement of the evidence from best available source, including his recollection. *S. v. Allen*, 612.

Only one copy of the record should be filed in the Court of Appeals for two or more appeals arising from a consolidated trial. *S. v. Tyler*, 682.

§ 155.5. Docketing of Transcript of Record in Court of Appeals

Where record on appeal is not docketed within time prescribed by Rule 5, appeal may be dismissed by Court of Appeals ex mero motu. *S. v. Cline*, 112; *S. v. Cooper*, 210; *S. v. Stewart*, 249; *S. v. McClain*, 265; *S. v. Garnett*, 367; *S. v. Sherron*, 386; *S. v. Griffin*, 397; *S. v. Byrd*, 494; *S. v. Ellisor*, 514; *S. v. Willis*, 641.

Co-defendants appealing from same judgment and trial should file only one record on appeal. *S. v. Barnes*, 446.

§ 156. Certiorari

Defendant's belated appeal is treated as a petition for certiorari by the Court of Appeals. *S. v. Cooper*, 210.

§ 157. Necessary Parts of Record Proper

The Court of Appeals will take notice *ex mero motu* of the failure of the record to show jurisdiction in the court entering the judgment appealed from. *S. v. Byrd*, 672.

Appeal is dismissed for failure to include the charge in the record on appeal when exception is taken thereto. *S. v. Ellisor*, 514.

§ 159. Form and Requisites of Transcript

Rule 19(d)(2) which permits the filing of stenographic transcript of the evidence is repealed effective 1 July 1969. *S. v. Garnett*, 367.

Appeal is subject to dismissal where appellant submits transcript of evidence under Rule 19(d)(2) but fails to affix appendix to brief summarizing evidence pertinent to questions raised on appeal. *S. v. Willis*, 641.

It is error to combine 44 cases into one record on appeal where the cases

CRIMINAL LAW—Continued

were divided into nine separate groupings for hearing in juvenile court. *In re Burrus*, 523.

§ 161. Necessity for and Form and Requisites of Exceptions and Assignments of Error.

Assignment of error must be based on exception duly noted. *S. v. Hitchcock*, 676.

An appeal itself is an exception to the judgment which presents face of record proper for review. *S. v. Hitchcock*, 676; *S. v. Flanders*, 505; *S. v. Williams*, 515.

§ 162. Objections, Exceptions, and Assignments of Error to Evidence, and Motions to Strike

Objection to testimony not taken in apt time is waived. *S. v. McClain*, 265.

Trial court properly overruled defendant's objection to whole line of questioning of defendant by solicitor relating to his prior convictions. *S. v. Sherron*, 386.

Assignment of error to admission of evidence is ineffectual where defendant made no objection or motion to strike. *S. v. Clontz*, 667.

Where defense counsel asked the State's witness on cross-examination, "You say you scared of these two defendants here?", defendant cannot complain of the witness' reply in explanation, "If anybody had a record like them, you'd be scared of them too." *S. v. Neely*, 475.

§ 163. Exceptions and Assignments of Error to Charge

Entire charge of trial court must be included in record on appeal where exception is made thereto. *S. v. Hitchcock*, 676.

§ 166. The Brief

Court will not consider a contention in the brief not based on any exceptions or assignments of error. *S. v. Johnson*, 681.

§ 167. Presumptions and Burden of Showing Error; Harmless and Prejudicial Error in General

Test of prejudicial error is whether a different result would have been reached at the trial out of which the appeal arose had the error complained of not occurred. *S. v. Garnett*, 367.

Appellant has burden of proof that error was prejudicial to him. *S. v. Mourning*, 569.

In ruling upon denial of motion to nonsuit, the court will consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State. *S. v. Walls*, 661.

§ 168. Harmless and Prejudicial Error in Instructions

A statement in the instructions of a material fact not contained in the evidence constitutes reversible error. *S. v. Alexander*, 513.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Testimony will not be deemed prejudicial to defendant where defendant fails to object to such evidence or where defendant does not affirmatively show that its admission could have affected the result. *S. v. McClain*, 265; *S. v. Stallings*, 184.

CRIMINAL LAW—Continued

§ 171. Error Relating to One Count or to One Degree of Crime Charged

Where one of two concurrent sentences is valid, defendant cannot complain of error in the other. *S. v. Garnett*, 367.

§ 172. Whether Error is Cured by Verdict

Error of failure to submit lesser included offense is not cured by verdict convicting defendant of the higher offense. *S. v. Strickland*, 105.

§ 181. Postconviction Hearing

Review of a post-conviction hearing is available only upon petition for writ of certiorari. *Aldridge v. State*, 297.

Where constitutional issue was not raised in post-conviction hearing in superior court, the Court of Appeals will not consider such issue on appeal. *Ibid.*

DAMAGES

§ 16. Instructions on Measure of Damages

In an action for personal services rendered decedent, instruction on damages which did not restrict jury's consideration to specific allegations of damages in the complaint is erroneous. *Burns v. Burns*, 426.

DECLARATORY JUDGMENTS

§ 1. Nature and Grounds of Remedy

Question of whether municipality or railroad must bear expense of new railway overpass may be determined under the Act. *Raleigh v. R. R. Co.*, 1.

DEEDS

§ 11. Construction Generally

A map or plat referred to in a deed becomes part of the deed and need not be registered. *Highway Comm. v. Wortman*, 546.

§ 19. Restrictive Covenants, Generally

In action to declare unenforceable restrictive covenant which limited use of property to residential purposes only, conclusion of trial court that the character of the neighborhood wherein the tract was located had not changed substantially so as to render residential use impractical held supported by competent evidence. *Hale v. Moore*, 374.

Where restrictive covenant is not part of a general plan of development, the restriction is personal to the grantor. *Ibid.*

The servitude imposed by restrictive covenants is a species of incorporeal right and restrains the owner of the servient estate from making certain use of his property. *Ibid.*

§ 24. Covenants Against Encumbrances

In grantee's action to recover damages for grantor's breach of covenants against encumbrances in a deed, it is no defense (1) that grantee had actual knowledge of the existence of an encumbrance, (2) that grantee failed to comply with provisions of the written sales contract requiring grantors to be given an opportunity to correct any defect in the title, or (3) that the deed was executed and accepted by the parties under a mutual mistake of law. *Gerdes v. Shew*, 144.

An encumbrance, within the meaning of a covenant against encumbrances, is any burden or charge on the land and includes any right existing in another whereby the use of the land by the owner is restricted. *Ibid.*

DIVORCE AND ALIMONY

§ 1. Jurisdiction

Jury finding in action for absolute divorce that plaintiff husband is not a resident of N. C. does not preclude jury from further finding that defendant wife is a resident of this State, legal fiction that domicile of wife follows that of husband not being applicable in divorce proceedings. *Rector v. Rector*, 240.

Evidence held sufficient to show that German national who is wife of serviceman stationed in N. C. is resident of this State for purpose of divorce. *Ibid.*

§ 5. Recrimination

The doctrine of recrimination bars a plaintiff's right to divorce if the defendant proves that plaintiff has himself been guilty of conduct which would entitle defendant to a divorce. *Hicks v. Hicks*, 28.

§ 14. Adultery

Where wife sets up abandonment as a defense in the husband's action for divorce on grounds of two years separation, the husband may testify as to the adultery of his wife. *Hicks v. Hicks*, 28.

Competency of circumstantial evidence on the question of adultery. *Hicks v. Hicks*, 28.

§ 15. Insanity

Defendant husband in action for divorce on ground of incurable insanity was not confined in institution for five years next preceding the bringing of the action as required by G.S. 50-5(6) where approximately 14 months prior to commencement of the action he was discharged automatically from the State Hospital by provisions of G.S. 122-67 after remaining away from the hospital on a trial basis for more than a year. *Vaughan v. Vaughan*, 253.

§ 16. Alimony Without Divorce

Fact that plaintiff referred in his complaint to repealed G.S. 50-16 rather than 50-16.1 is not fatal. *Richardson v. Richardson*, 99.

Plaintiff in action for alimony without divorce on ground of abandonment is not required to particularly allege the acts and conduct relied upon as the basis of the action. *Ibid.*

§ 19. Modification of Decrees

Where court adopts consent agreement and also orders that terms of the agreement be performed by the parties, the consent judgment may be modified upon a showing of change of circumstances. *Elmore v. Elmore*, 192.

While a change in circumstances must be shown in order to modify an order relating to custody, support or alimony, it is not required that the change of circumstances be alleged, either specifically or in general terms, in the motion in the cause for modification of the court's order. *Ibid.*

§ 24. Custody

Trial court's order concluding that sufficient change of circumstances had been shown to permit modification of consent judgment awarding custody of child to mother and granting custody to father is held supported by findings. *Elmore v. Elmore*, 192.

Wishes of child of sufficient age to exercise discretion in choosing a custodian are entitled to considerable weight when the contest is between parents. *Ibid.*

DIVORCE AND ALIMONY—Continued

§ 25. Validity of and Attack on Foreign Decrees

Plaintiff is not entitled to attack her out-of-state divorce decree on ground that she was coerced by her husband to perpetrate fraud on the out-of-state court. *Thrasher v. Thrasher*, 534.

DOMICILE

§ 1. Definitions and Distinctions, Generally

One need not be a citizen of the U. S. to establish domicile within the State for purpose of divorce action. *Rector v. Rector*, 240.

§ 2. Domicile of Wife

Legal fiction that domicile of the wife follows that of the husband is not applicable to divorce proceedings. *Rector v. Rector*, 240.

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking"

Owner of land abutting a highway has special right of easement in the public road for access purposes which cannot be damaged or taken from him without due compensation. *Highway Comm. v. Realty Corp.*, 215.

Denial of access granted by a right-of-way agreement constitutes a taking for which the landowner is entitled to compensation. *McNeill v. Highway Comm.*, 354.

Defendants have reasonable access to and from main highway by service road and are not entitled to compensation for loss of direct access to highway. *Highway Comm. v. Wortman*, 546.

§ 7. Proceedings to Take Land and Assess Compensation, Generally

In highway condemnation action, the court erred in instructing jury that owner of property abutting new highway was not entitled to compensation for taking of access rights as such to the new highway. *Highway Comm. v. Realty Corp.*, 215.

ESCAPE

§ 1. Elements of, and Prosecution for, the Offense

In escape prosecution, court properly admitted testimony by assistant prison superintendent that defendant was not authorized to leave the custody of the foreman to which he had been assigned. *S. v. Warren*, 441.

Gross deprivation of procedural rights does not constitute justification for escape from a criminal sentence so as to preclude conviction for the escape. *Ibid.*

A commitment signed by the clerk of a city recorder's court and impressed with his seal is admissible to show that defendant was in lawful custody at time of escape. *S. v. Walls*, 661.

In a prosecution for second offense of escape, a more formal proof of the prior escape conviction is required than the commitment issued as the result of the prior conviction. *Ibid.*

In a prosecution for a second offense of escape, where the name set out in the commitment is exactly the same name as the defendant on trial, this identity of names, nothing else appearing, is *prima facie* evidence that the defendant on trial is the same person named in the commitment. *Ibid.*

EVIDENCE

§ 8. Facts Within Common Knowledge

Courts will take judicial notice of facts of general knowledge, e.g., that certain names ordinarily are given only to one of the sexes and that the gender of a personal pronoun may identify sex. *Lowe's v. Worlds*, 293.

It is a matter of common knowledge that the great majority of manufacturing plants today employ quality control tests as part of their regular manufacturing process. *Thompson Apex Co. v. Tire Service*, 402.

§ 12. Communications Between Husband and Wife

In husband's action for divorce, testimony of the husband as to adultery of wife is admissible where the testimony wes neither for nor against the wife on the issue of adultery. *Hicks v. Hicks*, 28.

§ 22. Evidence at Former Trial or Proceeding

Court erred in admitting award of Industrial Commission where defendants were not parties to the proceedings before the Commission. *Wiles v. Mullinax*, 73.

In divorce action, trial court properly refused to permit introduction of transcript of testimony in divorce action between the parties in another state where it was not shown that the witnesses are not present in this State and are unavailable to testify in this action. *Glymph v. Glymph*, 274.

In action to determine title to land under a will executed in 1946, trial court properly excluded as irrelevant court records relating to the domestic difficulties of a party occurring in 1964 and 1965. *Summey v. McDowell*, 62.

§ 23. Competence of Allegations in Pleadings

Admission of specific facts in the answer may be introduced into evidence. *Wiles v. Mullinax*, 73.

§ 29. Accounts, Ledgers, and Private Writings

Where part but not all of a letter offered in evidence is incompetent, it is the duty of the objecting party to point out the incompetent parts thereof. *Clayton v. Ins. Co.*, 43.

Tire rubber manufacturer's quality control test reports, although ordinarily admissible as an exception to hearsay rule as records kept in regular course of business, are erroneously admitted in this case without proper foundation. *Thompson Apex Co. v. Tire Service*, 402.

§ 50. Expert Medical Testimony

Medical expert may express an opinion as to cause of physical condition of a person if such opinion is based upon facts within his personal knowledge, or upon assumed state of facts supported by evidence. *Petty v. Associated Transport*, 361.

§ 53. Expert Testimony as to Handwriting

An expert witness in the field of handwriting identification may give his opinion as to the comparison of two signatures. *Clayton v. Ins. Co.*, 43.

EXECUTORS AND ADMINISTRATORS

§ 24. Right of Action for Personal Services Rendered Decedent

Evidence that plaintiff rendered personal services to her sister-in-law during the latter's old age and final illness and that plaintiff was promised to be

EXECUTORS AND ADMINISTRATORS—Continued

paid "at the end" is sufficient to go to the jury in plaintiff's action to recover for personal services. *Burns v. Burns*, 426.

§ 26. Presumption That Personal Services Rendered Decedent Were Gratuitous

Although there is no presumption that the services rendered by a sister-in-law while living within the family are gratuitous, the burden still rests upon her to show circumstances from which it might be inferred that the services were rendered and received with the mutual understanding that they were to be paid for. *Burns v. Burns*, 426.

§ 27. Amount of Recovery and Evidence of Value for Personal Services Rendered Decedent

In an action for personal services rendered decedent, instruction on damages which did not restrict jury's consideration to specific allegations of damages in the complaint is erroneous. *Burns v. Burns*, 426.

In action to recover for personal services rendered decedent, the measure of damages is the reasonable market value of such services. *Ibid.*

EXTRADITION

Trial court did not err in denying motion to quash indictment on ground that extradition proceedings were invalid. *S. v. Mourning*, 569.

FALSE PRETENSE

§ 1. Nature and Elements of the Crime

Elements of obtaining property by false pretense. *S. v. Houston*, 484; *S. v. Clontz*, 667.

§ 2. Indictment and Warrant

In this prosecution for obtaining property by false pretense, the indictment is not ambiguous in alleging that defendant presented to the prosecuting witness a check which defendant had endorsed in the name of another person. *S. v. Clontz*, 667.

§ 3. Evidence

Evidence held sufficient for jury in prosecution for obtaining property by false pretense. *S. v. Houston*, 484.

FRAUD

§ 2. Fraud in the Factum and Fraud in the Treaty

Fraud in the factum and fraud in the treaty are distinguished. *Jarvis v. Parnell*, 432.

GAMBLING

§ 2. Slot Machines and Punchboards

Evidence of unlawful possession of gambling devices held insufficient for jury where State's evidence fails to show that such devices were in operation or were in defendant's possession for the purpose of being operated. *S. v. Sheppard*, 670.

HIGHWAYS

§ 1. Powers and Functions of Highway Commission in General

Statute giving Highway Commission jurisdiction to require installation of safety devices at railroad crossings and providing formula for allocating costs applies only to crossings forming a link in the State highway system. *R. R. Co. v. Winston-Salem*, 11.

§ 4. What Constitutes a State Highway or Public Road

State Highway Commission is sole authority to determine which roads and streets shall become part of the State highway system. *R. R. Co. v. Winston-Salem*, 11.

§ 5. Rights of Way

Defendants were given notice that highway right of way agreements obtained from their predecessors in title, which were not recorded, provided for an additional lane across their land where their deed was made subject to the highway right of way and referred to a plat showing a proposed lane across their land. *Highway Comm. v. Wortman*, 546.

Highway Commission can not only pay money as consideration for right-of-way agreement but can grant to landowner right of access at a particular designated point, and denial of access granted by a right-of-way agreement constitutes a taking for which the landowner is entitled to compensation. *McNeill v. Highway Comm.*, 354.

§ 9. Actions Against the Commission

Action of State Highway employee in removing large posts from shoulder of highway and leaving unfilled the holes constitutes a negligent act for which recovery may be had under the Tort Claims Act. *Mackey v. Highway Comm.*, 630.

In proceeding before Board of Review under former G.S. 136-29 for additional payment allegedly due from State Highway Commission for work on highway project, recovery must be within terms and framework of the contract and may not be based on quantum meruit. *Teer Co. v. Highway Comm.*, 126.

Work performed by paving contractor to correct deficiencies in rough grading project which prior contractor had failed to perform properly is held to be "extra work" which could be performed under existing contract without necessity of bids. *Ibid.*

Board of Review erred in using actual equipment costs in determining rental rates in performing extra work instead of using rate schedule provided in the contract. *Ibid.*

Highway contractor is not entitled to interest on the amount awarded to it by the Board of Review. *Ibid.*

Fact that paving contractor was directed by Highway Commission engineer to make extensive correction of deficiencies in rough grading of prior contractor does not permit contractor to be compensated on a force account basis for all work performed under contract with the Highway Commission. *Ibid.*

Board of Review may not change unit prices bid by contractor to force account basis on ground of contractor's extra expense from delays caused by failure of prior contractor to perform properly the rough grading. *Ibid.*

Highway Commission cannot circumvent statute requiring letting of bids by calling work not specifically covered in contract "Extra Work." *Ibid.*

"Extra Work" under a contract with the Highway Commission cannot be

HIGHWAYS—Continued

construed to mean work required to perform the specific items for which unit prices were bid by the contractor. *Ibid.*

HOMICIDE

§ 9. Self-Defense

Trial court erred in failing to instruct jury that right of self-defense may be restored to one who has started a fight or entered it willingly by quitting in good faith and giving his adversary notice of such action on his part. *S. v. Ramey*, 469.

§ 15. Relevancy and Competency of Evidence in General

In homicide prosecution, court properly permitted sheriff to identify certain stains and discolorations as bloodstains. *S. v. Willis*, 641.

§ 20. Demonstrative Evidence: Photographs and Physical Objects

Court properly admitted a knife found at the crime scene eight days after the incident occurred. *S. v. Battle*, 588.

§ 21. Sufficiency of Evidence and Nonsuit

Strong evidence of self-defense does not entitle defendant to nonsuit in homicide prosecution. *S. v. Kirby*, 380.

Evidence held sufficient for jury in prosecution for second degree murder. *Ibid.*

Evidence held sufficient for jury in prosecution for involuntary manslaughter by abuse or neglect of a child. *S. v. Ledbetter*, 303.

§ 24. Instructions or Presumptions

In second degree murder prosecution, trial court did not err in charging jury as to presumptions raised by a killing with a deadly weapon. *S. v. Battle*, 588.

§ 28. Instructions on Defenses and Burden of Proof

In homicide prosecution, court properly instructed jury that the fact that the episode produced a shock or trauma which created a mental block so that defendant did not subsequently recall what happened would not entitle her to acquittal. *S. v. Kirby*, 380.

In homicide prosecution, trial court did not err in failing to instruct jury on issue of self-defense where the evidence shows that although deceased slapped defendant, defendant thereafter became the aggressor. *S. v. Battle*, 588.

§ 31. Verdict and Sentence

Trial court properly accepted verdict of guilty of "manslaughter" where indictment charged defendant with crime of involuntary manslaughter and charge related only to involuntary manslaughter. *S. v. Ledbetter*, 303.

HOSPITALS

§ 3. Liability of Hospital to Patient

Though charitable hospital had liability insurance in effect at time plaintiff was injured, hospital is entitled to assert defense of charitable immunity where cause of action arose in February 1964. *Helms v. Williams*, 391.

Issue of charitable hospital's negligence in selection and retaining head nurse should have been submitted to jury. *Ibid.*

INCEST

In incest prosecution, court properly admitted testimony by prosecutrix as to other instances of intercourse with defendant and by sister of prosecutrix as to acts of intercourse with defendant. *S. v. Sutton*, 664.

Evidence held sufficient for jury in incest prosecution. *Ibid.*

INDICTMENT AND WARRANT

§ 6. Issuance of Warrants

Evidence is held sufficient to support a finding that warrant was sworn to by the complaining witness at the time he signed it. *S. v. Stallings*, 184.

§ 11. Identification of Victim

In prosecution for breaking and entering, there is no fatal variance where indictment alleges building broken and entered was occupied by named person and evidence shows business conducted in building was managed by another but owned by person named in indictment. *S. v. Smith*, 261.

Owner of service station from which radio and gloves owned by station manager were stolen has such a special property in the radio and gloves as would sustain indictment for larceny. *Ibid.*

§ 13. Bill of Particulars

Defendants in conspiracy prosecution were not prejudiced by denial of their motion for bill of particulars setting forth names of "divers others" referred to in the indictment where solicitor advised court he did not know names of any others against whom he could prove conspiracy. *S. v. Conrad*, 50.

§ 14. Grounds and Procedure on Motion to Quash

Trial court did not err in denying motion to quash indictment on ground that extradition proceedings were invalid. *S. v. Mourning*, 569.

Trial court properly denied defendant's motion to quash the indictment on the ground that the caption did not show the year in which the indictment was returned. *Ibid.*

§ 15. Time for Making Motion to Quash, and Waiver of Defects

A motion to quash, made in the superior court after pleading to the warrant in the recorder's court, is addressed to the discretion of the trial court. *S. v. Stallings*, 184.

By pleading to a warrant in an inferior court before moving to quash the warrant in superior court on the ground that the issuing officer was a police officer, defendant waives any defect incident to the authority of the person who issued the warrant. *Ibid.*

INFANTS

§ 3. Consent Judgments

Where court orders that terms of consent agreement relating to custody and support of children be performed by the parties, the consent judgment may be modified upon showing of change of circumstances. *Elmore v. Elmore*, 192.

§ 9. Hearing and Grounds for Awarding Custody of Minor.

While a change in circumstances must be shown in order to modify an order relating to custody, support or alimony, it is not required that the change of circumstances be alleged, either specifically or in general terms, in

INFANTS—Continued

the motion in the cause for modification of the court's order. *Elmore v. Elmore,* 192.

Court order modifying decree of custody held sufficiently supported by findings of changed circumstances affecting welfare of the child. *Ibid.*

§ 10. Commitment of Minors for Delinquency

Jury trial is not constitutionally required in a juvenile proceeding. *In re Burrus,* 523.

Constitutional rights of juveniles are not violated by exclusion of the general public from a juvenile court hearing. *Ibid.*

The N. C. Juvenile Act is constitutional. *Ibid.*

INSANE PERSONS

§ 5. Claims Against Estate

Action under G.S. 143-121 to recover for maintenance of incompetent at State Hospital may be brought after the patient has left the hospital, and sufficient funds need not be set aside for future support of the incompetent and his family. *Hospital v. Hollifield,* 453.

INSURANCE

§ 2. Control and Regulation of Brokers and Agents

In action for negligent failure of insurance agent to procure for plaintiff workmen's compensation insurance, trial court properly allowed plaintiff to introduce portions of defendant's answer to effect that two insurance companies had been dismissed as defendants in workmen's compensation proceeding before Industrial Commission, but court erred in admitting into evidence the opinion and award of the Commission. *Wiles v. Mullinax,* 73.

In action for negligent failure of insurance agent to procure for plaintiff workmen's compensation insurance, court committed prejudicial error in placing burden of proof on defendant to establish insurance binder introduced by defendant which allegedly bound an insurance company to provide coverage for plaintiff. *Wiles v. Mullinax,* 73.

§ 7. What Law Governs

Statute relating to provisions of a group life policy is inapplicable where policy is not delivered in this State. *Clayton v. Ins. Co.,* 43.

§ 27.5. Credit Life Insurance

When a creditor named as beneficiary of a credit life insurance policy effects payment of its indebtedness after death of insured debtor by repossessing mortgaged chattel, the credit life insurance policy becomes one for the benefit of the insured collectible by his executors or administrators. *Newsome v. Ins. Co.,* 161.

Insurer is liable upon its policy of credit life insurance where the creditor repossesses the mortgaged chattel subsequent to the insured debtor's death notwithstanding the policy provided that it should terminate automatically upon repossession of the chattel, since insurer's liability under the policy became fixed when the debtor died before repossession of the chattel occurred. *Ibid.*

§ 29. Right to Proceeds; Beneficiaries

Plaintiff is entitled as "surviving widow" to proceeds of policy of life in-

INSURANCE—Continued

surance notwithstanding plaintiff and deceased had executed a deed of separation in which plaintiff released all her right, title and interest in property and estate of deceased. *Zachary v. Trust Co.*, 221.

§ 37. Actions on Life Policies

In action to recover death benefits under a policy of group insurance, plaintiff's evidence is sufficient to make out prima facie case that he was the named beneficiary. *Clayton v. Ins. Co.*, 43.

§ 44. Actions to Recover Benefits

Under group medical expense policy, word "month" is construed to mean calendar month for purpose of determining employee's benefits. *Kennedy v. Ins. Co.*, 77.

§ 74. Actions on Collision and Upset Policies

Judgment on pleadings is properly allowed in action under automobile collision policy where pleadings disclose plaintiff has recovered against third party tort-feasor but refuses to assign judgment to defendant insurer to extent of defendant's subrogation rights. *Jefferies v. Ins. Co.*, 102.

§ 88. Garage and Dealers' Liability Insurance

Plaintiff's evidence fails to show vehicle involved in accident was covered on date of accident by garage liability policy issued by defendant. *Phillips v. Ins. Co.*, 655.

§ 105. Actions Against Insurer

Attorneys' fees are not allowable as item of damages or item of court costs in action against insurance company to determine coverage on policy of automobile liability insurance. *Perkins v. Ins. Co.*, 466.

§ 129. Cancellation of Fire Policies

Cancellation of fire policy upon insured's request was not affected by failure of insurance agent to return premium refund until after fire had occurred or to notify insured that cancellation had become effective. *Everett v. Ins. Co.*, 501.

§ 136. Actions on Fire Policies

Plaintiff's evidence held insufficient to show that fire policy was in effect at time of fire where she mistakenly returned wrong policy for cancellation. *Everett v. Ins. Co.*, 501.

INTEREST

§ 1. Items Drawing Interest in General

Interest may not be awarded against the State except by authority of statute or contract. *Teer v. Highway Comm.*, 126.

INTOXICATING LIQUOR

§ 2. Duties and Authority of ABC Boards; Beer and Wine Licenses

Application for review in superior court of order suspending beer permit is dismissed for failure to exhaust administrative remedies by requesting hearing before full ABC Board. *Porter v. Board of Alcoholic Control*, 284.

JUDGMENTS

§ 8. Nature and Essentials of Judgments by Consent

Validity of consent judgment depends on consent of the parties. *Sawyer v. Sawyer*, 594.

§ 14. Sufficiency of Pleadings to Sustain Default

If complaint fails to state a cause of action against one defendant, a default judgment against that defendant cannot be supported and must be set aside, even without showing of mistake, surprise or excusable neglect. *Lowe's v. Worlds*, 293.

§ 16. Direct and Collateral Attack

A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid. *Thrasher v. Thrasher*, 534.

§ 22. Attack on Foreign Judgment

Foreign judgment may be attacked in this State only upon grounds of lack of jurisdiction, fraud in the procurement or as act against public policy. *Thrasher v. Thrasher*, 534.

Plaintiff is not entitled to attack divorce judgment of another state on ground that she was coerced by her husband to procure the divorce by fraud. *Ibid.*

§ 27. Setting Aside Judgment for Fraud

Perjury is not ordinarily ground for equitable relief against a judgment resulting from it. *Thrasher v. Thrasher*, 534.

§ 31. Parties; Standing to Make Attack

The party at whose instance a judgment is rendered is not entitled in a collateral proceeding to declare the judgment invalid. *Thrasher v. Thrasher*, 534.

§ 33. Presumptions and Burden of Proof

The burden to overcome presumption of the validity of a foreign judgment rests upon the party attacking the judgment. *Thrasher v. Thrasher*, 534.

§ 36. Parties Concluded

In action arising out of a three-car collision, judgment obtained in another action by one defendant against the other for damages incurred in same accident is not res judicata on first defendant's right to contribution. *Johnson v. Petree*, 20.

Award of Industrial Commission is not res judicata as to defendants who were not parties to that proceeding. *Wiles v. Mullinax*, 73.

§ 42. Judgments of Retraxit and Dismissal

Judgment affirmed by Supreme Court sustaining demurrer for failure of complaint to state a cause of action is res judicata and bars subsequent action upon substantially identical allegations. *Cobb v. Clark*, 230.

JURY

§ 2. Special Venires

Motion for change of venue or for special venire is in discretion of trial judge. *S. v. Ledbetter*, 303.

JURY—Continued

No abuse of discretion is shown in denial of motion for special venire by fact that 22 out of 49 jurors were excused for cause on ground they were prejudiced against defendant. *Ibid.*

§ 6. Examination of Jurors

Trial judge did not abuse his discretion in denial of defendant's motion to excuse a juror who indicated during the trial that he was acquainted with a State's witness. *S. v. Blount*, 561.

KIDNAPPING

§ 2. Punishment

Sentence of 12 to 15 years for kidnapping is constitutional. *S. v. Kotofsky*, 302.

LARCENY

§ 5. Presumptions

Presumption arising from recent possession of stolen property is to be considered by jury merely as evidential fact. *S. v. Jackson*, 459; *S. v. Smith*, 261.

§ 7. Sufficiency of Evidence and Nonsuit

In prosecution for larceny of radio and gloves from a service station, there is no fatal variance where indictment places ownership of the property in owner of the station and his brother who managed the station, and the evidence shows the radio and gloves were sole property of the brother, the station owner having a special property in the radio and gloves. *Ibid.*

Evidence tending to show that an inventory of television sets owned by a corporation disclosed that a set having a listed serial number was missing, and that three days later the set so identified was in the possession of defendants, *held* sufficient to overrule nonsuit. *S. v. Neely*, 472.

Evidence held sufficient for jury in larceny prosecution. *S. v. Bertha*, 422; *S. v. Garnett*, 367.

§ 8. Instructions

Trial judge expressed an opinion on the evidence when he instructed the jury that a State's witness testified that she saw defendant with "this" TV set. *S. v. Bertha*, 422.

Instruction in larceny prosecution which did not sufficiently explain to jury that presumption arising from possession of recently stolen property is to be considered only as evidential fact is erroneous. *S. v. Jackson*, 459.

Instruction which failed to require jury to find that TV sets found in defendant's possession were the identical sets taken from store broken and entered was erroneous. *Ibid.*

§ 10. Judgment and Sentence

Punishment of 10 years is proper for the felony of larceny of property from a building by breaking and entering with intent to steal. *S. v. Reed*, 109.

LIMITATION OF ACTIONS

§ 12. Institution of Action, Discontinuance and Amendment

Statute permitting suits to be reinstituted within one year after dismissal of original action by nonsuit does not apply when original suit is brought in Federal District court in this State. *Cobb v. Clark*, 230.

LIS PENDENS

In this State the common law rule of *lis pendeds* has been replaced by statute, G.S. 1-116 to G.S. 1-120.1. *Pegram v. Tomrich Corp.*, 413.

An action to establish a trust as to certain described real property is an action "affecting title to real property" within the meaning of G.S. 1-116(a)(1), and a valid notice of *lis pendens* may be filed in connection therewith. *Ibid.*

Order of the trial court vacating plaintiff's notice of *lis pendens is held* proper on the ground that plaintiff's action is not one "affecting title to real property." *Ibid.*

MASTER AND SERVANT

§ 58. Workmen's Compensation: Negligent or Wilful Act of Injured Employee

Industrial Commission properly denied benefits for death of employee by suicide following injury arising out of and in course of his employment upon findings supported by evidence that death of employee was occasioned by his wilful intention to kill himself. *Petty v. Associated Transport*, 361.

§ 60. Unauthorized Acts of Employee, and Personal Missions

Trial court properly concluded employee was a guest passenger in his employer's truck at time he was injured and his injuries were not compensable under Workmen's Compensation Act. *Kilby v. Dowdle*, 450.

§ 61. Acts Performed by Injured Employee, and Personal Missions

Industrial Commission's determination that employee's death did not arise out of and in the course of his employment held supported by findings that employee was killed while assisting a third party. *Short v. Hosiery Mills*, 290.

§ 62. Injuries on the Way to and from Work

Employee's death from automobile accident while riding in private vehicle from work site to employer's plant held compensable under Workmen's Compensation Act. *McManus v. Chick Haven Farms*, 177.

§ 85. Nature and Extent of Jurisdiction Generally

G.S. 1-220, which authorizes a judge to set aside a judgment for mistake, inadvertence, surprise, or excusable neglect, does not apply to proceedings before the Industrial Commission. *Hartsell v. Cotton Mills*, 67.

§ 93. Prosecution of Claim and Proceedings Before the Commission

Industrial Commission did not abuse its discretion in refusing to set aside compromise settlement. *Hartsell v. Cotton Mills*, 67.

Industrial Commission has authority to strike findings of facts or conclusions of law of hearing commissioner and to substitute its own findings and conclusions. *Petty v. Associated Transport*, 361.

§ 94. Findings and Award of Commission

In workmen's compensation proceeding Industrial Commission is not required to make a finding as to each detail of the evidence. *McManus v. Chick Haven Farms*, 177.

§ 96. Review of Award in Superior Court

Whether an accident arises out of employment is mixed question of fact and law, and finding of the Industrial Commission as to the factual portion is

MASTER AND SERVANT—Continued

conclusive if supported by any competent evidence. *McManus v. Chick Haven Farms*, 177.

Failure of the Industrial Commission to make certain findings of fact in respect to defenses set up by defendant is not error where such findings would have no effect on the ultimate finding by the Commission that the deceased employee was injured by accident arising out of and in the course of his employment. *Ibid.*

Review of decision of Industrial Commission is limited to questions of whether there is competent evidence to support its findings and whether such findings support its conclusions of law. *Petty v. Associated Transport*, 361.

Findings of fact by the Industrial Commission are conclusive if supported by competent evidence. *Mackey v. Highway Comm.*, 630.

MORTGAGES AND DEEDS OF TRUST

§ 19. Right to Foreclose and Defenses

In an action to restrain foreclosure of a deed of trust, trial court properly found that parties intended that a new long-term note and deed of trust be in substitution of a prior construction note and deed of trust, that plaintiff was entitled to credit upon the note held by defendants for payments made upon the new long-term loan, and that note held by defendants was therefore not in default. *Piney Mountain Properties v. Supply Co.*, 334.

§ 20. Parties in Suits to Enjoin Foreclosure

In action to restrain defendants from foreclosing a deed of trust, the court erred in finding that the lien of a deed of trust held by a corporation which was not a party to the present action was extinguished by a merger of the legal and equitable title in the corporation. *Piney Mountain Properties v. Supply Co.*, 334.

§ 24. Foreclosure by Action

In an action for foreclosure of a deed of trust, the trustee in the deed is a necessary and indispensable party. *Watson v. Carr*, 287.

MUNICIPAL CORPORATIONS

§ 12. Liability Generally

Municipalities are not liable for tortious acts of their agents when exercising governmental functions. *Rappe v. Carr*, 497.

§ 15. Warnings, Barriers and Lights

Municipality may not be held liable for negligence of its agents in installation and maintenance of traffic control signals. *Rappe v. Carr*, 497.

§ 30. Zoning Ordinances and Building Permits

In municipality's action to restrain landowners from continuing construction work on their land until they obtain a zoning permit in compliance with a zoning ordinance, landowners may assert as an affirmative defense that they in good faith incurred substantial expense in reliance upon a building permit issued them by the municipality prior to the adoption of the ordinance. *Hillsborough v. Smith*, 316.

Landowners were not required to exhaust administrative remedies under

zoning ordinance in order to challenge the ordinance's invalidity as it applied to them. *Ibid.*

In order for landowners to complete construction of a nonconforming use prohibited by a zoning ordinance enacted after the issuance of a building permit, the landowners must show that they in good faith made substantial expenditures in reliance upon the building permit prior to the enactment of the ordinance, but the expenditures need not be limited to the land itself. *Ibid.*

On issue as to whether landowners made substantial expenditures in reliance upon building permit so as to allow them to complete construction of nonconforming use prohibited by zoning ordinance enacted after issuance of the permit, instructions which permitted jury to consider all expenditures made in good faith from date of issuance of the permit to date landowners received notice of revocation of the permit, rather than expenditures made from issuance of permit to effective date of ordinance, *is held* erroneous. *Ibid.*

§ 33. Control, Regulation and Authority Over Streets

While municipalities are not required to install electrical traffic control signals, they may do so as an exercise of their police power. *Rappe v. Carr*, 497.

§ 35. Regulation of Grade Crossings

G.S. 136-20 does not adopt a statewide policy with respect to allocation of costs of safety devices at railroad crossings which is binding upon municipalities in administering city streets which are not part of the State highway system. *R. R. Co. v. Winston-Salem*, 11.

Municipal ordinances requiring railroad to install warning signals at two grade crossings and allocating costs of signals between municipality and railroad is held constitutional. *Ibid.*

Attempt by municipality to impose upon railway entire cost of rebuilding railway bridge to accommodate increased width of city street is held unconstitutional. *Raleigh v. R. R. Co.*, 1.

NEGLIGENCE

§ 1. Acts and Omissions Constituting Negligence Generally

One who undertakes to do something and does it negligently commits a negligent act, not a negligent omission. *Mackey v. Highway Comm.*, 630.

§ 20. Actions Generally; Limitations

Action for personal injuries instituted in superior court more than three years after accident is barred by statute of limitations notwithstanding such action was begun within a year after dismissal of plaintiff's original suit brought in apt time in Federal District Court. *Cobb v. Clark*, 230.

§ 22. Pleadings in Negligence Actions

Plaintiff is entitled to rely upon a number of aspects of negligence. *Farmer v. Reynolds*, 554.

§ 37. Instructions on Negligence

Where plaintiff relies upon a number of aspects of negligence, instructions were erroneous which required jury to find that defendant had to be negligent in all aspects relied upon. *Farmer v. Reynolds*, 554.

OBSTRUCTING JUSTICE

The gist of the offense of intimidating or interfering with witnesses or jurors is the obstruction of justice. G.S. 14-226. *S. v. Neely*, 475.

In prosecution charging defendant with openly intimidating in the recorder's court a witness who had testified against him, defendant is not entitled to nonsuit where at the time the threat was made the witness was a prospective witness in superior court as a result of defendant's appeal. *Ibid.*

PARTIES

§ 3. Parties Defendant

Where action is dismissed as to certain defendants for misjoinder of parties and causes, plaintiff may not thereafter amend complaint and bring such defendants back into action as new parties under G.S. 1-73. *Gilliam v. Ruffin*, 85.

PLEADINGS

§ 2. Statement of Cause of Action in General

If allegations in a complaint are sufficient, reference to a particular statute is unnecessary. *Richardson v. Richardson*, 99.

The nature of plaintiff's action is determined by reference to the facts alleged in the complaint rather than by what is contained in the prayer for relief. *Pegram v. Tomrich Corp.*, 413.

Where both general and specific allegations are made respecting the same matter, the latter control. *Burns v. Burns*, 426.

§ 7. Prayer for Relief

Prayer for relief is not a necessary part of the complaint. *Burns v. Burns*, 426.

§ 13. Counterclaim in Contract

In plaintiff's action to remove cloud on title, defendant's counterclaim was proper where it alleged that defendants were owners of liens on the property and were entitled to have them satisfied. *Watson v. Carr*, 287.

§ 15. Pleas in Bar

Defendant who pleads a release in bar of plaintiff's claim has the burden of proving such defense. *Sexton v. Lilley*, 606.

A plea in bar may be tried prior to the trial of the main cause of action. *Ibid.*

§ 18. Form and Contents of Reply

Plaintiff may not set up a cause of action in his reply different from that contained in the complaint. *Jefferies v. Ins. Co.*, 102.

§ 19. Office and Effect of Demurrer

A demurrer to a complaint for failure to state facts sufficient to constitute a cause of action admits only those facts which are properly pleaded, and the legal inferences and conclusions of the pleader are to be disregarded. *Sawyer v. Sawyer*, 594.

A demurrer does not admit the alleged construction of an instrument which is incorporated in the pleadings when such construction is repugnant to the language of the instrument. *Ibid.*

PLEADINGS—Continued

§ 21. Statement of Grounds and Requisites of Demurrer

A demurrer may be disregarded if the grounds for demurrer are not strictly specified. *Berry v. Wilmington*, 648.

§ 26. Demurrer for Failure of Complaint to State a Cause of Action

Demurrer is properly overruled where it fails to specify any grounds of objection to the complaint. *Berry v. Wilmington*, 648.

Where complaint stating a single cause of action alleges two repugnant statements of fact, such allegations destroy each other, and demurrer will lie where the remaining averments are insufficient to state a cause of action. *Sawyer v. Sawyer*, 594.

§ 29. Judgment on Demurrer

Judgment affirmed by Supreme Court sustaining demurrer for failure to complaint to state a cause of action is res judicata and bars subsequent action upon substantially identical allegations. *Cobb v. Clark*, 230.

Where demurrer is sustained for misjoinder of causes only, the several causes of action may be divided; where demurrer is sustained for misjoinder of parties and causes of action, the action must be dismissed. *Gilliam v. Ruffin*, 85.

Judgment dismissing the action is proper where the complaint contains a statement of a defective cause of action. *Sawyer v. Sawyer*, 594.

§ 36. Variance Between Proof and Allegation

Allegata and probata must correspond. *Burns v. Burns*, 426.

§ 38. Motion for Judgment on the Pleadings

Effect of motion for judgment on the pleadings. *Jefferies v. Ins. Co.*, 102.

§ 41. Motions to Strike

Where motion to strike paragraph of further answer is not directed to any specific allegation, the paragraph should not be stricken if it contains any matter relevant to the controversy. *Johnson v. Petree*, 20.

§ 42. Right to Have Allegations Stricken on Motion

The fact that the factual allegations supporting defendants' pleas of insulating negligence and sudden emergency might have been more concisely stated is not sufficient cause for a motion to strike. *Johnson v. Petree*, 20.

PRINCIPAL AND AGENT

§ 4. Proof of Agency

In action to recover on a note executed by defendant's purported agent, plaintiff has burden to establish agent's power and authority. *Jarvis v. Parnell*, 432.

§ 5. Scope of Authority

Person dealing with a special agent must acquaint himself with the strict extent of the agent's authority. *Jarvis v. Parnell*, 432.

Where the asserted power of an agent to indorse or otherwise deal with commercial paper is grounded upon a letter or power of attorney, such writing is to be strictly construed upon the question of whether and how far it bestows authority to such matters upon the agent. *Ibid.*

QUASI CONTRACTS

§ 1. Elements and Essentials of Right of Action

The law will presume a promise to pay the reasonable worth of services rendered by one person to another which are knowingly and voluntarily received. *Burns v. Burns*, 426.

Quantum meruit must rest upon an implied contract. *Ibid.*

§ 2. Actions to Recover on Implied Contract

Pleader may abandon his allegations of recovery for personal services on theory of express contract and proceed on the principle of quantum meruit. *Stout v. Smith*, 81.

Recovery on theory of quantum meruit is limited to the reasonable value of the services and goods accepted and appropriated by defendant. *Ibid.*

RAILROADS

§ 2. Location, Relocation and Maintenance of Tracks, Overpasses and Underpasses

Municipal ordinance requiring railroad to install warning signals at two grade crossings and allocating costs between municipality and railroad is held constitutional. *R. R. Co. v. Winston-Salem*, 11.

G.S. 136-20 does not adopt a statewide policy with respect to allocation of costs of safety devices at railroad crossings which is binding on municipalities in administering city streets which are not part of State highway system. *Ibid.*

Attempt by municipality to impose upon a railroad the entire cost of rebuilding a railroad bridge to accommodate increased width of city street is held unconstitutional. *Raleigh v. R. R. Co.*, 1.

§ 5. Crossing Accidents

In a wrongful death action arising out of a collision at a railroad crossing, plaintiff's evidence is sufficient to show as a matter of law that negligence of the driver of the vehicle in which intestate was riding was the sole proximate cause of the collision notwithstanding evidence of negligence on the part of defendant's train in failing to give warning of its approach by horn or whistle. *Brown v. R. R. Co.*, 169.

RAPE

§ 18. Prosecutions for Assault With Intent to Commit Rape

Evidence is insufficient to be submitted to jury on issue of defendant's guilt of assault with intent to commit rape where it fails to show defendant intended at any time during the assault to have carnal knowledge of the prosecutrix at all events notwithstanding resistance on her part. *S. v. Walker*, 478.

In a prosecution for assault with intent to commit rape, nonsuit of the felony charge does not entitle defendant to his discharge, since the State may put defendant on trial under the same indictment for assault on a female, defendant being a male over the age of 18. G.S. 14-33. *Ibid.*

REGISTRATION

§ 1. Necessity for Registration and Instruments Within Purview of Statute

A map or plat referred to in a deed need not be registered. *Highway Comm. v. Wortman*, 546.

REGISTRATION—Continued

§ 3. Registration as Notice

Defendants were given notice that highway right of way agreements obtained from their predecessors in title, which were not recorded, provided for an additional lane across their land where their deed was made subject to the highway right of way and referred to a plat showing a proposed lane across their land. *Highway Comm. v. Wortman*, 546.

If facts disclosed in an instrument appearing in a purchaser's chain of title would lead a prudent person to make inquiry concerning the rights of others, these facts constitute notice of everything which such inquiry would have disclosed. *Ibid.*

A record deed of trust containing the word "widow" in parentheses after the name of the trustor is held insufficient to constitute notice to subsequent purchasers from the widow that the widow's interest in the property was a dower interest. *Morehead v. Harris*, 235.

ROBBERY

§ 1. Nature and Elements of Offense

Common law robbery defined. *S. v. Bailey*, 407.

§ 3. Competency of Evidence

The court did not err in denying defendant's motion to strike testimony by the prosecuting witness to the effect that he had known defendant ever since he was growing up when, in fact, the witness had not seen defendant for several years during which defendant had changed in appearance. *S. v. Blount*, 561.

§ 4. Sufficiency of Evidence and Nonsuit

Evidence held sufficient for jury in armed robbery prosecution. *S. v. Mourning*, 569.

In order to sustain a conviction of an attempt to commit common-law robbery, the jury need not find that the victim was actually intimidated by defendant's words and actions and that his fear was reasonably induced thereby, the State being required merely to show that defendant had the intent to commit the crime and had committed a direct but ineffectual act toward its commission. *S. v. Bailey*, 407.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

In common-law robbery prosecution, trial court was not required to submit issue of lesser offense of attempt to commit larceny where State's evidence shows all elements of an attempt to commit the robbery and there is no conflicting evidence. *S. v. Bailey*, 407.

Court properly instructed jury in prosecution for attempt to commit common-law robbery. *Ibid.*

In armed robbery prosecution, trial court expressed no opinion in the charge as to which version of the State's conflicting evidence jury should accept. *S. v. Blount*, 561.

In armed robbery prosecution in which court submitted question to jury as to whether pocketknife allegedly used in the robbery is a dangerous weapon, court's failure to submit lesser offense of common law robbery is prejudicial error. *S. v. Strickland*, 105.

§ 6. Verdict and Sentence

Attempt to commit common-law robbery is punishable under G.S. 14-2. *S. v. Bailey*, 407.

SAFECRACKING

Evidence held sufficient for jury in safecracking prosecution. *Chapman v. State*, 438.

SALES

§ 10. Recovery of Goods or Purchase Price

In seller's actions to recover purchase price of goods against husband and wife, where the material allegations of the complaint referred solely to the husband and used the personal pronoun "his", the complaint fails to state a cause of action against the wife and cannot support a default judgment against her. *Lowe's v. Worlds*, 293.

§ 14. Actions or Counterclaims for Breach of Warranty

In consumer's action for breach of implied warranty against retailers arising out of the failure of a defective tire, defendant retailer's cross-action against the manufacturer of the tire seeking indemnity is held subject to demurrer for failure to state a cause of action. *Mendenhall v. Garage*, 226.

SCHOOLS

§ 1. Establishment, Maintenance and Supervision in General

A county technical institute which provides adult vocational and general educational training is a part of the public school system of the State. *Parent-Teacher Assoc. v. Bd. of Education*, 617.

§ 2. Fees and Tuition

In action by a private school to recover tuition on a contract of enrollment, there is sufficient evidence to support a jury finding that the school and the parents of one of its pupils had created a binding contract. *Foundation v. Basnight*, 652.

§ 7. Taxation, Bonds, and Allocation of Proceeds

Expenditure of funds by a county for operation of a technical institute for adult and general vocational training without a vote of the people is constitutional. *Parent-Teacher Assoc. v. Bd. of Education*, 617.

The operation of the public school system is a necessary expense which does not require a vote of the people. *Ibid.*

STATE

§ 4. Actions Against the State

Interest may not be awarded against the State without authorization by statute or contract. *Teer Co. v. Highway Comm.*, 126.

§ 7. Filing of Claim and Procedure Under Tort Claims Act

In action brought in this State under Tort Claims Act for collision occurring in Virginia, substantive law of Virginia and procedural law of N. C. apply. *Parsons v. Board of Education*, 36.

Contributory negligence must be pleaded in order to rely upon it as a defense in an action under Tort Claims Act. *Ibid.*

§ 8. Negligence of State Employee and Contributory Negligence of Person Injured

In action under Tort Claims Act for injuries sustained in school bus colli-

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sion in Virginia, Industrial Commission properly found that defendant driver was negligent and that plaintiff was not contributorily negligent under Virginia law. *Parsons v. Board of Education*, 36.

Action of State Highway employee in removing large posts from shoulder of highway and leaving unfilled holes constitutes a negligent act for which recovery may be had under the Tort Claims Act. *Mackey v. Highway Comm.*, 630.

Recovery is permitted under the Tort Claims Act for injuries resulting from a negligent act but not from a negligent omission. *Ibid.*

§ 10. Appeal and Review of Proceedings

Findings of fact of Industrial Commission are conclusive on appeal if supported by competent evidence. *Parsons v. Board of Education*, 36.

The Industrial Commission is not required to make findings coextensive with all the credible direct evidence. *Ibid.*

TAXATION

§ 6. Necessary Expenses and Necessity for Vote

The operation of the public school system is a necessary expense which does not require a vote of the people. *Parent-Teacher Assoc. v. Bd. of Education*, 617.

Expenditure of funds by a county for operation of a technical institute for adult and general vocational training without a vote of the people is constitutional. *Ibid.*

TIME

The word "month" signifies a calendar month. *Kennedy v. Ins. Co.*, 77.

TORTS

§ 4. Right of One Defendant to Have Others Joined for Contribution

The Uniform Contribution Among Tort-Feasors Act, G.S. Ch. 1B, does not apply to litigation pending on 1 January 1968. *Johnson v. Petree*, 20.

In action arising out of a three-car collision, cross claim by one defendant against the other for contribution pursuant to the Uniform Contribution Against Joint Tort-Feasors Act is properly allowed. *Ibid.*

§ 5. Judgment in Prior Action as Affecting Right to Contribution or Right to File Cross Action

In action arising out of three-car collision, judgment obtained in prior action between two defendants does not constitute res judicata as to one defendant's right to contribution in the present action. *Johnson v. Petree*, 20.

§ 7. Release from Liability and Covenants Not to Sue

Defendant who pleads a release in bar of plaintiff's claim has burden of proving such defense. *Sexton v. Lilley*, 606.

A plea in bar may be tried prior to the trial of plaintiff's cause of action. *Ibid.*

Burden of proof with respect to avoiding a release from liability is on the party seeking to avoid the release. *Ibid.*

A release from liability is vitiated by fraud. *Ibid.*

Evidence held sufficient for jury on issue of whether release executed by

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plaintiff was fraudulently obtained by defendant's agents where it tends to show that plaintiff's failure to read the release before signing it resulted from misrepresentations by defendant's agents that purpose of release was for paying for vehicle to be repaired. *Ibid.*

TRESPASS TO TRY TITLE

§ 5. Instructions

In action for trespass to try title, trial court erred in failing to give instructions on adverse possession under color of title where there was evidence to support such instruction. *Overman v. Saunders*, 678.

TRIAL

§ 8. Consolidation of Actions for Trial

Actions by driver and his passengers against another driver should be tried separately since issue of contributory negligence arises in the driver's action but not in the actions brought by the passengers. *Kinney v. Goley*, 325.

§ 17. Admission of Evidence for Restricted Purpose

Where part but not all of a letter offered in evidence is competent, it is the duty of the objecting party to point out the incompetent parts thereof. *Clayton v. Ins. Co.*, 43.

§ 18. Province of the Court and Jury in General

It is for the jury to determine the weight of the evidence and to resolve inconsistencies therein. *Lineback v. Wood*, 512.

§ 21. Consideration of Evidence on Motion to Nonsuit

Consideration of evidence on motion to nonsuit. *Helms v. Williams*, 391; *Swain v. Williamson*, 622; *Campbell v. O'Sullivan*, 581.

§ 30. Effect of Judgment as of Nonsuit

Statute permitting suit to be reinstituted within one year after dismissal of the original action for nonsuit does not apply when original suit is brought in a Federal District Court. *Cobb v. Clark*, 230.

§ 33. Statement of Evidence and Application of Law Thereto

Trial judge erred in failing to relate and apply the law to the evidence. *Clayton v. Ins. Co.*, 43.

Trial court has the duty to charge the law applicable to the substantive features of the case arising on the evidence without special request. *Overman v. Saunders*, 678.

§ 36. Expression of Opinion on Evidence in Instructions

In contract action, trial judge did not express opinion in violation of G.S. 1-180. *Electro Lift v. Equipment Co.*, 203.

§ 39. Additional Instructions

Additional instructions are prejudicial where trial judge fails to charge that no juror should surrender his conscientious convictions. *In re Henderson*, 56.

§ 40. Form and Sufficiency of Issues

Trial judge erred in failing to instruct jury as to circumstances under

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which the issues in the case should be answered in the affirmative or in the negative. *Clayton v. Ins. Co.*, 43.

§ 41. Tender of Issues

Trial court did not err in refusing to submit issues stipulated by the parties as arising on their pleadings where such issues were not supported by competent evidence. *Electro Lift v. Equipment Co.*, 203.

§ 48. Power of court to Set Aside Verdict in General

Action of trial court in setting aside verdict as against greater weight of the evidence is not reviewable on appeal in absence of abuse of discretion. *Michaels v. Carson*, 417.

§ 51. Setting Aside Verdict as Contrary to Weight of Evidence

Trial court need not make findings of fact to support order setting aside verdict as against greater weight of evidence. *Michaels v. Carson*, 417.

§ 55. Effect of Order Setting Aside Verdict

Denial of motion for nonsuit is not reviewable on appeal where trial court has set aside verdict as against greater weight of evidence. *Michaels v. Carson*, 417.

§ 57. Trial and Hearing by the Court

In trial by agreement of the parties, the trial judge is the judge of both the law and the facts. *Lumber Co. v. Kincaid Carolina Corp.*, 342.

TRUSTS

§ 1. Creation of Written Trusts in General

To create an express trust in realty, there must be an actual intention to create it by the person having dominion over the realty. *Pegram v. Tomrich Corp.*, 413.

§ 13. Creation of Resulting Trusts

To impose a resulting trust upon land by operation of law, plaintiff must allege that he furnished part of the funds with which the land was purchased. *Pegram v. Tomrich Corp.*, 413.

§ 19. Sufficiency of Evidence to Establish Constructive Trust

Evidence held sufficient to establish a constructive trust. *Ross v. Sampson*, 270.

UNIFORM COMMERCIAL CODE

§ 2. Construction and Interpretation

The UCC does not apply to transactions validly entered into before July 1, 1967. *Lumber Co. v. Kincaid Carolina Corp.*, 342.

The UCC must be liberally construed. *Lumber Co. v. Kincaid Carolina Corp.*, 342.

§ 3. Application

Although lumber was sold and delivered prior to 1 July 1967, UCC is applicable to giving and receiving of checks in payment of the lumber where the

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transactions relating to the checks occurred after 1 July 1967. *Lumber Co. v. Kincaid Carolina Corp.*, 342.

§ 4. Definitions

What constitutes acceptance under reservation of right. *Lumber Co. v. Kincaid Carolina Corp.*, 342.

UTILITIES COMMISSION

§ 1. Nature and Function of Commission and Proceedings in General

Utilities Commission is required to find all facts essential to determination of the questions and issues. *Utilities Comm. v. Coach Co.*, 116.

§ 7. Hearings and Orders; Services

What constitutes public convenience and necessity is primarily an administrative question with a number of imponderables to be taken into consideration. *Utilities Comm. v. Coach Co.*, 116.

WILLS

§ 18. Presumptions and Burden of Proof

No presumption of fraud arises out of the parent-child relationship standing alone. *In re Will of Goodson*, 257.

§ 21. Undue Influence

In caveat proceeding, trial court's instructions on the question of undue influence, which was in substantial compliance with *In re Will of Thompson*, 248 N.C. 588, *held* without error. *In re Will of Goodson*, 257.

In caveat proceeding, trial court properly refused to charge jury on the presumption of fraud arising from dealings within a fiduciary relationship where all of the evidence points to a family relationship. *Ibid.*

§ 28. General Rules of Construction

In the construction of a will, the intention of the testator governs. *Adler v. Trust Co.*, 600.

Every expression in a will ought to be considered with a view to the circumstances of its use. *Adler v. Trust Co.*, 600.

A will is the most personal and individual of all legal documents, and therefore the construction arrived at by the courts in interpreting other wills written by other testators under other circumstances and affecting other properties and beneficiaries serve only as useful guides. *Adler v. Trust Co.*, 600.

§ 55. Whether Gift is Confined to Personalty or to Realty

The words "personal effects" have been defined as property specifically appertaining to one's person and having a close relation thereto. *Adler v. Trust Co.*, 600.

The word "effects" signifies all that is embraced in the term personal property. *Ibid.*

§ 57. Description of Amount or Share

Testator's bequest to his brother of "my personal effects" including jewelry, clothing, furniture, etc., does not include a houseboat owned by testator at the time of his death. *Adler v. Trust Co.*, 600.

WITNESSES

§ 8. Cross-Examination

Trial court properly sustained objection to repetitions and argumentative questions asked the prosecuting witness on cross-examination. *S. v. Blount*, 561.

Trial court did not commit prejudicial error in allowing solicitor to ask defendant a question concerning charge against defendant in another state after defendant has stated that the charge had been dismissed. *S. v. Warren*, 441.

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