NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
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[1]Resigned effective 1 November 1969. Succeeded by Charles T. Kivett 1 November 1969.

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[1]Appointed effective 21 October 1969 to succeed L. J. Phipps who died 1 October 1969.
[2]Appointed effective 31 July 1969.
[3]Appointed effective 1 August 1969 to succeed Keith S. Snyder who resigned 18 July 1969.
[4]Appointed 1 October 1969.
[5]Appointed effective 13 August 1969.

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CHARLES M. NEAVES	Twenty-first	Elkin

[1]Resigned 9 September 1969.
[2]Appointed effective 25 November 1969.
[3]Appointed effective 25 November 1969.
[4]Resigned effective 1 November 1969. Succeeded by A. Douglas Albright.

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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION, 1969

MARY BRASWELL, GUARDIAN OF TYLUS RHONE, MINOR v. N. C. A & T STATE UNIVERSITY

No. 6918IC55

(Filed 18 June 1969)

1. State § 5— Tort Claims Act — injuries compensable

Injuries intentionally inflicted by employees of agencies of the State are not compensable under the Tort Claims Act.

2. State § 8— tort claim proceeding — sufficiency of evidence to show intentional tort

In a Tort Claims Act proceeding instituted by a minor plaintiff against a state university to recover for injuries resulting from a bullet fired by a university security officer, evidence that the university assigned the officer to a gymnasium in which a dance was being held, that a group of people made repeated attempts to enter the gymnasium illegally through a locked side door, that the security officer opened the door and saw 100 to 150 people gathered outside, many of whom were intoxicated and in a belligerent mood, that the officer, who had been on continuous duty for 16 hours, was afraid for his safety, that he fired two shots from his pistol downward to the ground in order to disperse the crowd, that the officer stated that the first shot went off intentionally but that he had no explanation as to the second shot, and that the plaintiff, who was standing in the crowd, was struck by one of the bullets, *is held* not to establish as a matter of law that the officer's act was so grossly and wantonly negligent as to constitute an intentional tort.

3. Trial § 18— trial by jury — province of court and jury

In a jury trial the court declares and explains the law arising on the

evidence in the case; guided by these instructions, the jury resolves the disputed facts and by its verdict declares the ultimate finding.

4. Master and Servant § 93— function of the Industrial Commission

In proceedings before the Industrial Commission, the Commission makes both findings of fact and conclusions of law.

5. Appeal and Error § 26— exception to signing of order

An exception to the signing of an order presents for review the question whether the facts found support the conclusions of law.

6. Appeal and Error § 26— effect of appeal — review of findings of fact

An appeal alone, or an exception to the judgment, does not present for review the findings of fact or the sufficiency of the evidence to support them.

7. State § 10— tort claim proceeding — review of Commission's determinations

The determinations of negligence, proximate cause, and contributory negligence are mixed questions of law and fact in a proceeding under the Tort Claims Act and are reviewable on appeal from the Industrial Commission, and the designation "Finding of Fact" or "Conclusion of Law" by the Commission is not conclusive.

8. State § 8— tort claim proceeding — contributory negligence

In a proceeding under the Tort Claims Act by a minor plaintiff to recover for injuries resulting from a bullet fired by a state university security officer, the Industrial Commission's findings of fact that the university assigned its security officer to a gymnasium in which a dance was being held, that the plaintiff joined a crowd of people who were attempting to gain illegal entry into the gymnasium through a locked side door, although plaintiff did not physically participate in shaking and breaking in the door, that the security officer appeared at the door and twice fired his gun at the ground in order to disperse the crowd, and that plaintiff was struck by a bullet, *are held* to establish that plaintiff was contributorily negligent as a matter of law in joining the crowd, since it was reasonably foreseeable that the officer would perform his duty to prevent an illegal entry into the building.

9. Negligence § 1— act constituting negligence — mob action

Every person is charged with the duty of exercising reasonable care for his own safety, and the joining in illegal mob action is not an exercise of reasonable care.

APPEAL by defendant from the Full Industrial Commission.

Plaintiff instituted this action before the North Carolina Industrial Commission under the State Tort Claims Act. G.S. 143-291 *et seq.*

After hearing, a deputy commissioner awarded plaintiff $10,000. Defendant appealed to the Full Commission. The Full Commission

overruled defendant's exceptions, affirmed the deputy commissioner with the exception that the words "Moore Gymnasium" was inserted in lieu of the words "student union" in finding of fact No. 9 and the hospital bills were corrected to conform to the evidence and the award reduced accordingly from $10,000 to $9,940.

The findings of fact and conclusions of law as amended by the Full Commission are as follows:

"FINDINGS OF FACT

1. Plaintiff is a colored male, age 18, who resides with his guardian, Mary Braswell, at 413 S. O'Henry Boulevard, Apartment 16, Greensboro, North Carolina.

2. On October 14, 1967, about 2:00 a.m., the claimant in the company of several others including one Braswell went to the Moore Gymnasium at A & T College, Greensboro, for the purpose of attending a public dance which was to begin at 2:30 a.m.

3. Upon arriving at the gym the claimant and his companions observed a long line of people in front of the gym at the ticket booth. Plaintiff and his companions got into the line for the purpose of purchasing a ticket to the dance. The line was moving slowly. After waiting in line for about 15 minutes, they got out of the line and went around to the west side of the gym where there was a side door.

4. When the claimant and his companions went to the west side of the building, there were 75 to 100 people near the side door. Some 12 to 15 persons were at the door shaking it. The door had a chain around it to keep people out of the building. There were no tickets to be sold at the west side entrance. Some of plaintiff's companions including Braswell went upon the stoop to the door and began shaking and rattling the door. Johnnie Marable, Sr., the security officer for A & T College came to the door and told the crowd to go away and quit shaking and rattling the door. The people shaking the door then quit and backed away from the door.

5. Claimant and his companions then returned to the front door of the gym and again got into the line of people who were waiting to purchase a ticket. After waiting in line for some several minutes and not being able to get to the ticket booth, they returned to the west side of the building.

6. There were some 75 to 100 people gathered at the west side near the entrance and some 12 to 15 persons including Braswell

proceeded to shake and rattle the door attempting to get inside. The claimant did not participate in the shaking and rattling of the door. Marable again came to the door and instructed the crowd of people to leave and stop shaking the door. At this point the plaintiff went around to the front of the building to see a friend of his.

7. For the third time some 12 to 15 persons began rattling the west side doors and Marable again came from the inside of the building to the west side doors. He opened a door and stepped outside on the stoop. The 12 to 15 people in front of him backed up. Marable looked to either side and saw many people on each side of him. They were in a belligerent mood. Marable had drawn his gun and as the crowd was not disbursing (sic), he fired the gun which was pointed downward into the ground two times. He intended to fire the gun the first time. There is no explanation why the second shot was fired. After firing his gun, Marable went back into the building.

8. Claimant was walking back from the front of the building toward the west side doors when Marable fired his gun and was about 35 feet from the side door standing on the sidewalk when a bullet fired from Marable's gun struck his left front chest, to the left of and over his heart. Claimant turned to run but collapsed in an unconscious state. Plaintiff was very seriously injured.

9. Security Officer Marable had been on duty longer than his usual tour of duty. He was tired. The crowd was unruly and some had been drinking. It was Marable's thinking that the crowd was trying to break into the student union (corrected by Full Commission to Moore Gymnasium). Marable was afraid for his safety. Marable fired the gun, a .38 calibre revolver, as he thought that was the only way he could disburse (sic) the crowd.

10. There were several witnesses who saw Marable fire his gun. Marable had no intention of hitting any individual. He did not know the plaintiff although he knew Braswell who worked at the college. The crowd did not move toward Marable and no threat was made upon him before he fired the gun, but thereafter there were threats against him. Marable had never before had to use his gun in his line of duty.

11. While the plaintiff had been in the crowd assembled near the doors on the west side of the building he never participated

in the shaking and rattling of the doors in an attempt to gain entrance. Plaintiff would have gone inside if the doors had been opened.

12. Officer Cooper of the Greensboro Police Department was called to the scene but had difficulty getting to the place the plaintiff had been shot due to the large crowd of people. Officer Cooper stated that there were two to three thousand people in the general area. Some of the crowd had been drinking, were belligerent, cursing and making threats on Marable's life. No investigation was made at that time as the officer was afraid for his life.

13. After plaintiff was shot and lying on the ground he was assisted by a student by the name of Perry. An ambulance was summonsed (sic) and upon its arrival the plaintiff was carried to the hospital where he was admitted and treated by Dr. Watkins. Plaintiff was given oxygen and medication. The bullet was removed by surgical means. Plaintiff suffered intense pain and developed a respiratory difficulty. Plaintiff was hospitalized on October 14, 1967 and was treated there until November 28, 1967. He was thereafter treated as an outpatient. Plaintiff's doctor's bills were in the amount of $325.00 and his hospital bill is in the amount of $1,766.75 (corrected by Full Commission to $1,706.75). It was Dr. Watkins' opinion that the plaintiff's prognosis was good and that he will be all right. At the time of his injury plaintiff was employed at Bates Nightwear at Greensboro, North Carolina at a weekly wage of $66.00, and he has not worked regularly since his injury.

14. Officer Marable knew that a large crowd of people was near the west entrance door of the gym and that there were concrete sidewalks in the area and that the firing of his gun into the ground would likely cause injury to someone in the crowd and in so doing committed a negligent act.

15. While the plaintiff was in the crowd near the west side entrance to the gym, there was no contributory negligence on his part.

16. Plaintiff has been damaged in the amount of $10,000.00 (corrected by Full Commission to $9,940.00) as a result of the negligent act of Officer Marable who was an employee of A & T College, an agency of the State of North Carolina, and was

acting at the time of the incident in question within the course and scope of his employment.

* * *

The foregoing findings of fact and conclusions of law engender the following additional

CONCLUSIONS OF LAW

Officer Marable, an employee of A & T College, an agency of the State of North Carolina, while acting in the course and scope of his employment committed a negligent act by firing his gun into the ground where a large group of people were assembled. Said negligence was the proximate cause of the injury sustained by the plaintiff. Officer Marable did not act as a reasonable and prudent man would have acted under the same or similar circumstances. G.S. 143-291 *et seq; Lowe v. Department of Motor Vehicles,* 244 N.C. 353; 60 A.L.R. 2d 875, (cases cited).

There was no contributory negligence upon the part of the plaintiff. G.S. 143-291 *et seq.*

Plaintiff has been damaged in the amount of $10,000.00 (corrected by Full Commission to $9,940.00) as a result of the negligent act committed by the defendant's employee. G.S. 143-291 *et seq.*"

Defendant appealed, assigning as error certain designated portions of the findings of fact and conclusions of law and the signing and entry of the order based thereon.

Attorney General Thomas Wade Bruton by Staff Attorney Carlos W. Murray, Jr., for defendant appellant.

Lee, High, Taylor and Dansby by Alvis A. Lee for plaintiff appellee.

MORRIS, J.

Defendant assigns as error the statement "Marable had no intention of hitting any individual" contained in finding of fact No. 10; all of finding of fact No. 14; and all of finding of fact No. 16. The conclusions of law are the subject of exceptions Nos. 9 and 11, on which assignment of error No. 4 is based, for that they are inapplicable and contrary to applicable law.

[1] Defendant candidly states in his brief that the sole conten-

tion on appeal is that the act of the security officer in firing his gun downward to disperse the crowd was intentional and not negligent; therefore, no recovery can be had under the Tort Claims Act. It is true, of course, that injuries intentionally inflicted by employees of agencies of the State are not compensable under the Tort Claims Act. *Jenkins v. Department of Motor Vehicles,* 244 N.C. 560, 94 S.E. 2d 577; *Givens v. Sellars,* 273 N.C. 44, 159 S.E. 2d 530.

Appellant relies on *Garratt v. Dailey,* (Supreme Court of Washington) 279 P. 2d 1091. There the plaintiff brought an action to recover for personal injuries suffered by her when defendant, a five-year-old boy moved a chair in which she had been sitting, and she fell. The plaintiff contended that, as she started to sit down in a wood and canvas lawn chair, the boy deliberately pulled it out from under her. Plaintiff did not testify. The defendant's evidence was that sometime after plaintiff came in the yard, he moved the chair a few feet sideways and seated himself in it, at which time he discovered that plaintiff was about to sit down at the place where the lawn chair had formerly been; that he hurriedly got up and attempted to move the chair toward plaintiff to aid her in sitting down in the chair. Because of his size and lack of dexterity, he was unable to get the chair under plaintiff in time to prevent her falling to the ground. The trial court adopted the defendant's version and made findings of fact in accordance therewith and denied recovery. On appeal, the Supreme Court remanded for the trial court to make a specific finding as to whether at the time the child moved the chair he knew with substantial certainty whether the plaintiff would attempt to sit down where the chair had been. The Court said, "If the court finds that he had such knowledge the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff."

The deputy commissioner found as a fact that "Officer Marable knew that a large crowd of people was near the west entrance door of the gym and that there were concrete sidewalks in the area and that the firing of his gun into the ground would likely cause injury to someone in the crowd and in so doing committed a negligent act." Defendant concedes that Officer Marable was negligent and earnestly contends that the facts found compel the conclusion that the act of Officer Marable was so wanton in character as to be an intentional tort precluding recovery by the plaintiff under the terms of the Tort Claims Act.

In *Jenkins v. Department of Motor Vehicles, supra,* the Supreme Court had before it the question of whether recovery under the Tort

Claims Act for the negligent act of a State employee is authorized where the negligent act complained of was the intentional shooting of a prisoner by a member of the State Highway Patrol who had him in custody. Justice Higgins, writing for the Court, said: "An analysis of our decisions impels the conclusion that this Court, in reference to gross negligence, has used the term in the sense of wanton conduct. *Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence.* Wantonness, on the other hand, connotes intentional wrongdoing." (Citations omitted.)

A thorough and exhaustive discussion of the degree of negligence sufficient to constitute an intentional tort depriving the defendant of the defense of contributory negligence appears in *Wagoner v. R. R.*, 238 N.C. 162, 77 S.E. 2d 701. A portion of the opinion of Parker, J. (now C.J.), is here quoted:

> " 'An act is wanton when, being needless, it manifests no rightful purpose, but a reckless indifference to the interests of others; and it may be culpable without being criminal.' *Wise v. Hollowell,* 205 N.C. 286, 171 S.E. 82. 'An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.' *Foster v. Hyman,* 197 N.C. 189, 148 S.E. 36.
>
> 'The term "wanton negligence" . . . always implies something more than a negligent act. This Court has said that the word "wanton" implies turpitude, and that the act is committed or omitted of willful, wicked purpose; that the term "willfully" implies that the act is done knowingly and of stubborn purpose, but not of malice . . . Judge Thompson says: "The true conception of willful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract or which is imposed on the person by operation of law. Willful or intentional negligence is something distinct from mere carelessness and inattention, however gross. We still have two kinds of negligence, the one consisting of carelessness and inattention whereby another is injured in his person or property, and the other consisting of a willful and intentional failure or neglect to perform a duty assumed by contract or imposed by operation of law for the promotion of the safety of the person or property of another." Thompson on Neg. (2d Ed.), Sec. 20, *et seq.*' *Bailey v. R. R.*, 149 N.C. 169, 62 S.E. 912.
>
> To constitute willful injury there must be actual knowledge, or that which the law deems to be the equivalent of actual knowl-

edge, of the peril to be apprehended, coupled with a design, purpose, and intent to do wrong and inflict injury. A wanton act is one which is performed intentionally with a reckless indifference to injurious consequences probable to result therefrom. Ordinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act. Wanton and willful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results. *Everett v. Receivers,* 121 N.C. 519, 27 S.E. 991; *Ballew v. R. R.,* 186 N.C. 704, 120 S.E. 334, *Foster v. Hyman, supra; S. v. Stansell,* 203 N.C. 69, 164 S.E. 580; 38 Am. Jur., Negligence, Sec. 48."

[2] The evidence was that plaintiff's ward, along with others, went to Moore Gymnasium on the campus of A & T State University for the purpose of attending a dance which began at 2:30 a.m. and, although a part of the Homecoming activities, was open to the public. None of the persons in the minor plaintiff's group was an alumnus of or a student at the University. The ticket office was at the front of the building. The minor plaintiff and his friends got in line to purchase a ticket. The line was long and they could not immediately get to the ticket office, so they went around to the west side of the building where a group of about 75 to 100 people had gathered at the side door. One of the plaintiff's companions joined the group in trying to break open the door and illegally gain admittance. The minor plaintiff testified he stood around awhile and returned to the front door to see a friend, then started back to the west side of the building and was shot when he was rejoining the crowd. Plaintiff testified that if his friends had been successful in breaking in the door, he would have gone into the dance that way. Mr. Marable, the security officer, testified that he had been on duty continuously for over 16 hours. He was assigned to the front door of the gymnasium for the dance and was asked to go to the west door because "they're trying to break in". When he got there, the door had been opened and the crowd was pushing in. Two other men were preventing them from rushing in. There were some 12 or 14 trying to get in of a crowd of about 75 to 100 people outside the doors. He ran up and hit into the crowd with his shoulders, told them not to mess with the doors and pulled the doors together and wrapped a chain around them. Shortly thereafter, he again heard the crowd at the door but they stopped when they saw him. The third time he heard the crowd attempting to break in he returned to the doors, opened them and stepped out. There were "more than a hundred or 150 people and they was up against the doors." The people who were messing with the

doors moved but the people standing there did not move. He fired his pistol downward to the ground. In answer to whether he considered that he might injure someone at that time he replied "Things happened so fast, sir, I didn't have the time, you see, you didn't have the time." He said no one moved toward him but he was afraid for his safety because the crowd looked violent. Mr. Marable further stated that it was just as dangerous to fire either way, up or down; that there were buildings adjacent a parking lot by the gymnasium, but in his judgment the only way he could disperse the crowd was by firing his pistol. He fired two shots downward. He stated that the "first shot went off intentionally" but gave no explanation as to the second shot. The record does not disclose which shot hit the minor plaintiff who was shot in the chest slightly to the left and above the heart.

[3, 4] In a jury trial, the court declares and explains the law arising on the evidence in the case. Guided by these instructions, the jury resolves the disputed facts and, by its verdict, declares the ultimate finding. In proceedings before the Industrial Commission, the Commission makes both findings of fact and conclusions of law. *Lowe v. Department of Motor Vehicles,* 244 N.C. 353, 93 S.E. 2d 448.

[2] We cannot say that the evidence here compels no other conclusion than that Officer Marable's act was so grossly and wantonly negligent as to constitute an intentional tort.

[5-7] Conceding, *arguendo,* that there was sufficient competent evidence to support the Commission's findings of fact with respect to the negligence of Officer Marable and that the findings of fact, in this respect, support the conclusions of law, we think the order entered by the Industrial Commission must be reversed because the findings of fact do not support the conclusion of law that the plaintiff was not contributorily negligent. An exception to the signing of an order presents for review the question whether the facts found support the conclusions of law. *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590. An appeal alone, or an exception to the judgment, does not present for review the findings of fact or the sufficiency of the evidence to support them. *Sternberger v. Tannenbaum,* 273 N.C. 658, 161 S.E. 2d 116; *Re Adams' Will,* 268 N.C. 565, 151 S.E. 2d 59; *Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729; *Hatchell v. Cooper,* 266 N.C. 345, 146 S.E. 2d 62. However, the determination of negligence, proximate cause, and contributory negligence are mixed questions of law and fact and are reviewable on appeal from the Commission, and the designation "Finding of Fact" or "Conclusion of

Law" by the Commission is not conclusive. *Brown v. Board of Education,* 269 N.C. 667, 153 S.E. 2d 335.

[8, 9] Following these principles we look to see if the conclusions of law are supported by the findings of fact. Finding of fact No. 15 states, as do the conclusions of law, that while the claimant was in the crowd near the side of the gym, there was no contributory negligence on his part.

The findings of fact show that the plaintiff and one Braswell went to the Moore Gymnasium at approximately 2:00 a.m. on 14 October 1967 for the purpose of attending a public dance. Plaintiff and his companions waited in the ticket line for approximately 15 minutes and then went to the west side of the gymnasium where a door was located. There, they observed 75 to 100 people standing near the side entrance. These people were acting in an unruly manner and some had been drinking. Part of them were rattling and shaking the doors, and, in fact, some of the plaintiff's companions joined in these actions. There were no tickets to be sold at this side door. Marable, the security officer, came to the door and warned the crowd to go away. Plaintiff and his friends returned to the front of the building, and again stood in the ticket line for several minutes. Not being able to obtain a ticket during this time, they returned to west side of the building and again discovered that there were 75 to 100 people gathered at the side doors. Part of the crowd including plaintiff's companions, but not the plaintiff, began shaking the doors. Again, the security officer came to the door and instructed the crowd to stop shaking the door. Plaintiff, at this point, went around to the front of the building to see a friend. At this time the crowd began shaking the side doors for the third time. Plaintiff left the front of the building and was rejoining the crowd when the security officer shot his gun at the ground to disperse the crowd, and plaintiff was hit. Plaintiff did not participate in physically shaking the doors in an attempt to gain illegal entrance to the building; however, it is clear that all of the 75 to 100 people gathered outside the door could not participate in physically shaking and breaking in the doors. This illegal function had to be left to the few who were in position to reach the doors. Nevertheless the crowd, including the plaintiff, was obviously present for the purpose of gaining illegal entry when the doors were broken open; and it is clear that their presence gave aid, comfort and encouragement to the few who were in position actually to perform the illegal shaking and breaking. It seems to us that it was reasonably foreseeable that the security officer would undertake to perform his duty to prevent an illegal breaking and

entry of the building, and that someone in the crowd was likely to be injured in the process. It also seems that a reasonably prudent person, in the exercise of due care for his own safety, would not participate in mob action which was clearly intended to be in violation of the law and contrary to reasonable conduct. Every person is charged with the duty of exercising reasonable care for his own safety, and the joining in illegal mob action is not an exercise of reasonable care; in so doing plaintiff assumed the risk of whatever injury he might receive as a result. In addition, the illegal conduct of the mob of which the plaintiff was voluntarily a part was such as would reasonably be calculated to provoke the security officer into taking some action to disperse the mob.

We think the facts, as found by the Commission, give rise to one inference only, and that is — that the plaintiff was contributorily negligent in joining and rejoining the crowd. He knew they were acting in an unruly and unlawful manner and that the officer had warned them to stop trying to break in the doors. With this knowledge, he voluntarily became a member of the crowd on two occasions, and was rejoining the crowd a third time when he was shot. We think these facts point to only one conclusion; that is, the plaintiff was contributorily negligent as a matter of law. There being no findings of fact to support any other conclusion, the order of the Commission must be reversed. *Brown v. Board of Education, supra.*

Reversed.

CAMPBELL and BROCK, JJ., concur.

AR-CON CONSTRUCTION COMPANY v. NEIL ANDERSON AND WIFE, MRS. NEIL ANDERSON

No. 6918SC173

(Filed 18 June 1969)

1. Contracts § 6— applicability of statute requiring contractor to have license

The applicability of the general contractors licensing statute, G.S. Ch. 87, Art. 1, is determined by the cost of the undertaking and not by the amount of any separate progress payment required by the contract.

2. Contracts § 6— unlicensed contractor — action for breach of contract or quantum meruit

When an unlicensed person contracts with an owner to erect a building

costing more than the minimum sum specified in G.S. 87-1, he may not recover for the owner's breach of the contract, nor may he recover the value of the work and services furnished under the contract on the theory of *quantum meruit* or unjust enrichment.

3. Contracts § 6— action for breach of contract — contractor unlicensed when contract entered

In an action by a general contractor to recover an amount allegedly due for construction of a house costing more than $20,000, the trial court properly allowed plaintiff's plea in bar where it was stipulated that the contractor had previously held a valid general contractor's license but that the license had expired prior to the time the contract sued upon was entered and was not thereafter renewed, the fact that plaintiff contractor had at one time held a valid license but failed to pay the renewal fee required by G.S. 87-10 not amounting to a "substantial compliance" with the licensing requirements of G.S. Ch. 87, Art. 1, since the renewal fee is not merely for revenue purposes but bears a substantial relationship to the accomplishment of the purposes of the statute, and the annual renewal is an important, not merely perfunctory, requirement necessary to accomplish the protective public purpose of the statute.

4. Professions and Occupations; Administrative Law § 4— revocation of license — procedures — failure to pay statutory renewal fee

Provisions of G.S. Ch. 150 setting forth uniform procedures to be followed in the revocation of licenses do not apply where renewal of a license is withheld for failure to pay a statutory renewal fee. G.S. 150-10(3).

5. Pleadings § 15; Trial § 49— motion for new hearing on plea in bar — newly discovered evidence

The trial court did not err in the denial of plaintiff's motion for a rehearing on defendant's plea in bar on the ground of newly discovered evidence where there was no showing that plaintiff did not have full knowledge of the facts referred to in its motion at the time of the hearing on the plea in bar, there was no showing as to why, in the exercise of due diligence, plaintiff failed to present evidence concerning such facts at the hearing, and it is not clearly apparent that a different result would be reached upon a new hearing.

6. Professions and Occupations; Contracts § 6— knowledge by customer that contractor is unlicensed

The general contractors licensing statute does not authorize a person with whom an unlicensed contractor deals to waive the requirements of the statute, nor does it grant the unlicensed contractor immunity merely because he advises the customer that he is acting in violation of the statute.

APPEAL by plaintiff from *Martin, Robert M., J.*, 4 November 1968 Civil Session of GUILFORD Superior Court (High Point Division).

This is a civil action in which plaintiff, a North Carolina corporation, seeks to recover from defendants an amount allegedly due by

reason of materials and labor furnished by plaintiff in constructing a house for defendants. Plaintiff in its complaint alleged: That on 12 October 1967 the parties entered into a contract whereby plaintiff agreed to build a home for defendants on a tract of land owned by them in Guilford County, N. C., for which defendants agreed to pay plaintiff the sum of $27,800.00, payable $8,000.00 when the home should be 35% completed, $8,000.00 when the home should be 70% completed, and the balance when the home should be fully completed; that pursuant to said contract the plaintiff began construction on 21 November 1967 and continued construction until 26 April 1968; that plaintiff completed approximately 60% of the house and demanded payment from defendants as required by the contract, but defendants refused to pay. Plaintiff further alleged that between 21 November 1967 and 26 April 1968 it had furnished materials, labor and services in construction of said home reasonably worth $16,052.07 and that same has been demanded of defendants but defendants have refused to pay. Plaintiff prayed for judgment against defendants in the sum of $16,052.07.

Defendants answered, admitting entering into a contract with plaintiff whereby plaintiff had agreed to build a home for defendants on defendants' land, but denied the remaining allegations of the complaint as alleged therein. In a first further answer, defendants alleged that the parties had contracted that plaintiff would construct a home for defendants according to agreed plans for a price of $22,000.00; that subsequently certain changes and additions had been agreed upon, for a total agreed increase over the original contract price in the amount of $3,332.43; that plaintiff on 1 April 1968 had submitted a statement to defendants demanding that defendants agree to an increase of $10,623.05 rather than $3,332.43; that defendants refused to agree to the increase demanded by plaintiff, and plaintiff had abandoned construction of the house; that defendants were at all times and were still willing to allow plaintiff to complete said construction for the total agreed consideration of $25,332.43, but that plaintiff had refused to proceed. As a second further answer, defendants alleged that plaintiff, by its failure to perform its obligations under the contract within a reasonable time, had materially breached said contract and was thereby precluded from maintaining its action. As a third further answer defendants alleged that plaintiff had breached the contract in failing to furnish certain materials of the type which had been agreed upon, by reason of which defendants alleged they were entitled to a setoff.

As a fourth defense and as a plea in bar, defendants alleged that at the time the contract sued upon was entered into and at all times

during construction of the house, plaintiff did not hold a general contractor's occupational license as required by G.S., Chap. 87.

The parties agreed that the court might hear and determine the plea in bar raised by defendants' fourth further answer in advance of trial on the merits. At this hearing the parties stipulated that on 6 October 1966 plaintiff was licensed as a general contractor pursuant to G.S., Chap. 87, with a classification of "Building Contractor" and limitation of "Limited;" that said license, however, expired on 31 January 1967 and at all times since 31 January 1967 plaintiff possessed no valid building contractor's license, and said license previously granted was not renewed after its expiration. The trial court entered an order making findings of fact in conformity with these stipulations and the allegations in the complaint, including a finding that plaintiff was engaged in the business of general contracting in the State of North Carolina and that the contract between the parties comes within the definition of "general contracting" as set forth in G.S., Chap. 87. Based on these findings the court sustained defendants' plea in bar and dismissed plaintiff's action. Following entry of this order, and during the same session of superior court at which it was entered, plaintiff filed a motion for a rehearing on the plea in bar on the grounds of newly discovered evidence, which motion was denied. To the entry of the order sustaining defendants' plea in bar and dismissing plaintiff's action, and to entry of the order denying plaintiff's motion for rehearing, plaintiff appealed.

Morgan, Byerly, Post & Keziah, by Edward N. Post, for plaintiff appellant.

Schoch, Schoch & Schoch, by Arch K. Schoch, Jr., for defendant appellees.

PARKER, J.

[1] In entering into and undertaking to perform the contract alleged in the complaint, plaintiff was clearly subject to the provisions of G.S., Chap. 87, Art. 1. For purposes of that Article, G.S. 87-1 defines a general contractor as "one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building, . . . or any improvement or structure *where the cost of the undertaking is twenty thousand dollars ($20,000.00) or more* and anyone who shall bid upon or engage in constructing any undertakings or improvements above mentioned in the State of North Carolina costing twenty thousand dollars ($20,000.00) or more shall be deemed and held to have engaged in the business of general contracting in

the State of North Carolina." (Emphasis added.) Thus it is the "cost of the undertaking," which in this case plaintiff alleged in its complaint was to be $27,800.00, and not the amount of any separate progress payment, which determines applicability of the Article.

[2] In *Builders Supply v. Midyette,* 274 N.C. 264, 162 S.E. 2d 507, the North Carolina Supreme Court, in an opinion by Sharp, J., held:

> "The purpose of Article 1 of Chapter 87 of the General Statutes, which prohibits any contractor who has not passed an examination and secured a license as therein provided from undertaking to construct a building costing $20,000.00 or more, is to protect the public from incompetent builders. When, in disregard of such a protective statute, an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract. This is true even though the statute does not expressly forbid such suits."

That case, as the present one, concerned a suit brought by a contractor against the owners to recover the balance allegedly due for construction of a house costing more than $20,000.00. The Supreme Court held that upon the contractor's admission that at the time it entered into the contract it was not a licensed contractor, the trial court had correctly dismissed the contractor's action against the owners for the balance due under the terms of the contract upon which it had sued. Furthermore, the Court held that the unlicensed contractor was also barred from maintaining an action based on any theory of *quantum meruit* or unjust enrichment, in that connection saying:

> "The same rule which prevents an unlicensed person from recovering damages for the breach of a construction contract has generally been held also to deny recovery where the cause of action is based on *quantum meruit* or unjust enrichment. Annot., 82 A.L.R. 2d 1429, § 3(c); 53 C.J.S. *Licenses* § 59b (1948). . . . To deny any unlicensed person the right to recover damages for breach of the contract, which it was unlawful for him to make, but to allow him to recover the value of work and services furnished under that contract would defeat the legislative purpose of protecting the public from incompetent contractors. *Northen v. Elledge,* 72 Ariz. 166, 232 P. 2d 111. The importance of deterring unlicensed persons from engaging in the construction business outweighs any harshness between the parties and precludes consideration for unjust enrichment.

Lewis & Queen v. N. M. Ball & Sons, 48 Cal. 2d 141, 308 P. 2d 713."

In the present case the parties have stipulated that on 6 October 1966, approximately one year prior to making the contract here sued upon, plaintiff was licensed as a general contractor pursuant to G.S. Chap. 87, Art. 1, with a classification of "General Contractor" and limitation of "Limited." This license would have authorized the holder thereof to engage in the practice of general contracting in North Carolina, with the limitation that the holder should not be entitled to engage therein with respect to any single project of a value in excess of $75,000.00. G.S. 87-10. Thus plaintiff's license, so long as it remained valid, would have authorized it to undertake construction projects such as the one which is the subject of this litigation. The parties stipulated, and based on such stipulation the court found as a fact, that plaintiff's license had expired on 31 January 1967 and was not thereafter renewed. The contract here sued upon was entered into on 12 October 1967 and plaintiff undertook to perform it during the period 21 November 1967 until 26 April 1968. Therefore neither at the time the contract was entered into nor at any time thereafter pertinent to this litigation did plaintiff have a valid contractor's license.

G.S. 87-10 provides in part that "(c)ertificate of license shall expire on the 1st day of December following the issuance or renewal *and shall become invalid* on that day unless renewed, subject to the approval of the Board. Renewals may be effected any time during the month of January without reexamination, by payment of a fee to the Secretary of the Board of $60.00 for unlimited license, $40.00 for intermediate license and $20.00 for limited license." (Emphasis added.) It is not clear on what basis the parties stipulated that plaintiff's license had expired on 31 January when the statute expressly provides such licenses shall expire on the 1st day of December, but the discrepancy is immaterial insofar as it affects any question presented by this appeal, since in any event there is no dispute between the parties that plaintiff's license had expired prior to its entering into the contract with defendants and had not been thereafter renewed at any time while plaintiff was undertaking performance of said contract.

[3] Plaintiff contends that, having at one time held a valid contractor's license, presumably issued to it only after examination by the North Carolina State Licensing Board for Contractors as required by G.S. 87-10, it should be held to have "substantially complied" with the requirements of G.S., Chap. 87, Art. 1, and that the

purpose of protecting the public from incompetent builders would not be served by applying the rule of *Builders Supply v. Midyette, supra,* to the facts of this case. Plaintiff cites *Latipac Inc. v. Superior Court of Marin County,* 49 Cal. Rptr. 676, 411 P. 2d 564, as supporting this contention. In that case, as in the present one, the contractor had previously possessed a valid contractor's license. However, because of its failure to submit a renewal application and the $30.00 renewal fee, the license in that case had expired *after the contract had been entered into* and during the period in which the contractor was engaged in performing under the contract. In that case the license was valid and in effect at the time the parties executed their contract and remained in effect for fifteen months thereafter. The contract required 25 months for full performance, and it was only during the last ten months of that period that the contractor was engaged in performance after its license had expired. Under those circumstances a majority of the California Supreme Court found the case to be one in which the protective policy of the licensing statute had been effectively realized and permitted the contractor to maintain its suit to recover from the owner the balance allegedly due under the contract. A reading of the majority opinion in that case reveals that the California Supreme Court laid primary stress upon the fact, present in that case but not in the one now before us, that the contractor did have a valid license *at the time of entering into the contract.* In this connection the Court said:

> "Plaintiff possessed a valid license at the time its existence was crucial to the decisions of the other contracting party and to the prospective subcontractors and other creditors who might extend credit in reliance upon the validity of that contract. The key moment of time when the existence of the license becomes determinative is the time when the other party to the agreement must decide whether the contractor possesses the requisite responsibility and competence and whether he should, in the first instance, enter into the relationship. The license, as an official confirmation of the contractor's responsibility and experience, then plays its important role. Then, too, it serves as a basic determinant in the decision of prospective subcontractors and other creditors as to whether to extend credit to the contractor on the strength of the contract. At the date of the execution of the instant contract plaintiff held an unquestionably valid contractor's license. Indeed, plaintiff had possessed such a license ever since 1957; plaintiff held that license for seventeen months *after* the date of the execution of the contract.

"In determining whether or not a contractor has 'substantially complied' with the statute and whether such substantial compliance has afforded the other party the effective protection of the statute, the courts have accorded great weight to the significant moment of the entrance of the parties into the relationship. The contractor who holds a valid license at the time of contracting executes a contract valid at its inception both as between the parties and as to third parties who might rely upon it.

* * *

"As a corollary, the *absence* of a license at the time of contracting has figured prominently in decisions in which our courts have denied recovery for want of substantial compliance."

Since the contractor in the case presently before us did not have a valid license at the time of entering into the contract here sued upon, the *Latipac* case does not support its contention that it had "substantially complied" with the licensing statute.

In further support of its contention of substantial compliance, plaintiff contends that even though in January 1967 it had failed to pay the annual renewal fee required by G.S. 87-10, it should nevertheless be considered as still licensed and that the annual fee was merely for revenue purposes and not to protect the general public. This contention, however, cannot be made consistent with the express language of the statute, which provides that the license *"shall expire* on the 1st day of December following the issuance or renewal and *shall become invalid* on that date unless renewed, *subject to the approval of the Board."* Furthermore, the annual renewal fees required by G.S. 87-10 are in no way related to the license taxes required to be paid by contractors by the North Carolina Revenue Act. G.S. 105-54. The renewal fees required by G.S. 87-10 are not part of the State's revenues, but provide the funds by which the North Carolina State Licensing Board for Contractors is enabled to carry out the public purposes for which it was created. Therefore the payment of these fees does bear a direct and substantial relationship to the accomplishment of the public purposes of the statute. Also, by the express language of that section the license is to be renewed annually only "subject to the approval of the Board," and by clear implication of the language of the statute the Board may require reexamination of any contractor who shall have failed to make timely payment of the annual renewal fee. It should also be observed that G.S. 87-13 makes it a misdemeanor to use an expired license, just as it is a misdemeanor to operate in violation of the statute

without ever having procured a valid license in the first instance. In addition, one of the obvious purposes of requiring annual renewal of licenses is to enable the licensing Board to maintain and publish the roster of currently licensed contractors as required by G.S. 87-8. All of these statutory provisions, when considered together, indicate a clear legislative intent that annual license renewal should be considered an important, and not merely a perfunctory, requirement in order to accomplish the protective public purpose of the statute. Plaintiff cannot be said to have substantially complied with the statute when it ignored this requirement.

[4] Appellant further contends that the order dismissing its action was deficient in that it contained no finding that the requirements of G.S., Chap. 150 had been complied with. That Chapter provides for uniform procedures to be followed in connection with revocation of licenses. It expressly does not apply where renewal of a license is withheld for failure to pay a statutory renewal fee. G.S. 150-10(3).

[5, 6] Finally, appellant contends there was error in the trial court's refusal to grant its motion for a rehearing on the plea in bar. The stated purpose of the motion for rehearing was to permit plaintiff to present evidence to the effect that prior to and at the time the contract had been entered into the male defendant had been informed that plaintiff's license had already expired. Treating this motion in the same manner as a motion for a new trial upon the ground of newly discovered evidence, it is apparent that the requirements for favorable consideration of such a motion have not been met. *Johnson v. R. R.*, 163 N.C. 431, 79 S.E. 690; 2 McIntosh, N. C. Practice 2d, § 1596(8). There was no showing that appellant did not have full knowledge of the facts referred to in its motion at the time of the hearing on the plea in bar, and no showing as to why, in the exercise of due diligence, appellant had failed to present evidence concerning such facts at the time of that hearing. In addition, though we do not find it necessary so to decide, it is not clearly apparent that upon a new hearing a different result would be reached; nothing in the licensing statute authorizes a person with whom an unlicensed contractor deals to waive the requirements of the statute or grants the unlicensed contractor immunity merely because he advises one of his customers that he is acting in violation of the statute. Other persons, including prospective subcontractors and suppliers of building materials, also have an interest to be protected. In any event,

granting of such a motion is within the discretion of the trial court, and there has been no showing of abuse of discretion in this case.

The orders appealed from are

Affirmed.

MALLARD, C.J., concurs.

BRITT, J., dissents.

STATE OF NORTH CAROLINA v. SAMUEL BRYANT

No. 698SC151

(Filed 18 June 1969)

1. Evidence § 14— physician-patient privilege — applicability to nurses and technicians

The provisions of G.S. 8-53 apply to nurses, technicians and others when they are assisting or acting under the direction of a physician or surgeon.

2. Evidence § 14— physician-patient privilege — common law rule — G.S. 8-53

G.S. 8-53 has amended the common law rule that confidential communications between a patient and a physician and information acquired by the physician while attending or treating the patient were not privileged.

3. Evidence § 14— admission of confidential communications between physician and patient — discretion of court

The trial judge may admit a confidential communication between a physician and patient if in his opinion such is necessary to a proper administration of justice. G.S. 8-53.

4. Criminal Law § 158— presumption from silent record

If the record is silent on a particular point, the action of the trial judge will be presumed correct.

5. Criminal Law § 167— presumptions and burden of showing error

There is a presumption against error, and the burden is on the complaining party to show error.

6. Evidence § 14— physician-patient privilege — blood alcohol test results — failure of court to find that testimony was necessary to proper administration of justice

In this prosecution for manslaughter, the trial court did not err in the admission over defendant's objection of testimony as to the results of a

blood alcohol test administered to defendant at the direction of the attending physician in order to aid him in his diagnosis and treatment of defendant, notwithstanding the trial court made no specific finding that the testimony was necessary to a proper administration of justice, since in the absence of a request for a specific finding the ruling of the trial court was in itself a finding that its admission was necessary to a proper administration of justice.

7. Constitutional Law §§ 21, 33; Criminal Law §§ 55, 84— blood sample taken from unconscious defendant — admissibility of analysis

Defendant's constitutional rights were not violated by the taking of a sample of his blood at a physician's direction while defendant was unconscious or by the admission of evidence relating to the analysis of the blood sample.

APPEAL by defendant from *Parker, J.*, October 1968 Session of Superior Court of LENOIR County.

Defendant was tried on four bills of indictment. Three of the bills properly charged him with the felonies of manslaughter, and in the other one he was properly charged with the misdemeanor of driving a motor vehicle while under the influence of intoxicating beverages, and the misdemeanor of reckless driving. One of the bills of indictment charged defendant with manslaughter in connection with the death of Gloria Bryant, another one charged him with manslaughter in connection with the death of Johnnie Scott, and another one charged him with manslaughter in connection with the death of Barbara Bryant.

The evidence for the State tended to show that at about 6:00 P.M. on Saturday, 17 August 1968, the defendant and six others were traveling north on a paved road in Lenoir County in defendant's automobile. The defendant was driving. On a curve the automobile left the road and came to rest about 360 feet away after hitting a tree and a utility pole. The investigating officer found a bottle of whiskey and a can of cool beer in the automobile. The defendant had the odor of alcohol on his breath. One witness testified the defendant was drunk. Dr. D. L. Whitaker, who treated the defendant after he was admitted to the Lenoir Memorial Hospital testified, without objection, that the defendant "was very inebriated" and in a very drunken condition. Upon his arrival at the hospital the defendant was unconscious and had no blood pressure. Dr. Whitaker testified that in order to treat the defendant he ordered a Blood Alcohol Test made on him. Mrs. Catherine Wadsworth, a Laboratory Technician at the hospital, testified that at the request of Dr. Whitaker she took a blood sample from the defendant early on this Saturday evening, while he was unconscious. The actual test for al-

cohol content in the blood was made by David Lutz, the Director of the Clinical Laboratory in Lenoir Memorial Hospital. Mr. Lutz was found by the court to be an Expert Clinical Laboratory Technician. Mr. Lutz testified that the test revealed that the defendant had 0.22% alcohol in his blood. Later the doctor determined that the defendant's low blood pressure had been caused by alcohol.

The following stipulation appears in the record:

> "IT IS STIPULATED by counsel for the State and for the defendant that the two girls (Barbara Bryant and Gloria Bryant) and the woman (Johnny Mae Scott) came to their deaths as the result of the injuries sustained in this collision or wreck."

Defendant offered evidence which in substance tended to show that he was operating his automobile at a speed of about forty-five miles per hour when an automobile being operated by the State's witness Leonard Jones "forced" him off the road and caused him to wreck his car. He had only one swallow of whiskey that morning and was not under the influence of any intoxicating beverages. The two children that were killed were his children.

Upon the defendant's plea of not guilty, trial was by jury, and the verdict was "Guilty of Manslaughter" in all three cases. In its verdict the jury made no mention of the charges of driving under the influence of intoxicating beverages, and reckless driving. The following judgment was entered: "The Judgment of the Court is that the defendant be confined in State Prison not less than five nor more than seven years; all sentences to run concurrently."

The defendant assigned error and appealed to the Court of Appeals.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Assistant Attorney General Henry T. Rosser for the State.

Turner and Harrison by Fred W. Harrison for defendant appellant.

MALLARD, C.J.

Defendant contends that the court committed error and violated the provisions of G.S. 8-53 in permitting the witnesses for the State, Mrs. Wadsworth, Mr. Lutz, and Dr. Whitaker to testify over his objection to facts concerning the taking and examining of the defendant's blood for the purpose of determining its alcoholic content. The

blood sample was not taken at the request of the officer, but was taken at the direction of the attending physician in order to aid him in his diagnosis and treatment of the defendant.

G.S. 8-53 reads as follows:

> "Communications between physician and patient. — No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice."

[1] The provisions of this Statute also apply to nurses, technicians, and others when they are assisting or acting under the direction of a physician or surgeon, if the physician or surgeon is at the time acting so as to be within the rule set out therein. *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326.

The defendant's assignments of error number 1 and 2 are based upon exceptions number 3, 4, 5, and 6. Defendant contends that these assignments of error present the question of whether there was a violation of G.S. 8-53 relating to communication between a physician and patient.

Exception 3 was taken when the court overruled defendant's objection to the following question: "Do you recall, Mrs. Wadsworth, whether or not on the 17th day of August you took some blood from the body of Samuel Bryant, the defendant who is seated next to his attorney?"

It was not prejudicial error for the witness to testify that she took some blood from the body of Samuel Bryant. We do not think that this exception raises the question of a violation of G.S. 8-53.

Defendant's exception number 4 appears when the defendant objected, which objection was overruled by the court, to the following question propounded to Mrs. Wadsworth: "Will you state who instructed you to draw the blood from the defendant's body?" The witness answered "Doctor Whitaker." We do not think that the answer to this question was in any way prejudicial to the defendant.

Defendant's exception number 5 appears after the witness David Lutz had testified to the following: "I made an analysis of the blood sample taken from the body of Samuel Bryant. The analysis

was made on August 19,1968. That was on Monday. The sample that I used was the one drawn by Mrs. Wadsworth. It was marked with her handwriting. The sample showed 0.22% alcohol in the blood." Whereupon the records show, "Defendant moves to strike. Motion denied. Defendant's exception number 5." There was no objection made to any question asked Mr. Lutz. In fact the motion to strike does not specify what defendant moves to strike. After the defendant made this motion to strike the witness Lutz responded without objection or exception, "My scale will only read up to 0.22%; therefore it could have been higher." This latter statement of the witness was made without objection, exception, or motion to strike.

Defendant's exception number 6 appears on top of page 28 and does not state what the exception relates to. It appears in the record after the following questions had been propounded to Dr. Whitaker:

"Q. What is your opinion?

A. He was very inebriated.

Q. You mean he was in a very drunken condition?

A. Right; correct.

COURT: Doctor, did I understand you correctly to say that the reason you took this Blood Pressure Test was to determine . . . the reason you took the Blood Alcohol Test was to determine whether or not his extremely low blood pressure was due to the loss of blood or ro (sic) excess of alcohol?

A. That is correct.

DEFENDANT'S EXCEPTION No. 6."

There was no objection made and exception taken to the questions asked or answers given by the doctor stating his opinion as to the inebriated and drunken condition of the defendant, and the exception that was taken as "Defendant's Exception No. 6" comes after the witness had responded to the court's question. There was no motion made to strike the answer. We do not think that this exception properly raises the question of a violation of G.S. 8-53.

[2] Under the common law, communications which passed between a patient and a physician in the confidence of the professional relation, and information acquired by the physician while attending or treating the patient, were not privileged or protected from disclosure by the physician. G.S. 8-53 as interpreted by our Supreme Court has the effect of amending this common law rule. *Sims v. Insurance Co., supra.*

In the case of *Insurance Co. v. Boddie,* 194 N.C. 199, 139 S.E. 228, it is said:

> "At common law no privilege existed as to the confidential relations between physician and patient. Wigmore on Evidence, vol. 5, 2 ed., sec. 2380. In its wisdom the General Assembly of this State has seen fit to pass the statute above quoted. We think that in construing same it was incumbent on the presiding judge to find the fact, and this should appear in the record in substance, that in his opinion, the disclosure is necessary to a proper administration of justice. Under the statute, the evidence is incompetent unless in his opinion the same was necessary to a proper administration of justice. The disclosures of a physician as to what takes place between him and his patient has from time immemorial been held by the medical profession as inviolate."

We note that the court said in *Insurance Co. v. Boddie, supra,* the opinion of the trial judge that the disclosure is necessary to a proper administration of justice "should appear in the record in substance." The Statute does not specifically require that the judge's opinion holding that such testimony is necessary to a proper administration of justice should appear in the record in the words of the statute. Of course, it should appear in the record in such a manner as to leave no question or doubt that the judge was controlling the admission of the evidence and that in his opinion such was necessary to a proper administration of justice.

In *Sims v. Insurance Co., supra,* the court said:

> "In North Carolina the statutory privilege is not absolute, but is qualified. A physician or surgeon may not refuse to testify; the privilege is that of the patient. And G.S. 8-53 provides that notwithstanding a claim of privilege on the part of the patient, the presiding judge of superior court may compel the physician or surgeon to disclose communications and information obtained by him 'if in his (the judge's) opinion the same is necessary to a proper administration of justice.' In such case the judge shall enter upon the record his finding that the testimony is necessary to a proper administration of justice. *Sawyer v. Weskett, supra; State v. Newsome,* 195 N.C. 552, 143 S.E. 187. The judge, in the exercise of discretion and by the same authority, may follow the same procedure and admit hospital records in evidence. * * * Our Legislature intended the statute to be a shield and not a sword. It was careful to make provision to avoid injustice and suppression of truth by putting it in the power of the trial

> judge to compel disclosure. Judges should not hesitate to require the disclosure where it appears to them to be necessary in order that the truth be known and justice be done. The Supreme Court cannot exercise such authority and discretion, nor can it repeal or amend the statute by judicial decree. If the spirit and purpose of the law is to be carried out, it must be at the superior court level. * * *
>
> On this record and in the absence of a finding by the trial court that, in its opinion, the admission of the hospital records was necessary to a proper administration of justice, we are compelled to hold that their exclusion was not error."

The exclusion of the proffered testimony was held not to be error because the judge made no finding on the record of a necessity for its admission.

[3] The Statute requires and the decisions of our Supreme Court are to the effect that the trial judge may admit communication between physician and patient if in his opinion such is necessary to a proper administration of justice. In this connection there appears in Stansbury, N. C. Evidence 2d, § 63, p. 138, the following.

> "This privilege is unique in that a certain amount of discretion is vested in the superior court judge, who 'may compel such disclosure if in his opinion the same is necessary to a proper administration of justice.' It has been held that a finding of necessity must be made by the trial judge and incorporated in the record in order for this proviso to justify the admission of a communication otherwise privileged, but this is in conflict with other decisions and with the established rule that where the judge has discretionary power and gives no reason for his ruling it will be presumed that the ruling was made in the exercise of discretion."

In *State v. Martin,* 182 N.C. 846, 109 S.E. 74, the trial judge did not make a specific finding of necessity but stated "that in his discretion he not only permitted but required" the physician to testify when called as a witness for the State. The court in the opinion said "His Honor no doubt did so because in his opinion the testimony of Dr. Mimms was necessary to a proper administration of justice."

In *Brittain v. Aviation, Inc.,* 254 N.C. 697, 120 S.E. 2d 72, the Supreme Court said:

> "If it appeared that the court excluded the testimony of Dr. Coffey because he was compelled by statute to do so, we would direct a new trial; but the record, we think, clearly negatives

any idea that the ruling was based on want of authority. The use of the word 'permit' implies a discretion and a refusal because the court did not deem the evidence necessary to a proper administration of justice.

When no reason is assigned by the court for a ruling which may be made as a matter of discretion for the promotion of justice or because of a mistaken view of the law, the presumption on appeal is that the court made the ruling in the exercise of its discretion. *Phelps v. McCotter,* 252 N.C. 66, 112 S.E. 2d 736; *Ogburn v. Sterchi Bros.,* 218 N.C. 507, 11 S.E. 2d 460; *Warren v. Land Bank,* 214 N.C. 206, 198 S.E. 624; *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789; *Jones v. Insurance Co.,* 210 N.C. 559, 187 S.E. 769. If a party adversely affected by the ruling desires to review it on appeal, he may request the court to let the record show whether the ruling is made as a matter of law or in the exercise of the court's discretion."

[4-6] In the case before us the defendant had been the driver of an automobile involved in a wreck in which three people had been killed, he had been taken to the hospital unconscious and with the odor of alcohol on him. He had no blood pressure. The doctor who treated him was the one on duty at the hospital and was not his regular physician. The doctor ordered a Blood Alcohol Test made. Defendant objected to the admission of the results thereof and on appeal for the first time claims that such was a privileged communication under the provisions of G.S. 8-53. The objection was overruled. No request was made to the trial court to permit the record to show on what basis the ruling was made. The defendant's objection was all inclusive. The court's ruling was such as to permit the evidence to be admitted. If the record is silent upon a particular point, the action of the trial judge will be presumed correct. *State v. Dew,* 240 N.C. 595, 83 S.E. 2d 482. "The presumption is that the judgment is valid, and the facts necessary to sustain it are presumed to exist." *Jones v. Fowler,* 161 N.C. 354, 77 S.E. 415. There is a presumption against error, and the burden is on the complaining party to show error. *London v. London,* 271 N.C. 568, 157 S.E. 2d 90.

[6] When the trial judge overruled the objections in this case, under these circumstances, we are of the opinion and so hold that such constituted judicial action on his part and that there can be no doubt that he did so because in his opinion the testimony was necessary to a proper administration of justice. It must be assumed that the judge was aware of the statute when he made the ruling, and that under these circumstances the very act of ruling, in the absence of a re-

quest for a specific finding, was in itself a finding that its admission was necessary to a proper administration of justice. From the standpoint of the witness, after the trial judge had overruled the objection to the question, the witness was required to answer. By the act of overruling the objection the court, in effect, said to the defendant your objection is not sustained on any lawful grounds which included the law as set forth in G.S. 8-53. Under the circumstances of this case we are of the opinion and so hold that no violation of the rule of privileged communication as set forth in G.S. 8-53 has been shown.

[7] We are of the opinion and so hold that neither the taking of a sample of defendant's blood nor the admission of evidence relating to the analysis of the blood sample are in violation of the Constitution of the State of North Carolina or the Constitution of the United States. *State v. Cash*, 219 N.C. 818, 15 S.E. 2d 277; *Branch v. State*, 269 N.C. 642, 153 S.E. 2d 343; *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908; *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581; *United States v. Wade*, 388 U.S. 218, 18 L. Ed. 2d 1149.

The defendant contends that the court committed error in its charge to the jury, both as to the presumption arising from the percent of blood alcohol and as to the possible verdicts that it could return. After a careful examination of the entire charge, when viewed as a whole, we are of the opinion and so hold that no prejudicial error has been made to appear.

It follows therefore that the court did not commit error when it failed to grant defendant's motion to set the verdict aside. We are of the opinion and so hold that the defendant has had a fair trial free from prejudicial error.

No error.

BRITT and PARKER, JJ., concur.

IN THE MATTER OF FORECLOSURE OF RAY GUSTAVA REGISTER AND ELIZABETH B. REGISTER PROPERTY UNDER DEED OF TRUST (2143-423)

No. 6926SC84

(Filed 18 June 1969)

1. Appeal and Error § 24— form of exceptions

Exceptions appearing for the first time in the assignments of error will not be considered.

2. Mortgages and Deeds of Trust § 40— action to set aside foreclosure — inadequacy of price

Inadequacy of the purchase price obtained at a foreclosure sale, standing alone, is not sufficient ground to upset a sale duly and regularly made in strict conformity with the power of sale contained in the deed of trust.

3. Mortgages and Deeds of Trust § 40— action to set aside foreclosure — statutory rights

The provision of G.S. 45-21.29 that on the resale of real property the clerk shall make all such orders as may be just and necessary to safeguard the interests of all parties extends to orders securing the rights of the parties as defined by the statute, but not to orders abrogating or abridging such rights.

4. Courts § 9— superior court — appeal from one court to another

No appeal lies from one superior court to another.

5. Judgments § 18— attack on erroneous judgments — appeal

Even though a judgment regularly entered is concededly based upon an erroneous application of legal principles, upon the expiration of the term at which it is rendered the judgment can only be corrected by an appellate court.

APPEAL from *Ervin, J.*, 2 September 1968, Schedule B, Civil Session, Superior Court of MECKLENBURG.

Ray Gustava Register and Elizabeth B. Register, referred to herein as "Register" are grantors in a deed of trust dated 31 March 1960 to Wallace S. Osborne, Trustee, given to secure an indebtedness to Gulf Life Insurance Company. The deed of trust is duly recorded in the Mecklenburg County Registry. Upon default in the payment of the note secured by the deed of trust, foreclosure was instituted by the trustee under the terms of the deed of trust and sale was set for 21 August 1967. On 17 August 1967, Register instituted an action seeking to restrain and enjoin the foreclosure. After a hearing before Judge Snepp, an order was entered continuing the ex parte restraining order until the matter was heard on its merits but conditioning the continuance of the restraining order upon the payment by Register of payments required by the note secured when and as called for in the note. Thereafter, the matter came on for hearing before Judge Clarkson on 28 February 1968. He entered an order finding that the payments due on the note for the month of December 1967 and the months of January and February 1968 had not been paid and the note was, therefore, in default; that Register had failed to comply with the order of Judge Snepp, and was not entitled further to restrain the foreclosure proceedings; that as of 30 August 1967, the date on which the restraining order was entered, the amount of the obligation secured by the deed of trust, including interest and

penalties, was $8404.90. The order entered dissolved the restraining order and authorized the trustee to proceed with foreclosure upon proper advertising and publication. The trustee proceeded to advertise sale of the property for 12 o'clock noon on 1 April 1968. At that time Piedmont Production Credit Association was high bidder at $8825. On 11 April 1968 an upset bid was filed in the amount of $9316.25. Thereafter, pursuant to order of resale, another public sale was had on 29 April 1968, when the upset bid was the last and highest bid. On 3 May 1968 another upset bid was filed in the amount of $9832.07 and another public sale was had on 27 May 1968, pursuant to order of resale, when the upset bid of $9832.07 was the last and highest bid. 6 June 1968 was the last day for filing an upset bid and no upset bid was filed by that date. During the process of sale and on 25 April 1968, the action for injunctive relief filed by Register came on for hearing before Judge Ervin, who found that the property was being advertised for resale; that the need for accounting contended by Register had been resolved by the order of Judge Clarkson; that all matters, both in equity and in law, had been determined; and the action was dismissed.

On 7 June 1968, Register filed a motion in the office of the clerk requesting that the bid not be confirmed for that the bid of $9832.07 is grossly inadequate. Attached to the motion is a complaint in which Register alleges that the bid is inadequate and inequitable and will result in irreparable damage; that the value of the property is $22,500; that a dispute exists between the Registers and the defendants (Gulf Life and the trustee) as to the amount due and Register asked that defendants be restrained and enjoined from proceeding further pending a preliminary hearing and thereafter until a final hearing and further that defendants render an accounting and allow Register to bring the loan current.

On 7 May 1968, the clerk entered an order directing that confirmation of the sale be withheld pending consideration by the court of evidence concerning the adequacy of the bid and the value of the property.

On 14 May 1968, defendants filed a motion that the sale be confirmed and the motion of Register be dismissed for that the clerk has no jurisdiction to enjoin a confirmation of a sale; that the motion was not filed in apt time; that the order of Judge Clarkson resolved any dispute as to the amount due; that three separate sales had been had and the amount bid at the last sale was the best price obtainable at foreclosure; that Register had not alleged any irregularity in the foreclosure; that mere inadequacy of purchase price is

not sufficient to set aside a sale duly and regularly made in conformity with the power of sale continued in the deed of trust. Filed with the motion is the affidavit of the trustee setting out in seriatim all of the proceedings had and orders entered to that date.

On 19 June 1968, the clerk entered an order finding that the property had a value of between $18,500 and $22,500 and that to confirm a bid of $9832.07 would be unconscionable and refusing confirmation and directing the trustee to resell the property as in the case of an original sale at foreclosure. From the entry of this order the trustee and the noteholder appealed and the proceeding was ordered transferred to the civil issue docket.

The matter was heard before Judge Thornburg on 11 July 1968. He entered an order finding facts and incorporating therein a summary of the contents of all orders and judgments entered and made conclusions of law, in summary except where quoted as follows: (1) That the parties in the action for injunctive relief are the same as the parties in this action. (2) That the need for an accounting was resolved by the order of Judge Clarkson, and no appeal having been taken therefrom, that order finally adjudicated the question of the amount due on the note; that the judgment of Judge Ervin dismissing the action constitutes a full and final determination of the rights of Register further to enjoin the trustee and noteholder and prohibits the clerk and the court from further consideration of evidence as to a dispute as to the amount due, and that said judgment, not having been appealed, is *res judicata* as to all matters and things alleged in the action terminating in that judgment. (3) That the sole basis of the clerk's order refusing to confirm the sale is inadequacy of purchase price and this is not sufficient grounds upon which to set aside or deny confirmation of a sale of realty under the power of sale in a deed of trust if the procedures of sale set out in the instrument have been followed. (4) That there is neither allegation nor proof of irregularity in the foreclosure. (5) That the order of the clerk was error for that it was not based upon facts which would legally justify the clerk in denying confirmation. (6) That after thorough study of record and affidavits, court is of the opinion that sale of 27 May 1968 should be confirmed. The court ordered the cause remanded to the clerk for the "entry of an order by said Clerk of Superior Court in keeping with the legal conclusions contained herein."

From the entry of this order, Register appealed. The record contains an order tendered by Register but the record discloses no exception taken to the refusal of the court to sign said order.

On 19 August 1968, trustee and noteholder moved to dismiss the appeal for failure of Register to serve case on appeal within the time allowed by the court and as extended by agreement of counsel. This motion was heard by Judge Snepp and an order was entered on 26 August 1968 dismissing the appeal.

Thereafter, and on 27 August 1968, the clerk entered an order, on motion of the trustee and noteholder, confirming the sale of 27 May 1968. From the entry of this order, Register appealed.

The matter was heard by Judge Ervin who again found facts including summarization of orders and judgments entered and made the following conclusions of law: (1) that the order of Judge Thornburg of 11 July 1968 is the law in this case to and including the order of the clerk of 27 August 1968 confirming the foreclosure sale; (2) that neither Register nor counsel have brought to the attention of the court any fact or law justifying interference with the clerk's order of confirmation; (3) that the order of Judge Thornburg of 11 July 1968 is binding on the court and the appeal is without merit. It was, therefore, ordered that the appeal be dismissed and the order of the clerk affirmed.

From this order, Register appealed.

Henderson, Henderson & Shuford by William A. Shuford for petitioner appellants.

Osborne and Griffin by Wallace S. Osborne for respondent appellees.

MORRIS, J.

Appellants contend that error was committed in the trial tribunal's refusal to sign and enter the order tendered by them; in making the conclusions of law in the order entered 11 July 1968 (the Thornburg order) and in the signing and entry of said order; and in making the conclusions of law in the order entered 12 September 1968 (the Ervin order) and in signing and entry of said order.

[1] No exception to the refusal of Judge Thornburg to adopt, sign and enter the judgment tendered by appellants appears in the record except under the listing of assignments of error. The Supreme Court has held repeatedly that exceptions appearing for the first time in the assignments of error will not be considered. *Dilday v. Board of Education,* 267 N.C. 438, 148 S.E. 2d 513.

The record discloses that on 6 June 1968, the last day for an upset bid, Register verified a complaint alleging the sale and resales

of the property by the trustee after advertisement; that 6 June 1968 is the last day for filing an upset bid; that no upset bid had been filed to the time of drafting the complaint; that "on June 7, 1968 the Trustee will be able to apply to the Clerk of Court for Mecklenburg County, North Carolina, for confirmation of the sale based on said bid of $9,832.07"; that the bid is inadequate and "will result in irreparable damage to the Plaintiffs"; that the value of the property is more than $22,500; that a dispute exists as to the amount due, the defendants demanding $8400 and plaintiffs claiming they owe only $5,000; that an accounting should be required; that plaintiffs have no adequate remedy at law, or otherwise, and irreparable damage will result to plaintiffs unless the sale is restrained. They asked the court to treat the complaint as an affidavit and to issue a restraining order and to require an accounting and allow plaintiffs to pay such amount to bring their loan current. The complaint, apparently drafted under the provisions of G.S. 45-21.34, was not filed as a complaint, but on 7 June 1968 it was attached to Register's motion directed to the clerk and asked to be taken as an affidavit in support of the motion that the clerk not confirm the sale but have a hearing "for the purpose of considering other evidence as to the value of said property and to order a resale of said property."

Neither the complaint nor the motion alleges any irregularity in the foreclosure proceedings. Appellants rely solely on inadequacy of purchase price. True, the complaint, which is asked to be treated as an affidavit in support of the motion, alleges a dispute as to the amount due. That question had, however, been resolved by the 28 February 1968 order of Judge Clarkson and the order of 25 April 1968 of Judge Ervin. We note that nowhere in the record before us is there any indication of any tender by Register of any amount in payment from the beginning of the foreclosure in August 1967 to the date of appeal in September 1968.

[2] From the procedural quagmire of this case, one question arises: Is inadequacy of purchase price, even if proved, sufficient, standing alone, to upset a sale duly and regularly made in strict conformity with the power of sale contained in the deed of trust? If this question is answered in the negative, then the conclusions of law of Judge Thornburg to which appellants except are correct. We think the question must be answered in the negative.

[3] Appellants point to G.S. 45-21.29 — Resale of real property; jurisdiction; procedure; writs of assistance and possession — and particularly subsections (h) and (j) thereof which provide: "(h) When a resale of real property is had pursuant to an upset bid, such

sale may not be consummated until it is confirmed by the clerk of the superior court . . ." and "(j) The clerk of the superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have the authority to fix and determine all necessary procedural details with respect to resales in all instances in which this article fails to make definite provision as to such procedure."

In *In Re Sale of Land of Sharpe,* 230 N.C. 412, 53 S.E. 2d 302, the trustee in a deed of trust had conducted seven sales. The trustor, by an agent, had filed an upset bid each time. The noteholder and trustee brought a proceeding before the clerk alleging that the trustor had used the statute providing for resales as a means of delaying the proper foreclosure of a valid deed of trust. The clerk entered an order finding this as a fact and directing that the high bidder at any subsequent sale and any person filing an upset bid would be required to deposit with the clerk cash or certified check in the amount of 15% of the last and highest bid. Trustor appealed to the superior court. There, after notice, noteholder and trustee moved to dismiss the appeal as frivolous. The superior court affirmed the clerk's order in all respects and dismissed the appeal. Trustor appealed. The Supreme Court reversed, holding that the order of the clerk was void for that it undertook to deprive trustor of rights granted by the legislature in the statute providing for resales and prescribing the amount to be deposited with the clerk. Justice Ervin, for the Court, said:

> "The order of the Clerk of the Superior Court of Moore County finds no warrant in the statutory provision that 'the clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties.' This authorization *extends to orders securing the rights of the parties as defined by the statute, but not to orders abrogating or abridging such rights.*" (Emphasis supplied.)

We are of the opinion that the case before us is governed by the well-established legal principles stated by Barnhill, J. (later C.J.), in *Foust v. Loan Association,* 233 N.C. 35, 37, 62 S.E. 2d 521. Justice Barnhill noted that the statutory provisions are, by operation of law, incorporated in all mortgages and deeds of trusts and control any sale under such instruments. The jurisdiction of the clerk vests at the moment an upset bid is filed with him. In the case then before the Court a resale had been had after an upset bid. The trustee had erroneously reported the bid at the resale as $6400 rather than the actual bid of $825. The clerk's decree of confirmation recited a last

and highest bid of $825 and ordered conveyance. The Court held that this irregularity was of such substantial nature as to require the court to vacate the order of confirmation. In reaching this result, Justice Barnhill said:

> "Mere inadequacy of the purchase price realized at a foreclosure sale, standing alone, is not sufficient to upset a sale, duly and regularly made in strict conformity with the power of sale. *Weir v. Weir,* 196 N.C. 268, 145 S.E. 281; *Roberson v. Matthews,* 200 N.C. 241, 156 S.E. 496; *Hill v. Fertilizer Co.,* 210 N.C. 417, 187 S.E. 577.
>
> Even so, where there is an irregularity in the sale, gross inadequacy of purchase price may be considered on the question of the materiality of the irregularity. *Hill v. Fertilizer Co., supra,* and cases cited.
>
> Speaking to the subject in *Weir v. Weir, supra, Stacy, C.J.,* says: 'But gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. *Worthy v. Caddell,* 76 N.C. 82, 70 A. & E. (2 Ed.) 1003; note: 42 L.R.A. (N.S.) 1198'; *Bundy v. Sutton,* 209 N.C. 571, 183 S.E. 725; *Roberson v. Matthews, supra.*"

These principles were quoted with approval in *Products Corp. v. Sanders,* 264 N.C. 234, 141 S.E. 2d 329 and, we think, are controlling here.

[2] There is no allegation of irregularity in the foreclosure proceedings and no dispute as to the validity of the deed of trust. The only question before the clerk was the alleged inadequacy of purchase price. We hold that the conclusions of law contained in Judge Thornburg's order of 11 July 1968 were correct.

Appellants did not perfect their appeal from this order, and the appeal was subsequently, on motion of appellees, dismissed. Thereafter, the clerk, on motion of appellees, entered an order confirming the sale. From this order, appellants appealed, and from the order of Judge Ervin dismissing that appeal as being without merit, appealed to this Court.

[4, 5] We think Judge Ervin correctly concluded that the order of Judge Thornburg of 11 July 1968 is the law in the case and "binding upon this Court and that, in effect, this matter is before this Court on a purported appeal from said Order of Judge Thornburg entered on July 11, 1968, and that this appeal is therefore

without merit." No appeal lies from one superior court to another. *Cameron v. McDonald,* 216 N.C. 712, 6 S.E. 2d 497. Indeed, even though a judgment regularly entered is concededly based upon an erroneous application of legal principles, upon expiration of the term at which rendered, it can only be corrected by an appellate court; for "after the term neither the judge who rendered the judgment nor another judge holding the court can set it aside for such error, and the only remedy is an appeal or a *certiorari* as a substitute for an appeal." *Mills v. Richardson,* 240 N.C. 187, 81 S.E. 2d 409. As pointed out above, however, the order of Judge Thornburg in the instant case was not based upon an erroneous application of legal principles.

Affirmed.

CAMPBELL and BROCK, JJ., concur.

VIRGINIA H. MARTIN, WIDOW AND NEXT FRIEND OF WANDA ANN MARTIN, TERESA JEAN MARTIN, REBECCA SUE MARTIN, ROY EARL MARTIN, JR. AND JOSEPH QUINTON MARTIN, ROY EARL MARTIN, DEC'D., EMPLOYEE v. GEORGIA-PACIFIC CORPORATION, EMPLOYER; SELF-INSURER

No. 696IC99

(Filed 18 June 1969)

1. Master and Servant § 55— Workmen's Compensation Act — injuries compensable

The Workmen's Compensation Act is not intended to provide general health and accident insurance, but its purpose is to provide compensation for those injuries which result from accidents which arise out of and in the course of the employment.

2. Master and Servant § 96— review of Industrial Commission's findings

Where there is sufficient competent evidence to support the Industrial Commission's findings of fact, the Court of Appeals is bound thereby.

3. Master and Servant § 60— course of employment — travel

Ordinarily, employees whose work entails travel away from the employer's premises are within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown.

4. Master and Servant §§ 56, 60— course of employment — procurement of meals

Findings that the deceased employee was attending a training program

in another state at the request of his employer, that the employer paid all expenses for the trip including meals and lodging, that at the conclusion of the day's classes the employee returned to his hotel and joined several companions for a walk to a steakhouse for supper, that the employee and his friends deviated three or four blocks from their destination in order to sightsee but that at the time of the accident resulting in the employee's death they had resumed their walk to the restaurant, and that an automobile struck the employee as he was standing on the corner of an intersection, *are held* to support the Industrial Commission's conclusions (1) that a reasonable relationship existed between the employment and the procurement of the meal and (2) that the employee's death arose out of and in the course of employment.

5. Master and Servant § 56— Workmen's Compensation Act — causal relation between employment and accident

An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business.

6. Master and Servant § 93— proceedings before the Commission — motion to offer additional evidence

Motion to offer additional evidence on appeal before the Full Commission is addressed to the discretion of the Commission, whose ruling thereon is not reviewable in the absence of an abuse of discretion.

APPEAL by defendant employer, self-insurer, from an opinion and award of the North Carolina Industrial Commission entered 11 September 1968.

In this action plaintiffs seek to recover death benefits under the North Carolina Workmen's Compensation Act (G.S. Chap. 97) by reason of the death of Roy Earl Martin, which they contend resulted from injury by accident arising out of and in the course of his employment with defendant employer.

The facts found by the hearing commissioner, based upon stipulations and evidence introduced at the hearing, are as follows:

"1. On the date of accident, September 19, 1967, Roy Earl Martin was an employee of Georgia-Pacific Corporation, American Timber Products Division, Ampac Plant, Conway, North Carolina.

2. The employer, Georgia-Pacific Corporation, is a self-insurer under the North Carolina Workmen's Compensation Act.

3. That on September 19, 1967, both the employer and employee were subject to the provisions of the North Carolina Workmen's Compensation Act.

4. The employee's average weekly wage was $138.46 per week.

5. Martin went to Oilgear school at the request of his employer for a one week training program (week of September 18, 1967) at the Oilgear Company, 1560 West Pierce Street, Milwaukee, Wisconsin.

6. All expenses were paid by the employer, including meals and lodging during the week of September 18, 1967; the employer made reservations at the hotel and paid all expenses, including transportation to and from Milwaukee, Wisconson.

7. Classes at the Oilgear School were conducted from 8:30 A.M. to 4:30 P.M. daily during the period September 18, 1967, through September 21, 1967. The classes for September 22, 1967, were to be conducted from 8:30 A.M. to 11:30 A.M.

8. On September 19, 1967, Martin was released from his classes at the Oilgear School at 4:30 P.M. He was not required to return to such classes until 8:30 A.M. on the morning of September 20, 1967.

9. Upon his release from class on September 19, 1967, Martin returned to his place of lodging at the Plankinton House, a hotel located on the southeast corner of the intersection of Plankinton Avenue and East Michigan Street. The Plankinton House is located approximately one and one-third miles (7200 feet) northeast of the Oilgear School.

10. The employer gave Martin no instructions with respect to the use of his time while he was not attending classes at the Oilgear School.

11. The instructor at the Oilgear School informed Roy Earl Martin and other students in the class that there would be no homework, that no tests would be given in the course, and that the students through their own initiative were to learn and do what they wanted to do insofar as working on pumps.

12. At approximately 6:45 P.M. on September 19, 1967, Martin, Stewart Lane, and two other students attending the Oilgear School left the Plankinton House.

13. Upon leaving the Plankinton House, Martin and the others walked east three or four blocks and observed some yachts which were moored on the Milwaukee River. After walking several blocks they decided to go to the steakhouse at which they had previously planned to eat dinner. The steakhouse was located on Wisconsin Avenue, six to eight blocks west of the Plankinton House.

14. At approximately 8:30 P.M., while en route to the steakhouse, Martin and the others were standing on the sidewalk at the intersection of Plankinton and Wisconsin Avenues, waiting to cross the street, when an automobile driven by one Harold M. Brumfield traveling north on Plankinton Avenue struck a safety island and veered across the intersection and hit three men, including Martin, standing on the corner.

15. Martin was admitted to Milwaukee County General Hospital for treatment of injuries arising out of the accident; he was a patient in said hospital from September 19, 1967, until his death on September 26, 1967, having never regained consciousness.

16. Martin's death resulted from injuries by accident as hereinabove described.

17. Martin's medical bill for hospitalization from September 19 to September 26, 1967, was $875.70.

18. Martin's medical bill for professional services rendered by doctors attending him at Milwaukee County General Hospital was $900.00.

19. Martin's complete funeral bill was $1535.85.

20. That Roy Earl Martin sustained an injury by accident arising out of and in the course of his employment on September 19, 1967; that the restaurant at the hotel where he was staying was not open for the evening meal and at the time of said accident Roy Earl Martin was on his way to a restaurant to eat his evening meal which the defendant employer was to pay for as a part of the expenses of his trip to Milwaukee to attend school at the direction of the employer.

21. That the deceased employee left surviving at the time of his death his widow, Virginia H. Martin, whom he married on January 30, 1954; that he also left surviving five minor children, to wit: Wanda Ann, born March 4, 1955; Teresa Jean, born July 30, 1956; Rebecca Sue, born December 17, 1958; Roy Earl, Jr., born April 28, 1960; and Joseph Quinton, born February 17, 1963."

The hearing commissioner concluded as a matter of law that Martin sustained an injury by accident arising out of and in the course of his employment with defendant and awarded plaintiffs "compensation at the rate of $42.00 per week for a period of 350 weeks (not to exceed $15,000.00, including funeral expense)" plus all medical expenses resulting from the accident.

Pending review of the decision and award of the hearing commissioner by the Full Commission, the defendant made a motion supported by affidavits to the Full Commission to receive further evidence. Upon review, the Full Commission denied the motion and adopted as its own the findings of fact, conclusions and award of the hearing commissioner. From this opinion and award the defendant appealed.

Allsbrook, Benton, Knott, Allsbrook & Cranford by Dwight R. Cranford and Johnson, Johnson & Johnson by Bruce C. Johnson for plaintiff appellees.

Poyner, Geraghty, Hartsfield & Townsend by John Q. Beard for defendant appellant.

MALLARD, C.J.

[1, 2] It is well established in this State that the Workmen's Compensation Act is not intended to provide general health and accident insurance, but its purpose is to provide compensation for those injuries which result from *accidents* which *arise out of* and *in the course of* the employment. *Bryan v. Church,* 267 N.C. 111, 147 S.E. 2d 633 (1966); *Lewis v. Tobacco Co.,* 260 N.C. 410, 132 S.E. 2d 877 (1963); *Anderson v. Motor Co.,* 233 N.C. 372, 64 S.E. 2d 265 (1951); *Withers v. Black,* 230 N.C. 428, 53 S.E. 2d 668 (1949). From an examination of the evidence presented, we think there was sufficient competent evidence to support the Industrial Commission's findings of fact, and we are bound by them. *Hinkle v. Lexington,* 239 N.C. 105, 79 S.E. 2d 220 (1953); G.S. 97-86; *Williams v. Board of Education,* 1 N.C. App. 89, 160 S.E. 2d 102 (1968). See also *Askew v. Tire Co.,* 264 N.C. 168, 141 S.E. 2d 280 (1965).

Martin's death was by accident. The main question presented for decision by defendant's assignments of error is whether the evidence was sufficient to support the finding and conclusion that the injury by accident arose out of and in the course of employment. G.S. 97-2(6).

[3] In 1 Larson, Workmen's Compensation Law, § 25.00, p. 443, it is said, "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable." Also in 1 Larson, Workmen's Compensation Law, § 25.21, p. 445, it is stated

that "traveling employees, whether or not on call, usually do receive protection when the injury has its origin in a risk created by the necessity of sleeping and eating away from home. The hotel fire cases are the best illustration of this. Closely related are the injuries sustained in the process of getting meals. So when a traveling man slips in the street or is struck by an automobile between his hotel and a restaurant, the injury has been held compensable, even though the accident occurred on a Sunday evening, *or involved an extended trip occasioned by employee's wish to eat at a particular restaurant.*" (Emphasis added.) See *Kiger v. Service Co.*, 260 N.C. 760, 133 S.E. 2d 702 (1963), and *Brewer v. Trucking Co.*, 256 N.C. 175, 123 S.E. 2d 608 (1962). This seems to be the majority rule based upon an analysis of cases from various parts of the United States. Illustrative of such cases are: *Thornton v. Hartford Acc. & Indem. Co.*, 198 Ga. 786, 32 S.E. 2d 816 (1945); *Zurich Insurance Company v. Zerfass*, 106 Ga. App. 714, 128 S.E. 2d 75 (1962); *Alexander Film Co. v. Industrial Commission*, 136 Colo. 486, 319 P. 2d 1074 (1957), *Kohl v. International Harvester Company*, 9 A.D. 2d 597, 189 N.Y.S. 2d 361 (1959).

In the *Kohl* case the employee was sent to Ohio to assist in putting on a demonstration of his employer's products at a so-called field day, and after working until a late hour, left his motel and undertook a journey of approximately ten miles to obtain his evening meal and some incidental relaxation at a particular restaurant. While en route to such restaurant he was involved in a fatal automobile accident. The Supreme Court of New York held that the employee died in an accident which arose out of and in the course of his employment and affirmed an award entered by the Workmen's Compensation Board. Accord, *Alexander Film Company v. Industrial Commission*, 136 Colo. 486, 319 P. 2d 1074 (1957); *Walker v. Speeder Mach. Corp.*, 213 Iowa 1134, 240 N.W. 725 (1932); *Robinson v. Federal Telephone & Radio Corp.*, 44 N.J. Super. 294, 130 A. 2d 386 (1957).

In the case of *Thornton v. Hartford Acc. & Indemn. Co., supra*, it is said:

> "A traveling salesman is taken away from his home or headquarters by his employment; and, because of the nature of his work, he usually can not return home each night. He must of necessity eat and sleep in various places in order to further the business of his employer; and the employer recognizes these necessities and usually pays the expenses of his lodging and meals, as was done in this case.

> While lodging in a hotel or preparing to eat, or while going to or returning from a meal, he is performing an act incident to his employment, unless he steps aside from his employment for personal reasons. Such an employee is in continuous employment, day and night. This does not mean that he can not step aside from his employment for personal reasons, or reasons in no way connected with his employment, just as might an ordinary employee working on a schedule of hours at a fixed location. He might rob a bank; he might attend a dance; or he might engage in other activities equally conceivable for his own pleasure and gratification, and ordinarily none of these acts would be beneficial or incidental to his employment and would constitute a stepping aside from the employment."

[4] The facts stipulated and found by the Industrial Commission disclose that the deceased employee, Roy Earl Martin, was in Milwaukee at the request of his employer to attend a one-week training program. All expenses for the trip, including meals and lodging, were paid by the employer. Martin was sent to a school conducting the training program for the benefit of the employer's business, and at the time of the accident he was on his way to a restaurant to eat his evening meal. The evidence does not reveal that he was required to eat his meals at the hotel, but under the circumstances he could eat his meals at a place of his choice in Milwaukee. That this was a necessary incident of the employment is recognized by the employer when it agreed to pay for his meals. In the absence of some requirement of the employer specifying where he should eat, we think it is immaterial under the evidence and facts of this case whether he could have eaten at the hotel where he was staying. Even if we assume that he deviated from the course of employment to walk three or four blocks from his hotel to see yachts moored on the Milwaukee River and that this was purely a personal mission, the facts supported by competent evidence clearly show that at the time of the accident he had abandoned this personal sight-seeing mission and was on his way to eat the evening meal. In order to attend the training program Martin had to travel from North Carolina to Milwaukee. He had to eat and he had to sleep. These were necessities incidental to the trip. It is clear that he could not accomplish that which was assigned to him by the employer without traveling to Milwaukee, and eating and sleeping while there. We think there was a reasonable relationship between Martin's employment and the eating of meals. The eating of meals was reasonably necessary to be done in order that he might perform the act he was employed to do, to wit, attendance at the training program in Milwaukee. We are of the

opinion and so hold that while Martin was on his way to eat the evening meal, under the circumstances of this case, that he was at a place where he might reasonably be at such time and doing what he, as an employee, might reasonably be expected to do, and that in so doing he was acting in the course of and scope of his employment.

[5] "An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." *Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E. 2d 643 (1964). See also *Rice v. Boy Scouts*, 263 N.C. 204, 139 S.E. 2d 223 (1964).

Defendant appellant relies strongly on two North Carolina cases to support its contention that Martin's death was not by accident arising out of and in the course of his employment. In *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 128 S.E. 2d 218 (1962), the employee went out on a mission of his own to purchase a soft drink and some beer after he had completed his day's work. While returning to the motel he was struck by an automobile and died as a result of the injuries received. Compensation was denied by the Commission. The denial was affirmed on appeal. In *Perry v. Bakeries Co., supra,* the employee was away from his home attending a sales meeting of the employer, at the expense of the employer. Employee arrived the day before the sales meeting was scheduled to begin and attended a social hour given by the employer at 5:30 P.M. Afterwards he had dinner and then went out on a mission of his own to the swimming pool, where he was injured. The Commission awarded compensation but the Supreme Court reversed. Each case is easily distinguishable from the instant case in that the employee was injured while engaging in an entirely personal function wholly independent of the employment. The purchase of drinks and swimming were not necessary incidents of the employment and there was no reasonable relationship between the employment and the soft drink, the beer, or the swimming. Other cases cited by defendant and not referred to herein are distinguishable.

[6] After the Hearing Commissioner had filed his opinion and award based thereon and before the matter was heard by the Full Commission on appeal, the defendant filed a written motion requesting that the Commission issue an order authorizing the receiving of additional evidence. The ground upon which the defendant bases its motion is that the witness Lane was mistaken when he testified that the hotel restaurant was closed on the date of the accident. At the

hearing the Full Commission entered the following order relating to the motion:

> "After considering all matters involved in this case the Full Commission is of the opinion that there has been no showing that the motion to receive further evidence in this case would produce any substantially material evidence which would in any manner change the results which have been reached in this case, and it is the opinion of the Full Commission that the defendant's motion to receive further evidence should be, and it is hereby, denied."

In the case of *Green v. Construction Co.*, 1 N.C. App. 300, 161 S.E. 2d 200 (1968), it is said:

> "Motions to take additional evidence on appeal before the Full Commission are governed by the general law of this State for the granting of new trials on the grounds of newly discovered evidence. (See Rule XX, § 6 of Rules of the Industrial Commission.) Under our practice, a motion for new trial on the ground of new evidence is addressed to the discretion of the trial judge, and his decision, whether granting or refusing the motion, is not reviewable in the absence of an abuse of discretion."

In the case before us we are of the opinion and so hold that no abuse of discretion has been shown. This assignment of error is without merit.

In this case we think the fatal accident is fairly traceable to the employment and that a reasonable relationship to the employment exists.

We are of the opinion and so hold that the competent evidence was sufficient to support the finding and the conclusion that the fatal accident arose out of and in the course of employment.

The opinion and award of the Industrial Commission is affirmed.

Affirmed.

BRITT and PARKER, JJ., concur.

GEORGE T. DAVIS AND WIFE, ALMA LEE C. DAVIS v. CARL M. CAHOON AND WIFE, CELIA G. CAHOON

No. 692SC105

(Filed 18 June 1969)

1. Waters and Watercourses § 1— drainage of surface waters — obstruction by owner of lower estate

The owner of each upper estate has an easement or servitude in the lower estates for the drainage of surface water flowing in its natural course and manner without obstruction or interruption by the owners of the lower estates to the detriment or injury of the upper estates. The "common-enemy doctrine" is not recognized in this State.

2. Waters and Watercourses § 1— acceleration of water flow

While water may not be diverted from its natural course so as to damage another, the natural flow of the water may be increased or accelerated.

3. Waters and Watercourses § 1— drainage of surface waters — duty owed by intermediate owner to upper and lower estates

The owner of property located in an intermediate position along the course of a drainway is both a dominant and a servient proprietor and may not interrupt or interfere with the natural passage of the waters to the detriment of the upper or lower estates.

4. Waters and Watercourses § 1— obstruction of common drainway — sufficiency of evidence

In this action for damages from the flooding of plaintiffs' lands allegedly caused by defendants' wrongful obstruction of a common drainway and for an injunction to prevent such obstruction, plaintiffs' evidence *is held* sufficient for the jury where it tends to show that a canal serves as a common drainway for surface waters from lands of plaintiffs and defendants, that defendants constructed on their land a drainage canal which runs parallel to the common drainway and a cross canal connecting defendants' drainage canal with the common drainway, and that defendants pump water from their drainage canal through the cross canal into the common drainway, thereby obstructing the natural flow of water in the common drainway and causing water to back up and flood plaintiffs' lands.

APPEAL from *Cowper, J.*, 7 October 1968 Mixed Session of Superior Court of HYDE.

This is an action for damages and for injunctive relief to enjoin defendants from further flooding plaintiffs' lands by use of an artificial method of drainage; to wit, a pumping system.

George T. Davis, one of the plaintiffs, is the owner of a 490-acre tract of land referred to in the complaint and throughout the evidence as Tract No. 1. The defendants are the owners of a 138-acre tract of land referred to as Tract No. 6. Ownership of the intervening four tracts of land, referred to as Tracts 2, 3, 4 and 5, is set out in the

complaint. All the lands about which the controversy revolves are situate in Hyde County east of Swan Quarter. Tract No. 1 is the most northern of the six tracts and Tract No. 6 is the most southern. Tract No. 1 is bounded on the north by U.S. Highway No. 264. Tract No. 6 is bounded on the north by the right-of-way of N.C. Secondary Road No. 1121, which separates it from Tract No. 5, and on the south by the right-of-way of an old abandoned public road which once led from Oyster Creek to Juniper Bay which right-of-way separates Tract No. 6 from the lands of the E. B. Bell heirs lying south of Tract No. 6. All of the six tracts are bounded on the west by N.C. Secondary Road No. 1124, known as the "Quarter Road". All of the six tracts are bounded on the east by double canals leading from U.S. Highway No. 264 to Juniper Bay, a natural body of water which is a tributary of the Pamlico Sound. All of the six tracts drain into the West One Canal (hereinafter referred to as "West One") of these double canals. It is the primary and common drainway for all six tracts and all tracts have had, for many years, equal right of drainage into the canal. North of Juniper Bay and just south of Tract No. 6 there are three 48-inch floodgates which were constructed in 1950 for the purpose of preventing the flow of tidewater into the canal and back into the lateral field ditches when the tide is higher on the south side of the gates than it is on the north or field side. The gates are so constructed that whenever the level of water in the sound is higher than the level of water in the canal, the gates shut. As soon as the level of the water in the sound is below that of the water in the canal, the gates open to permit the water from the lands lying to the north of the floodgates to drain into Pamlico Sound through Juniper Bay, a natural body of water. The parties are in agreement with respect to these facts.

The plaintiffs allege that just prior to 1965 defendants changed completely the drainage system of Tract No. 6 by constructing dikes around the lower sides of the tract and by constructing on said tract a drainage canal running north-south about six to eight feet wide running from the northern boundary of Tract No. 6 to just a few feet north of the southern boundary thereof and about 100 feet west of the West One. This canal is referred to as the North-South Canal. Defendants then constructed another canal running, approximately, from the south end of the North-South Canal, and approximately perpendicular thereto, in an easterly direction into the West One. (Apparently the East-West Canal and the North-South Canal are not actually joined, but are connected by a pipe which, apparently, runs through the dike constructed just prior to 1965.) This canal is referred to as the East-West Canal. Defendants then in-

stalled in the East-West Canal a drainage pump about 14 to 16 inches in diameter powered by a farm tractor. When in operation, the pump pumps water from Tract No. 6 out of the North-South Canal through the pipe into the East-West Canal, and then into the West One in substantial volume. Plaintiffs further allege that when defendants purchased Tract No. 6, the eastern portion thereof was too low in elevation to be drained naturally for agricultural purposes. They allege that when the pump is in operation and the tidewater south of the floodgates is higher than the water on the north side thereof, the water pumped from Tract No. 6 would drain north through the West One back into the field ditches on plaintiffs' land. When the pump is in operation and the tidewater is lower on the south side of the floodgates than it is on the field side, the water being pumped from Tract No. 6 crosses the West One and hits the east side thereof with such force and violence that it creates a dam, obstructs the natural flow of water from the northern tracts into Juniper Bay, and causes the water to back up on plaintiffs' land. These conditions cause flooding of Tract No. 1 with resulting damage to land and crops. Plaintiffs alleged that they had repeatedly requested defendants to discontinue the pumping operations, but they had failed and refused to do so, but, on the contrary, had advised that they intended to continue the operations.

Defendants admitted that they did put a pump in the East-West Canal and that they used the pump in 1965 and 1966 after heavy rains. They denied that the eastern part of Tract No. 6 could not be naturally drained for agricultural purposes, that they had constructed dikes, that a large volume of water is carried by the pump, or that plaintiff George Davis made any demands or attempted to forbid the pumping at any time other than during 1966. They specifically denied any wrongful use of the pumping system or that it was done in anything but a proper and careful manner.

At the close of plaintiffs' evidence, defendants' motion for judgment as of involuntary nonsuit was allowed and plaintiffs appealed.

John H. Hall and Gerald F. White for plaintiff appellants.

John A. Wilkinson for defendant appellees.

MORRIS, J.

This case involves the application of rules relating to the reciprocal rights and duties of upper and lower landowners with respect to the flow or course of surface waters.

[1] Generally, there are two well-defined and recognized rules with respect to the right of a lower proprietor to obstruct and repel surface water draining from the land of a higher proprietor. One is the common law rule frequently referred to as the "common enemy" doctrine. Under this doctrine, each landowner may take whatever steps he pleases to dispose of surface water. No natural easement or servitude exists in favor of the higher land for the drainage of surface water, and the proprietor of the lower land may lawfully obstruct or hinder the flow of surface water on his land and may turn it back or away from his own land and onto and over other lands without liability for any adverse consequences suffered by reason of such obstruction or diversion. 56 Am. Jur., Waters, § 69; 59 A.L.R. 2d 423.

Diametrically opposed to this rule is the civil law rule which is the rule prevailing in this jurisdiction. In *Mizzell v. McGowan,* 120 N.C. 134, 137-138, 26 S.E. 783, the Court said:

> "The surface of the earth is naturally uneven, with inequality of elevation. The upper and lower holdings are taken with a knowledge of these natural conditions, and the privilege or easement of the upper tenant to carry off the surface water in its *natural* course, under reasonable limitations, and the subserviency of the lower tenant to this easement are the natural incidents to the ownership of the soil. The lower surface is doomed by nature to bear this servitude to the superior and must receive the water that falls on and flows from the latter. The servient tenant can not complain of this, because *aqua currit et debet currere ut currere solebat.*
>
> The upper owner can not divert and throw water on his neighbor, nor the latter back water on the other with impunity. *Sic utere tuo, ut alieum non laedas.*" (Emphasis added.)
>
> See also *Mizzell v. McGowan,* 125 N.C. 439, 34 S.E. 538, and *Mizell v. McGowan,* 129 N.C. 93, 39 S.E. 729.

In *Midgett v. Highway Commission,* 260 N.C. 241, 132 S.E. 2d 599, the Court noted that North Carolina has not recognized and does not apply the common enemy doctrine but follows the civil law rule. The opinion contains a scholarly discussion of the two rules, noting that the civil law rule of this jurisdiction places less emphasis on the existence of well-defined watercourses than does the common enemy doctrine.

> "Our rule embraces surface waters flowing and draining naturally from a higher to a lower level, and is stated thus: The

law confers on the owner of each upper estate an easement or servitude in the lower estates for the drainage of surface water flowing in its natural course and manner without obstruction or interruption by the owners of the lower estates to the detriment or injury of the upper estates. Each of the lower parcels along the drainway is servient to those on higher levels in the sense that each is required to receive and allow passage of the natural flow of surface water from higher land. *Johnson v. Winston-Salem, supra* [239 N.C. 697, 81 S.E. 2d 153]." *Midgett v. Highway Commission, supra,* at p. 246.

[2] Defendants concede that they cannot with impunity divert the flow of surface water from its natural course — here West One — by dam, dike or otherwise, but they contend that another well-known principle is applicable. Defendants earnestly contend that they have done only what they have a right to do, i.e.: increase or accelerate the natural flow of water. The right to accelerate the flow has long been recognized in this jurisdiction.

"Whether water has been diverted is an issue of fact for the jury, while the effect of such diversion is a question of law for the court. The rule has become too well established in this State to need further discussion. It has been generally stated in the following words: 'Neither a corporation nor an individual can divert water from its natural course so as to damage another. They may *increase and accelerate, but not divert.' Hocutt v. R. R.,* 124 N.C. 214; *Mizzell v. McGowan,* 125 N.C. 439; S.c., 129 N.C., 93; *Lassiter v. R. R.,* 126 N.C., 509; *Mullen v. Canal Co., post,* 496." *Rice v. R. R.,* 130 N.C. 375, 41 S.E. 1031.

While defendants do not concede that the natural drainage is always north to south, it appears that all parties regard West One as a natural watercourse for the drainage of Tracts Nos. 1 through 6. Defendants argue in their brief that who is the upper and lower proprietor is not always the same because when the water in the sound is low, the drainage is from north to south; that the direction of the drainage depends on which way the wind is blowing.

[3] In *Johnson v. Winston-Salem,* 239 N.C. 697, 81 S.E. 2d 153, plaintiff was the lower proprietor and brought an action to recover for flood damage to personal property located in the basement of their home due to the negligence of the individual defendant Harper, an upper proprietor, in failing to keep in proper repair a large subsurface drain pipe running under his property. Harper's predecessor in title had extended through his property when he acquired it the artificial drain, using 24-inch pipe, the same size used by upper land-

owners in bringing the drain to Harper's property. Harper bought with knowledge of the existence of the drain. There was a manhole just a few feet from plaintiff's residence. A hole developed over the underground drain and dirt and debris started going into the drain. Harper erected a fence around the hole, but did nothing to repair the drain. Facts: During a heavy rain the manhole just below plaintiff's property overflowed by reason of the fact that it became stopped up by a large piece of terra-cotta pipe which washed down the pipe into the manhole and lodged against the outfall side of the manhole. This caused the water to gush out of the manhole in great volume and with great force, forcing the lid off the manhole, and flooding the space between the manhole and plaintiff's house. Water poured into plaintiff's basement through two ground level windows, completely filling the basement and doing considerable damage to plaintiff's personal property stored therein. At the close of plaintiff's evidence, motion of individual defendant Harper for judgment as of involuntary nonsuit was sustained, a voluntary nonsuit having been taken as to the City of Winston-Salem, and plaintiff appealed. In reversing the trial court, the Supreme Court said:

> "The then owner of the Harper property, located as it was in an intermediate position along the course of this drainway, was both a dominant and a servient proprietor. As servient to the upper proprietors, he was not permitted by law to interrupt or prevent the natural passage of waters, to their detriment. And conversely, as the owner of an estate dominant to the lower tenements, he was required, under pain of incurring actionable liability, to refrain from interfering with the natural flow of waters by artificial obstruction or device, to the detriment or injury of the lower tenements. *Phillips v. Chesson, supra* [231 N.C. 566, 58 S.E. 2d 343]; *Commissioners v. Jennings,* 181 N.C. 393, 107 S.E. 312; Farnham, Waters and Water Rights, Sec. 889d."

While the principles of law are well defined, attempted application to the varying circumstances and facts is frequently fraught with difficulty.

[4] Plaintiffs' evidence, considered in the light most favorable to plaintiffs and accepting the evidence so construed as true, as we are bound to do in reviewing a judgment of nonsuit, *Boyd v. Blake,* 1 N.C. App. 20, 159 S.E. 2d 256, tends to show:

The natural flow of water on Tracts Nos. 1 through 6 is from north to south by virtue of the difference in elevation. The southeastern portion of defendants' tract (No. 6), where the pumping system is located, is lower in elevation than the remaining portion of

Tract No. 6. Prior to 1965, defendants' lateral field ditches emptied into West One. When they were changed, they were blocked off from the West One. The canal was dredged out with mosquito control money and the dirt which was removed from the canal was placed on the west bank of West One and formed a dike three or four feet high. Defendants were then the owners of Tract No. 6. The North-South Canal was constructed by defendants on Tract No. 6 and the East-West Canal was constructed emptying into West One from the North-South Canal. The East-West Canal is now the only outlet that Tract No. 6 has to the West One. Defendants installed a pump to pump water from their North-South Canal through the East-West Canal into the West One. The tile in the west end of the East-West Canal is 18 inches in diameter. The pump is just small enough to go in the west end of that pipe and is between a 14-inch and 16-inch pump. The pump is powered by a farm tractor with a power take off connection. The natural flow of waters from all six tracts is from north to south and the natural flow of waters in West One is north to south. When the pump was in operation, and the floodgates at the south end of Tract No. 6 are closed, the water in West One flowed south to north, raised the water level in the lateral ditches in plaintiffs' land, and caused the ditches to overflow on plaintiffs' land. When the pump was in operation, water would be discharged from the East-West Canal into West One with such force that it went across and hit the east bank of the West One causing it to act as a dike or dam in the West One thereby obstructing the natural flow of water in West One, causing the waters to back up in plaintiffs' ditches and overflow on the cultivated land. Plaintiffs were told by male defendant that he was pumping water from his land and would continue to do so until made to stop by the court. Plaintiffs in 1967 had increased the number of lateral ditches in their field and had installed a floodgate in West One adjacent to their tract to prevent the flooding of their land from the pumping operation. The level of water in the sound is governed by "wind, storm tides, and rain waters coming into the sound from rivers". West One is about six to eight feet wide at its beginning at Highway No. 264 and gradually increases in width to between 14 and 18 feet at the floodgates. It is eight to ten feet in width at the south end of Tract No. 1. From the southern end of Tract No. 1 down to where the pump was installed is a little more than a mile.

We are of the opinion, and so hold, that plaintiffs' evidence was sufficient to show that defendants had willfully constructed and operated a drainage system which, in its operation, created an obstruction to the natural flow of water in West One, causing surface waters

from all six tracts to back up and flood plaintiffs' lands. Credibility of the evidence is, of course, for the jury.

New trial.

CAMPBELL and BRITT, JJ., concur.

KENNEDY W. WARD v. I. L. CLAYTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA

No. 693SC129

(Filed 18 June 1969)

1. Taxation § 28— deductions for casualty losses

G.S. 105-147(9)(b) authorizes State income tax deduction for certain casualty losses, including fire, to property not connected with a trade or business.

2. Taxation § 28— loss from disposition of property — basis

G.S. 105-144 provides that in ascertaining a loss from the sale "or other disposition of property," the basis shall be the adjusted cost of the property.

3. Taxation § 28— amount of casualty loss deduction

A casualty loss by fire is an "other disposition of property" within the meaning of G.S. 105-144; therefore, a State income tax deduction for such a casualty loss may not exceed the taxpayer's adjusted cost basis of the property damaged or destroyed by the fire.

4. Taxation § 28— realized losses

The income tax law is concerned only with realized losses, as with realized gains.

5. Taxation § 28— deductions — burden of proof

The taxpayer has the burden of establishing a deductible loss and the amount thereof.

6. Taxation § 28— proof of amount of casualty loss — cost basis of property destroyed

Plaintiff taxpayer has failed to prove that he is entitled to a deduction for a casualty loss by fire where he introduced no evidence of the cost basis of the property destroyed by fire whereby a realized loss can be measured.

APPEAL by plaintiff from *Cohoon, J.*, 30 September 1968 Session, Superior Court of CRAVEN.

Plaintiff instituted this action to recover income tax and interest paid under protest. The parties agreed that the case might be heard by the court without a jury. The cause was submitted upon stipulation of facts and defendant's exhibits, consisting of certain income tax bulletins issued by the Commissioner of Revenue, and the parties agreed that the court could hear the evidence, make its findings of fact and conclusions of law and render judgment accordingly.

In summary (except where quoted), the facts found by the court, in addition to jurisdictional facts, are these: Plaintiff, a cash basis taxpayer, owned a one-half undivided interest in a tract of land in Craven County, North Carolina. On 4 and 5 April 1963, a fire burned over a large portion of the tract. Plaintiff filed a timely income tax return for the year 1963 in which he reported adjusted gross income of $19,128.25 and itemized personal deductions of $29,666.41, of which $28,142.56 was described as follows: "fire loss of ½ interest in 2,500 acres timber April 1963; value before $34,097.02, value after $6,067.96, total loss $28,029.06 plus expense of Consulting Forester $113.50." On 26 January 1968, defendant, in accordance with the provisions of G.S. 105-159 and G.S. 105-241.1, gave formal notice to plaintiff of income tax assessment for additional income tax due of $866.11 plus interest of $199.21 for a total amount due of $1065.30. The assessment was based on defendant's disallowance of the claimed $28,142.56 casualty loss for the reason that the amount claimed had not been shown to be the same as, or less than, plaintiff's adjusted basis in the property which was the subject of the claimed casualty loss. Plaintiff protested the proposed assessment and requested a hearing which was held on 27 March 1968. Defendant affirmed the assessment, holding that a casualty loss deduction may not exceed the adjusted cost basis of the taxpayer in the property. No evidence as to adjusted cost basis was presented by plaintiff, it being plaintiff's contention that the amount of a casualty loss is the difference between the fair market value of the property immediately before and after the loss without regard to cost basis and that plaintiff's loss was in such an amount that, if deductible, plaintiff would owe no income tax for 1963, plaintiff having received no compensation from insurance or otherwise to reduce the loss. Plaintiff paid the sum of $1065.30 under protest and brought this action to recover same with interest and costs. Finding of fact No. 16 was as follows:

> "16. The pamphlet entitled 'State of North Carolina Individual Income Tax Bulletins for Taxable Years 1963 and 1964' excerpts of which were admitted in evidence as Defendant's Exhibit 2, was not approved by the Tax Review Board, nor was

the same filed with the Secretary of State. No evidence was received with respect to the approval by the Tax Review Board or to the filing with the Secretary of State the 'State of North Carolina Individual Income Tax Bulletins' for the taxable years 1961 and 1962, 1965 and 1966 and 1967 and 1968, excerpts of which were admitted in evidence as Defendant's Exhibits 1, 3 and 4. Therefore, none of the aforesaid Bulletins, or excerpts therefrom, were considered by the Court in reaching its findings of fact, other than this paragraph 16, or in reaching its conclusions of law."

The administrative practice of the Commissioner of Revenue has been, at least since 2 January 1962, to limit a deduction for a casualty loss arising by fire to an amount not in excess of the adjusted cost basis of the property damaged or destroyed by the fire, for the purpose of administering the North Carolina income tax laws. Plaintiff, through counsel, admitted in open court that he had no cost basis in the property referred to herein, which was acquired by him prior to 1 July 1963.

Upon the foregoing findings of fact, the court made the following conclusions of law:

"1. That this Court has jurisdiction over the parties and over the subject matter of this action.

2. That plaintiff is properly before this Court and is not required to have sought further administrative review prior to the institution of this action.

3. That for North Carolina income tax purposes, G.S. 105-147(9)(b) authorizes the deduction from gross income of losses of property not connected with a trade or business sustained in an income year, if the loss arises from fire, storm, shipwreck or other casualties or theft to the extent such losses are not compensated by for insurance or otherwise; but that in ascertaining the loss from the sale or other disposition of property, G.S. 105-144(a)(1) provides that the basis shall be the cost of the property, if the property was acquired before 1 July 1963.

4. That a casualty loss by fire is an 'other disposition of property,' so that such loss is required to be measured by reference to G.S. 105-144(a).

5. That the burden of proving plaintiff's basis in property which is subject to a casualty loss deduction is upon the plaintiff, and having failed to prove his basis, plaintiff is not entitled to any casualty loss deduction.

6. That defendant properly denied plaintiff's casualty loss deduction and properly assessed an additional income tax of $866.11, plus interest of $199.21, a total tax of $1,065.30.",

and ordered the action dismissed at plaintiff's cost.

Plaintiff did not except to any of the findings of fact or conclusions of law but excepted to the signing and entry of the judgment and appealed.

A. D. Ward for plaintiff appellant, and Kennedy W. Ward plaintiff appellant In Personam.

Attorney General Robert Morgan by Assistant Attorney General Myron C. Banks for defendant appellee.

MORRIS, J.

Appellant's only assignment of error is the signing and entering of the judgment sustaining the Commissioner of Revenue and dismissing the action.

G.S. 105-147 entitled "Deductions" provides:

"In computing net income there shall be allowed as deductions the following items: . . . (9) Losses of such nature as designated below: . . . b. Losses of property not connected with a trade or business sustained in the income year if arising from fire, storm, shipwreck or other casualties or theft to the extent such losses are not compensated for by insurance or otherwise;".

[1] Unquestionably the statute authorizes a deduction for certain casualty losses, including fire, to property not connected with a trade or business. The parties are agreed that plaintiff has suffered such a loss. It is stipulated that plaintiff's loss was not compensated for by insurance or otherwise.

[3] The only controversy between the parties is the method of arriving at the amount of the deduction. Plaintiff contends that the loss is to be measured by the difference between the fair market value immediately before and after the loss. Defendant contends that the loss must be measured by reference to plaintiff's cost basis; i.e., that plaintiff may not deduct any amount of a casualty loss in excess of his cost basis, and since plaintiff has failed to show what his cost basis is, he is not entitled to a deduction. Plaintiff states he has no cost basis in the property.

Defendant argues that G.S. 105-144 "Determination of gain or

loss" must be applied. The pertinent portion of that statute is as follows:

> "(a) Except as provided in subsection (c) of this section (not applicable), in ascertaining the gain or loss from the sale or other disposition of property;
>
> (1) For property acquired after January 1, 1921 and before July 1, 1963, the basis shall be the cost thereof; provided, however, that in the case of property which was included in the last preceding annual inventory used in determining net income in a return under this division, such inventory value shall be the basis in lieu of cost.
>
> (2) For property acquired before January 1, 1921, the basis for the purpose of ascertaining gain, shall be the fair market value of the property at January 1, 1921, or the cost of the property, whichever is greater; and the basis for determining loss, shall be the cost of the property in all cases, if such cost is known or determinable.
>
> (3) (Refers to property acquired on or after July 1, 1963, and is not pertinent to this appeal.)
>
> The basis of property so determined under this subsection (a) shall be adjusted for capital additions or losses applicable to the property and for depreciation, amortization, and depletion, allowed or allowable."

[2] The statute clearly provides that in ascertaining a loss from the sale *or other disposition of property,* the basis shall be the adjusted cost of the property.

Plaintiff earnestly contends that to apply G.S. 105-144 would result in a limitation on G.S. 105-147 and cites *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505, where the Court stated: "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. *Gould v. Gould,* 245 U.S. 151, 62 L. Ed. 211." There the Court was asked to interpret the statute levying an excise tax. The question involved here does not involve interpretation of a statute *levying* taxes. On the contrary, we are here dealing with a statute authorizing a *deduction.* A deduction is defined as "something that is or may be subtracted". An example is

given: "Business expenses are proper deductions from one's taxable income." Webster's Third New International Dictionary.

"The states may allow deductions in the computation of income for income tax purposes as they choose, and statutes imposing a tax on incomes ordinarily authorize the deduction from gross income of particular charges, expenses, or disbursements, in arriving at the income on which the tax is to be imposed." 85 C.J.S., Taxation § 1099, p. 771.

Deductions are in the nature of exemptions; they are privileges, not matters of right, and are allowed as a matter of legislative grace. A taxpayer claiming a deduction must bring himself within the statutory provisions authorizing the deduction. 85 C.J.S., Taxation § 1099.

[3] In our view of the matter, G.S. 105-144 is applicable if the casualty loss sustained by plaintiff is an "other disposition of property" within the meaning of the statute. Is a casualty loss an "other disposition of property"? Again we are constrained to answer in the affirmative.

As early as 1931, the Federal Courts included a casualty loss within the meaning of "other disposition of property". In *Pioneer Cooperage Co. v. Commissioner of Internal Revenue,* 53 F. 2d 43, cert. den. 284 U.S. 686, 76 L. Ed. 579, timber owned by the plaintiff was destroyed by storm and the ravages of worms and insects. Section 234(a)(4) of the Revenue Act of 1918 allowed a deduction for "losses sustained during the taxable year and not compensated for by insurance or otherwise." Section 202(a)(1) of the Revenue Act of 1918 provided that for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property acquired before 1 March 1913, the fair market price or value of such property as of that date should be the basis. Plaintiff insisted that he should be allowed as a deduction the fair market value of the timber on 1 March 1913, which was $3.50 per thousand feet. The Board of Tax Appeals had allowed as a deduction the actual cost which was $1.13 per thousand. In construing the statutes, the Court noted that the United States Supreme Court in *U. S. v. Flannery,* 268 U.S. 98, 45 S. Ct. 420, 69 L. Ed. 865, among others, had held that the act allowed a deduction to the extent only that an actual loss was sustained from the investment, as measured by the difference between the purchase and sale prices of the property and that the effect of the statute was to limit the deductible loss to the value as of 1 March 1913, if it be less than actual cost. The Court went on to say that although the decisions discussed referred to sales of prop-

erty, "[t]he act includes not only sales, but other disposition of property. A loss of property, such as occurred in this case, is a disposition within the meaning of this act, although it is involuntary. The property is disposed of so far as its owner is concerned, and there is no reason, in the absence of a positive statute, in determining a loss why a different rule should be adopted than in the case of a voluntary sale. The purpose of the act is to allow the owner to deduct what he has actually lost in the transaction." See also *Ayer v. Blair,* 26 F. 2d 547, and *Long v. Com'r. of Revenue,* 96 F. 2d 270.

The Supreme Court of Oklahoma reached the same result in a case strikingly similar in its facts to the case before us. There the taxpayer had abandoned an oil and gas lease as a dry hole operation. Taxpayer contended that he was entitled to a deduction under section 9(d) of the Income Tax Law (art. 6, ch. 66, S.L. 1935) which provides that the taxpayer may deduct losses sustained in trade or business, or in any transactions entered into for profit though not connected with trade or business, the loss to be measured under section 12 of the Act providing for the determination of a loss from the sale or other disposition of property. The Court agreed that this was an "other disposition of property". The question presented by the appeal was whether since the loss was attributable wholly to business done in Kansas, it could be deducted from the gross income attributable to Oklahoma. The Court allowed the deduction. *In re Terminal Land Co.,* 191 Okla. 549, 131 P. 2d 743.

The principle applied is wholly in accord with the uniform interpretation and administration of the Federal Income Tax Law since the early years of its administration. Our statute is substantially similar to the Federal statute, § 165(c)(3) Internal Revenue Code, the only substantial difference being that this section now contains a reference to § 1011, Internal Revenue Code, providing that the basis for determining the loss shall be the adjusted cost basis as set out in § 1011. In *Helvering v. Owens,* 305 U.S. 468, 59 S. Ct. 260, 83 L. Ed. 292, the United States Supreme Court, in two cases involving casualty losses, held that a casualty loss is measured by the difference between fair market value before and after the loss, not exceeding the adjusted cost basis of the property.

[3] We find no case law in this jurisdiction dealing with the exact question. Indeed, there is a paucity of case law in other jurisdictions. We do find that since 1962, when the North Carolina Department of Revenue first began issuing tax bulletins for the use of taxpayers, the bulletins have annually reflected the practice of the Department in holding that a casualty loss is measured by the difference

between fair market value but not to exceed the cost basis of the property. We find also that at least four other states have statutes almost identical to G.S. 105-147 and G.S. 105-144 and their administrative interpretation is the same as in this jurisdiction. Alabama § 51-385 and § 51-378-379, Adm. Reg. 385.7; Arkansas § 84-2016(d) and § 84-2013-2014, Adm. Reg. 1.84-2016(d); Georgia § 92-3109(d) and § 92-3119, Adm. Reg. 92-3109(d)(1); Mississippi Code Annotated § 9228(5) and § 9232, Adm. Reg. 14, Article 112. See *Brandon v. State Revenue Commission,* 54 Ga. App. 62, 186 S.E. 872.

[4] We are of the opinion that the rule here applied harmonizes with one of the fundamental principles undergirding the income tax law — that generally speaking, the income tax law is concerned only with *realized* losses, as with *realized* gains. *Lucas v. American Code Co.,* 280 U.S. 445, 50 S. Ct. 202, 74 L. Ed. 538; *Burnet v. Huff,* 288 U.S. 156, 53 S. Ct. 330, 77 L. Ed. 670.

[5, 6] Taxpayer here has shown no cost basis whereby a *realized* loss can be measured. *Long v. Com'r. of Rev.,* 96 F. 2d 270. The burden of proof to establish a deductible loss and the amount of it was on the plaintiff. *Burnet v. Houston,* 283 U.S. 223, 51 S. Ct. 413, 75 L. Ed. 991.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

EDWARD C. ROWE, JOSEPHINE K. ROWE, AND THE NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY v. NOAH W. McGEE AND JEANETTE K. McGEE

No. 6925DC181

(Filed 18 June 1969)

1. Nuisance § 1; Negligence § 47— decaying tree — damage to adjoining landowner

Where landowner knew that the tree on his property was decayed as a result of disease or other natural cause and was liable to fall and damage the property of the adjoining landowners, he was under a duty to eliminate the danger and could not with impunity place the burden to remove the tree on adjoining landowners.

2. Nuisance § 1— decaying tree — damage to adjoining landowners — contributory negligence

In plaintiffs' action for damages incurred when a decayed and rotted

tree located on defendant's adjoining land fell onto their house, issue of plaintiffs' contributory negligence was properly submitted to the jury where the evidence would permit a finding that plaintiffs had led defendant to believe that the tree had been cut and removed, in that some eight to twelve months prior to the fall plaintiffs had contacted defendant concerning the dangerous condition of the tree and had received defendant's permission to cut it down.

APPEAL by plaintiffs from *Evans, J.*, 18 November 1968 Regular Civil Session, CATAWBA County District Court.

Edward C. Rowe (Edward), Josephine K. Rowe (Josephine) and New York Central Mutual Fire Insurance Company (insurer) instituted this civil action against Noah W. McGee (defendant) and Jeanette K. McGee (*feme* defendant). Edward and Josephine sought to recover $5,000 plus interest for damages to their brick veneer house located in Newton Township, Catawba County. The insurer, as subrogee to the rights of Edward and Josephine, sought to recover $2,900, which was the amount paid by the insurer to Edward and Josephine pursuant to a homeowners insurance policy. In their complaint, it was alleged that the defendants "were the owners in fee simple of a certain tract of land situated" immediately north of Edward and Josephine's tract of land; there was a common boundary line between the two tracts; a large oak tree was situated on the defendants' tract, "approximately four feet from the common boundary line"; the "tree was in an extremely rotted condition and filled with honey bees"; Edward advised the defendant of this condition on at least two occasions and had requested its removal before it fell onto his house; the defendants negligently allowed the tree to remain standing, when they knew or should have known of its dangerous and rotten condition and its close proximity to Edward and Josephine's house and after the defendant had been given notice by Edward; on 22 April 1967, the tree was blown down onto Edward and Josephine's house, thereby damaging the house in the amount of $5,000.

In their answer, the defendants admitted that the tree was situated on their property; it was located a short distance from the common boundary line; and, on 22 April 1967, it blew down and came to rest on Edward and Josephine's house. In a further answer the defendants alleged that their tract of land was a vacant lot; Edward and Josephine asked permission to cut and remove the tree located thereon; the defendants advised Edward and Josephine "that they had no objection to the removal of said tree"; "thereafter the defendants did not know that the tree had not been removed"; on 22 April 1967 the tree was blown down by the strong wind of a sudden and violent storm; this storm "was unusual, unprecedented and un-

foreseeable for the area in question"; the tree "was capable of withstanding the stress caused by normal and foreseeable winds"; the damage was, therefore, "caused by an unforeseeable Act of God for which the defendants are in no way liable or responsible". The defendants further alleged that "if the tree in question was in any way decayed, hollow and unsound, the defendants had no knowledge or notice of the same and in the exercise of due care had no reason to know of the same"; the defendants were, therefore, not negligent; but even if the defendants were negligent, Edward and Josephine were contributorily negligent, because they knew of the tree's location and dangerous condition, but "failed and neglected to take any steps to cause said tree to be removed and to avoid any danger therefrom".

The evidence tends to show that the defendants sold the tract of land presently owned by Edward and Josephine to Charles Hedrick in 1964 and that Hedrick then built a house on the tract, which he thereafter sold to Edward and Josephine in August 1964. The evidence further tends to show that the oak tree in question was blown down on 22 April 1967 during a violent wind and rain storm; it broke off near the surface of the ground and came through the roof and northern portion of Edward and Josephine's house, thereby causing damage in the amount of $5,000; and pursuant to the extended coverage provision of their homeowners insurance policy with the insurer, Edward and Josephine received $2,900 on repairs to the house.

Edward testified that the tree was fifty to sixty feet high; it was located approximately 25 feet from the northern end of his house, at a point three or four feet from the common boundary line on the defendants' property; "[t]he tree was rotten to the top and had a nest of honey bees in the bottom"; he "knew the tree was going to fall because it was leaning" toward his house; he "had not been there six months when [he] thought the tree should come down"; he informed the defendant of the condition of the tree on at least two occasions; and the defendant told him that "Mr. Hedrick built the house and that Charles [Hedrick] was suppose [*sic*] to cut the tree down before the house was built".

The trial judge submitted the following issues to the jury:

"1. Was the property of the Plaintiff damaged by the negligence of the Defendant as alleged in the complaint?

2. If so, did the Plaintiff by his own negligence contribute to causing his damage as alleged in the answer?"

Both issues were answered in the affirmative by the jury. The trial judge thereupon entered a judgment to the effect that Edward, Josephine and the insurer have and recover nothing. The three plaintiffs then appealed to this Court claiming error in the trial judge's charge to the jury and in the submission of the contributory negligence issue to the jury.

Larry W. Pitts and Wendell Gene Sigmon for plaintiff appellants.

Patrick, Harper & Dixon by Charles D. Dixon for defendant appellees.

CAMPBELL, J.

[1] This case presents for determination the question of who has the responsibility for a tree which has become dangerous due to a rotten condition resulting from disease or other natural causes.

The evidence reveals that the defendants sold the tract of land presently owned by Edward and Josephine to Charles Hedrick in 1964; Hedrick then constructed a house and sold it to Edward and Josephine in August 1964; the defendants retained a second tract of land which adjoined the property of Edward and Josephine; a large oak tree was located on this second tract; the tree was hollow and partially rotten and it was leaning in a manner which would indicate that sooner or later it would fall; this condition existed at the time Hedrick acquired the property from the defendants and at the time the house was built. Under these circumstances, what was the responsibility of the defendants for this tree? Our research does not disclose any decisions in North Carolina on the point, and the decisions from other jurisdictions vary.

The Restatement of the Law of Torts, § 840, p. 310, provides:

> "Where a natural condition of land causes an invasion of another's interest in the use and enjoyment of other land, the possessor of the land containing the natural condition is not liable for such invasion."

This section states that the term "natural condition" comprehends trees which are the result of a natural condition and not trees which have been planted by man.

In the instant case, there is nothing to show that the tree in question did not grow on and become a part of the land by natural condition. Pursuant to the Restatement rule, *supra,* the defendants were, therefore, under no obligation and had no responsibility toward Edward and Josephine for the tree. Edward and Josephine had the

entire burden of protecting their house and property from this tree in the event it should fall.

A similar case confronted the Supreme Court of Mississippi in *Griefield v. Gibraltar Fire & Marine Ins. Co.*, 199 Miss. 175, 24 So. 2d 356. The defendant in that case acquired a tract of land on which a large oak tree was growing. A very large limb extended from this tree across a common boundary line and over the roof of the plaintiff's adjacent dwelling. The plaintiff wrote the adjoining property owner and called her attention to the limb. The defendant promised to take care of the situation, but she did not do so. During a severe windstorm some three years later, the limb was blown off of the tree and onto the plaintiff's dwelling, thereby causing considerable damage. The Mississippi Court held that, since there was nothing in the evidence to indicate that the tree was not of natural growth, the defendant was under no obligation to remove the limb. Therefore, her gratuitous promise to remove it was not binding on her and the plaintiff had no right of recovery. Mississippi thus follows the Restatement rule, *supra.*

In *Sterling v. Weinstein,* 75 A. 2d 144, branches of two large trees on the defendant's property extended across a common boundary line. The leaves and buds from these trees clogged the gutters of the plaintiff's building, thereby causing damage. The plaintiff sought to recover for the damage and sought an order requiring the defendant to cut, and to keep cut, the overhanging branches. The Municipal Court of Appeals for the District of Columbia denied recovery as it was a sound tree and not a nuisance as such. Plaintiff had the right to prune it at the boundary line. In so doing, the Court refused to adopt the natural growth doctrine as enunciated in the Restatement, *supra.* The Court stated:

> "[W]e think it would often be difficult to ascertain whether a tree of natural growth might not be in part the result of human activity, such as cultivating, fertilizing, trimming, etc. The distinction between purely natural conditions and conditions which in some degree are the result of man's activity may be practicable and even necessary in rural areas, but in our opinion such distinction cannot reasonably be made in our jurisdiction which is almost entirely urban."

In *Kurtigian v. City of Worcester,* 348 Mass. 284, 203 N.E. 2d 692, the defendant owned a vacant lot on which a large, dead elm tree was located. A large limb from the tree fell across a common boundary line onto the plaintiff's property. The plaintiff was in his yard and was struck by the limb, thereby sustaining serious per-

sonal injuries. The Massachusetts Court held that the maintenance of such a tree near a property line constituted a private nuisance. It was stated:

> ". . . Public policy in a civilized community requires that there be someone to be held responsible for a private nuisance on each piece of real estate, and particularly in an urban area, that there be no oases of non-liability where a private nuisance may be maintained with impunity."

The Massachusetts Court thereupon permitted the plaintiff to recover. It was then stated:

> ". . . It has not been argued that we should adopt a distinction between trees naturally on land and those which have been planted, even assuming it is possible to ascertain the origin of this particular tree. . . ."

Thus, the Massachusetts Court did not specifically disagree with the Restatement rule, *supra*. However, it indicated that this Restatement view would not be adopted.

In *Davey v. Harrow Corporation,* 1 Q.B. 60 (1958), the plaintiff's house was damaged when it was penetrated by the roots of trees located on adjoining lands. The plaintiff instituted an action for nuisance against the adjoining landowners to recover damages. Lord Goddard, speaking for the Court, held: "In our opinion it must be taken to be established law that if trees encroach, whether by branches or roots, and cause damage, an action for nuisance will lie" against the owner of the land on whose property the trees stood. This case pointed out that no distinction was to be drawn between trees which were planted and trees which were self-sown and the fact that the damage was caused by natural growth was no defense.

In *Chambers v. Whelen,* 44 F. 2d 340 (4th Cir. 1930), 72 A.L.R. 611, the plaintiff sought to recover damages for personal injuries sustained when a dead tree located on rural property fell onto a public highway. The Court held that, since no duty was imposed upon a landowner of rural lands to inspect trees located thereon, the defendant was not liable to the plaintiff for such personal injuries. Judge John J. Parker, speaking for a unanimous Court consisting of himself and Judges Soper and Groner, stated:

> "It will be noted that the question is not as to the liability of a city or suburban dweller who plants or maintains trees within or overhanging a highway. Nor is it as to the liability of one who, with knowledge of the dangerous condition of a tree, maintains it on his property when it is liable to fall and injure the prop-

erty of adjoining owners or persons passing in a public street or highway. Nor does it involve the duty or liability of one who erects an artificial structure near a highway. In all of these cases the greater probability of injury to the person or property of others imposes a higher degree of care upon the owner of the tree or structure. The question here is the narrow one as to whether it is the duty of the owner to inspect trees growing naturally upon rural lands, for the purpose of determining whether, through natural processes of decay, they have become dangerous by reason of their proximity to a highway. . . ."

While this case does not determine or answer the question in the instant case, it does imply that, where a landowner knows that he has a tree on his property which is in a dangerous condition and which is likely to fall and injure the property of an adjoining landowner, he has a duty to eliminate such danger.

[1, 2] In the instant case where the defendants knew that the tree on their property was decayed and liable to fall and to damage the property of Edward and Josephine, we think and hold that the defendants were under a duty to eliminate the danger and could not with impunity place such burden to remove the tree on Edward and Josephine. However, the evidence would permit a finding that the predecessor in title, Charles Hedrick, had procured permission from the defendant to cut and remove this tree; he was supposed to have so cut and removed it before building the house in question; the tree was still standing in August 1964 when Edward and Josephine purchased the house; Edward and Josephine realized the danger and contacted the defendant eight to twelve months prior to 22 April 1967; and they received permission from the defendant to cut and remove the tree. The evidence of the defendants is susceptible to the interpretation that by their conduct, Edward and Josephine led the defendants to believe that the tree had been cut and removed and the dangerous condition eliminated. Therefore, it was not error to submit the contributory negligence issue to the jury. The instructions of the trial judge to the jury were adequate, and we find no error in the charge. Under the evidence of the case, the determination of the facts was for the jury, and the jury found those facts contrary to the contentions of the three plaintiffs.

The judgment of the trial court is

Affirmed.

BROCK and MORRIS, JJ., concur.

CLARENCE M. SMITH AND WIFE, PAULINE G. SMITH v. THE CLERK OF SUPERIOR COURT AND ALL CLAIMANTS KNOWN OR UNKNOWN, IF ANY

No. 6923SC146

(Filed 18 June 1969)

1. Laborers' and Materialmen's Liens § 1— nature of the lien

G.S. 44-1 gives a contractor an inchoate lien upon a building and the lot on which it is situated for work done and material furnished by him in constructing, improving or repairing such building pursuant to a contract with the owner.

2. Laborers' and Materialmen's Liens § 8— effect of perfected lien

When a contractor perfects a laborers' and materialmen's lien in compliance with the requirements of G.S. Ch. 44, Art. 8, the resulting judgment creates (1) a special lien on the building and the lot upon which it is situated, and (2) a general lien on the other real property of the owner in the county where the judgment is docketed.

3. Laborers' and Materialmen's Liens § 8— satisfaction of judgment establishing the lien — sale of the property

The specific property subject to a laborers' and materialmen's lien must be sold for the satisfaction of the judgment before resort may be had to the other property of the owner. G.S. 44-46.

4. Laborers' and Materialmen's Liens § 8; Mortgages and Deeds of Trust § 33— foreclosure of junior deed of trust — materialmen's claims to surplus proceeds

Where a house and lot subject to a deed of trust and two superior materialmen's liens were sold upon foreclosure of the deed of trust, the surplus proceeds from the foreclosure sale deposited with the clerk of superior court by the trustee do not retain the identity of the real estate but constitute general funds of the original owners, and the assignee of the two superior materialmen's liens has no claim against the funds deposited with the clerk until the house and lot are first sold for satisfaction of the judgment establishing the materialmen's liens.

APPEAL by plaintiffs from *Collier, J.*, 22 November 1968 Session, YADKIN County Superior Court.

Clarence M. Smith and wife, Pauline G. Smith, (plaintiffs) instituted this special proceeding on 24 May 1967 pursuant to G.S. 45-21.32 to procure the sum of $2,345.36 which had been deposited with the Clerk of the Yadkin County Superior Court. This sum represented the excess proceeds from a foreclosure sale of a deed of trust.

Charles G. Hutchens (Hutchens) intervened in the action and filed an answer on 23 June 1967 in which it was alleged that Air Control Products, Inc., *et al.*, (Air Control) had procured a judgment against the plaintiffs in the amount of $468.64; this judgment

had been assigned to Hutchens and should be paid out of the funds on deposit with the clerk; subsequent to the foreclosure sale, someone had removed the doors, electric fixtures, plumbing fixtures, cabinets and other items from the premises, thereby damaging the property in the sum of $5,000.00; and this sum of $5,000.00 should be declared a specific lien upon the funds on deposit with the clerk.

On 29 November 1968 the plaintiffs filed an answer to the Hutchens claim denying the lien of the Air Control judgment against these funds and again asserting their right to these funds.

The record in this case lacks much in the way of clarity, but the following appear to be the facts:

1. In 1965 the plaintiffs owned a parcel of real estate containing nine-tenths of an acre and located on Pilot View Road in Yadkin County.

2. In May 1965 the plaintiffs started the construction of a house on this property. Pursuant to a contract, Harris Wholesale Builders Supply of Winston-Salem, Inc., (Harris) began furnishing materials for this construction on 22 May 1965. However, the plaintiffs did not pay for these materials, and within the six months' statutory time period after the final furnishing of the materials, Harris filed a lien against the property. Harris started an action to foreclose this lien in June 1966, which was within six months from the date of filing the lien. On 12 December 1967, a consent judgment was entered in favor of Harris for the sum of $6,673.07, and in the judgment it was specifically stated that the lien against the property dated from 22 May 1965.

3. Beginning on 6 July 1965, Air Control furnished materials for the construction of the house, but the plaintiffs did not pay for these materials. Within the six months' statutory time period after the final furnishing of the materials, Air Control filed a lien against the property. Air Control thereafter instituted an action to foreclose this lien on 12 January 1966, which was within six months from the date of filing the lien. On 20 December 1966 a judgment was duly entered by consent in favor of Air Control in the amount of $468.64, and this judgment specifically stated that it constituted a lien against the property relating back to 6 July 1965.

4. On 27 July 1965 the plaintiffs executed a deed of trust to Alvin A. Thomas, Trustee, (trustee) to secure an indebtedness of $7,500.00 to Economy Supply Co. (Economy). This deed of trust was recorded in Book 161, Page 48 of the Yadkin County Public Registry and was filed for recordation on 29 July 1965.

5. The plaintiffs defaulted in the payments due on the indebtedness secured by the deed of trust *supra.* The trustee thereupon advertised the property for sale "subject to all prior unpaid taxes, liens and encumbrances of record."

6. Pursuant to the trustee's notice of sale, the property was sold on 23 March 1967 to J. W. Steelman, *et al.,* who were the last and highest bidders with a bid of $10,000.00. The trustee executed a deed under date of 10 April 1967 to the purchasers. It was recorded on 10 April 1967 in Book 100, Page 646 of the Yadkin County Public Registry.

7. J. W. Steelman, *et al.,* conveyed the property by deed under date of 12 April 1967 to Hutchens. This deed was subject to an outstanding deed of trust securing an indebtedness of $10,000.00 to the Bank of Yadkin, which Hutchens assumed. This deed was recorded on 17 May 1967 in Book 100, Page 799 of the Yadkin County Public Registry.

8. The trustee filed his final report on 4 May 1967 showing the receipt of $10,000.00 from J. W. Steelman, *et al.* The report showed the expenses of the sale, including a payment of $7.100.28 to R. L. Brownlow, trading as Economy. This payment represented the balance due on the indebtedness secured by the deed of trust which had been foreclosed and which had been recorded in Book 161, Page 48 of the Yadkin County Public Registry. The report further showed that a surplus in the amount of $2,345.36 had been paid to the clerk of superior court to be "disbursed to those persons who may establish an interest in the same".

9. By recorded assignments Hutchens acquired and now owns both the Air Control judgment and the Harris judgment.

The hearing before Judge Collier was conducted without a jury and in a most informal manner. The informality is accounted for probably by the fact that the plaintiffs were not represented by counsel. At any rate, no evidence was formally introduced, and the court records, consisting of lien dockets and judgment dockets, were referred to without being formally introduced in evidence. The following excerpt from the record will suffice to illustrate:

> "JUDGE: I can't see what practical difference it makes. If I should declare the money belongs to these lienholders or to you. I can't see what the point of this is. Suppose I do declare it is your money, they will get the money anyway.
>
> SMITH: According to the lien laws, they will have to levy upon the property and not on me.

JUDGE: That doesn't have anything to do with it. This is a personal judgment against you. If I declare the money in the Clerk's hands is yours, they still get the money. I can't see what difference it makes. They are going to get it anyway.

SMITH: According to what I get from the law, they can't do it.

JUDGE: Either you or I don't understand the law. The judgments are against you. They are not restricted to levying against that property. They can levy against any assets you and your wife have. May be you can get the Supreme Court to say otherwise, but I'm not sure that it's right. That is the way I understand it.

SMITH: I give notice of appeal."

Judge Collier entered a judgment under date of 22 November 1968 in which he made findings of fact in conformity with what has been set out above. He then stated:

"That Clarence M. Smith appeared in Court on behalf of himself and his wife, Pauline G. Smith, and admitted in open Court that the lien and judgment in favor of Air Control Products, Inc., recorded in Judgment Docket No. 9, page 294, was an outstanding lien and judgment and admitted that the lien and judgment in favor of Harris Wholesale Builders Supply of Winston-Salem, Inc., recorded in Judgment Docket No. 9, page 452, was an outstanding lien and judgment.

It further appearing to the Court that even if Clarence M. Smith and wife, Pauline G. Smith, were entitled to the surplus proceeds in the amount of $2,345.36 now being held in the Office of the Clerk of the Superior Court of Yadkin County, that the recorded judgments against Clarence M. Smith and wife, Pauline G. Smith, hereinabove referred to, would be entitled to be satisfied out of said surplus proceeds in the Office of the Clerk of the Superior Court of Yadkin County before any payment from said proceeds could be made to Clarence M. Smith and wife, Pauline G. Smith, and that equity and justice would require the satisfaction of said judgment liens before any other disposition could be made of said funds. The Court further finds as a fact that the holders of said judgments or their assignees are entitled to be paid in the following order: That the judgment entitled Air Control Products, Inc. vs. Clarence M. Smith, Jr., and wife, Pauline G. Smith, et al., in the amount of $468.64 plus interest from August 31, 1965, and the costs should be paid first, and that

the remainder of said proceeds in the Office of the Clerk of the Superior Court of Yadkin County should be applied as a payment on the judgment entitled Harris Wholesale Builders Supply of Winston-Salem, Inc. vs. Clarence M. Smith and wife, Pauline G. Smith; and that the payment should be made to the holder of said judgment or the assignee of the same.

That the Court is of the opinion and finds as a fact and as a conclusion of law that Charles G. Hutchens, claimant, should have and recover of Clarence M. Smith and wife, Pauline G. Smith, as a claim against the surplus held by the Clerk of the Superior Court of Yadkin County, North Carolina, the sum of $468.64 together with interest from August 31, 1965, and the cost in satisfaction of the judgment recorded in Judgment Docket No. 9, at page 294, Office of the Clerk of the Superior Court, Yadkin County; and that the remainder of said surplus funds should be paid to the holder or the assignee of the judgment of Harris Wholesale Builders Supply of Winston-Salem, Inc. vs. Clarence M. Smith and wife, Pauline G. Smith, to be applied on the amount due under said judgment; and that the Clerk of the Superior Court of Yadkin County should be authorized, empowered and directed to disburse said funds in accordance with this judgment.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that Charles G. Hutchens, claimant, have and recover of Clarence M. Smith and wife, Pauline G. Smith, as a claim against the surplus held by the Clerk of the Superior Court of Yadkin, the sum of $468.64 together with interest from August 31, 1965, and the cost in satisfaction of the judgment recorded in Judgment Docket No. 9, at page 294, Office of the Clerk of the Superior Court, Yadkin County; and that Lon H. West, Clerk of the Superior Court, is authorized, empowered and directed to disburse funds from the surplus funds in satisfaction of the judgment recorded in Judgment Docket No. 9, at page 294, as herein provided; and that the remainder of said surplus funds shall be disbursed by the Clerk of the Superior Court of Yadkin County to the holder or the assignee of the judgment of Harris Wholesale Builders Supply of Winston-Salem, Inc. vs. Clarence M. Smith and wife, Pauline G. Smith, and that Lon H. West, Clerk of the Superior Court of Yadkin County is hereby authorized, empowered and directed to disburse the remainder of said surplus funds to be

applied on the payment of the amount due on the judgment recorded in Judgment Docket No. 9, at page 452.

This the 22 day of November, 1968.

/s/ Robert A. Collier, Jr.
Judge Presiding"

From the entry of this judgment, including the findings of fact and conclusions of law, the plaintiffs excepted and appealed to this Court.

Clarence M. Smith in Propria Personia for plaintiff appellants.

F. D. B. Harding and Allen and Henderson by H. F. Henderson for Hutchens appellee.

CAMPBELL, J.

The determinative facts in the instant case are not in dispute. The Harris judgment established a lien against the real estate and the improvements thereon as of 22 May 1965, the date the materials were first furnished. The Air Control judgment, likewise, established a lien against the real estate and the improvements thereon as of 6 July 1965, the date it first furnished materials. By virtue of the statutory provisions permitting such liens to date back to the time materials were first furnished for these improvements, both of the judgments predated the deed of trust, which established a lien as of 29 July 1965. Both the notice of the trustee's sale under the deed of trust and the trustee's deed conveying the property specifically provided that the sale and conveyance were made "subject to all prior unpaid taxes, liens and encumbrances of record". Therefore, the purchasers at the foreclosure sale, who were the predecessors in title of Hutchens and from whom Hutchens derived title to the premises, acquired the premises subject to the outstanding liens of Harris and Air Control.

In connection with the enforcement of a judgment procured by virtue of a materialmen's lien, G.S. 44-46 provides:

"Upon judgment rendered in favor of the claimant, an execution for the collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest which the owner had in the premises or the crops thereon, at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant."

[1-3] In *Surety Corp. v. Sharpe,* 236 N.C. 35, 72 S.E. 2d 109, Mr. Justice Ervin, speaking for the Supreme Court, stated:

> "G.S. 44-1 gives a contractor an inchoate lien upon a building and the lot on which it is situated for work done and materials furnished by him in constructing, improving, or repairing such building pursuant to a contract with the owner. *Assurance Society v. Basnight,* 234 N.C. 347, 67 S.E. 2d 390. When the contractor perfects such inchoate lien in compliance with the requirements of Article 8 of Chapter 44 of the General Statutes, the resulting judgment creates this twofold lien: (1) A special lien on the building and the lot upon which it is situated; and (2) a general lien on the other real property of the owner in the county where the judgment is docketed. Under the controlling statute, the property subject to the special lien, *i.e.,* the building and the lot on which it is situated, must be sold for the satisfaction of the judgment before resort can be had to the other property of the owner. G.S. 44-46; *Pipe & Foundry Co. v. Howland,* 111 N.C. 615, 16 S.E. 859; *McMillan v. Williams,* 109 N.C. 252, 13 S.E. 764."

[4] In support of the judgment entered by Judge Collier, Hutchens contends that the surplus funds retained the identity of the real estate and that he is, therefore, entitled to satisfy his judgments out of the surplus funds rather than out of the real estate itself. In support of this position, he relies upon *Realty Co. v. Wysor,* 272 N.C. 172, 158 S.E. 2d 7, wherein it was stated:

> ". . . The surplus paid into the hands of the clerk of superior court must be used to discharge the *junior* liens in the same priority as if resort were made to the land. For the purpose of satisfying the *junior* liens, and thus for the purpose of this decision, the fund in the hands of the clerk of Superior Court and the land described in the deeds of trust are one and the same." (Emphasis added)

It is to be noted that *Realty Co.* involved "junior liens", while the instant case involves senior liens. The judgments which were assigned to and are now owned by Hutchens, constitute senior liens and not junior liens. Therefore, *Realty Co.* affords no support to Hutchens under the particular facts here presented.

In the instant case, the surplus funds, which arose from the foreclosure sale and which were deposited by the trustee with the clerk of superior court, did not constitute real estate. The surplus funds represented the general funds of the plaintiffs, the owners of the

premises and the grantors in the deed of trust which was foreclosed. This being so, Hutchens, as owner of the Harris judgment and the Air Control judgment, had no claim against the funds on deposit with the clerk until the real estate and the house thereon were first sold for the satisfaction of these judgments, and only after this was done could there be resort to the plaintiffs' other property, including the funds in question. The judgment of Judge Collier provided otherwise, and this was error.

Reversed.

BROCK and MORRIS, JJ., concur.

LURANIA M. MIDGETT, NORA M. HERBERT, ELLERY C. MIDGETT, BETHANY M. GRAY, HERBERT MIDGETT, DALLAS MIDGETT, ELIZA M. EDWARDS, ROWENA MIDGETT, JOHN A. MIDGETT, MARTHA TOWNSEND, PHOEBE HAYMAN, ADDIE MATHIS, NATALIE MANDELL AND BEVERLY MIDGETT v. ARETTA MIDGETT

No. 691DC238

(Filed 18 June 1969)

1. Ejectment § 7— issues of title and trespass — burden of proof

In action in ejectment to try title, where the plaintiffs' allegations as to their title and the trespass of defendant are denied, it is incumbent upon plaintiffs to establish both the issue of ownership and the issue of trespass.

2. Boundaries § 13— maps — contentions of litigants

It is highly desirable in the trial of a lawsuit involving the location of disputed boundary lines to have one map showing thereon the contentions of all the parties.

3. Appeal and Error § 24— form of exceptions

Exceptions which appear nowhere in the record except under the purported assignments of error will not be considered. Court of Appeals Rule No. 21.

4. Ejectment § 9— competency of evidence — maps

In action in ejectment, a map prepared by the witness, a surveyor, of the land in controversy is competent evidence to illustrate the testimony of the witness as to the location of the land.

5. Appeal and Error § 45— the brief — discussion of assignment of error

Assignment of error not set out in appellant's brief and in respect of which no reason or argument is stated or authority cited will be deemed abandoned. Court of Appeals Rule No. 28.

6. Appeal and Error § 24— numbering of exceptions

Exceptions not properly numbered as required by Court of Appeals Rule No. 21 are ineffectual.

7. Trial § 33— instructions — statement of evidence — waiver

Even though the parties waive a recapitulation of the evidence, such waiver does not relieve the judge of the duty to state the evidence of the respective parties to the extent necessary to enable him to explain the application of the law thereto. G.S. 1-180.

8. Trial § 32— instructions — compliance with G.S. 1-180

The parties are not required to make a request that the judge comply with G.S. 1-180.

9. Trial § 33— instructions — statement of evidence

Although trial judge in his charge stated that in the absence of a specific request he would not attempt to review the evidence, no prejudicial error is shown where it appears from a review of the charge as a whole that the judge did recapitulate the evidence to the extent necessary to enable him to explain the applicable law.

10. Ejectment § 10— action in ejectment — instructions on title

Where plaintiffs in ejectment action sought to show title to the land in question by possession under a record title, any errors in the charge with respect to defendant's title are not prejudicial to plaintiffs, unless some error was made relating to plaintiffs' title.

11. Ejectment § 10— action in ejectment — plaintiffs' superior title — instructions

Where plaintiffs in ejectment action sought to show title to the lands in question by possession under a record title, plaintiffs cannot complain of instructions to the effect that (1) plaintiffs' title is superior or better than defendant's title and (2) the jury should answer the issue of plaintiffs' ownership in the affirmative if plaintiffs have satisfied them that the land in question was the land described in plaintiffs' deed, since the instructions were more favorable to plaintiffs than they were entitled.

12. Ejectment § 10— action in ejectment — proof — description in deed

In an ejectment action, a plaintiff must offer evidence which fits the description contained in his deeds to the land claimed.

APPEAL by plaintiffs from *Privott, J.*, December 1968 Civil Session of the District Court of DARE County.

This action in ejectment was instituted on 22 November 1967 by plaintiffs claiming ownership and right to possession of a tract of land containing approximately ten acres located on the shore of Pamlico Sound on Hatteras Island at the Village of Rodanthe. Plaintiffs allege that defendant has and is continuing to trespass on said lands. Plaintiffs requested a jury trial.

Defendant filed answer denying plaintiffs' title and right to possession and asserted that the lands described in the complaint "now lie in Pamlico Sound." By way of further answer and defense defendant asserted she owns and is and has been since September 27, 1940 in the "open, actual notorious, exclusive, uninterrupted, peaceable and adverse possession" of a tract of land formerly owned by and known as the Edward Paine Tract and "(t)hat should any portion of the land described in the complaint and alleged to be owned by plaintiffs be a part of the Edward Paine Tract as described above, which defendant denies, then the provisions of G.S. 1-38, adverse possession under color of title, is specifically pleaded as a bar to plaintiff's action." In the prayer for relief defendant does not ask that she be declared the owner of and entitled to the possession of the lands described in her answer although she does pray for "such other and further relief as to the Court may seem just and proper."

Without objection issues were submitted to and answered by the jurors as follows:

"1. Are the plaintiffs the owners of the land lying within the boundaries A-B-E-F as shown on plaintiffs' map?

ANSWER: No

2. Is the defendant the owner of the lands lying within the boundaries A-B-E-F as shown on plaintiffs' map?

ANSWER: YES"

From the entry of a judgment holding, among other things, that the defendant "is the owner in fee simple of and entitled to the possession of the lands lying within the boundaries A-B-E-F as shown on plaintiffs' map, marked and identified in the record as Plaintiffs' Exhibit PX-1, . . .", plaintiffs assign error and appeal to the Court of Appeals.

Leroy, Wells, Shaw & Hornthal by Dewey W. Wells for plaintiff appellants.

No Counsel and no Brief for defendant appellee.

MALLARD, C.J.

[1] In this action for the recovery of land and for trespass thereon the allegations of plaintiffs as to their title and the trespass of the defendant are denied. It was then incumbent upon plaintiffs to establish both the issue of ownership and the issue of trespass. *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673, *Andrews v. Bruton,* 242 N.C. 93, 86 S.E. 2d 786.

In *Andrews v. Bruton, supra,* it is said:

> "It seems appropriate to call attention to certain well-established rules. Their allegations as to title having been denied, it was incumbent upon plaintiffs to establish both ownership and trespass. *Norman v. Williams,* 241 N.C. 732, 86 S.E. 2d 593, and cases cited. Whether relying upon their deeds as proof of title or of color of title, they were required to locate the land by fitting the description in the deeds to the earth's surface. G.S. 8-39; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673, *Parsons v. Lumber Co.,* 214 N.C. 459, 199 S.E. 626. In the absence of title or color of title, they were required to establish the known and visible lines and boundaries of the land actually occupied for the statutory period. *Carswell v. Morganton,* 236 N.C. 375, 72 S.E. 2d 748."

Notwithstanding the allegation in the complaint that plaintiffs owned the ten-acre tract described therein and the defendant's denial of that allegation, the parties at the trial apparently by stipulation narrowed the dispute to the question of the ownership of the land described on "plaintiffs' map" within the letters A-B-E-F. Such a stipulation appears in the charge of the court. Appellants in their brief state, "The controversy is narrowed to ownership of the land A-B-E-F on plaintiffs' map as stated in the charge." In plaintiffs' brief it is also stated, "It was stipulated that E-F represents the south boundary of defendant's claim." Plaintiffs and defendant claim title from a common source.

[2] It is highly desirable in the trial of a lawsuit involving the location of disputed boundary lines to have one map showing thereon the contentions of all the parties. When one map shows the contentions of one party and not the other, it is extremely difficult, and often impossible, to determine the contentions of the parties. In this case there were five maps introduced, none of which specifically show the contentions of the parties with respect to the location of the land they claim in relation to the land claimed by the opposing parties. However, the stipulations helped to clarify this confusion to some degree but not to any appreciable extent. One of the maps is drawn on a scale of 100 feet to the inch, two are drawn on a scale of 150 feet to the inch, one is drawn on a scale of 60 feet to the inch, and the other doesn't reveal on what scale it is drawn. When reading the legend on the maps, north is indicated to the reader's left on one, toward the bottom of the page on two of them, and toward the top of the page on the other two. None of the maps reveal that they

were prepared for the purpore of showing the contentions of the parties in this particular lawsuit.

[3] Assignment of error number 1 is based on exceptions numbered 1 through 13. Exceptions numbered 1, 2, 3, 4, 6, 7, 11, 12, and 13 do not appear anywhere in the record except under this assignment of error and therefore they will not be considered. Rule 21 of Rules of Practice in the Court of Appeals. The Supreme Court has repeatedly held that exceptions not duly noted and appearing only under the purported assignments of error will not be considered. 1 Strong, N.C. Index 2d, Appeal and Error, § 24; *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476.

[4] However, exceptions numbered 5, 8, 9, and 10 under assignment of error number 1 relate to the admission by the court of a map prepared by the witness Sinclair, a surveyor, and the testimony of the witness Sinclair as to the location of the lands in controversy and the lands shown on a map in a subdivision known as Holiday Shores. We think that the map of the Holiday Shores subdivision prepared by the witness Sinclair was competent evidence in this case to illustrate the testimony of the witness and that it was competent for the witness Sinclair to testify as to the location of the lands in controversy in relation to the Holiday Shores subdivision. In 25 Am. Jur. 2d, *Ejectment,* § 106, pp. 609-610 the rule is stated as follows:

> "The identity or location of the land may be shown by documentary evidence, such as plats, surveys, and field notes. A map made by a surveyor of the premises sued for and of other tracts adjacent thereto, when proved to be correct, is admissible to illustrate other testimony in the case and throw light on the location of the land in controversy; and a draft of a survey, proved to be correct, is admissible in evidence as explanatory of what the surveyor testified he had done in making the survey."

[3] Assignments of error numbered 2 through the two assignments of error numbered 5 in the record (the latter of which is numbered 6 in the brief) are based on exceptions numbered 14 through 19. These assignments of error and the exceptions on which they are based are not properly before us because these exceptions do not appear anywhere in the record except under the assignments of error. They will not be considered.

[5] Assignment of error number 7 is based on exception number 20. It is deemed abandoned because it is not set out in appellant's brief, and no reason or argument is stated or authority cited in sup-

port thereof. Rule 28 of the Rules of Practice in the Court of Appeals.

[6] Assignment of error number 8 is based on exceptions 21 and 22. These exceptions are not presented because they are not properly numbered as required by Rule 21. There are no exceptions numbered 21 and 22 in this record on appeal other than under the purported assignment of error.

Plaintiffs requested the court, at the conclusion of the evidence, to charge the jury as follows:

> "In deliberating on your verdict you should not be influenced by what the effect of the verdict may be upon the continued ownership of the restaurant building. You should render your verdict in accordance with the facts and the applicable law and should your verdict be for the plaintiffs, the Court will then follow established procedure in determining the disposition of the building."

The court did not so charge, and the plaintiffs except. In their brief plaintiffs cite no authority for their position. Under the circumstances of this case, when the charge is read as a whole, we do not think that the failure of the trial judge to so instruct the jury resulted in prejudicial error to the plaintiff.

[7-9] Plaintiffs complain that the judge in his charge said, "In the absence of specific request, I shall not attempt to review the evidence which has been presented you." In the case of *Sugg v. Baker*, 258 N.C. 333, 128 S.E. 2d 595, the Supreme Court held that even though the parties waive a recapitulation of the evidence, such waiver does not relieve the judge of the duty under G.S. 1-180 to state the evidence of the respective parties to the extent necessary to enable him to explain the application of the law thereto. The parties are not required to make a request that the judge comply with the provisions of G.S. 1-180. The judge may not escape this duty imposed upon him by the statute, either by specific waiver of the parties, or by attempting to place the burden upon counsel to make such a request. If the judge had done what he said he was going to do and had not reviewed the evidence, he would have committed prejudicial error; however, after a careful review of the charge as a whole, we are of the opinion that the judge did recapitulate the evidence to the extent necessary to enable him to explain the applicable law.

The remainder of plaintiffs' assignments of error relate to the instructions given by the court to the jury and the submission of the second issue.

[10] Plaintiffs in order to recover had the burden of proving their title to the disputed area by any one of the various methods set out in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142. Plaintiffs sought to show title to the lands in question by possession under a record title. Unless some error was made in the trial relating to the first issue and plaintiffs' title, errors, if any in the charge with respect to defendants' title, would not seem prejudicial to plaintiff. *Paper Company v. Jacobs,* 258 N.C. 439, 128 S.E. 2d 818.

[11, 12] While the charge does not appear to be a model one, when viewed as a whole, it seems to be favorable to plaintiffs. The court instructed the jury in connection with the first issue, among other things:

> "As far as record title is concerned, the claim of the plaintiff and that of the defendant stems from the same source; namely, Edward Payne, Jr. and, as far as record title is concerned, the plaintiff's title to the land in question is superior or better than the defendant's title, since the deed under which the plaintiff's claim, recorded in Book C, page 91, Dare County Registry, was filed on June 25, 1888, and the deed under which defendant claims is recorded in Book 6, page 295, Dare County Registry, and was filed on November 4, 1926. . . . If the plaintiffs have satisfied you that the land in question is the land described in the deed, it would be your duty to answer the first issue yes. If they have not so satisfied you, it would be your duty to answer that issue no. If you answer the first issue yes, then that would end the lawsuit; if you answer the first issue no, then you would proceed to the second issue, . . ."

It can be seen that the judge expressed an opinion favorable to plaintiffs in telling the jury that plaintiffs' title was superior or better than defendants. The instruction that if the land in question was the land described in the deed that it would be the duty of the jury to answer the first issue yes was error in favor of the plaintiffs. "In an ejectment action a plaintiff must offer evidence which fits the description contained in his deeds to the land claimed. That is, he must show that the very deeds upon which he relies convey, or the descriptions therein contained embrace within their bounds, the identical lands in controversy." *Skipper v. Yow,* 238 N.C. 659, 78 S.E. 2d 600. Under the instructions of the court on the first issue, the jury was told that the plaintiffs' title to the land in question was superior or better than the defendant's and that if the land in question was the land described in the deed that they should answer the issue yes. The plaintiffs cannot complain because the instructions

were more favorable to them than they were entitled. The jury has found by its verdict that the land in controversy was not described in plaintiffs' deed. In order to recover plaintiffs must rely upon the strength of their own title.

We have carefully examined each of the assignments of error which the plaintiffs have brought forward. We do not find any error that is prejudicial to the plaintiffs.

No error.

BRITT and PARKER, JJ., concur.

IN RE: CONDEMNATION OF PROPERTY OF WILLIAM EARL SIMMONS AND WIFE, ETHEL HAYES SIMMONS (RESPONDENTS) BY THE CITY OF GREENSBORO (PETITIONER)

No. 6918SC61

(Filed 18 June 1969)

1. Appeal and Error § 39— docketing of appeal — time of docketing

The appeal is subject to dismissal where record on appeal was docketed in the Court of Appeals one day after the ninety-day period for docketing expired. Court of Appeals Rules Nos. 5 and 48.

2. Eminent Domain § 7— proceedings — petition — description of land

The petition of the condemnor must precisely describe the land sought to be condemned.

3. Eminent Domain § 7— description of land — entire tract v. portion

It is not necessary to describe an entire tract of land where only a portion is to be condemned.

4. Eminent Domain § 7— petition — description of land — sufficiency of description

In a condemnation by a municipality for purpose of widening a city street, resolutions which described the entire tract owned by the respondent landowners and attempted to condemn any and all property rights that respondents might have which were in conflict with the widening for a distance of twenty-two feet from the center line of the street *are held* ineffectual as a description of the property sought to be condemned.

5. Eminent Domain § 7— proceedings — inconsistent claims by condemnor — damages

Where municipal condemnor expressly denied in its resolutions of con-

demnation that the respondents had any title to or rights in the property sought to be condemned but instead asserted that it owned the property in dispute, trial court did not err in granting respondents' motion to dismiss the resolutions on the ground that condemnor inconsistently claimed title to the property sought to be condemned; condemnor's contention that the trial court should have determined the issue of damages is without merit.

6. Eminent Domain § 1— nature and extent of power

The terms "condemnation" and "exercise of the power of eminent domain" by definition admit the condemnor did not own or have title to the land but rather that it took or appropriated the property of another for public use.

7. Eminent Domain § 7— proceedings — determination of damages — title

The best interests of efficient judicial administration would not be served by determining the issue of damages prior to determining the issue of title.

8. Eminent Domain § 7— proceedings — motion to amend petition

The granting of a motion to amend a petition for condemnation lies in the discretion of the court.

APPEAL by petitioner from *Collier, J.*, 19 August 1968 Non-jury Civil Session, Greensboro Division, GUILFORD County Superior Court.

On 8 November 1967 a resolution under date of 5 June 1967 was filed by petitioner pursuant to Chapter VI, Subchapter B, Article 1 of the Charter of petitioner, as revised and reorganized by Chapter 1137 of the 1959 Session Laws of North Carolina. The resolution provided for the immediate condemnation of the property interest, if any, of respondents, and it stated:

"1. That for the purpose of widening Church Street approximately twenty-two feet from its present center line within the vicinity of property owned by [respondents], located at 2802 Church Street, any and all property rights that said [respondents] may have which are in conflict with and contrary to the said widening and improvement for a distance of twenty-two feet from the center line of Church Street are hereby condemned in accordance with the Charter of [petitioner]. . . .

. . . .

3. That [petitioner] take immediate possession, if it has not already done so, of said portion of property pending the determination of damages to the [respondents], if any, for such alleged taking, the use thereof being necessary for street purposes and public interest requires that said widening be accomplished.

. . . .

10. That, in authorizing the condemnation herein, it is expressly denied that said [respondents] have any rights within the above mentioned improvement area nor are they entitled to any damages for an alleged taking thereof; however, in order to determine the respective rights of the parties and to proceed with the completion of the project and in order to alleviate the dispute as to right of possession and title, this condemnation proceeding is hereby commenced."

In accordance with the provisions of the resolution, a personal inspection was conducted by three appointed appraisers. On 20 July 1967 they reported to the petitioner that "the reasonable value of the property interest condemned is $1,189.00." This report was filed on 8 November 1967.

On 8 November 1967 a final resolution under date of 16 October 1967 was filed by petitioner. It stated:

"1. That for the purpose of widening Church Street approximately twenty-two feet from its present center line within the vicinity of property owned by [respondents], located at 2802 Church Street, any and all property rights that said [respondents] may have which are in conflict with and contrary to said widening and improvement for a distance of twenty-two feet from the center line of Church Street are hereby condemned in accordance with the Charter of the [petitioner]. . . .

. . . .

3. That the appraisers have appraised the damages at $1,189.00.

. . . .

4. That, without prejudice to the [petitioner] regarding its former claim for right-of-way as set forth in its previous resolution, the report of the appraisers is hereby approved, and the payment of the award . . . is hereby authorized. . . ."

The respondents excepted to this final resolution and appealed to the Guilford County Superior Court because the award was allegedly inadequate and not representative of the reasonable market value of the property in question. In the notice of appeal, the respondents expressly reserved their right to object to the irregularities in and unconstitutionality of the condemnation proceeding.

On 17 November 1967 a motion to dismiss the action was filed by the respondents, who alleged that Chapter VI, Subchapter B, Article 1 of the Charter of petitioner was unconstitutional and that there were irregularities in the condemnation proceeding. It was alleged that petitioner claimed ownership of the property in question,

but at the same time sought to condemn it, and that this was, therefore, an attempt to quiet title in a condemnation proceeding. The respondents also excepted to the description in the resolution because it failed to describe specifically the property to be condemned. It simply described the entire tract owned by the respondents.

On 22 August 1968 petitioner filed a motion to amend the resolution and the final resolution in order to provide that the respondents owned the property in question and to describe specifically the property to be condemned. Petitioner also made a motion to be allowed to introduce evidence "that the award of the appraisers set forth in the final resolution of the [petitioner] was based on an appraisal which assumed that respondents owned all the property within the 22-foot right-of-way being condemned by said resolution." However, the presiding judge denied these motions.

On 22 August 1968 a judgment was filed dismissing the action because petitioner failed "to precisely describe the property or interest it seeks to condemn" and because petitioner claimed title to the property sought to be condemned. The petitioner excepted and appealed to this Court.

Jesse L. Warren; Cooke & Cooke by William Owen Cooke for petitioner appellant.

Turner, Rollins, Rollins & Suggs by Thomas Turner; J. Owen Lindley for respondent appellees.

CAMPBELL, J.

[1] The date of the judgment appealed from is 22 August 1968. The record on appeal was docketed in this Court on 21 November 1968, one day after the ninety-day period for docketing expired. 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. However, we have nevertheless considered the appeal on its merits.

[2, 4] Petitioner's first contention is that the presiding judge erred in sustaining the respondents' motion to dismiss based upon the finding that petitioner failed to describe precisely the property sought to be condemned. In its brief, petitioner concedes "that there can be no proper condemnation without a description of the property condemned" and that "[a] controversy as to what land a condemnor is seeking to condemn has no place in a condemnation proceeding". However, it is argued that the respondents were not misled by the absence of a precise description, because the whole tract owned by

the respondents was described in the resolution and final resolution and because "[t]he resolution condemns any and all property rights that respondents may have which are in conflict with the widening of Church Street for a distance of 22 feet from its center line. Since the tract owned by respondents adjoins the east margin of Church Street, the property of respondents to be taken is that part of said tract lying between the old east margin of Church Street and the new east margin which new east margin will be 22 feet from the center line of Church Street."

[3] Chapter VI, Subchapter B, Article 1, Sections 6.103(a)(1) and 6.110(4) of Chapter 1137 of the 1959 Session Laws of North Carolina require that both the resolution and final resolution include a description of the property to be condemned. It is not necessary to describe an entire tract of land where only a portion is to be condemned. 6 Nichols on Eminent Domain, § 26.112, p. 175. In the instant case, the entire tract was described, and both of the resolutions stated that the curb line of Church Street was to be extended to a distance of 22 feet from the then existing center line. However, the specific portion to be condemned was not described, and no reference was made to any survey from which it could be determined. Neither the resolution nor the final resolution contained any information from which "the old east margin of Church Street" could be located and no reference was made to any source which would provide this information. "A controversy as to what land a condemnor is seeking to condemn has no place in a condemnation proceeding. It is for the condemnor to determine what land it seeks to condemn . . . and to describe it in its petition by reference to uncontroverted monuments. . . ." *Light Company v. Creasman,* 262 N.C. 390, 137 S.E. 2d 497.

> "The petition must contain an accurate description of the land sought to be taken, so that the extent of the claim will appear on the record. In the absence of an opportunity to amend the petition, failure in this respect will invalidate the proceeding. This description should be, it is sometimes said, as accurate as is required in the case of a deed of land. At any rate it must be such that a surveyor could locate the parcel described without the aid of extrinsic evidence. . . . It is no objection that the description is incomplete or unintelligible without consultation with a map or plan, if the map is referred to in the description and is filed with it, and taken together the map and the description make clear what is intended to be included in the taking. A map not referred to in the description cannot be considered.

. . . Accuracy in the description is deemed essential. . . ." 6 Nichols on Eminent Domain, § 26.112, p. 175. See 29A C.J.S., Eminent Domain, §§ 259(a) and 259(d), pp. 1105 and 1113; 27 Am. Jur. 2d, Eminent Domain, § 396, p. 274.

The first contention is without merit.

[5] Petitioner's second contention is that the presiding judge erred in sustaining the respondents' motion to dismiss based upon the finding that petitioner claimed title to the property sought to be condemned. In its brief, petitioner stated:

"The fact that the resolutions may have raised some questions of title should not have been a ground for dismissal; they should have been disregarded and the Trial Court should have proceeded to try the issue of damages."

[6] Chapter VI, Subchapter B, Article 1, Sections 6.103(a)(4)(6), 6.110(6), 6.111 and 6.112 of Chapter 1137 clearly indicate that a condemnation proceeding is to involve two sides, petitioner and the owner or owners of the property to be condemned. There is no provision for the exercise of the power of eminent domain where title is claimed by petitioner. Such a provision would in fact be contrary to and inconsistent with the definition of condemnation. "The phrase 'condemnation' or 'exercise of the power of eminent domain' by its very definition admits the condemnor did not own or have title to the land, but rather that it took or appropriated the property of another for public use. . . ." *Hughes v. Hwy. Comm.*, 2 N.C. App. 1, 162 S.E. 2d 661. *Wescott v. Highway Commission*, 262 N.C. 522, 138 S.E. 2d 133; 29A C.J.S., Eminent Domain, § 260, p. 1113; 27 Am. Jur. 2d, Eminent Domain, § 405, p. 287. Condemnation is defined in Black's Law Dictionary, 4th Ed., as follows:

"The process by which [real] property of a private owner is taken for public use, without his consent, but upon the award and payment of just compensation, being in the nature of a forced sale and condemner stands toward owner as buyer toward seller."

"[T]he petitioner is estopped from showing that title is in the public or in itself, by dedication, prescription or otherwise, if it has alleged in its petition that the respondent is the owner. If the petitioner claims title to the land which it wishes to occupy, a petition for condemnation is not the proper proceeding to institute for the purpose of trying the question." 2 Nichols on Eminent Domain, § 5.2[2], p. 22.

In *Power Co. v. King*, 259 N.C. 219, 130 S.E. 2d 318, the Supreme

Court quoted with approval from *Grand River Dam Authority v. Simpson,* 192 Okla. 338, 136 P. 2d 879, as follows:

> " 'The institution of the proceeding admits the ownership. The condemnor cannot claim the beneficial ownership of the land and at the same time assert that the condemnee claims all or some part of that interest; the proceeding in condemnation cannot be employed as a means to quiet title; and the right to exercise the power of eminent domain is dependent entirely upon the ownership being in some one other than the condemnor; the power to condemn negatives ownership in the condemnor.' "

In *Houston North Shore Ry. Co. v. Tyrrell,* 128 Tex. 248, 98 S.W. 2d 786, the Supreme Court of Texas stated:

> ". . . 'A party cannot proceed to condemn land as the property of another and then in that same proceeding set up a paramount right or title in itself either by prescription, dedication or otherwise.' Lewis' Eminent Domain (3d Ed.) § 441, vol. 2, p. 1137. If the petitioner in condemnation claims the fee title to the property, his petition should be dismissed. . . . The reasons for the foregoing general rules are: That there is irreconcilable inconsistency between an allegation by the condemnor of the entire title, or a paramount title, in himself, and the taking of the property of another by the proceeding; that condemnation rests upon necessity, and there can be no necessity to acquire what one already owns. . . ."

[5, 7] Petitioner, however, expressly denied in the resolution that the respondents had any title to or rights in the property, and this position was reaffirmed in the final resolution. Petitioner nevertheless sought to settle the issue of damages before the issue of ownership was resolved. In *Hertford v. Harris,* 263 N.C. 776, 140 S.E. 2d 420, a case in which there was no dispute over title between the town and the owners, the Supreme Court stated:

> ". . . A governmental agency has no need or right to condemn property which it owns. . . . Where controversy exists between condemnor and condemnee as to which has title, logic would seem to dictate that value should be ascertained only after these rights have been determined. . . ."

The best interests of efficient judicial administration would not be served by determining the issue of damages prior to determining the issue of title.

> "The [respondents'] ownership of the property sought to be condemned lies at the very foundation of the [petitioner's] jur-

isdiction. To permit the [petitioner] to claim title in the public way it seeks to condemn deprives the proceedings of all foundation. It would render the judicial condemnation proceedings nothing but a sham. . . ." *Demers v. City of Montpelier,* 120 Vt. 380, 141 A. 2d 676.

Therefore, it was not incumbent upon the presiding judge to disregard such an express contention and "to try the issue of damages".

The second contention is without merit.

[8] Petitioner's third contention is that the presiding judge erred in denying petitioner's motion to amend the resolution and final resolution in order to provide that the respondents owned the property to be condemned and to describe same specifically. "The granting of a motion to amend lies in the discretion of the court." 6 Nichols on Eminent Domain, § 26.21, p. 248. 29A C.J.S., Eminent Domain, § 265, p. 1124.

There is no provision for an absolute right to amend the condemnation resolutions in Chapter 1137. Chapter VI, Subchapter B, Article 1, Section 6.113 of Chapter 1137 simply provides that "such appeal [to the superior court] shall be tried as other actions at law". "[I]t has been uniformly held that the denial of a motion to amend, being a matter within the sound discretion of the trial court, is not reviewable upon appeal except in case of manifest abuse of discretion." *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789. No abuse of discretion has been made to appear in the instant case.

The third contention is without merit.

Affirmed.

BRITT and MORRIS, JJ., concur.

MYRON KENNETH THOMAS, BY HIS NEXT FRIEND, JUSTIN W. THOMAS v. QUEEN CITY COACH COMPANY

No. 68SC196

(Filed 18 June 1969)

1. Negligence § 12— last clear chance — burden of pleading and proof

To invoke the doctrine of last clear chance, it must be pleaded by plaintiff and the burden of proof is upon him.

2. Negligence § 12— pleading last clear chance

While plaintiff's pleadings need not contain the words "last clear chance"

in order to have the benefit of that issue, facts must be alleged and proof thereof offered which bring the doctrine into play under the circumstances of the particular case.

3. Negligence § 12— pleading and proof of last clear chance

Allegations and proof of "original negligence" on the part of defendant may, under some circumstances, be sufficient to bring the doctrine of last clear chance into play, provided the other elements of that doctrine are sufficiently alleged and proved.

4. Automobiles § 86; Negligence § 12— last clear chance — sufficiency of evidence

In this action for personal injuries sustained when a bicycle ridden by the minor plaintiff collided with defendant's bus at an intersection controlled by traffic lights, the court did not err in failing to submit the issue of last clear chance where plaintiff's evidence tended to show that defendant's bus was traveling toward the intersection at 35 to 40 m.p.h. in a 55 m.p.h. zone along a dual-lane highway divided by a median, that plaintiff had not yet reached the median at the intersection when the bus driver first saw him, that when plaintiff continued to move slowly through the median and reached the center thereof, the bus driver blew his horn, the bus being only 180 to 200 feet from the intersection at that time, that plaintiff rode his bicycle through the red light into defendant's lane of travel, and that the bus driver applied his brakes but was unable to stop before striking plaintiff, the evidence being insufficient to show that the bus driver had sufficient time to avoid the collision after he discovered that defendant was moving into a position of peril to which he was inadvertent.

5. Negligence § 12— last clear chance

To invoke the doctrine of last clear chance where it is shown that plaintiff, even though not yet in position of peril, is negligently moving into a position of peril and is inadvertent to that fact, the evidence must also show that when defendant knew or in the exercise of due care should have known of the plaintiff's situation, defendant still had time and the means to avoid the injury but negligently failed to do so.

APPEAL by plaintiff from *McConnell, J.*, February 1968 Session of UNION Superior Court.

This is a civil action to recover damages for personal injuries suffered by the minor plaintiff as result of a collision between defendant's bus and plaintiff's bicycle which occurred on 6 May 1966 at the intersection of Walkup Avenue and Highway No. 74 in the city of Monroe, N. C. At this location Walkup Avenue is a paved street 22 feet wide running north and south, with one lane for northbound and one lane for southbound traffic. Highway No. 74 runs east and west and is a dual-lane divided highway with two lanes for eastbound and two lanes for westbound traffic, each 24 feet wide, separated by an unobstructed grass median 30 feet wide. Approaching the intersection on Highway No. 74 from the east and traveling

in the westbound lanes, Highway No. 74 is straight and slightly downhill and there is an unobstructed view of the intersection for 800 feet or more. The speed limit on Highway No. 74 in this area is 55 miles per hour. Traffic at the intersection is controlled by traffic lights emitting alternate red, yellow and green lights. When the traffic control signals facing east and west on Highway No. 74 are green, they are red facing north and south on Walkup Avenue. The traffic lights facing north and south on Walkup Avenue are located in the center of the median at the point Walkup Avenue passes through Highway No. 74. At the time of the collision, a hard, blowing rain was falling and the highway and street were wet and slippery. The wind and rain were blowing toward the southwest. Defendant's bus approached the intersection traveling west on the inside westbound traffic lane of Highway No. 74. Plaintiff approached the intersection riding his bicycle north on Walkup Avenue. The point of impact was about the center of the southbound lane of Walkup Avenue and in the southern edge of the inside westbound lane of Highway No. 74.

Plaintiff alleged that the collision occurred as a result of the bus driver's negligence in operating the bus at a speed greater than was reasonable and prudent under the conditions then existing, in failing to reduce speed in approaching and crossing an intersection when special hazards existed, and in failing to keep a proper lookout. Paragraph 8 of plaintiff's amended complaint is as follows:

> "8. That the bus operated by the defendant's agent failed to give any warning of its approach whatsoever until it was less than 200 feet from the point of the collision, and that the same was being driven at a rate of speed which was greater than that proper under the circumstances then and there existing, and that, although the plaintiff riding on his bicycle was in plain view of the defendant's agent, who was not looking toward the bus, and that the plaintiff was a young boy on a bicycle, all of which was known, or should have been known by the bus driver, the defendant's agent failed to apply his brakes, but wrongfully, unlawfully and negligently continued on down the highway and into the plaintiff, knocking him approximately thirty feet; that the defendant's agent failed to apply his brakes or to blow the horn of the bus in time to avoid the collision, although the plaintiff was in plain view; that a portion of the highway was unobstructed with ample room for the defendant's agent to have avoided the collision if he had attempted to do so, but he continued into the intersection and into the plaintiff when he could have avoided the accident had he used another part of the highway or exercised proper care and maintained a proper lookout;

that the negligence of the defendant's agent, as herein set out, was a proximate cause of the collision and of the damages sustained by the plaintiff."

Defendant answered, denied negligence on its part, and pleaded contributory negligence on the part of the plaintiff in failing to stop for a red light.

Plaintiff offered three witnesses who testified concerning the collision. Plaintiff himself testified: On 26 May 1966 he was twelve years old and in the sixth grade. About 3:20 that day he got out of school. It was pouring rain. He got on his bicycle and started riding north on Walkup Avenue toward his house, which was across the boulevard (Highway No. 74). When he got to the boulevard, he was undecided whether to go straight across toward his home or to turn left down the boulevard. When he was about 120 feet away, he looked at the traffic light facing him and it was green. He put his head back down and kept on going. As he approached the intersection, he didn't know whether to turn left or to keep on going straight toward his home, because it was raining so hard. After that he didn't remember anything. The next thing he remembered was being in the hospital.

A Mrs. Janet Tolley testified: That she was going south on Walkup Avenue. The traffic light turned red and she stopped at the Walkup Avenue-Highway No. 74 intersection. She saw the plaintiff approaching from the other direction on his bicycle. He was coming slowly, bent down over his bicycle. When she first saw him, he was south of Highway No. 74 coming into the intersection in the east lane of Walkup Avenue. Plaintiff was coming slowly, and he kept coming across the road. He still had his head down, but he was looking towards the left, and he kept coming to his left across the road. She heard a horn, and saw the bus coming. She looked back towards the plaintiff and he glanced up and turned his head for just a second, and it appeared that he was deciding what to do or was frightened. It looked like he tried to turn his bicycle wheel to the left. Just about that time the bus passed between Mrs. Tolley and the plaintiff, and Mrs. Tolley did not see the bus hit plaintiff. The bus was on the inside westbound lane. The last time she saw plaintiff before the impact, he was approaching the westbound lane of Highway No. 74 about ten feet away from the westbound lane. The bus was approximately 180 to 200 feet from the intersection when she heard the horn. It was traveling approximately 35 to 40 miles an hour. When she heard the horn, plaintiff was a little over halfway in the median in the intersection. During the time she saw plaintiff, he was going

at a slow rate of speed and did not stop. She did not hear any tires or squeaking of brakes, and was not conscious whether the bus reduced its speed before it got to the intersection. She was not aware of any other vehicles in the westbound traffic lane. During the period of time that she saw plaintiff before the impact, he never looked in the direction of the bus.

The police officer who investigated the accident testified that the bus driver had told him: He was approaching the light driving approximately 35 miles an hour, coming along with the other traffic. When he first saw the boy on the bicycle the boy was about the center of the inside, or northern, lane of the eastbound lanes, and the bicycle was traveling in a northerly direction very slowly. He thought the bicycle was going to stop. Then he realized that it wasn't and he sounded his horn and applied brakes, but couldn't avoid the accident. He didn't have time to stop and had no way he could avoid it. This police officer also testified that there were marks on the outside of the bus around to the left front side, right by the driver. No evidence was presented by defendant.

The case was submitted to the jury on issues as to defendant's negligence and plaintiff's contributory negligence. The jury answered both issues in the affirmative, finding defendant negligent and plaintiff contributorily negligent. The plaintiff requested and the court refused to submit the following issue:

> "Did the defendant have the last clear chance to avoid the accident, as alleged in the Complaint?"

From judgment that plaintiff recover nothing by this action, plaintiff appealed.

Clark & Huffman, by Richard S. Clark for plaintiff appellant.

Myers, Sedberry & Collie, by J. C. Sedberry and Charles T. Myers; and Smith, Griffin, Smith & Clark, by C. Frank Griffin for defendant appellee.

PARKER, J.

[1, 2] Plaintiff assigns as error the refusal of the trial court to submit an issue as to last clear chance. To invoke that doctrine, plaintiff must plead it and the burden of proof is upon him. *Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845; *Bailey v. R. R.*, 223 N.C. 244, 25 S.E. 2d 833. Plaintiff's pleadings need not contain the words "last clear chance," but to have the benefit of that issue it is necessary that facts be alleged and proof thereof offered which bring the doc-

trine into play under the circumstances of the particular case. See, Annot., 25 A.L.R. 2d 257.

[3] In the present case, after defendant by its answer had pleaded the defense of contributory negligence, plaintiff filed no reply. Plaintiff contends that the allegations of his complaint are sufficient to raise the issue of last clear chance, pointing particularly to paragraph 8 of the complaint. It is true that allegations and proof of "original negligence" on the part of the defendant may, under some circumstances, be sufficient to bring the doctrine of last clear chance into play, provided the other elements of that doctrine are sufficiently alleged and proved. *Exum v. Boyles, supra.* In the present case, however, it is questionable whether such other elements were sufficiently alleged in plaintiff's complaint. Only by the most liberal construction of paragraph 8 of the complaint can it be said that plaintiff has alleged facts from which it may be inferred that the collision occurred when plaintiff had gotten into a position of helpless peril or had gotten into or was moving into a position of peril to which he was inadvertent, and that after defendant discovered or in the exercise of due care should have discovered plaintiff's situation, defendant had both the time and means to avoid the injury and negligently failed to do so. We do not, however, find it necessary to pass upon the sufficiency of plaintiff's pleading, since in our view the trial court was clearly correct in refusing to submit an issue as to last clear chance for the reason that the issue did not arise on the evidence presented.

[4] All of the evidence tended to show: The bus was moving west on the inside westbound lane of Highway No. 74, approaching the intersection with Walkup Avenue. The light facing the bus was green. It was moving with the other traffic at 35 to 40 miles per hour, well within the posted speed limit. While it was raining, there was no evidence from which the jury could find that the bus was traveling at an unsafe speed under the conditions then existing. When the driver first saw plaintiff, he was riding his bicycle slowly northward on Walkup Avenue and was about the center of the inside, or northern, lane of the eastbound traffic lanes on Highway No. 74. At that point the plaintiff on his bicycle had yet to travel across the remainder of the eastbound inside lane and across all of the 30-foot median before he would reach any position of peril as far as the bus was concerned. The traffic light in the center of the median facing the plaintiff was red. The bus driver, in the exercise of due care, was at that time reasonably entitled to assume that plaintiff would stop within the median. *Raper v. Byrum,* 265 N.C. 269, 144 S.E. 2d 38; *Hawes v. Refining Co.,* 236 N.C. 643, 74 S.E. 2d 17. Had the plaintiff

done so, he would have been entirely safe so far as the bus was concerned. When plaintiff continued to move slowly through the median and had reached the center thereof, the bus driver blew his horn. At that time the bus was 180 to 200 feet from the intersection and traveling at 35 to 40 miles per hour. So traveling, the bus would reach the intersection in less than four seconds. Only thereafter, when the plaintiff despite the warning signal continued to move toward a place of danger, can it be said that the bus driver in the exercise of due care should have known that plaintiff was inadvertent to his peril and might continue to move toward and into a place of danger. By that time a substantial portion of the four seconds required for the bus to reach the intersection must have elapsed. Certainly the evidence would not support a finding that the bus driver then had sufficient time remaining to take effective action to avoid the collision.

[5] There is a question whether plaintiff's evidence was sufficient to submit the first issue relative to defendant's negligence to the jury. It is clear that it was not sufficient to require submission of an issue as to last clear chance. While the doctrine can be invoked where it is shown that the plaintiff, even though not yet in a place of peril, is negligently moving into a position of peril and is inadvertent to that fact, this is true only if the evidence also shows that when the defendant either knew, or in the exercise of due case should have known of the plaintiff's situation, defendant still had sufficient time and the means to avoid the injury and negligently failed to do so. Here, there was no evidence that the bus driver had sufficient time remaining. There was no error in the court's refusal to submit an issue as to last clear chance.

Plaintiff also assigns as error one portion of the judge's charge relating to the second issue. This portion, when considered contextually with the charge as a whole, could not have misled the jury. Considered as a whole, the charge correctly declared and explained the law arising on the evidence. The court explained fully the standard of care required of a child of plaintiff's age and experience and the rebuttable presumption that he was incapable of contributory negligence. We find no prejudicial error in the trial.

No error.

BROCK and BRITT, JJ., concur.

BENJAMIN HUBERT LEWIS, JR., AND WIFE, MARY E. LEWIS; JOSEPH E. BROWN AND WIFE, BETSY O. BROWN; J. BARRY SHANNON AND WIFE, ANNA RAY SHANNON; ROY E. HAIRR AND WIFE, ADELA R. HAIRR; GORDON H. FARRELL AND WIFE, SARAH HERRING FARRELL; DONALD R. BLALOCK AND WIFE, ELIZABETH R. BLALOCK; PAUL O. TREADWELL AND WIFE, CONSTANCE M. TREADWELL; FRANK PARKER MEACHAM AND WIFE, ELOISE C. MEACHAM; JERRY L. BROWN AND WIFE, NORA ANN BROWN v. CHARLES A. WIGGS AND WIFE, MARILYN WIGGS.

No. 698SC63

(Filed 18 June 1969)

1. Deeds § 20— restrictive covenants — demurrer — misjoinder of parties and causes

Demurrer for misjoinder of parties and causes is properly overruled in action by subdivision landowners to obtain a permanent injunction forbidding defendant landowners in the same subdivision from operating a beauty shop on their subdivision property in violation of restrictive covenants.

2. Parties § 2— parties plaintiff

All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs. G.S. 1-68.

3. Deeds § 19— restrictive covenants — construction in favor of use

In construing restrictive covenants all doubts should be resolved in favor of the free use of land.

4. Deeds § 20— restrictive covenants — subdivision — beauty shop

Restrictive covenant providing that "no business establishment of any kind shall be erected or permitted on any lot of this subdivision" is not unclear or vague, and the operation of a beauty shop is within the prohibition of the covenant.

5. Deeds § 20— restrictive covenants — subdivision — waiver and estoppel

In an action by subdivision landowners to obtain a permanent injunction forbidding defendant landowners in the same subdivision from operating a beauty shop in violation of a restrictive covenant, the evidence is insufficient to support a finding that the restriction has been waived or the right to enforce it lost by estoppel because of acquiescence by the plaintiff landowners in permitting similar type home occupations to be carried out in the subdivision, there only being evidence that (1) an insurance salesman had a filing cabinet and desk in his home but that it was infrequent that a prospect came to his house to discuss insurance, (2) a housewife sold decorative candles which she made in her home and another housewife sold cakes, and (3) one woman ran a "Welcoming Service" for merchants but did not transact any business at her home other than occasional typing and using the phone.

6. Deeds § 20— restrictive covenant — invalidation — change of character in neighborhood

In order to invalidate a restrictive covenant it must be shown that a

change in the character of the neighborhood which was intended to be created by the restriction has come about and that it is no longer possible to accomplish the purpose intended by such covenant.

APPEAL by defendants from PARKER, J., 26 August 1968 Civil Session, Superior Court of WAYNE.

Plaintiffs bring this action to enjoin permanently the defendants from operating a beauty shop business in their home. Plaintiffs are owners of land within the Ridgecrest Subdivision, Wayne County. On 22 December 1965 defendants purchased eight lots in the Ridgecrest Subdivision, and, like plaintiffs' lots, defendants' lots are subject to the following restriction: "No business establishment of any kind shall be erected or permitted on any lot of this subdivision with the exception of Lots 1, 50, 73, 74, 113, 114, 145 and 146." Defendants demurred to the plaintiffs' complaint on the ground that there was a misjoinder of causes and parties. This demurrer was overruled on 2 May 1968 by Judge Fountain and the temporary restraining order previously issued was continued until final hearing. Defendants answered admitting that the conveyance to them of certain lots in the Ridgecrest Subdivision on which they were constructing their home was subject to restrictions of record.

As a first further answer and defense the defendants alleged that the Board of Adjustment granted defendants a special permit to operate a beauty shop in their home upon a finding that this would be a customary home occupation incidental to the occupancy of the home and a permissive use under the zoning ordinances of the City of Goldsboro. As a second further answer and defense the defendants alleged that for several years there have existed and continued to exist several types of home businesses in the Ridgecrest Subdivision such as dressmaking and alterations, baking and cake decorating, home decorations, cabinet making and printing and rubber stamp manufacturing; that these home occupations are similar to the beauty shop business which defendants propose to operate; that the restrictive covenants applicable to this subdivision do not prohibit such home occupations; and that if they are in violation of the restrictive covenants the failure of plaintiffs to object to similar type home occupations constitutes an estoppel of their right to enjoin and prevent the defendants from the operation of their home occupation.

To the defendants' first further answer and defense the plaintiffs demurred; and to defendants' second further answer and defense plaintiffs entered a motion to make more definite and certain. Plaintiffs' demurrer and motion were allowed by Judge Fountain on 27 May 1968.

The matter was heard without jury and upon stipulations and evidence presented by the parties. The following facts were stipulated by the parties:

That the plaintiffs are property owners in Ridgecrest Subdivision, New Hope Township, Wayne County; that at the time each of the plaintiffs acquired title to the property owned by them there was of record and is still of record a list of restrictive covenants imposed by the developers of said subdivision which contain the following: "No business establishment of any kind shall be erected or permitted on any lot of this subdivision with the exception of Lots 1, 50, 73, 74, 113, 114, 145 and 146." That on 22 December 1965 the defendants purchased eight lots in the subdivision; that the deed by which the defendants acquired title specifically states that the conveyance of the lots was "subject to restrictions of record"; that in December 1967 the defendants entered into a contract for the construction of a new residence; that in order to comply with the zoning ordinances of the City of Goldsboro a special use permit to operate a one-chair beauty shop was obtained by defendants with certain conditions attached; and that the Board of Adjustment expressly noted that the deed restrictions urged by other property owners in opposition to the defendants' application were a matter for the court and not the Board of Adjustment to decide.

Upon these stipulations and evidence presented, the trial court made the following findings of fact and conclusions:

"1. The Court adopts as findings of fact by the Court for the purpose of determining this cause all those facts stipulated by the parties in paragraphs one through seven of the written stipulation signed by the attorneys of record for both the plaintiffs and the defendants.

2. The Court finds as a fact that at the time of the institution of this action by the plaintiffs that both the lands of the plaintiffs and the defendants were subject to the provisions of the restrictive covenants as set out in paragraphs two and three of the aforesaid stipulation.

3. The Court finds as a fact that the operation by the defendants of a one-chair beauty shop in their residence in Ridgecrest Subdivision, pursuant to a special use permit issued by the Board of Adjustment of the City of Goldsboro, is in direct contravention of item three of the aforesaid restrictive covenants.

4. The Court finds as a fact that since the original development of Ridgecrest Subdivision and particularly since the re-

strictive covenants as stipulated by the parties were filed of record, there has been no change or alteration in the nature and character of Ridgecrest Subdivision as a residential neighborhood.

5. The Court finds as a fact that the restrictive covenants as stipulated by the parties hereto and particularly Number three thereof are of substantial and significant value to the plaintiffs from the standpoint of maintaining the value of their residential property.

6. The Court finds as a fact that the restrictive covenants as stipulated by the parties and particularly Number three thereof are presently of substantial value to the parties plaintiff from the standpoint of the use and enjoyment of their property as residential property.

7. The Court finds as a fact that at the time each of the parties plaintiff acquired title to their respective lands in Ridgecrest Subdivision they were substantially influenced in the purchase of said property by the assurance contained in the restrictive covenants to which the parties have stipulated that the residential nature of the Subdivision would be preserved and protected from the intrusion of business activity therein.

8. That the evidence presented by the defendants as to other alleged business establishments or activities in Ridgecrest Subdivision reveals only minor, occasional and trivial activities which do not constitute a breach of Item three of the restrictive covenants, and the Court finds as a fact from the evidence presented in this hearing that such alleged business activity in Ridgecrest Subdivision does not in any way limit the rights of the plaintiffs in this action to enforce the restrictive covenants against the defendants by injunctive relief.

9. The Court finds that none of the plaintiffs have by waiver, laches, estoppel, acquiescence or in any other manner lost the right to enforce the restrictive covenants herein stipulated by injunctive relief.

10. The Court finds as a fact that the plaintiffs have no adequate remedy at law for the violation of the restrictive covenants by the defendants as herein set out and that they are entitled to a permanent injunction against the defendants for the enforcement of the restrictive covenants herein stipulated and particularly Number three thereof.

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

a. That the defendants Charles A. Wiggs and wife, Marilyn Wiggs, are hereby permanently restrained and enjoined from operating a one-chair beauty shop or any other type of beauty shop or other business activity of any kind on their residential property in Ridgecrest Subdivision.

b. That the written undertaking filed in this action by the plaintiffs conditioned upon indemnifying the defendants in the event the relief herein granted were denied, are hereby discharged.

c. This judgment is signed out of term by consent of the parties hereto as evidenced by the written consent of their respective attorneys appended hereto."

Defendants appealed.

Herbert B. Hulse and George F. Taylor for plaintiff appellees.

Taylor, Allen, Warren & Kerr by John H. Kerr, III, for defendant appellants.

MORRIS, J.

[1, 2] Defendants except to the overruling of their demurrer. They argue, on the authority of *Chambers v. Dalton,* 238 N.C. 142, 76 S.E. 2d 162, that there is a misjoinder of causes and parties. This assignment of error cannot be sustained. In *Chambers v. Dalton, supra,* several parties joined as plaintiffs and each sought to recover damages for injuries to their land caused by a breach of a restrictive covenant by the defendants. The Court correctly held that the several causes of action stated by the plaintiffs were separate and distinct, and that no one cause affected all parties. In the present case there is but one cause of action stated — that is to obtain a permanent injunction forbidding defendants to operate a business establishment on their property in Ridgecrest Subdivision so long as the restrictive covenants remain in force. Each of the plaintiffs being landowners in the subdivision, each is affected by this cause of action. "By statute all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs . . ." 1 McIntosh, N. C. Practice 2d § 642. See G.S. 1-68. See *Conrad v. Land Co.,* 126 N.C. 776, 36 S.E. 282; and *Johnston v. Garrett,* 190 N.C. 835, 130 S.E. 835; for cases in which several landowners joined in an action to enjoin permanently the violations of certain covenants.

[3, 4] We think the stipulations and evidence fully support the

findings of fact made by the trial court and these findings fully support the judgment. It is true that in construing restrictive covenants all doubts should be resolved in favor of the free use of land. *Construction Company v. Cobb,* 195 N.C. 690, 143 S.E. 522. However, we do not feel that this restriction is unclear or vague. It prohibits the creation of a business establishment. The operation of a beauty shop is within this prohibition.

[5] We do not agree that this restriction has been waived or released or the right to enforce it lost by estoppel because of acquiescence by the landowners in the subdivision in permitting similar type home occupations to be carried out. Charles Shumate, an insurance salesman, testified that he had a filing cabinet and desk in his home, but that it was infrequent that a prospect would come to his house to discuss insurance. He did not advertise in the telephone book that he had an office in the Ridgecrest Subdivision. Two witnesses testified that they had purchased cakes from a Mrs. Smyk who lives in the subdivision, but that to their knowledge she did not have extra plumbing or wiring in her home. Edmund Brown, the owner of Brown Rubber Stamp Works, testified that the mailing address for his business was Ridgecrest Drive. However, he stated that his equipment for this business was in his print shop and that the telephone number on his invoice was the number of the shop. Dorothy M. Hussey testified that she sells decorative candles which she makes in her home. James Head testified that he had an office in his home with a desk and filing cabinet. However, he stated that he only used this office for night work and that he had a business office not in the subdivision. Eloise Meacham testified that she ran a "Welcoming Service". She would call upon newcomers at their homes and give certificates from various merchants. She was paid by the merchants for this service; however, none of the merchants ever came to her home. Other than occasional typing and using the phone she did not transact any business at her home.

[6] We need not decide whether by these actions the various property owners in the subdivision have violated the restriction now in question. It is sufficient to say that the evidence does not show a change in the character of this neighborhood sufficient to invalidate the restrictive covenant. In order to invalidate a restrictive covenant it must be shown that a change in the character of the neighborhood which was intended to be created by the restriction has come about and that "it is no longer possible to accomplish the purpose intended by such covenant, . . . and, owing to the changed conditions, the enforcement of the covenant would be of no benefit to the party seeking an injunction, but, on the other hand, would re-

sult in an increased value of his premises by a departure from the restrictions, or where enforcement would be inequitable." *Muilenburg v. Blevins,* 242 N.C. 271, 87 S.E. 2d 493. Also, see *Tull v. Doctors Building, Inc.,* 255 N.C. 23, 120 S.E. 2d 817.

Finding of fact No. 4, to which defendants have abandoned their exception, provides ". . . there has been no change or alteration in the nature and character of Ridgecrest Subdivision as a residential neighborhood."

Neither do we think that the alleged violations of this restrictive covenant by landowners within the subdivision other than the defendants make it inequitable to enforce this restriction. In the judgment below we find

No error.

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

STATE OF NORTH CAROLINA v. JOHN L. ENGLE AND GARLAND E. NEASE
No. 6918SC296

(Filed 18 June 1969)

1. Constitutional Law § 32— appointment of counsel — one attorney for two defendants

In this consolidated trial of two defendants for the crime of armed robbery, defendants were not denied the effective assistance of counsel by refusal of the court to appoint separate attorneys to represent each defendant where no conflict of interest between defendants has been shown and the record shows that appointed counsel diligently represented both defendants.

2. Criminal Law § 34— evidence of defendant's guilt of other offenses

While evidence of a defendant's guilt of another crime is inadmissible to show his guilt of the crime in issue when its only relevancy is to show the character of the accused or his disposition to commit a crime of the nature of the one in issue, proof of other offenses is competent when such proof tends to show quo animo, intent, design, or guilty knowledge, or make out the res gestæ, or exhibit a chain of circumstances with respect to the offense in issue, and is so connected with the offense charged as to throw light upon one or more of these questions.

3. Criminal Law § 34— evidence of defendant's guilt of other offenses — competency

In this prosecution for armed robbery, the trial court did not err in the admission of testimony by an assistant prison superintendent which tended

to show that shortly before the robbery occurred defendants had assaulted the witness, stolen files and two pistols from the prison safe, and escaped from prison in an automobile stolen from the witness, the testimony being competent to show a chain of circumstances leading up to the offense in issue and to identify the defendants and the weapons and automobile used in the robbery.

4. Criminal Law § 101— mistrial — juror asleep during trial

In this prosecution for armed robbery, the trial court did not err in refusing to order a mistrial when defense counsel advised the court that witnesses had suggested to him that one of the jurors had been sleeping during the trial, where defense counsel presented no competent evidence that any juror had been sleeping during the trial.

5. Criminal Law § 101— motion for mistrial — failure to find facts

The trial court did not err in failing to make findings of fact upon defendants' motion for mistrial on the ground that a juror had been sleeping during the trial where there was no competent evidence before the court upon which to make findings of fact, defense counsel having merely suggested to the court that a juror had been sleeping.

6. Criminal Law § 154— parts of record on appeal — affidavits executed after the trial

Affidavits in support of defendants' motion for a mistrial which were executed approximately five months after the conclusion of the trial are not properly a part of the record on appeal and will not be considered by the Court of Appeals.

ON *certiorari* to review trial of defendants before *Gwyn, J.*, 14 October 1968 Session, GUILFORD Superior Court.

Defendants were charged in identical bills of indictment with the felony of robbery with firearms. Upon their affidavits of indigency, W. Marcus Short, Esq., was appointed on 24 June 1968 to represent each defendant. According to a stipulation appearing in the record, appointed counsel for defendants asked the solicitor to request the presiding judge at the 16 September 1968 session to appoint another attorney to represent one of the defendants, and that this request was denied. Appointed counsel, W. Marcus Short, represented both defendants at their trial, at which time pleas of not guilty by reason of temporary insanity were entered.

The evidence for the State tended to show that on 16 June 1968 the two defendants were confined in the Davie County Prison Unit at Mocksville, North Carolina, where they were serving sentences imposed upon convictions of misdemeanors. As approximately 6:20 p.m. the two defendants, and another inmate, went to the prison unit office where they assaulted the assistant superintendent, took money from his wallet, took his automobile keys, and forced him to open

the unit safe. From the safe they took two 38 calibre revolvers and various prison unit records. They then handcuffed the assistant superintendent to the gun locker and drove away in his automobile.

At about 9:30 p.m. on 16 June 1968 the two defendants went into the 7-11 store in Greensboro where they purchased some beer. About 10:30 p.m. they returned, and with the threatened use of a pistol, or pistols, they took over five hundred dollars from the cash register, locked the operator and her husband in the walk-in cooler, and left in the car which they had taken from the assistant superintendent of the prison unit.

There was additional evidence for the State which tended to show that defendants gave some of the money to relatives, gave up one of the pistols to a relative, and talked about having robbed the 7-11 store. Defendant Nease was later arrested for reckless driving while driving the automobile taken from the assistant superintendent of the Davie County Prison Unit. At the time of his arrest he had $111.00 on his person and various prison unit records were found on the floor of the car. During the early hours of 17 June 1968 the defendant Engle was arrested when officers stopped a car in which he was riding. At that time Engle had four or five 38 calibre bullets in his pocket.

Defendants offered evidence which tended to show that on 16 June 1968 they were inmates at the Davie County Prison Unit; that they found a jar of whiskey in the trash can in a toilet; and that they also found some pills; that they began to take the pills and drink the whiskey, and they didn't remember anything until they waked up the next morning in jail.

From verdicts of guilty as charged, and judgments of imprisonment for terms of not less than 20 nor more than 30 years, defendants gave notice of appeal. Because of inability to complete the record on appeal within the time allowed, upon application therefor we allowed *certiorari.*

Robert Morgan, Attorney General, by Harrison Lewis, Deputy Attorney General, and Eugene A. Smith, Trial Attorney, for the State.

W. Marcus Short for defendants.

BROCK, J.

[1] Defendants assign as error that the presiding judge at the 16 September 1968 session declined to appoint another attorney to rep-

resent one of the defendants. There is no showing in this record on appeal as to the grounds upon which such a request to the judge was made, and no exception to his ruling was entered. The only thing in the record on appeal is an undated stipulation of counsel that a request was made and denied. The defendants' exception follows this stipulation. Also we note that no motion or argument was made to the trial judge. We do not conceive that such an exception will support an assignment of error.

Nevertheless, defendants argue that they were denied effective assistance of counsel because they did not have separate attorneys appointed to represent them. There is absolutely no argument or showing of a conflict of interests between the two defendants, and the transcript of the evidence bears out that there was none. Also it appears from the entire record that the appointed counsel diligently represented both defendants.

"While the right to counsel is absolute, its exercise must be 'subject to the necessities of sound judicial administration'; and where there appears to be no conflict, the court may, in its discretion, assign to a defendant the attorney of a co-defendant. Such an assignment is not, in itself, a denial of effective assistance of counsel. Since *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), it has been clear that some conflict of interest must be shown before an appellant can successfully claim that representation by an attorney also engaged by another defendant deprived him of his right to counsel." *U. S. v. Dardi*, 330 Fed. 2d 316 (*Certiorari* denied 379 U.S. 845, 13 L. Ed. 2d 50).

[2, 3] Defendants assign as error the admission of the testimony of the assistant superintendent of the Davie County Prison Unit which tended to show an escape, an assault upon him, the larceny from the prison unit safe, and the larceny of his automobile. Evidence of a defendant's guilt of another crime is inadmissible to show his guilt of the crime in issue where its only relevancy is to show the character of the accused, or his disposition to commit a crime of the nature of the one in issue. Stansbury, N.C. Evidence 2d, § 91. However, ". . . proof of other offenses is competent when such proof tends to show quo animo, intent, design, or guilty knowledge, or make out the res gestæ, or exhibit a chain of circumstances with respect to the offense in issue, and is so connected with the offense charged as to throw light upon one or more of these questions." 2 Strong, N.C. Index 2d, Criminal Law, § 34, p. 536. Clearly the testimony of the assistant superintendent tended to show preparation by defendants, to explain their possession of firearms and corroborate the victim, to

explain their possession of the automobile and corroborate the victim. The testimony showed a chain of circumstances leading up to the offense in issue, and served to help identify the weapons, the automobile and the defendants. It was relevant for these purposes and properly admitted even though it disclosed the commission of independent offenses.

[4] Defendants' third and final assignment of error is to the refusal of the trial judge to order a mistrial when defense counsel advised the judge that witnesses had suggested to him that one of the jurors had been sleeping.

During the second day of the trial the transcript shows the following:

"MR. ALBRIGHT: The State of North Carolina rests its case, your Honor, against these Defendants.

"THE COURT: Is there any evidence for the Defendants?

"MR. SHORT: Your Honor, I'd like to make a motion in the absence of the jury.

"THE COURT: Go to your room, members of the jury.

"(The jurors withdraw from the Courtroom.)

"The following proceedings were had in the absence of the jury:

"THE COURT: Go ahead.

"MR. SHORT: Your Honor, at this time, I'd like to make a motion or ask your Honor's indulgence in declaring a mistrial in this case for the reason —

"THE COURT: On what grounds?

"MR. SHORT: On the grounds that the second juror from the end of the front row has been — several witnesses have called it to my attention and are willing to sign affidavits — that he has been dozing some yesterday afternoon and some this morning during the course of the trial, and I don't have their affidavits now, but it is my understanding that I wouldn't have any trouble getting them.

"THE COURT: Well, I have observed the jury all along, and I haven't seen anybody asleep. It may have looked like they were sort of drowsy at times, but they have been responsive, it seems to me.

"MR. SHORT: Your Honor, of course, I believe your prerogative is —

"THE COURT: I wouldn't declare a mistrial unless I had more grounds than that.

"MR. SHORT: I don't have the affidavits, but it is my understanding that I'd have no trouble getting them.

"THE COURT: It's hard to tell when a man is asleep. People close their eyes — I do that myself — a lot of times, concentrating. Sometimes my eyes get tired, and I close my eyes, and anyone would say that I was asleep, but I listen."

After the trial judge allowed the defendant Nease to make certain statements about the juror sleeping, the jury returned to the courtroom whereupon the following transpired:

"THE COURT: Let me ask before the case goes any further, during the progress of the trial, has any of the jurors dozed off and gone to sleep or not? If you have, I want to know it now.

"(No response.)

"THE COURT: Is there any juror who has been in such a dazed or dozed condition that he didn't hear the witness? If so, I want to hear it now.

"(No response.)"

[4] As can be seen from the foregoing there was absolutely no competent evidence before the court that any juror had been sleeping; the only thing before the court was defense counsel's suggestion that witnesses had called to his attention that a juror had dozed some that day and the day before. It seems clear that neither defense counsel nor the trial judge had observed a juror dozing or sleeping.

[5, 6] Defendants argue that the trial judge erred in failing to make findings of fact upon their motion for a mistrial. There was no competent evidence before the court upon which to make findings of fact; there was only a suggestion from defense counsel. We note that attached to the record on appeal, and agreed to by the solicitor, are seven affidavits each of which, among other things, makes the following statement: ". . . that during said trial this affiant witnessed a male Negro juror in the front row, second juror from the end away from the Judge, dozing and actually appearing to be asleep during the time that evidence was being introduced . . ." It appears from the identifications in the transcript of the trial proceedings that six of the affiants are relatives of defendant Nease (his mother, two sisters, a brother-in-law, an aunt, and an uncle), and apparently the seventh affiant is the wife of defendant Engle.

But in any event, each of the affidavits shows that it was signed on 14 or 15 April 1969, approximately five months after the conclusion of the trial. Obviously not any of these affidavits were before the trial court. We do not perceive why the solicitor agreed that these affidavits could be sent up with the record on appeal, but even his agreement does not make them a proper part of the record on appeal. We will ignore them.

Counsel has pursued every defense available to his clients, but in the trial we find

No error.

CAMPBELL and MORRIS, JJ., concur.

FREDERICK HARDY, BY HIS NEXT FRIEND, EDMUND I. ADAMS v. FELIX L. TESH AND PINE HALL BRICK & PIPE COMPANY, AND H. K. SAUNDERS

— AND —

DAVID HARDY, BY HIS NEXT FRIEND, EDMUND I. ADAMS v. FELIX L. TESH AND PINE HALL BRICK & PIPE COMPANY, AND H. K. SAUNDERS

— AND —

JAMES HARDY, BY HIS NEXT FRIEND, EDMUND I. ADAMS v. FELIX L. TESH AND PINE HALL BRICK & PIPE COMPANY, AND H. K. SAUNDERS

No. 6921SC260

(Filed 18 June 1969)

Automobiles §§ 47, 57— intersection accident — nonsuit — plaintiff's evidence contradicted by physical facts

In an action for personal injuries received in a collision at a T-intersection, the trial court properly allowed defendant's motion for nonsuit where plaintiff's only evidence of actionable negligence by defendant, that defendant drove his automobile from a servient highway into the path of the automobile in which plaintiff was riding on the dominant highway, is in irreconcilable conflict with the uncontradicted physical facts established by plaintiff's evidence which place the point of impact on the servient highway and corroborate testimony by defendant, which was a part of plaintiff's evidence, that his automobile was stopped on the servient highway pursuant to a stop sign at the intersection when the automobile in which plaintiff rode skidded into it.

APPEAL by plaintiffs from *Armstrong, J.*, 6 January 1969 Session, FORSYTH County Superior Court.

The three cases were consolidated for trial. The parties stipulated that only the appeal in the case of David Hardy (David) would be perfected, and it was agreed that the decision would be binding and conclusive with regard to the cases of Frederick Hardy (Frederick) and James Hardy (James).

The cases arose out of an automobile collision on 9 January 1965 about 5:10 p.m. in the City of Winston-Salem. Two automobiles were involved, a 1964 Ford automobile owned by the defendant H. K. Saunders (Saunders) and driven by Edd Hardy, Jr., (Edd) and a 1965 Pontiac automobile leased by the defendant Pine Hall Brick & Pipe Company (Pine Hall) and driven by the defendant Felix L. Tesh (Tesh).

The three plaintiffs were the minor children of Edd, and they were riding in the Ford automobile with him. David, who was fourteen years of age, was riding in the front seat next to the door, while Frederick, who was five years of age, was riding in the front seat between Edd and David. James was twelve years of age and was riding in the back seat by himself.

Robinhood Road (Robinhood) and Shoreland Road (Shoreland) were paved, hard-surfaced streets and were approximately twenty-seven feet wide. Robinhood, which ran in a general north-south direction, was upgrade from the point where it crossed Silas Creek Parkway as it went southerly towards the intersection with Shoreland. Shoreland ran in a general east-west direction and intersected Robinhood from the west. It did not cross Robinhood and thereby formed a T-intersection. The maximum speed limit on both streets was thirty-five miles per hour. Traffic on Shoreland was controlled by a stop sign. Therefore, Robinhood was the dominant road and Shoreland was the servient road.

Edd was driving the Ford automobile in a southerly direction on Robinhood and Tesh was driving the Pontiac automobile in an easterly direction on Shoreland. The two vehicles collided at the T-intersection and all three of the Hardy children were injured.

At the close of the plaintiffs' evidence, the trial court entered an order declaring a mistrial as to Saunders and continuing the cases against him for the remainder of the court session. The trial court sustained motions for judgment as of involuntary nonsuit and entered a judgment to that effect as to Tesh and Pine Hall. The plaintiffs thereupon excepted and assigned as error the action of the trial court in granting Tesh's motion and in entering the judgment of involuntary nonsuit as to Tesh.

Randolph and Drum by Clyde C. Randolph, Jr., for plaintiff appellants.

Deal, Hutchins & Minor by John M. Minor and William K. Davis for defendant Tesh appellee.

CAMPBELL, J.

The appeal presents only the question of whether "the evidence offered by [David], considered in the light most favorable to [him], was sufficient to warrant submission thereof to the jury as to the alleged actionable negligence of" Tesh. *Jones v. Schaffer,* 252 N.C. 368, 114 S.E. 2d 105.

David alleged that his injuries were caused by the joint and concurrent negligence of the two drivers. He alleged that Tesh drove at an excessive speed, failed to stop for a stop sign and to yield the right of way, failed to keep a proper lookout and failed to have the Pontiac automobile under proper control. He alleged that Edd drove at an excessive speed, failed to keep a proper lookout, failed to keep the Ford automobile under proper control, failed to drive on the right half of Robinhood and "instead left the highway and entered into the intersecting street, in violation of G.S. 20-147." He further alleged that Edd "changed the course of travel of the vehicle which he was driving into the intersecting road upon which the automobile of . . . Tesh was stopped and did so in such a manner as to cause his vehicle to go into the left side of Shoreland Road and crash into the automobile driven by . . . Tesh in violation of G.S. 20-153(a)".

With regard to the collision itself, the plaintiffs offered their own testimony and the testimony of Edd, Tesh and L. N. Ivester, the investigating police officer.

James testified that he was talking at the time of the collision and that

> "when [Edd] came up to the top of the hill, he applied the brakes right quick and that is all we heard — the squeaking tires — and my head — I flew over the seat and hit the dashboard and knocked out my teeth.
>
> I did not see the other car at any time before this collision. . . ."

Frederick testified:

> "I can't exactly remember nothing about this accident. . . . I don't remember where I rode in the car. I don't remember anything about the accident itself."

David testified:

"As to what I remember about the accident and the events leading up to it; as we was on our way, we was going along past the street and everything, and when we got down there about Robinhood Road, me and my brother was carrying on a conversation, and we just talked like brothers do, and mostly we was talking about the trip, and all of a sudden I heard the wheels and things begin to slide on the car, and I turned around and I seen the car out there in the street — a quick glance is all I could get. Regarding whether or not I saw the car we hit, before the collision: I turned around, I got a quick glance at it, but I couldn't see it because it happened so quick I just barely could see it. As to whether or not I saw where the car was right before we hit: when I seen the car it was approaching the street. I turned around, and all I know, my head or something, some part of my face hit the dashboard of the car, some part of the front of the car somewhere. . . ."

On direct examination by plaintiffs' counsel, Tesh testified:

"Just preceding this accident, I pulled up to the intersection, stopped, looked to the right and there was nothing coming. I heard tires screeching, I turned to the left and the Hardy car was approaching. It skidded into the left front of my automobile and knocked it around at a 90-degree angle approximately. His car hit mine at my left front wheel, damaging the side up as far as the door back of the wheel and then the grille to the front of the wheel."

On cross-examination Tesh testified:

"I pulled up and stopped on Shoreland Road in response to the stop sign which was there. When I came to a stop, the front of my car was 18 inches to 2 feet back into Shoreland Road from the edge of Robinhood Road as it crosses over Shoreland Road. My car was at a complete stop. I looked to my right, which mean I was looking in towards town, which is the direction indicated on the blackboard diagram as south. There was no traffic going out to the north on Robinhood. The noise I heard of tires screeching came from my left, and I turned to my left. At that point I observed the car driven by Mr. Hardy; it was about 80 feet from me, skidding toward me, and as it approached me it came in a broadside condition, ran off of the Robinhood Road into Shoreland Road and struck me. . . .

. . . ."

. . . I have an opinion satisfactory to myself that the speed to the Hardy car when I first observed it and as it came towards me was 45 to 50 miles an hour. . . ."

Edd testified:

"As to what happened as I approached this intersection leading up to the time of the accident: when I crossed Silas Creek down there I was coming up the hill and all at once this car just come out in the road and I applied brakes and I hit, and that's the only thing I remember. As I approached this intersection before the accident happened, other than the car that I hit, I also saw a car that was meeting me and one was in front of me. The car that was in front of me had got by the intersection and one was meeting me.

Before the collision, the car that I hit was coming from my right on the intersecting street, coming into Robinhood Road. I don't know where it hit in the intersection there, exactly."

On cross-examination by Saunders, Edd testified:

"When I approached Shoreland Road, coming up to it I just seed [*sic*] the car coming on out, and I applied brakes and I hit. That is all I remember: I applied brakes and I hit. I saw the car coming out Shoreland Road onto Robinhood Road. I saw the front of that car coming on out into Robinhood Road and I applied the brakes. I just jammed the brakes on. As far as remembering the car skidding at that time, it happened so quick. . . . After I applied the brakes, as far as observing the Pontiac automobile driven by Mr. Tesh then, I just observed — I tried to hold it and it hit and that is all I remember. I don't remember trying to turn the wheel or nothing."

Police Officer Ivester testified that he investigated the accident and that when he arrived he observed the Ford automobile in the middle of and sitting sideways across Robinhood, with the front pointed in a general northwesterly direction. No part of it was in Shoreland. The Pontiac automobile was sitting on the southwest corner of Shoreland and Robinhood, with the front pointed in a southeasterly direction. The rear portion of the Pontiac automobile was off the street, but the front was one or two feet on Robinhood. He testified that he observed tire marks and that these

". . . tire marks had started on Robinhood and went off the pavement and came into Shoreland, and the tire marks stopped approximately 3 feet from the south curb line of Shoreland, 4

> feet west of Robinhood, and the cars were at that position shown on the diagram when I arrived. . . .
>
> . . . By saying '4 feet west of Robinhood' I am talking about 4 feet into Shoreland Drive. There was a gouge mark. . . . That gouge mark led up to the left front wheel of the Hardy car."

He testified that by gouge mark he meant something that had dug into the pavement; this gouge mark started inside of Shoreland and then led up to the Ford automobile; and the left front tire of the Ford automobile was partly off of the rim. The Pontiac automobile was 36 feet from where the tire marks ended and the gouge mark appeared in the pavement. He further testified:

> "The gouge mark was 4 feet west of the curb line of Robinhood Road and 21 feet south of the north curb line of Shoreland. . . ."

The evidence, when taken in the light strongest for the plaintiffs, reveals that, as the Ford automobile approached the intersection, Edd, according to his testimony, saw the Pontiac "coming out Shoreland" and "saw the front of that car coming on out into Robinhood"; Edd "jammed the brakes on", but the two vehicles collided. The Ford automobile came to rest "sitting right out in the middle of Robinhood" and "[n]o part of [the Ford] was extending into Shoreland". The Pontiac automobile, which was knocked 36 feet and which turned a 90-degree angle, came to rest on the southwest corner of Shoreland and Robinhood with the front pointing in a general southeasterly direction and with the front extending into Robinhood for 1 or 2 feet. The left front and right front fenders of the Ford automobile were damaged and the left front tire was punctured and partially off the rim. The left front fender of the Pontiac automobile was damaged. There were tire marks extending for a distance of 135 feet. These marks started on Robinhood, went off the pavement, came into Shoreland and stopped at a point approximately 3 feet from the south curb line of Shoreland and 4 feet west of the westerly curb line of Robinhood. There was also a gouge mark located 4 feet west of the western curb line of Robinhood and 21 feet south of the north curb line of Shoreland, and this gouge mark led up to the left front tire of the Ford automobile.

The only evidence of actionable negligence on the part of Tesh was the testimony of Edd to the effect that he saw the Pontiac "coming out Shoreland" and "into Robinhood". However, this testimony "is in irreconcilable conflict with [the] physical facts [*i.e.,* the tire

marks and gouge marks] established by plaintiff's uncontradicted evidence." *Jones v. Schaffer, supra.* This uncontradicted evidence places the point of impact on Shoreland and not on Robinhood and corroborates the testimony of Tesh, which was part of the plaintiffs' evidence.

> " 'As a general rule, evidence which is inherently impossible or in conflict with indisputable physical facts . . . is not sufficient to take the case to the jury, and in case of such inherently impossible evidence, the trial court has the duty of taking the case from the jury.' . . . It is noted: 'The rule that a nonsuit should be directed, if the physical facts disprove the plaintiff's case, is inapplicable if there is a substantial conflict in the evidence tending to prove the physical facts.' . . . Here, the relevant physical facts are established by plaintiff's uncontradicted evidence." *Jones v. Schaffer, supra.*

The judgment of involuntary nonsuit as to Tesh was properly entered.

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. DONALD FREDERICK FAULKNER AND ARTHUR SMITH

No. 6926SC235

(Filed 18 June 1969)

1. Criminal Law § 75— voluntariness of statements — illegal arrest

Statements made by a person in custody as a result of an illegal arrest are not *ipso facto* involuntary and inadmissible.

2. Criminal Law § 76— voluntariness of statements — findings of fact

In armed robbery prosecution, trial court's findings of fact and conclusions of law as to the voluntariness of defendants' statements *are held* amply supported by the evidence and, when viewed in the totality of the circumstances, their admission was not error.

3. Constitutional Law § 31; Criminal Law § 95— joint trial of defendants — confessions — waiver of objection

Where each defendant in a joint trial takes the stand and subjects himself to cross examination by the other, the defendants waive the ob-

jection that it was error to introduce their confessions which implicated each other.

4. Witnesses § 8; Criminal Law § 88— cross-examination — nature and extent

Right of cross-examination is accorded to defendants when they are brought face to face with each other on the witness stand.

5. Witnesses § 8; Criminal Law § 88— right of cross-examination

The right to cross-examine does not mean that the cross-examination must produce that which is favorable.

6. Robbery § 1— common law robbery — elements

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

7. Robbery § 1— armed robbery

G.S. 14-87 does not add to or subtract from the common law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission or attempted commission of the offense sentence shall be imposed as therein directed.

8. Robbery § 1— pistol defined

A pistol is a short firearm, intended to be aimed and fired from one hand.

9. Robbery § 1— gun defined

A gun is a portable firearm and usually includes pistols, carbines, rifles and shot guns.

10. Robbery § 5— armed robbery — instruction on lesser degree of crime

In armed robbery prosecution, trial judge was required, without a request from the defendants, to charge the jury that they could return a verdict of guilty of the lesser included offense of common law robbery where State's witness had testified on cross-examination that she was not certain whether defendants used a real pistol or a toy pistol in the commission of the robbery.

11. Robbery § 1— armed robbery — nature of the offense — use of firearms

The actual possession and use or threatened use of firearms or other dangerous weapon is necessary to constitute the offense of robbery with firearms or other dangerous weapon.

12. Robbery § 5— armed robbery — use of firearm or toy — jury questions

In armed robbery prosecution, where the State's witness testified on cross-examination that she was not certain whether the defendants used a real pistol or a toy pistol in the commission of the robbery, whether the "weapon" was a firearm or a toy pistol, and if a toy pistol, whether it was a dangerous weapon, *held* questions for the jury under proper instructions.

STATE *v.* FAULKNER

APPEAL by defendants from *Falls, J.*, 2 December 1968 Schedule A Session of Superior Court of MECKLENBURG County.

The defendants were tried upon a proper bill of indictment which charged them with the armed robbery of the Frances Meat and Grocery, a business owned by Robert Neal, at 2820 Statesville Avenue, Charlotte, North Carolina. The robbery took place on 28 October 1968 and a total of $210.52 in currency and coin was taken. Upon the call of the case for trial, the defendants pleaded not guilty and trial was by jury.

The evidence for the State tended to show that the two defendants at about 6:30 P.M. on the night of 28 October 1968 entered the Frances Meat and Grocery while the cashier was alone in the store. Defendant Faulkner had a gun and after a tussle, the cashier was struck on the head with the pistol. A customer came in and was forced to the rear of the store. Faulkner then, by threats, forced the cashier to open the cash register. Defendant Smith took all the money out of the register and stuffed it in his coat pocket. Another customer then entered the store, and he too was forced to go to the rear of the store. The defendants left the store through the front door. The cashier and the two customers identified the defendant Faulkner as one of the men who had committed the robbery, and the cashier and one of the customers identified defendant Smith as one of the men who had committed the robbery. Detective H. R. Smith of the Charlotte Police Department testified that at his request defendant Faulkner was taken into custody at 4:00 A.M. on the morning of 5 November 1968. He was placed in jail where he remained until approximately 7:30 A.M. when Detective Smith took him from the jail to the detective bureau in the Police Department where defendant Faulkner was informed of his constitutional rights. At 7:35 A.M. Faulkner signed a waiver of his right to counsel. About a half hour later Faulkner admitted his participation in the crime. Faulkner's statement implicated defendant Smith who was arrested with a warrant at about 11:30 A.M. the same morning. The defendant Smith also signed a waiver of his right to counsel, and made a statement admitting his participation in the crime after being questioned for about an hour. Smith's statement implicated defendant Faulkner.

At the trial both defendants testified and denied their participation in the crime alleged and stated that they had not made the statements attributed to them. Defendant Smith introduced evidence to show that he was home at the time of the robbery. Defendant Faulkner introduced evidence to show that he was at the Sportsman's Boxing Club at the time of the robbery.

The jury returned a verdict of "Guilty as charged in the Bill of Indictment" as to both defendants. From a judgment sentencing them to "not less than twenty-nine (29), nor more than thirty (30) years," the defendants appeal to the Court of Appeals, assigning error.

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

Arthur Goodman, Jr., for defendant Faulkner.

Franklin L. Teague for defendant Arthur Smith.

MALLARD, C.J.

At the trial when the confessions of the defendants were sought to be introduced into evidence, the trial court held a *voir dire* as to their admissibility and made the following findings of fact and conclusion of law:

> "Based upon the foregoing testimony, this court finds as a fact that the defendant, Donald Fredrick Faulkner and the defendant Arthur Smith were advised of their right to remain silent, that anything that either of the defendants . . . that anything that the defendant said could be used against him in a court of law; thirdly, that he has the right to remain silent, I mean, has the right to the presence of an attorney during the questioning and that if he could not afford an attorney that one would be provided for him at no cost, and that any statement which either of the defendants made to the witness were knowingly, and intelligently, understandingly and voluntarily made."

G.S. 15-41 dealing with when an officer may arrest without a warrant provides in part:

> "(2) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

[1] Conceding without deciding that the arrest of defendant Faulkner at 4:00 A.M. was illegal, it has little bearing on the decision in this case. In the case of *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969), we find the following language:

> "We condemn any illegal act by police officers. However, when viewed in the narrow field of voluntary confession, we fail to see why an illegal arrest — unaccompanied by violent or oppressive circumstances — would be more coercive than a legal arrest.

> Both reason and weight of authority lead us to hold that every statement made by a person in custody as a result of an illegal arrest is not *ipso facto* involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility."

[2] In the present case, the findings of fact and conclusion of law as to the voluntariness of the statements of the defendants are amply supported by the evidence and when viewed in the totality of the circumstances of this case we hold that their admission was not error. See *Frazier v. Cupp,* 394 U.S. 731, 22 L. Ed. 2d 684, 89 S. Ct. 1420, (1969). See also *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481 (1968). However, since there were three witnesses who saw the crime committed, it may be that the Solicitor will not deem it expedient to attempt to use these statements, as such, on the new trial.

[3] The defendants contend that it was error to permit the State "to introduce the confessions of both defendants in a joint trial where the confession of each implicated the other." The defendants, by going upon the witness stand and subjecting themselves to cross-examination by the other, waived this objection. In *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968), there appears the following:

> "The result is that in joint trials of defendants it is necessary to exclude extra-judicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant . . . and (2) that the declarant will not take the stand. *If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation.*" (Emphasis added).

[4, 5] In this case, both defendants later took the stand and were accorded their right to confrontation. Defendants cite no authority supporting their contention. However, the defendants say that both of them denied having made the confession and "if cross-examination can produce nothing more than a denial by the witness that he made the statement at all, then there is no cross-examination." Defendants were brought face-to-face with each other on the witness stand. Each had the right to cross-examine the other. The right to cross-examine does not mean that the cross-examination must produce that which

is favorable. It is common knowledge that it frequently produces unfavorable results.

[6, 7] The trial judge instructed the jury that they could find each defendant guilty of armed robbery as charged or not guilty. Each of the defendants contend that the trial judge committed prejudicial error in failing to submit the lesser offense of common-law robbery. Robbery at common law is defined as "the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear." *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834 (1948). The statute G.S. 14-87 "does not add to or subtract from the common-law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission or attempted commission of the offense, sentence shall be imposed as therein directed." *State v. Jones,* 227 N.C. 402, 42 S.E. 2d 465 (1947).

In the case of *State v. Davis,* 242 N.C. 476, 87 S.E. 2d 906 (1955), it is said:

> "An indictment for robbery with firearms will support a conviction of a lesser offense such as common law robbery, assault with a deadly weapon, larceny from the person, simple larceny or simple assault, if a verdict for the included or lesser offense is supported by the evidence on the trial. *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; *S. v. Holt,* 192 N.C. 490, 135 S.E. 324."

In the case of *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954) it is said:

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

The defendants' evidence was that they did not participate in any robbery and that they were at another place at the time the crime was committed. Each defendant testified and offered evidence tending to corroborate him in his testimony that he was at another place at the time the robbery occurred. In the evidence of the defendants

there is nothing that would require the judge to charge on any lesser offense.

The State's evidence tended to show by three witnesses and the confession of each of the defendants that the two defendants robbed the cashier with a pistol. State's witness Smith testified that the defendant Arthur Smith told him that defendant Donald Faulkner got a "Roscoe" at a poolroom, and that Donald Faulkner told him that "he pulled a gun out of his pocket and hit the woman on the head."

[8, 9] A pistol is sometimes referred to as a "Roscoe." A pistol is a "short firearm, intended to be aimed and fired from one hand." Black's Law Dictionary, Fourth Edition. A gun is a portable firearm and usually includes pistols, carbines, rifles, and shotguns.

[10] The State's witness Pearline Anthony testified that the defendant Faulkner hit her on the side of the head with a pistol. On cross-examination she stated, "I couldn't be certain whether this was a real pistol or a toy pistol. It just looked like a pistol." The State's other two witnesses to the robbery testified that the defendant Faulkner had a .22 caliber pistol. This testimony of the State's witness Anthony that she couldn't be certain whether it was a real pistol or a toy pistol relates to a material element of the crime of armed robbery. This testimony is in conflict with the other testimony of this same witness that it was a pistol and required the judge, without a request from the defendants, to also charge the jury that they could return a verdict of guilty of the lesser included offense of common-law robbery. It was prejudicial error to fail to do so. If one of the witnesses could not tell whether it was a pistol or a toy, the jury should determine this conflict in the State's evidence.

[11, 12] The actual possession and use or threatened use of firearms or other dangerous weapon is necessary to constitute the offense of robbery with firearms or other dangerous weapon. Whether it was a firearm or a toy pistol, and if a toy pistol, whether it was a dangerous weapon, were questions for the jury under proper instructions. *State v. Keller,* 214 N.C. 447, 199 S.E. 620 (1938). See annotation in 61 A.L.R. 2d 996, entitled "Robbery — Toy or Simulated Gun."

Defendants make other assignments of error, but since the case goes back for a new trial, we do not deem it necessary to discuss them.

New trial.

BRITT and PARKER, JJ., concur.

LEE R. SMITH, NEXT FRIEND OF CHRISTINE SMITH, MINOR v. MARY FRANCES PERKINS

No. 6919SC244

(Filed 18 June 1969)

1. Infants § 5— action by next friend

An action to recover damages for personal injuries to a minor should be brought in the name of the infant acting by his next friend, since the next friend is not a party to the action as such but is only representing the infant plaintiff under the control of the court.

2. Appeal and Error § 49— exclusion of evidence — other evidence shows same fact

Where evidence admitted tends to establish a particular fact, the exclusion of other evidence offered for the purpose of establishing the same fact cannot be prejudicial upon review of judgment of nonsuit.

3. Trial § 14— reopening case for additional evidence

Once a plaintiff rests his case and defendant moves for nonsuit, it is discretionary with the trial court whether to allow plaintiff thereafter to introduce additional evidence.

4. Trial § 14— reopening case for additional evidence — abuse of discretion

In this action for personal injuries allegedly caused by defendant's negligence, no abuse of discretion is shown in the trial court's denial of plaintiff's motion to be permitted to reopen her case in order to offer additional evidence after plaintiff had rested and defendant had moved for nonsuit, where the additional evidence which plaintiff sought to introduce would not have been sufficient to change the court's ruling on the question of nonsuit.

5. Automobiles § 67— negligence in parking vehicle — sufficiency of evidence

In this action for personal injuries allegedly caused by the negligence of defendant in parking her automobile, the trial court properly allowed defendant's motion for nonsuit where plaintiff's evidence shows only that defendant's automobile, which was parked in a private yard, rolled backward for an undisclosed distance after plaintiff entered the front seat on the driver's side and leaned over toward the dash, and the only testimony relative to the manner of parking the automobile was given by defendant, who was called as a witness for plaintiff, that when she parked the car she put the emergency brake on and placed the gear lever in a park position, all of the evidence disclosing that defendant followed those procedures which prudent drivers customarily follow in parking their automobiles under similar circumstances.

6. Automobiles § 10— parking on steep incline — failure to scotch wheel of car

Even in parking on a steep incline, a person of ordinary prudence does not usually scotch the wheel of his car with a brick or other object absent

some factor in the situation to place him on notice that more conventional means of securing his car might prove inadequate.

7. Automobiles §§ 10, 67— negligence in parking — failure to scotch wheel of car

In this action for personal injuries allegedly caused by the negligence of defendant in parking her automobile wherein all the evidence showed that defendant put the emergency brake on and placed the gear lever in park, failure of defendant to scotch the wheel of her car with a brick or other object is not evidence of failure to use due care absent a showing that defendant's brakes or the parking mechanism of her gear shift were defective or inadequate.

8. Automobiles §§ 44, 67— negligence in parking vehicle — res ipsa loquitur

In this action for personal injuries allegedly caused by negligence of defendant in parking her automobile, the fact that the car rolled backwards when plaintiff entered it is no evidence of negligence by defendant, the doctrine of *res ipsa loquitur* being inapplicable.

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

This is a civil action to recover damages for personal injuries to Christine Smith, a minor, allegedly caused by the negligence of the defendant in parking her Ford automobile. At the trial plaintiff called defendant as a witness and defendant testified:

"I had been living at my sister's house on Craven Street at Ramseur for a month or two before March 19, 1964, and working on the third shift in Asheboro, approximately nine (9) miles away. I drove my Ford car daily to and from work and parked it daily in my sister's yard in the same position it was in when Christine Smith was supposedly hurt. I pulled up the hand brake and placed the gear lever in park position that morning when I arrived at home from my third shift job. I never put a brick or a rock under my wheels. My car had not been moved all day.

"When I woke up late in the evening on March 19, I asked my niece, Katherine Warr, to go to my car to get my billfold out of the glove compartment. I at no time asked Christine Smith to go or to run any errand for me. I did not know she was in the car, and if she was in the car, it was without my knowledge or authority."

Plaintiff also introduced in evidence a letter written by defendant to plaintiff's attorney, dated 6 August 1964, prior to institution of this action, reading as follows:

"You want to know if I left my car in gear or not. I always

left my car in Park and put the emergency brake on, because, the yard was sort of hilly. The car was an automatic drive.

"She had knocked the car in Neutral so that's why it rolled backwards. You see it was up on a small hill. And I always put a small brick under the wheel, maybe I didn't put the brick there that day. But, believe me the emergency brake was on and it was in Park."

Prior to trial the plaintiff took the adverse examination of the defendant and at the trial introduced the record thereof. In this, in addition to testifying to substantially the same facts as testified to by her at the trial, defendant testified that at the times she had parked her car at her sister's residence she had never put a brick under the wheel and that she had never had any trouble with her brakes; that after the accident she had gone out to see her car and found it "had rolled down the driveway some;" that she did not remember whether it was then in gear or park or neutral; that the brakes were still on and that she then released the emergency brake so that she could drive the car back.

The adverse examination of Christine Smith was taken prior to the trial by the defendant and the record thereof was introduced at the trial by the plaintiff. In this Christine Smith testified: That she was eighteen years old at the time of testifying in October 1968; that on the afternoon of 19 March 1964, she and her brother and sister were visiting in the Warr house; that she heard the defendant ask someone to go get her billfold; that she and Katherine Warr started to go, but Katherine said she was afraid to go because it was dark; that she then went by herself to the driver's side of the car, opened the door, and "sort of sit down and leaned over the seat to reach for the billfold" in the dash; that she did not take hold of the steering wheel or any of the driving controls; that when she got in the car, it started rolling backward, so she jumped out and the door knocked her down and the front wheel of the car ran over her left foot, injuring it; that she did not touch the gear shift, the steering wheel, or the emergency brake. Plaintiff also introduced evidence concerning the injuries to Christine Smith's foot.

Plaintiff rested, and defendant moved for nonsuit. Upon intimation from the judge that he would allow defendant's motion for nonsuit, plaintiff moved to be permitted to reopen her case in order to

call Lee R. Smith as a witness. The court denied plaintiff's motion and entered judgment of nonsuit. Plaintiff appealed.

John Randolph Ingram for plaintiff appellant.

Coltrane & Gavin, by W. E. Gavin for defendant appellee.

PARKER, J.

[1] This action to recover damages for personal injuries to a minor has been brought in the name of the next friend of the infant as the nominal party plaintiff. It should have been brought in the name of the infant, acting by her next friend. In such cases the next friend is not a party to the action as such, but is only representing the infant plaintiff under the control of the court. 1 McIntosh, N.C. Practice 2d, §§ 690, 691. However, since no question concerning this has been raised by the parties, who throughout this litigation apparently have treated the infant as the real party plaintiff, for purposes of this appeal we shall also recognize the infant as the real party plaintiff.

[2] Appellant's first two assignments of error relate to the trial court's actions in excluding certain portions of defendant's testimony taken on adverse examination and offered in evidence by plaintiff at the trial. While we think the trial court's rulings were correct, we do not find it necessary so to decide, since in any event plaintiff suffered no prejudice by exclusion of this testimony. Other testimony of the defendant which was admitted in evidence and her letter written to plaintiff's attorney, which was also admitted in evidence, tended to establish all of the same facts sought to be shown by the excluded testimony. Where evidence admitted tends to establish a particular fact, the exclusion of other evidence offered for the purpose of establishing the same facts cannot be prejudicial upon review of judgment of nonsuit. *Petty v. Print Works,* 243 N.C. 292, 90 S.E. 2d 717; 1 Strong N.C. Index 2d, Appeal and Error, § 49, p. 200.

[3, 4] Appellant's third assignment of error is directed to the court's refusal of her motion to be permitted to reopen her case in order to offer additional evidence. In this there was no error. "When the plaintiff rests his case and a demurrer to the evidence is sustained, generally no further evidence is admitted, since this would allow a party to try his case by piecemeal." 2 McIntosh, N.C. Practice 2d, § 1488. Once a plaintiff rests his case and defendant moves for nonsuit, it is discretionary with the trial court whether to allow plaintiff thereafter to introduce additional evidence. *Featherston v. Wilson,* 123 N.C. 623, 31 S.E. 843. Clearly in this case there was no abuse of the

trial court's discretion. The additional evidence which appellant sought to introduce related only to the method of engaging the emergency brake on the type of car which was involved in this litigation. Even had this evidence been timely introduced, it would not, in our opinion, have been sufficient to change the court's ruling on the question of nonsuit.

[5] Appellant's final assignments of error are directed to the court's allowance of defendant's motion of nonsuit. In this there was no error. Plaintiff in her complaint alleged that her injuries had been caused by defendant's negligence in parking her car in that defendant: (1) Failed to effectively set the parking brake; (2) failed to turn her front wheels toward the side of the drive; (3) failed to engage the transmission or to place the car in park; (4) failed to maintain adequate brakes; and (5) failed to scotch a wheel of the car with a brick. Viewing all of plaintiff's evidence in the light most favorable to her and resolving all discrepancies therein in plaintiff's favor, we find no evidence of any negligence on the part of the defendant sufficient to submit an issue on that question to the jury. The only evidence relative to the manner of parking the car was that contained in the testimony of the defendant, who was called by plaintiff as plaintiff's own witness. The defendant testified that when she parked her car in the morning she put the emergency brake on and placed the gear lever in park position. It was parked in a private yard, not on a public street. The only evidence as to terrain is that "the yard was sort of hilly" and that the car "was up on a small hill." It is uncontroverted that the car remained stationary all day, and then "rolled down the driveway some," for an undisclosed distance, only after plaintiff had entered the front seat on the driver's side and had leaned over toward the dash. There was no evidence that the brakes were defective or that placing the gear shift in park position would have been inadequate to secure the car. All of the evidence discloses that defendant followed those procedures which prudent drivers customarily follow in parking their vehicles under similar circumstances.

[6, 7] Plaintiff's brief stresses the discrepancy in defendant's testimony given on adverse examination and again on the trial, to the effect that she had never scotched the wheel of her car with a brick, with the statement in her letter, written four years previously, that she "always put a small brick under the wheel." Whichever version may have been true, there was here no evidence of defendant's negligence. Even in parking on a steep incline, a person of ordinary prudence does not usually scotch the wheel of his car with a brick or

other object, at least absent some factor in the situation to place him on notice that more conventional means of securing his car might prove inadequate. And even if defendant may have on some previous occasions taken this additional precaution, she would not forever thereafter be required to continue to do so. Her failure to do so on the particular occasion here involved is no evidence of failure to use due care, absent any showing that her brakes or the parking mechanism of her gear shift were defective or inadequate. There was here no such showing.

[8] The fact that after plaintiff had entered the car it did in fact roll "down the driveway some," is no evidence of any negligence on the part of the defendant. The doctrine of *res ipsa loquitur* does not apply. *Warren v. Jeffries,* 263 N.C. 531, 139 S.E. 2d 718.

The case of *McCall v. Warehousing, Inc.,* 272 N.C. 190, 158 S.E. 2d 72, is clearly distinguishable. In that case defendant driver had parked a heavy tractor-trailer unit at a loading dock in such position that the trailer was level but the tractor was on an incline, down which the driver knew plaintiff's intestate was working. After making some apparently unsuccessful efforts to disconnect the tractor from the trailer, the driver left the vehicle unattended. Within minutes after he left, the tractor disengaged from the trailer, rolled forward down the incline, and ran over the plaintiff's intestate. The driver admitted that the air brakes were cut off, that he did not remember setting the emergency brake, and that he had not placed wooden blocks, which had been provided for that purpose, under the wheels of the tractor. He assumed that the tractor and trailer were still securely joined together. Under these circumstances, the Supreme Court held that evidence of negligent acts were amply sufficient to go to the jury.

The case of *Arnett v. Yeago,* 247 N.C. 356, 100 S.E. 2d 855, is also distinguishable. In that case the defendant left her car unattended headed downhill on a street in a thickly populated neighborhood with knowledge a number of small children were about. Defendant failed to set the hand brake or to turn the front wheels toward the curb, depending on leaving the gear shift in reverse to hold the car in place. Additionally, there was evidence the gear shift could be easily moved and that defendant left the left front door of the car open. A three year old child climbed in the car and it thereafter moved downhill, injuring the child. The Supreme Court held that under these circumstances the jury could legitimately find defendant negligent.

The evidence of negligence present in the *McCall* and *Arnett* cases is completely lacking in the present case.

In the trial and in the judgment of nonsuit we find

No error.

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

STATE OF NORTH CAROLINA v. WILLIE LEE BARBER AND DANIEL TERRY

No. 6926SC251

(Filed 18 June 1969)

1. Criminal Law § 115— joint trial — instruction as to possible verdicts

Where the evidence against each of the two defendants charged was not identical, the trial court should submit the question of the guilt or innocence of each separately, and an instruction which requires the jury to find both defendants guilty as charged or both not guilty is error.

2. Burglary and Unlawful Breakings § 7— felonious breaking and entering — instructions on intent

An instruction that the defendants would be guilty of felonious breaking and entering if the jury should find that defendants broke or entered a motel room with intent to commit the crime of larceny "or other infamous crime" *is held* erroneous where the defendants were not charged with the intent to commit any crime other than larceny.

3. Larceny § 10— punishment

Nothing else appearing, larceny of goods of the value of not more than two hundred dollars is a misdemeanor for which the maximum imprisonment is two years. G.S. 14-72.

4. Larceny § 8— felonious larceny — goods less than $200 — instructions

In a prosecution charging defendants with the larceny of goods of the value of less than $200 after breaking and entering with intent to steal, failure of the trial court to instruct the jury that in order to convict of the felony of larceny they must find the goods were stolen after the building was broken or entered with intent to steal, *held* error.

5. Criminal Law § 154— record on appeal — duty of appellant

It is the duty of the appellant to see that the record is properly made up and docketed in the Court of Appeals.

6. Concealed Weapons § 2— punishment — excessive sentence

Sentence of ten years imprisonment imposed upon conviction of the offense of carrying a concealed weapon is in excess of the two-year maximum permitted by statute. G.S. 14-269.

APPEAL by defendants from *Falls, J.,* 6 January 1969 Schedule "B" Session of Superior Court of MECKLENBURG County.

The defendants were tried upon what purports to be a written information in the form of a bill of indictment, signed by the Solicitor. In this they are charged with the felony of breaking and entering with intent to steal, with the felony of larceny of a television set and a watch of the value of $125.00 after breaking and entering with intent to steal, and with the misdemeanor of receiving said property knowing it to have been stolen. Each charge begins with the words "The Jurors for the State upon their oath present." This instrument was not returned by the grand jury as a true bill but following it on the record appears the following words signed by each defendant and his attorney:

> "The foregoing information has been read and explained to me and I do hereby waive the finding of a bill of indictment by the Grand Jury upon the advice of my attorney and counsel. I have requested my counsel to sign this waiver."

There is no warrant, bill of indictment, or waiver thereof in this record charging the defendant Daniel Terry with carrying a concealed weapon in violation of G.S. 14-269.

Each defendant pleaded not guilty. Trial was by jury. The verdict was guilty as to both defendants of the crime of "breaking into and entering the room 909 of the James Lee Motor Inn with the felonious intent to commit the felony of larceny or other infamous crime therein." The verdict was guilty as to both defendants "of the larceny of the Timex Lady's Wrist Watch." The verdict was guilty as to Daniel Terry of "carrying a concealed weapon."

The judgment as to Willie Barber was:

> "In the count charging felonious breaking and entering, IT IS THE JUDGMENT OF THE COURT that the defendant be confined in the State Prison in Raleigh, North Carolina at hard labor for ten years. In the count charging larceny by reason of felonious breaking and entering, IT IS THE JUDGMENT OF THE COURT that the defendant be confined in the State's Prison in Raleigh for a period of ten years. This sentence to commence at the expiration of the sentence pronounced in the breaking and entering count

and is to be served separate from, and in addition thereto, and not to run concurrently therewith."

The judgment as to Daniel Terry was:

"In the case of Daniel Terry 68-CR-201 and 68-CR-202, consolidated for the purpose of Judgment. * * * IT IS THE JUDGMENT OF THE COURT that the defendant be confined in the State's Prison in Raleigh, North Carolina for ten years."

The defendants assign error and appeal to this Court.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Trial Attorney J. Bruce Morton for the State.

T. O. Stennett for defendant Willie Lee Barber appellant.

Robert F. Rush for defendant Daniel Terry appellant.

MALLARD, C.J.

The State's evidence tended to show that on 30 October 1968 Miss Laura Blanch Smith lived in room 909 at the James Lee Motor Inn in Charlotte. Miss Smith testified that she had retired and gone to sleep on the night of 29 October 1968 and was awakened by the defendant Barber knocking on her door a little after ten o'clock. She had never seen Barber before this occasion. Barber told her that a gentleman wanted to see her downstairs. She didn't go, but closed the door, left a light on in her room and went back to bed. She was awakened again after midnight and Barber was in her room. When she jumped out of bed, Barber grabbed her and began choking and beating her. In doing so he knocked two of her teeth out causing her mouth to bleed and she also received two fractured ribs. Defendant Terry entered the room a few seconds after defendant Barber. She also testified that while Barber was beating and choking her Terry "was just scurrying around the room, dismantling things and getting the television loose, I assume." After the defendants tied her feet and tried to gag her and tie her hands behind her back, they left together. Barber took from her room a television set that she had borrowed from Mrs. Tommy Howell. After the defendants left her room Miss Smith's Timex ladies wrist watch was missing. The State's evidence further tends to show that when the defendants were arrested at approximately 12:30 A.M. they were together and the defendant Barber dropped Miss Smith's Timex watch and the police officer recovered it. The police officer did not see the defendants with a television set. No evidence was offered as to any specific value of the Timex

watch owned by Miss Smith. The watch was offered into evidence against the defendant Barber but not against the defendant Terry.

Neither of the defendants testified or offered any evidence.

[1] Defendants contend that since the evidence against each defendant was not identical, the trial judge committed prejudicial error in failing to instruct the jury that they could convict or acquit one or both of the defendants. In the case of *State v. Massengill*, 228 N.C. 612, 46 S.E. 2d 713 (1948), the Supreme Court said, "The evidence against the three defendants was not identical as to each, and the jury should have been instructed they had the right, if they so found the facts to be, to convict or acquit one or more of them. The defendants were entitled to have the question of the guilt or innocence of each, on the evidence presented, submitted to the Jury."

In the case before us the record reveals that the trial judge failed to instruct the jury that they could convict one defendant and acquit the other on the charges of breaking and entering and larceny. The jurors were limited in the verdicts they were instructed they could return on these counts to finding both defendants guilty as charged or both not guilty.

The evidence in this case was not identical. Under the circumstances of this case each defendant had the right to have his case considered by the jury solely on the evidence presented and admitted against him. It was the duty of the trial judge to declare and explain the law arising on the evidence given against each defendant. It was the duty of the jury to give consideration to the guilt or innocence of each defendant. We think it was prejudicial error to fail to instruct the jury they could convict or acquit one or both of the defendants on the charges of breaking and entering, and larceny.

[2] The court in its charge to the jury as to the first count informed the jury that it would be their duty to return a verdict of guilty of felonious breaking and entering if the defendants "broke into or entered the said room with intent to commit the crime of larceny *or other infamous crime.*" (Emphasis added). The vice in this instruction is that the defendants were not charged in the "information" with the intent to commit any crime other than larceny.

The court, after instructing the jury as to the first count of breaking or entering, said:

> "So, regardless of how you find as to the first count, Members of the Jury, you will, [then consider and determine whether the defendants are guilty of the crime of larceny as charged in the

second count in the Bill of Indictment. If you find from the evidence and beyond a reasonable doubt that the defendants took and carried away the property of Miss Smith, that is, a wrist watch, that the same was carried away without the consent of Miss Smith and against her will, that such property was taken and carried away by the defendants with the felonious intent to deprive her, that is, the rightful owner of her property permanently and convert the same to their own use, that is, the defendants' use or to the use of some person other than the true owner, if you find these to be the facts beyond a reasonable doubt, then it would be your duty to render a verdict of guilty. If you fail to so find, it would be your duty to render a verdict of not guilty, or if upon a fair and impartial consideration of all the facts and circumstances in the case you have a reasonable doubt as to the defendants' guilt, it would be your duty to give them the benefit of such doubt and to acquit them.]"

Although the defendants except and argue the insufficiency of the above portion of the charge on larceny in brackets with respect to the failure of the judge to properly present to the jury the guilt or innocence of each defendant, we think it proper and appropriate to discuss other error appearing therein.

[3, 4] Nothing else appearing, larceny of goods of the value of not more than two hundred dollars is a misdemeanor. G.S. 14-72. The maximum imprisonment for the misdemeanor of larceny is two years. *State v. Ford,* 266 N.C. 743, 147 S.E. 2d 198 (1966). G.S. 14-72 divides the crime of larceny into two degrees, one a misdemeanor, the other a felony. *State v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745 (1957). The defendants were charged in the "information" with larceny of goods of the value of less than $200.00 after breaking and entering with intent to steal. The court did not give the jury any instructions with respect to the value of the watch that was stolen. Neither did the court instruct the jury that in order to convict of the felony of larceny as charged in this case, they must find that the watch was stolen after the building was broken or entered with intent to steal. The failure to do so was prejudicial error. If the watch had some value and was stolen after a felonious breaking or entering, the larceny thereof was a felony regardless of its value. If it was stolen without a felonious breaking or entering, the larceny thereof was a misdemeanor if its value was not more than two hundred dollars. In this case there was no evidence of the value of the watch other than circumstantial evidence tending to show it had some value. The jury found the defendants guilty of larceny, but there is nothing in the

verdict to indicate whether the jury found them guilty of the misdemeanor of larceny or the felony of larceny.

[5, 6] The defendant Daniel Terry also appealed from the conviction of carrying a concealed weapon. The warrant, if there is one, is not included in this record. It is the duty of the appellant to see that the record is properly made up and docketed in the Court of Appeals. *State v. Stubbs,* 265 N.C. 420, 144 S.E. 2d 262 (1965). There is no assignment of error specifically relating to the charge of carrying a concealed weapon, and no error with respect thereto appears upon the face of the record other than the judgment of imprisonment for ten years is excessive if, as indicated, case number 68-CR-202 is the case against the defendant Daniel Terry for carrying a concealed weapon. The maximum imprisonment that may be imposed upon a defendant convicted of carrying a concealed weapon in violation of G.S. 14-269 is two years. See also *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34 (1967). In the case before us this charge was consolidated for punishment with the felony of breaking and entering and larceny and a sentence of ten years was imposed. This judgment of ten years imprisonment on the charge of carrying a concealed weapon is in excess of that permitted by statute; it is therefore ordered that the sentence be vacated and it is hereby remanded to the Superior Court of Mecklenburg County in order that proper judgment may be imposed.

Defendants bring forward and argue other assignments of error which may not recur on a new trial, and we do not deem it necessary to discuss them.

The result is, as to the charge against Daniel Terry for carrying a concealed weapon, the sentence is vacated and the cause remanded for proper judgment.

The result is, as to the charges of breaking and entering, larceny, and receiving, as set out in the "information," both defendants are entitled to a new trial.

New trial.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. GEORGE JUNIOR JENNINGS

No. 6918SC183

(Filed 18 June 1969)

1. Criminal Law § 104— motion for nonsuit — consideration of evidence

On motion for nonsuit in a criminal action, 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 in the State's evidence are for the jury and do not warrant nonsuit.

2. Homicide § 21— second degree murder — sufficiency of evidence

The State's evidence *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of second degree murder or manslaughter where it tends to show that during a gun battle with deceased, defendant intentionally shot deceased with a rifle, thereby causing his death.

3. Criminal Law §§ 95, 113— evidence competent only for impeachment — request for instructions

In this prosecution for second degree murder, the trial court did not err in failing to instruct the jury that evidence of defendant's prior convictions brought out on cross-examination of defendant by the solicitor should be considered only for the purpose of impeaching defendant's credibility where defendant made no request for such an instruction.

APPEAL by defendant from *Lupton, J.*, at the 9 December 1968 Criminal Session of GUILFORD Superior Court, High Point Division.

By indictment proper in form, defendant was charged with the murder of Willie Edward Gibson on 20 July 1968. When the case was called for trial, the solicitor for the State announced that the State would not ask for a verdict of murder in the first degree but would seek conviction of murder in the second degree or manslaughter. Defendant pleaded not guilty.

The evidence introduced at the trial is summarized as follows: For more than five years prior to 20 July 1968, defendant had known and had been seeing Naomi Gibson, wife of the deceased, Willie Gibson. Deceased had known of the relationship between his wife and the defendant for approximately four years but had continued to live with his wife and six children until Wednesday before his death on Saturday. On Wednesday, 17 July 1968, defendant took Mrs. Gibson and her six children from the Gibson residence and left them at the home of one of her relatives in the Florence community of Guilford County. Mrs. Gibson and the children remained there until the following Friday when they moved into the home of Mrs. Gibson's father, Lacy Clawson, who lived two doors from the home

where they had been since Wednesday. Around noon on Saturday, 20 July 1968, as defendant was returning to his home from work, deceased (Gibson) drove up beside the defendant, sounded his horn and motioned for defendant to stop. After stopping, defendant got out of his car and Gibson inquired if defendant knew where Mrs. Gibson was; defendant replied that he had heard that she was at her sister's. The two then went their respective ways. Around 1:00 p.m., defendant went to the home where Mrs. Gibson was staying and visited with her for a few minutes. A little later that afternoon as defendant was traveling on Penny Road, he met Gibson who pulled across the road in front of defendant and stopped, causing defendant to stop. Gibson walked up to defendant's car, jerked the door open, cursed defendant and struck defendant on his forehead and nose with a hard object. Defendant kicked Gibson off him and drove away. A short while later defendant, with a loaded .22 rifle in his car, drove to the Florence community; he saw the car Gibson had been driving in the driveway of the Clawson home where Gibson's wife and children were staying. Defendant parked on the edge of Bundy Road with part of his car on the paved surface of the road and part of it in the driveway of the Clawson residence. Shortly after defendant drove up, Gibson walked out of the Clawson house, obtained a .32 caliber pistol from his automobile and walked toward defendant's automobile. Gibson pointed his pistol toward defendant who was still seated in his car; defendant took his rifle and pointed it toward Gibson. Gibson ran to the rear of defendant's car and shot through the rear window of the car, after which defendant stuck his rifle out the window and fired several shots. Gibson then ran across Bundy Road, climbed a low bank on the opposite side of the road and again aimed his pistol at defendant. Defendant opened the door of his car and fired several shots in Gibson's direction. There was conflict in the testimony as to whether defendant shot at Gibson when Gibson first approached defendant's automobile. In any event, at some time during the altercation, two bullets from defendant's rifle struck Gibson, one causing a superficial wound over his armpit and the other striking him near his navel. Gibson fell to the ground, after which defendant and several others went to him and saw that he was critically wounded. While someone else called for an ambulance, defendant left in his automobile and drove to the home of a High Point police officer, advising the officer that he had shot a man and gave the officer his rifle. Medical testimony was to the effect that the bullet which entered Gibson's abdomen caused a hemorrhage resulting in death.

The jury returned a verdict finding the defendant guilty of man-

slaughter, and from a prison sentence of not less than seven nor more than ten years, defendant appealed.

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

Schoch, Schoch & Schoch by Arch K. Schoch, Jr., for defendant appellant.

BRITT, J.

[1] Defendant first assigns as error the overruling of his motion for nonsuit. It is well established in this jurisdiction that on motion to nonsuit in a criminal action, 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. 2 Strong, N.C. Index 2d, Criminal Law, § 104, pp. 648-650.

In *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305, in an opinion by Parker, C.J., we find the following:

> "* * * When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased or the defendant admits that he intentionally shot the deceased, and thereby proximately caused his death, it raises two presumptions against him: (1) That the killing was unlawful, and (2) that it was done with malice. This constitutes the felony of murder in the second degree. *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387; *S. v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83; *S. v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337; 2 Strong, N.C. Index, Homicide, § 13. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. *S. v. Gordan,* 241 N.C. 356, 85 S.E. 2d 322; *S. v. Phillips, supra.* When the presumption from the intentional use of a deadly weapon obtains, the burden is upon defendant to show to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter or that will excuse it altogether upon the grounds of self-defense. *S. v. Mangum, supra* [245 N.C. 323, 96 S.E. 2d 39]; *S. v. McGirt,* 263 N.C. 527, 139 S.E. 2d 640; *S. v. Todd,* 264 N.C. 524, 142 S.E. 2d 154. When defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter. 2 Strong, N.C. Index, Homicide, § 13. It was incumbent upon defendant

upon a plea of self-defense to satisfy the jury (1) that he did act in self-defense, and (2) that, in the exercise of his right to self-defense, he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. *S. v. McDonald,* 249 N.C. 419, 106 S.E. 2d 477. It is hornbook law that if excessive force or unnecessary violence is used in self-defense, the killing of the adversary is manslaughter at least. *S. v. Cox,* 153 N.C. 638, 69 S.E. 419; *S. v. Glenn,* 198 N.C. 79, 150 S.E. 663; *S. v. Terrell,* 212 N.C. 145, 193 S.E. 161; *S. v. Mosley,* 213 N.C. 304, 195 S.E. 830. * * *"

[2] Applying the well-established principles above-stated to the evidence in this case, we hold that the evidence was sufficient to be submitted to the jury and the trial court did not err in overruling defendant's motion for nonsuit. The assignment of error is overruled.

[3] Defendant's next assignment of error relates to the solicitor's cross-examination of defendant with regard to previous criminal convictions without instructions by the court limiting such evidence to impeachment of defendant's credibility. The record discloses that although defendant's counsel objected to the questions of the solicitor and moved to strike the answers, he did not request the trial judge to instruct the jury to limit consideration of the evidence to impeachment purposes. In *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310, it is said:

"Admissions as to convictions of unrelated prior criminal offenses are not competent as substantive evidence but are competent as bearing upon defendant's credibility as a witness. Stansbury, North Carolina Evidence, Second Edition, § 112; *State v. Sheffield,* 251 N.C. 309, 312, 111 S.E. 2d 195, 197. No request was made that the court so instruct the jury. 'It is a well recognized rule of procedure that when evidence competent for one purpose only and not for another is offered it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent.' *State v. Ray,* 212 N.C. 725, 729, 194 S.E. 482, 484; Stansbury, *op. cit.,* § 79; Rule 21, Rules of Practice in the Supreme Court, 254 N.C. 803. * * *"

We hold that in the absence of a request by defendant's counsel that the testimony be received for the limited purpose of impeachment, the trial court did not err and the assignment of error related thereto is overruled.

Defendant's remaining assignments of error relate to the trial court's instructions to the jury. We do not deem it necessary to discuss these assignments of error; suffice to say, we have carefully considered the charge and find it to be free from prejudicial error. The assignments of error relating thereto are overruled.

The defendant received a fair trial and the sentence imposed was well within the limit provided by statute.

No error.

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

HALLETT WARD WHITLEY AND WIFE, KATHLEEN C. WHITLEY v. DICK O'NEAL AND WIFE, DAPHNE D. O'NEAL

No. 692SC128

(Filed 18 June 1969)

1. Pleadings § 2— theory of pleadings

A party is entitled to any relief justified by the material facts alleged in his pleading and established by proof, even though such facts do not justify recovery on his original theory.

2. Fraud § 4— allegation of intent to deceive

In order for a promissory representation to be the basis of an action for fraud, facts must be alleged from which it may reasonably be inferred that defendant did not intend to carry out such representation when it was made.

3. Contracts § 25— breach of contract — sufficiency of allegations

Allegations that plaintiffs and defendants agreed to sell property which they jointly owned and to divide the proceeds evenly, that plaintiffs conveyed their one-half interest in the property to the purchaser and the proceeds actually received were divided evenly, but that defendants secretly retained a 20/100 interest in the property, *are held* to state a cause of action for breach of contract.

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

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

5. Contracts § 27— breach of contract — sufficiency of evidence

In an action for breach of a contract to sell property which plaintiffs and defendants jointly owned and to divide the proceeds evenly, the court

erred in granting defendants' motion for nonsuit where plaintiffs' evidence tended to show that the proceeds actually received from the sale were divided evenly but that defendants secretly retained a 20/100 interest in the property, the interest in the property retained by defendants being "proceeds" of the sale and the proceeds of the sale not having been divided evenly.

6. Appeal and Error § 4— theory of trial in lower court

While as a general rule a party will not be allowed to change theories when he reaches an appellate court even though the pleadings and proof justify a recovery based upon a theory not asserted in the trial court, there is no rigid rule which prevents an appellate court from considering a theory not considered below.

7. Appeal and Error § 4— review of nonsuit — pleadings and proof support theory not asserted in trial court

Judgment of nonsuit entered in the trial court is reversed by the Court of Appeals where the pleadings and proof show a breach of contract, notwithstanding plaintiffs argued their case in the trial court on the theory of fraud.

APPEAL from *Cowper, J.*, 21 October 1968 Civil Session, Superior Court of BEAUFORT.

Plaintiffs allege that by deed dated 1 August 1966 Roy Kessinger and wife conveyed to the plaintiffs and defendants a one-half interest each in certain property located within the town of Nags Head, North Carolina. Simultaneously with this transaction, a deed of trust was executed in the amount of $24,400, for the benefit of Roy Kessinger. Plaintiffs allege that following the conveyance, the property was operated as a general store and motel until 16 September 1966. On this date, plaintiffs and defendants agreed to sell the property provided they could find a suitable purchaser at a suitable price. Further, it was agreed between plaintiffs and defendants on this date that the total consideration received from the sale would be divided one-half to plaintiffs and one-half to defendants. These allegations are admitted by the defendants, but defendants aver that the agreement was not in writing and plead the statute of frauds.

Plaintiffs allege that in February 1967 the defendant, Dick O'Neal, told him that he had found a purchaser for the property in question at a price of $31,400, subject to the deed of trust for $24,400. Defendants, at this time, assured the plaintiffs that they would receive one-half of all that the property sold for. On 6 February 1967 plaintiffs executed a deed conveying their one-half interest in the property to Donald B. Freeman, and others, upon the assurance by the defendants that $31,400 was the full and complete purchase price. Plaintiffs allege and defendants admit that at the time of the con-

veyance plaintiffs were paid $4,000 plus one-half of the checking account of the business. It is admitted that on 1 March 1967 the defendants executed a deed for 30/100 interest in the property in question to Donald B. Freeman, and others. It is denied that the defendants were paid the equivalent of $4,000 plus one-half of the checking account of the business. Plaintiffs allege that the 20/100 interest retained by the defendants in the property in question was worth approximately $6,000; that the representations by the defendants to the effect that $31,400 was the total selling price and that the plaintiffs were receiving one-half of this amount were false and fraudulent; that in truth and fact the defendants were receiving $6,000 more from this transaction than the plaintiffs; and that the plaintiffs are entitled to recover of the defendants the sum of $3,000 which represents one-half of the value of the 1/5 interest retained by the defendants.

Plaintiffs' evidence tends to show that the plaintiffs and defendants operated the general store and motel located on the property in 1966 during the month of August and part of September. In September 1966 the parties agreed to sell the property and divide the proceeds, one-half to plaintiffs and one-half to defendants. Dick O'Neal later got in touch with the plaintiffs and told them that he had found a buyer for the property for $31,400, subject to the deed of trust. The purchasers were to pay $7,000 cash and assume the mortgage of $24,400. Dick O'Neal told the plaintiffs that this amount would be divided evenly. On 6 February 1967 the plaintiffs conveyed their one-half interest in the property to Donald B. Freeman, and others, receiving $4,000 in cash and one-half of the checking account of the business. Plaintiffs testified that the defendants received from this transaction $3,000 in cash, equipment from the business worth approximately $1,000, and one-half of the checking account. Sometime later, the plaintiffs learned that the defendants had conveyed only a 30/100 interest in the property and retained a 20/100 interest. Plaintiff Hallett Ward Whitley testified that upon learning this, he went to see Mr. O'Neal and his wife and the following conversation took place:

> "I asked him 'Don't you think I came out kind of short leg on this deal down here to Nags Head?' I said 'You all got the same money I got and you still own a fifth interest in it.' He said 'Somebody pulled one on you this time, didn't they, Hallet Ward?' "

Plaintiff Hallett Ward Whitley testified, over objection, that the defendant Dick O'Neal stated that he (O'Neal) received the same

dollar value as the plaintiff plus 1/5 interest in the property. Plaintiff Whitley stated that in his opinion the fair and reasonable market value of the 1/5 interest retained by defendants was approximately $6,000.

At the close of the plaintiffs' evidence the trial court allowed the defendants' motion for judgment as of nonsuit. From the entering of this judgment the plaintiffs appealed.

LeRoy Scott for plaintiff appellants.

John A. Wilkinson for defendant appellees.

MORRIS, J.

[1, 2] In oral argument in this Court, the defendant's entered a demurrer ore tenus on the ground that the plaintiffs' complaint does not state a cause of action. There is some confusion as to what theory plaintiffs are relying upon in seeking relief. Their complaint, apparently, attempts to set forth a cause of action based upon fraud. North Carolina does not follow the strict rule that a party must succeed, if at all, only upon the theory set forth in his pleading. "This strict rule savors of the technicalities of the common law system; and North Carolina follows the more liberal view that the party is entitled to any relief justified by the material facts alleged in his pleading and established by proof, even though such facts do not justify recovery on his original theory." 1 McIntosh, N.C. Practice 2d, § 999. The facts alleged and established are controlling. *Lytton Mfg. Co. v. House Mfg. Co.*, 161 N.C. 430, 77 S.E. 233. Plaintiffs' complaint does not sufficiently state a cause of action based upon fraud because it is not alleged that the statements made to the plaintiffs by the defendant Dick O'Neal concerning the selling price of the land and the division of the proceeds were made with the knowledge that they were false. In order for a promissory representation to be the basis of an action for fraud, facts must be alleged from which a court and jury may reasonably infer that the defendant did not intend to carry out such representations when they were made. *Hoyle v. Bagby*, 253 N.C. 778, 117 S.E. 2d 760. This amounts to a misrepresentation of an existing fact.

[3, 4] Paragraph No. 5 of the plaintiffs' complaint contains the following:

> "That thereafter, plaintiff operated the aforesaid property as a store and motel until September 16, 1966. That plaintiffs and defendants agreed to sell the said property, provided they could

> find a suitable purchaser at a suitable price. That it was agreed between plaintiffs and defendants that the total consideration received for the sale of said property would be divided one-half to plaintiffs and one-half to defendants. That both plaintiffs and defendants began searching for a buyer for the above property."

The allegations contained in this paragraph are admitted by the defendants. We think these allegations, along with other allegations to the effect that the defendants conveyed only 30/100 of the property, retained a 20/100 interest, and received the equivalent of $4,000 plus one-half of the checking account, constitute a cause of action based upon a breach of contract. Defendants argue that this contract is not enforceable because of the statute of frauds. However, "[i]t is clear that in North Carolina an oral contract to divide the profits from the purchase and sale of real estate is not within the statute of frauds. *Newby v. Realty Co.*, 180 N.C. 51, 103 S.E. 909, 182 N.C. 34, 108 S.E. 323; *Brogden v. Gibson*, 165 N.C. 16, 80 S.E. 966." *Cook v. Lawson*, 3 N.C. App. 104, 164 S.E. 2d 29. Defendants' demurrer is overruled.

[5] It is alleged and admitted that on 16 September 1966 plaintiffs and defendants agreed to sell the property in question and divide the proceeds. We think the 20/100 interest in the property retained by the defendants must be considered to be "proceeds" of the sale just as if they had conveyed all of their interest in the property and received interest in unrelated property plus the same amount of cash that the plaintiffs received. In either case we do not think that it can be said that there has been an equal division of the "proceeds" of the sale. Thus, the contract between the plaintiffs and defendants has been breached. We think plaintiffs' evidence was sufficient to support their allegations for recovery based upon the theory of breach of contract; therefore, the judgment of nonsuit entered below was improper.

[6, 7] It is apparent from the briefs and oral arguments that plaintiffs argued this case in the trial court on the theory of fraud, and that the theory discussed herein has not previously been argued. We recognize the general rule that a party will not be allowed to switch theories when he gets to the appellate court, even though the pleadings and proof justify a recovery based upon a theory unasserted in the trial court. *Thrift Corp. v. Guthrie*, 227 N.C. 431, 42 S.E. 2d 601.

> "However, there is no rigid rule which prevents the Supreme Court from considering a theory not considered below. Thus, upon plaintiff's appeal from judgment of nonsuit entered at the

close of the evidence, the Supreme Court has considered theories of recovery not advanced by plaintiff's attorney in his argument to the trial judge. And when the plaintiff has recovered on a theory untenable to the Supreme Court, but the facts alleged and proved justify recovery on some other theory, the court, while reversing the judgment, will not direct judgment for defendant, but will remand the case for a new trial on the tenable theory." 1 McIntosh, N.C. Practice 2d, § 999(5), p. 562.

Also, see *Jackson v. Parks*, 216 N.C. 329, 4 S.E. 2d 873; and *Voorhees v. Porter*, 134 N.C. 591, 47 S.E. 31, where new theories were considered on an appeal by plaintiff from a judgment of nonsuit.

For the reasons stated, we think there must be a

New trial.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. MARGARET RUTH HORTON

No. 6922SC147

(Filed 18 June 1969)

1. Criminal Law § 104— motion to nonsuit — consideration of evidence — scintilla rule

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State; and when so considered, if there is more than a scintilla of competent evidence to support the allegations in the warrant or bill of indictment, it is the duty of the court to overrule the motion and to submit the case to the jury.

2. Criminal Law § 104— motion to nonsuit — consideration of evidence

On motion to nonsuit, the State is entitled to the benefit of every reasonable inference which may be fairly drawn from the evidence.

3. Conspiracy § 3— criminal conspiracy defined

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.

4. Conspiracy § 3— conspiracy to commit a felony

A conspiracy to commit a felony is a felony.

5. Conspiracy § 3— completion of agreement

The crime of conspiracy is complete when the agreement is made.

6. Conspiracy § 3— overt act

It is not required that an overt act be committed before the conspiracy becomes criminal.

7. Conspiracy § 3— prosecution of conspirators — number of defendants

Although at least two persons are required to create a conspiracy, it is not required that more than one person be prosecuted for the offense.

8. Conspiracy § 6— criminal conspiracy to murder husband — sufficiency of evidence — exculpatory testimony

In a prosecution charging that femme defendant conspired with two other persons to murder her husband, which conspiracy was abortive, defendant's motion for nonsuit was properly denied, notwithstanding that much of the co-conspirators' testimony was to the effect that they had no intention of killing defendant's husband but only sought to obtain money from her, where State offered evidence that defendant asked one co-conspirator to procure someone to kill her husband for her, that defendant and the co-conspirator went to an airport to meet the other co-conspirator who had purportedly arrived from New York, that defendant paid the co-conspirators $2550 and directed them to an abandoned farm house where her husband went almost every day, and that one co-conspirator purchased bullets for his .38 pistol and testified that "I received the money for doing just what we were talking about, to kill him."

APPEAL by defendant from *Johnston, J.*, at the 21 October 1968 Criminal Session of IREDELL Superior Court.

In a bill of indictment returned by an Iredell County grand jury, defendant was charged as follows:

> "* * * [T]hat Margaret Ruth Horton late of the county of Iredell, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty-seven, with force and arms, at and in the county aforesaid, and from said date up to and through the 22nd day of November, 1967, with force and arms at and in the county aforesaid, unlawfully, wilfully and feloniously, in secret and with malice, did conspire in combination agreement and union of purpose of mind with Robert Lee James, Carl Ruben Deal and person or persons unknown to the State to unlawfully, wilfully and feloniously and with malice aforethought kill and murder one Lee Roy Horton, late of the County of Iredell, now deceased; against the form of the statute in such case made and provided and against the peace and dignity of the State."

The evidence most favorable to the State tended to show: Defendant and her husband were having marital difficulties. In October 1966, Attorney Arthur S. Beckham, Jr., while standing in front of

the courthouse, overheard a conversation between defendant and her husband in which she said, "I'll see you dead and burning in hell before you'll divorce me or keep my children." Robert Lee James (James) became acquainted with defendant in January 1967 when she was working as a waitress in a restaurant. In late April 1967, defendant went to James' home and handed him a note with her telephone number on it. James called the defendant the next day and they made arrangements to meet each other on the Charlotte highway. That night between eight and nine, they rode to an old abandoned farm house owned by defendant. She told James she had been having trouble with her husband and they agreed to meet again the following night. On that occasion, defendant asked James if he knew anybody that she might get to do something to her husband. James asked her if she wanted him "beat up or roughed up"; she replied, "I want a little more than that." James told defendant he knew a man who might do something like that for defendant and she inquired as to what it would cost. James stated that he did not know but would contact the man in New York and get him to come down there. Defendant told James to contact the man, and they drove back to Statesville and stopped at a Texaco station. James made a telephone call from a pay station to Carl Deal (Deal) in Taylorsville but left the impression with defendant that he had made a call to New York. A day or two later James and defendant drove to the Charlotte airport for the purpose of meeting Deal, who was driving there from Taylorsville, but James and Deal wanted defendant to think Deal arrived on a plane from New York. James had a .38 pistol and bought some bullets for it. James introduced Deal as Joe Fratt and the three of them returned to the abandoned farm house near Statesville. Defendant asked Deal what he was going to charge her for getting the job done and he replied, "Five." She asked if he meant five hundred and Deal replied five thousand but that amount would take care of James' part. Defendant paid Deal $1250.00 that night and agreed to pay him more the next night. Defendant advised James and Deal that her husband came to the abandoned farm house practically every day and if they would wait for him at the upstairs window, they could see him arrive. She provided them with a picture of her husband but told them not to do anything to him if either of her children was with him. The next night defendant delivered an additional $1300.00 to Deal. James and Deal later scattered some cigarette butts around the upstairs window of the farm house and told defendant that they had waited many hours for her husband but he did not arrive. Deal returned to Taylorsville and neither Deal nor James did any harm to defendant's

husband. Several days later, defendant saw James and said, "You fellows took me, didn't you?" She demanded that James return her money, but he did not do so. Some five or six months later, a bombing occurred in Statesville, after which James talked with police officers about his and Deal's transactions with defendant.

Defendant offered no testimony but moved for judgment of nonsuit, contending that the evidence introduced by the State showed that there was never any intent on the part of James or Deal to harm her husband and that their only purpose was to get money from her.

Motion for nonsuit was overruled, the jury found the defendant guilty as charged, and from a prison term of not less than seven nor more than ten years, defendant appealed.

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

F. Lee Bailey and Gardner & Wilson by Rossie G. Gardner and Jerry C. Wilson for defendant appellant.

BRITT, J.

Defendant first assigns as error the failure of the trial court to grant her motion for judgment as of nonsuit.

[1, 2] It is well settled that in passing upon a motion for judgment as of nonsuit in criminal prosecutions, the evidence must be considered in the light most favorable to the State; and when so considered, if there is more than a scintilla of competent evidence to support the allegations in the warrant or bill of indictment, it is the duty of the court to overrule the motion and to submit the case to the jury. Moreover, on such motion, the State is entitled to the benefit of every reasonable inference which may be fairly drawn from the evidence. *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *State v. Gordon,* 225 N.C. 757, 36 S.E. 2d 143; *State v. Scoggins,* 225 N.C. 71, 33 S.E. 2d 473; *State v. Herndon,* 223 N.C. 208, 25 S.E. 2d 611.

[3-6] In *State v. Gallimore,* 272 N.C. 528, 158 S.E. 2d 505, in an opinion by Higgins, J., it is said: " 'A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme — the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means. (Citing many cases.)' *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334; *State v. McCullough,* 244 N.C. 11, 92 S.E. 2d 389. A conspiracy to commit a felony is a felony. *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262; *State v. Aber-*

nethy, 220 N.C. 226, 17 S.E. 2d 25. The crime 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. 2d [sic] 711; *State v. Knotts,* 168 N.C. 173, 83 S.E. 972. Many jurisdictions follow the rule that one overt act must be committed before the conspiracy becomes criminal. Our rule does not require an overt act."

[7] Although at least two persons are required to create a conspiracy, it is not required that more than one person be prosecuted for the offense. *State v. Gallimore, supra.*

[8] Defendant strenuously contends that the State's case depended primarily upon the testimony of Robert Lee James and Carl Deal, they being named in the indictment as defendant's co-conspirators; that the testimony of James and Deal negatived the creation of a conspiracy. Specifically, defendant refers to their testimony to the effect that at no time did either of them intend to kill defendant's husband, their only purpose being to get money from the defendant.

Conceding that a large part of the testimony given by James and Deal was exculpatory, the fact remains that from their testimony there could be gleaned "more than a scintilla" of evidence to support the allegations in the bill of indictment. When James talked with Deal over the telephone soon after defendant first contacted James, James told Deal that there was a woman in Statesville that wanted to get her husband killed. Thereafter, defendant and James met Deal at the airport in Charlotte. James had a .38 caliber pistol for which he purchased some bullets. In response to a direct question as to what he received the money for, James replied, "I received the money for doing just what we were talking about, to kill him."

In their testimony, James and Deal stated that at no time did they have any intention of killing the defendant's husband. The conversations and transactions between the defendant, James and Deal occurred during late April and early May 1967; it was following a bombing some five or six months later that James talked with the solicitor and police officers. The State contends that it is reasonable to infer that James and Deal "changed their tune" between the time they had the conversations and agreement with the defendant and the time of their conversations with law enforcement officers five or six months later and that it was for the jury to determine where the truth lay.

We have not attempted to recapitulate all of the pertinent testimony but hold that the evidence presented at trial was sufficient to withstand the motions for nonsuit. The assignment of error relating thereto is overruled.

The only other assignment of error brought forward and discussed in defendant's brief relates to the trial judge's instructions to the jury. We have carefully considered the instructions given and conclude that when they are considered contextually they are free from prejudicial error. The assignment of error is overruled.

The defendant received a fair trial, free from prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. WILLIAM DOSS AND BAXTER HUNSUCKER

No. 6919SC230

(Filed 18 June 1969)

1. Burglary and Unlawful Breakings § 5; Larceny § 7— recent possession of stolen property — sufficiency of evidence

In this prosecution for breaking and entering and larceny, the State's evidence *is held* insufficient to be submitted to the jury under the doctrine of possession of recently stolen goods where it tends to show only that defendant was a passenger in an automobile driven by the owner in which articles stolen from a house by breaking and entering were transported shortly after the crime occurred.

2. Criminal Law § 113— joint trial — instructions permitting guilty verdict as to both defendants if one defendant committed offense

In a joint trial of two defendants for the same offense, a charge susceptible to the construction that should the jury find beyond a reasonable doubt that either defendant committed the offense charged it should convict both defendants *is held* to constitute reversible error.

APPEAL by defendants from *Crissman, J.*, October 1968 Session, Superior Court of CABARRUS.

Defendants were charged in a valid bill of indictment with breaking and entering and larceny. Through court-appointed counsel, each defendant entered a plea of not guilty to each count. The cases were consolidated for trial. As to defendant Doss, the jury found him not guilty of breaking and entering but guilty of larceny. As to defendant Hunsucker, the jury found him guilty of both charges. Both defendants appealed from the judgments entered.

The facts are set out in the opinion.

Attorney General Robert Morgan by Assistant Attorney General Bernard A. Harrell for the State.

James C. Davis and Clarence E. Horton, Jr., for defendant appellant Doss.

M. B. Sherrin for defendant appellant Hunsucker.

MORRIS, J.

APPEAL OF DOSS

[1] Defendant Doss assigned as error on appeal the failure of the court to grant his motion for nonsuit and certain portions of the charge of the court. He has elected to abandon his assignments of error as they relate to the charge, but earnestly contends that it was error for his case to be submitted to the jury.

The evidence, taken in the light most favorable to the State, tends to show:

Richard D. Barnhardt lives at 1042 McClinton Road in Kannapolis. When he left his home on the afternoon of 4 December 1967, the doors to the house were locked and the screens latched. When he returned some time after 11 o'clock that night he found that a latch on the window in the bedroom had been broken, the screen taken off, and the curtain torn. A television set and a shotgun had been taken, and these items were identified by him at the trial. Defendant Doss is his next door neighbor.

Claude King testified for the State that he knows both defendants, that they came to his home on 4 or 5 December 1967 between 10:30 and 11:30 p.m. and asked him to go pull Doss's car which was disabled. He didn't know who was driving, but they were driving a car which belonged to Hunsucker. He was in bed when they came and they waited for him to dress. Hunsucker said that the voltage regulator on his car wasn't working and he asked if he could park his car at King's house that night. King agreed. Hunsucker then said he had some items in the car he wanted to leave with King so they wouldn't be taken from the car. Hunsucker then went out to the car and brought in a television set and a gun. The witness then took the defendants in his truck to Doss's car which was sitting in a driveway across from Hunsucker's house and pulled it from there to Doss's house. It was between 10:30 and 11:30 when the two came to his home and between 11 and 12 o'clock when they got to Doss's house. He returned to his home after pulling Doss's car to Doss's house. A day or two later Hunsucker came to his house and got the gun. Detective Tucker came and got the television set.

Mr. Joseph Yoss testified that he asked Hunsucker if he knew anybody who had a shotgun or a rifle for sale, and Hunsucker said he'd check on it. Later in the week and on Thursday night, he stopped by Hunsucker's house and Hunsucker told him he knew a man who had a shotgun for sale for fifty dollars. They went to a house in the Jackson Park area, Hunsucker went in and got the shotgun. The witness told him he'd try it out Friday night. Hunsucker told him to let him have the gun back or the money by Saturday morning, that he had to return it. On Friday night near dark Hunsucker came to his home and said Police Officer Tucker was out there and wanted the shotgun, that it was stolen.

Officer Tucker testified that he went to Hunsucker's house on 8 December and asked if he had picked up a shotgun from Claude King's house. Hunsucker said that he had and had sold it to Joe Yoss. Hunsucker went with him to Yoss's home where Mr. Yoss got the gun from the trunk of his car and gave it to Officer Tucker. Hunsucker (not in Doss's presence and not admitted against Doss) told him he first saw the gun and television set in Doss's possession, and Doss told him (not in Hunsucker's presence) that he first saw the gun and television set in Hunsucker's car the night of 4 December.

Defendant Doss offered no evidence.

Defendant Hunsucker testified that he was at home all day 4 December working on his car, that he left once during the afternoon to go to the grocery store to get cigarettes and did not leave again until after 10 o'clock when he left to carry Doss to Mr. King's house to get Mr. King to pull Doss's car. That when they got to Mr. King's house, his car would not start, so he rode back with Doss and Mr. King. The next day he went back to Mr. King's to fix his car, and Mr. King told him he had a shotgun and a rifle he'd sell and when Mr. Yoss came by on Thursday he told him this and went with Mr. Yoss to Mr. King's. That Mr. King said to have the gun or fifty dollars back by Saturday morning. That Friday Mr. Tucker came and asked if he had a shotgun he got over at Mr. King's the night before, that he said he didn't have it but knew who did, that when he found out the gun was stolen he went with Mr. Tucker to Mr. Yoss's to get it. He and Doss had served prison terms together.

Hunsucker's mother testified he was home all day and didn't leave the house except to get cigarettes. That night he went off with Doss to help him get his car home. That it was about 9:30 when Doss came.

Elizabeth Storey testified that she was at the Hunsucker house that night. That Hunsucker left, was gone a few minutes and came

back in time to ride to work with her which was twenty or twenty-five after ten.

[1] The State concededly relies on the doctrine of possession of recently stolen goods. There is no question but that the property was stolen. However, in our view the evidence falls short of showing possession in Doss. Doss was neither the owner nor the driver of the car from which the articles were taken by Hunsucker into King's house. The evidence is not sufficient as to Doss to take the case to the jury. *State v. Hopson,* 266 N.C. 643, 146 S.E. 2d 642.

As to Doss, the judgment of the trial tribunal is

Reversed.

APPEAL OF HUNSUCKER

[2] Defendant Hunsucker also brings forward only one assignment of error, and that relates to the charge of the court.

The court charged the jury: "Now, members of the jury, on this first count the Court charges you that if you are satisfied from this evidence beyond a reasonable doubt that the home of Richard Barnhardt was broken into and these items, the TV and the gun, were stolen, and *that they were found in the possession of either or both of these defendants;* you can determine from the evidence, then the law raises the presumption that the defendant is guilty of theft." (Emphasis added.)

When two defendants are tried together it is error for the court to instruct the jury in the disjunctive. *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230. While this portion of the charge is not technically a submission of the question of guilt or innocence in the disjunctive, we think it is confusing and ambiguous. Particularly is this true when in other portions of the charge the court had previously instructed "If you find from the evidence and beyond a reasonable doubt that *either one of these defendants, or both,* broke into this house, and at the time that it was done that the intent was to take, steal and carry away such personal property as they might find, valuable property; and that the intent was to convert it to their own use, they not having permission at the time to do so, and that neither had any consent from the owner to go in, or to take any of the property, then it would be your duty to return a verdict of guilty of breaking and entering as charged. If you are not so satisfied, the burden being upon the State to so satisfy you, then it would be your duty to return a verdict of not guilty." (emphasis added), and subsequently charged: "Now, members of the jury, on the second count of larceny, if you are satisfied from the evidence beyond a reason-

able doubt *that either or both of these defendants took or had a part in taking* this TV and the shotgun, and that it belonged to Barnhardt and not to either one of them; and that it was taken against the will of the owner, and was carried away, and *that both the taking and carrying away on the part of either, or one of these, or both of these defendants,* was with the felonious intent, that is, the intent to steal existing at the time, then the Court charges you it would be your duty to return your verdict of guilty as charged on the second count of larceny. If you are not so satisfied, the burden being upon the State to satisfy you beyond a reasonable doubt, then it would be your duty to return a verdict of not guilty." (Emphasis added.)

For error in the charge there must be, as to Hunsucker, a new trial.

Appeal of Doss: Reversed.

Appeal of Hunsucker: New trial.

CAMPBELL and BRITT, JJ., concur.

STELLA R. PHILLIPS v. STOWE MILLS, INC.

No. 6927SC144

(Filed 18 June 1969)

1. Master and Servant § 89— common-law action against third person tortfeasor — immunity from suit

In plaintiff's action for injuries sustained when a wall in a building owned by defendant fell on her, the fact that plaintiff's employer is a wholly-owned subsidiary of the defendant and shares with defendant common administrative offices, a common purchasing agent, personal department and sales organization does not give defendant immunity from the common-law action under the Workmen's Compensation Act on the ground that plaintiff is likewise an employee of defendant, where plaintiff's employer and defendant are separate entities for all tax and accounting purposes, each charges the other for all services actually rendered, including rent on the building, and on the day of the injury complained of plaintiff was performing work under the direction, supervision and control of her employer.

2. Negligence § 29— action for negligence — sufficiency of evidence

If plaintiff's evidence, when considered in the light most favorable to her, shows that defendant violated some legal duty which it owed to plaintiff and that such breach of duty was the proximate cause of plaintiff's

injury and damage, plaintiff would be entitled to have the jury pass upon her cause for negligent injury.

3. Landlord and Tenant § 8— landlord's liability to employee of tenant

In plaintiff's action for injuries sustained when a wall collapsed in a building owned by defendant and rented by plaintiff's employer, plaintiff had no stronger rights against the landlord of her employer than did her employer.

4. Landlord and Tenant § 8— landlord's liability for personal injuries — collapsing wall — nonsuit

In plaintiff's action for injuries sustained when a wall collapsed in a building owned by defendant and rented by plaintiff's employer, the evidence *is held* insufficient to support a finding that the defendant was negligent in the construction of the wall.

APPEAL by both plaintiff and defendant from *Snepp, J.*, October 1968 Civil Session, GASTON County Superior Court.

Stella R. Phillips (plaintiff) instituted this civil action against Stowe Mills, Inc., (defendant) to recover damages for personal injuries sustained on 17 June 1964 when a wall in a building owned by the defendant fell on her. The plaintiff was employed as a pin draft operator by the building's occupant, Pharr Worsted Mills, Inc. (Pharr). Pharr, which manufactures and sells worsted and synthetic yarns, is a North Carolina corporation. All of its stock is owned by the defendant, which is a separate North Carolina corporation. However, the officers of the two corporations are identical and there is one general manager for the entire complex. At the time in question, Pharr was paying the defendant for the use of the building, but Pharr owned the equipment, including the pin draft machines on which the plaintiff worked.

A sprinkler system had been installed in the building for fire protection. Water for this sprinkler system came into the building by means of an underground 6-inch water pipe. After coming under the exterior wall of the building, the pipe, by means of a 90-degree elbow joint, came to the surface at a point inside the building about 1½ feet from the exterior wall. The pipe then connected onto the sprinkler system. Water in the pipe was under pressure of anywhere from 60 to 125 pounds. The pipe, which was of cast iron construction, and the elbow, which was of lead construction, were designed to last one hundred years or longer.

At a point approximately 58 feet from this exterior wall, the ground was excavated in order to provide for a basement. Pharr had occupied the building since approximately 1961 and this basement

was constructed by the defendant in 1964. A curtain wall was erected at that time and the sprinkler system was extended to afford fire protection for the basement area. This curtain wall enclosed the basement working area and served as a partition between the working area and the unexcavated portion of the basement. It was not a weight-bearing wall. The curtain wall, which extended for a total length of approximately 50 feet, was constructed with three courses of brick at the base. It was then reduced to two courses of brick, a reduction from a thickness of approximately 12 inches at the base to 8 inches at the top. The curtain wall extended from the surface of the ground to a height of approximately 9 feet. At the top of this brick portion, plywood was placed for approximately 4 feet, giving a total height of approximately 13 feet. The unexcavated portion of the basement provided a crawl space of approximately 4 feet between the floor and the ground. This crawl space was adjacent to and outside of the curtain wall and it decreased in height from approximately 4 feet to approximately 2½ feet at a point next to the exterior wall. The surface of the ground sloped from the exterior wall toward the curtain wall. Since the crawl space afforded a dry and protected area, Pharr utilized it for the storage of extra machinery parts.

On 17 June 1964 the plaintiff and another female employee were operating pin draft machines located approximately 3 feet from the curtain wall in the basement working area. About 9:00 p.m. the plaintiff noticed water seeping through the curtain wall approximately 1 foot above the floor and she reported this condition to her overseer. About 9:05 p.m. the plaintiff and the other employee began moving cans, which were sitting next to the curtain wall, in order to keep them dry. These cans contained the materials with which the plaintiff worked. While so engaged, the wall collapsed and the falling brick injured the plaintiff.

At the conclusion of the plaintiff's evidence, the defendant's motion for judgment as of nonsuit was sustained.

Childers and Fowler by H. L. Fowler, Jr., and W. N. Puett for plaintiff appellant.

Mullen, Holland & Harrell by James Mullen for defendant appellee.

CAMPBELL, J.

DEFENDANT'S APPEAL

[1] At the commencement of the trial, Judge Snepp first considered the defendant's plea in bar. The defendant contended that, since Pharr was a wholly-owned subsidiary of the defendant, it was conducting the business of the defendant; the plaintiff thereby occupied a position tantamount to an employee of the defendant; under the North Carolina Workmen's Compensation Act, the only remedy available to such an employee was that provided for pursuant to such act; therefore, this civil action did not lie. After hearing evidence on this question, Judge Snepp entered an order finding that, while Pharr and the defendant had common administrative offices, a common purchasing agent, a common personnel department and a common sales organization, they were nevertheless separate entities for all accounting and tax purposes and, even though they had such common administrative offices, each charged the other for all services actually rendered. Judge Snepp further found that Pharr paid the defendant for the use of the building in question; on 17 June 1964 the plaintiff was performing work under the direction, supervision and control of Pharr; and with respect to this work, the defendant was not conducting the business of Pharr. Based upon his findings of fact, Judge Snepp concluded that the North Carolina Workmen's Compensation Act did not prohibit this action. The defendant thereupon appealed from the denial of its plea in bar.

G.S. 97-9 provides:

"*Employer to secure payment of compensation.* — Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified."

G.S. 97-10.1 provides:

"*Other rights and remedies against employer excluded.* — If the employee and the employer are subject to and have accepted and complied with the provisions of this article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death."

The evidence fully sustained the findings of Judge Snepp that, on 17 June 1964, the plaintiff was the employee of Pharr and the defendant was not conducting the business of Pharr.

The immunity granted by the North Carolina Workmen's Compensation Act applies only between Pharr and the plaintiff. It does not extend to the defendant, even though the defendant is the sole owner of all of Pharr's stock. The defendant and Pharr are separate entities and the plaintiff was not an employee of the defendant. Compare with *McWilliams v. Parham,* 269 N.C. 162, 152 S.E. 2d 117.

The order of Judge Snepp denying the plea in bar was correct and is

Affirmed.

PLAINTIFF'S APPEAL

[2] The remaining question for consideration is whether the evidence, when considered in the light most favorable to the plaintiff, giving her the benefit of all permissible inferences which may be drawn from the evidence, presents a case for the jury. If the evidence, when so considered, shows that the defendant violated some legal duty which it owed to the plaintiff and that such breach of duty was the proximate cause of the plaintiff's injury and damage, the plaintiff would be entitled to have the jury pass upon her cause. Otherwise, no case would be presented for the jury.

[3] There was no contractual duty existing between the plaintiff and the defendant. The only contractual duty was that between Pharr as tenant and the defendant as landlord. The plaintiff was not an employee of the defendant. Therefore, she did not have any stronger rights against the defendant than Pharr, her employer. In *Harrill v. Refining Co.,* 225 N.C. 421, 35 S.E. 2d 240, the test of such a landlord's liability is stated:

> "Ordinarily, the doctrine of *caveat emptor* applies to the lessee; *Gaither v. Hascall-Richards Steam Generator Co., supra; Hudson v. Silk Co.,* 185 N.C., 342, 117 S.E. 165; *Fields v. Ogburn,* 178 N.C., 407, 100 S.E., 583. To avoid foreclosure under this doctrine in an action for tortious injury, he must show that there is a latent defect known to the lessor, or which he should have known, involving a menace or danger, and a defect of which the lessee was unaware or could not, by the exercise of ordinary diligence, discover, the concealment of which would be an act of bad faith on the part of the lessor. 'If the landlord is without knowledge at the time of the letting of any dangerous defect in the premises, he is not responsible for any injuries which result

from such defect.' *Covington v. Masonic Temple Co.*, 176 Ky., 729, 197 S.E., 420. And he is not liable if he did not believe or suspect that there was any physical condition involving danger. *Charlton v. Brunelle*, 82 N.H., 100, 130 A., 216, 43 A.L.R., 1281."

Even in case of a contract to repair, liability for personal injury resulting from a breach of the agreement is ordinarily not within the contemplation of the parties. Only in case of repairs negligently made is there liability. *Robinson v. Thomas*, 244 N.C. 732, 94 S.E. 2d 911.

[4] The plaintiff asserts that the curtain wall was negligently constructed because no drainage facilities were provided and because a lack of such facilities was an inherently dangerous situation and a latent defect, which the defendant knew about. The evidence fails to show any defect in the construction of the curtain wall, other than the failure to provide for drainage facilities in the event the 6-inch sprinkler system pipe should break. The evidence shows that the pipe, which was of cast iron construction, and the elbow, which was of lead construction, were designed to last one hundred years or longer; the elbow, the point at which the break occurred, was approximately 3 feet underground; this elbow was of proper construction at the time of installation; when the basement area was constructed in 1964, the sprinkler system was extended to provide this area with fire protection; the pipe and elbow were tested with 200 pounds of water pressure, but this pressure was thereafter maintained anywhere from 60 to 125 pounds; the sprinkler system was inspected three or four times per year; and it had been inspected in May prior to the accident in June.

The evidence fails to show that the defendant knew, suspected or had any cause to believe that there was any defect in this elbow or to show that the defendant had actual or constructive knowledge of any inherently dangerous situation or latent defect in the construction of the sprinkler system water line; hence, there was no negligence in the construction of this curtain wall without a drain. The defendant violated no legal duty owed to the plaintiff.

The judgment of the Superior Court of Gaston County is

Affirmed.

BROCK and MORRIS, JJ., concur.

INVESTORS CORPORATION OF SOUTH CAROLINA, A SOUTH CAROLINA CORPORATION v. FIELD FINANCIAL CORPORATION, A NORTH CAROLINA CORPORATION, AND N. C. DEVELOPMENT CORPORATION, A NORTH CAROLINA CORPORATION

No. 6922SC239

(Filed 18 June 1969)

1. Deeds § 6; Corporations § 23— corporate deed — necessity for corporate seal

In this action to set aside a conveyance allegedly made by corporate defendant to defraud its creditors, the trial court properly set the conveyance aside upon findings supported by a stipulation of the parties that the deed in question did not contain the corporate seal of the grantor corporation, no curative statute having been enacted since the conveyance was made. G.S. 47-71.1; G.S. 55-158.

2. Deeds § 6; Corporations § 23— corporate deeds — necessity for seal

A corporate seal is a necessary prerequisite to a valid conveyance of real estate by a corporation. G.S. 47-41.

3. Deeds § 6; Corporations § 23; Fraudulent Conveyances § 3— deed invalid for lack of corporate seal — equitable effect — innocent purchaser for value

In this action to set aside a conveyance allegedly made by one corporate defendant to another for the purpose of defrauding the creditors of the grantor corporation, equity will not give effect to the purported deed which is invalid because the seal of the corporate grantor is not affixed thereto, where the trial court finds that defendant purchaser is not an innocent purchaser for value without notice that defendant grantor was seeking to conceal assets from its creditors.

APPEAL by defendants from *Collier, J.*, Spring Session 1969, IREDELL County Superior Court.

Investors Corporation of South Carolina (plaintiff) instituted this civil action for the purpose of setting aside and declaring ineffective a deed dated 23 December 1964 from defendant Field Financial Corporation (Field) to defendant N. C. Development Corporation (Development). The deed conveyed a parcel of real estate located in Statesville Township, Iredell County, North Carolina. Plaintiff alleged that the conveyance was made for no consideration and for the purpose of removing the assets of Field from its creditors; the conveyance did not have a corporate seal affixed thereto; at the time of the conveyance, Field was indebted to the plaintiff; and said indebtedness was later reduced to judgment on 8 December 1965 in Mecklenburg County, North Carolina. The defendants admitted the conveyance from Field to Development. However, the defendants asserted that it was done for a valuable consideration and

denied that the conveyance was made in an effort to defraud any creditors of Field. Judge Collier heard the matter without a jury, and after finding certain facts, he made the following conclusions of law:

"Based upon the foregoing Findings of Fact upon the evidence presented by the Plaintiff and by the Defendants, the Court makes the following Conclusions of Law:

1. That the transaction between the Defendant, Field Financial Corporation, and the Defendant, N. C. Development Corporation, was not an arms length transaction, and that the Defendant, Field Financial Corporation, was attempting to protect its assets from its creditors, and that the signing and recording of said deed was made in an effort to defraud the creditors of Field Financial Corporation.

2. That the aforementioned document purported to be a corporate deed was erroneously probated by the Register of Deeds and was insufficient to pass title because said document did not contain the corporate seal of the Defendant Field Financial Corporation.

3. That either of said conclusions requires the Court to set aside the aforementioned deed from Field Financial Corporation to N. C. Development Corporation.

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

1. That the purported deed from the Defendant, Field Financial Corporation, to the Defendant, N. C. Development Corporation, be ordered set aside and that title to said property be vested in the Defendant, Field Financial Corporation, subject to the various creditors as provided by law.

2. That the costs of this action be taxed against the Defendants.

This the 24th day of October, 1968.

/s/ Robert A. Collier, Jr.,
Robert A. Collier, Jr.
Judge Presiding"

From the entry of this judgment, the defendants excepted and appealed to this Court.

Scarborough, Haywood & Carson by James H. Carson, Jr., for plaintiff appellee.

Hovey and Warlick by George D. Hovey for defendant appellants.

CAMPBELL, J.

[1] When the case was called for oral arguments in this Court, the defendants demurred *ore tenus* to the complaint for failure to state a cause of action on the grounds of fraud. However, we find it unnecessary to rule on this demurrer because the complaint alleges that the corporate seal of Fields was not affixed to the conveyance in question. In his findings of fact, Judge Collier found that the corporate seal of Field was not affixed to the deed of conveyance and that there was no corporate seal on said conveyance. The parties stipulated "that the deed recorded in Iredell County Registry in Book 404, at Page 243, from Field . . . to . . . Development . . . may be admitted in evidence and that it did not contain a corporate seal of the grantor nor any revenue stamps". This stipulation supported the findings of fact by Judge Collier, and the findings of fact supported the conclusions of law and the judgment setting aside the deed of conveyance.

[2] A corporate seal is a necessary prerequisite to a valid conveyance of real estate by a corporation. *Caldwell v. Mfg. Co.*, 121 N.C. 339, 28 S.E. 475. G.S. 47-41 sets out the forms of probate for a deed and other conveyances executed by a corporation and reveals the necessity of having a corporate seal. In *Withrell v. Murphy*, 154 N.C. 82, 69 S.E. 748, the corporate seal had been affixed to a deed of conveyance, but the acknowledgment by the corporate officers failed to acknowledge that the seal so affixed was the seal of the corporation. The Supreme Court held that this conveyance was, therefore, ineffectual as to the corporation's creditors.

[1] There have been curative statutes validating corporate conveyances where the corporate seal has been omitted. The last such statute was enacted in 1963 and provides:

> "Any corporate deed, or conveyance of land in this State, made prior to January 1, 1963, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance." G.S. 47-71.1.

This statute, however, only serves to accentuate the necessity of a corporate seal in order to make a corporate conveyance of real estate valid and effectual.

Another curative act is contained in G.S. 55-158 which provides:

> *"Certain corporate conveyances validated.* — All deeds and conveyances of land in this State, made by any corporation of this State prior to January first, one thousand nine hundred fifty-seven, executed in its corporate name and signed and attested by its proper officers, from which the corporate seal was omitted, shall be good and valid, notwithstanding the failure to attach said corporate seal."

Since the deed in the instant case was executed on 23 December 1964 and since the corporate seal was omitted and no curative act has made this conveyance effective without the corporate seal, we hold that the judgment of Judge Collier setting this conveyance aside was correct.

[3] Development seeks to have the deed of conveyance in question construed to be an effective instrument under an equitable doctrine enunciated in *Willis v. Anderson*, 188 N.C. 479, 124 S.E. 834. In other words, Development takes the position that it purchased the land from Field; it paid a valuable consideration for the land; therefore, it should be permitted to retain the land even as against the creditors of Field. However, in order to sustain this position, it would be incumbent upon Development to establish that it was an innocent purchaser for value from Field without any notice that Field was seeking to conceal assets from creditors. The burden of establishing this would fall upon Development. Judge Collier found, however, that the transaction between Field and Development was not an arms length transaction; A. H. Field served as president of each corporation and represented both Field and Development in this transaction; Field was attempting to protect its assets from its creditors; and, in short, Development was not an innocent purchaser for value from Field. Therefore, regardless of whether the complaint properly alleged fraud, Development fails to sustain its position as an innocent purchaser for value. The conveyance from Field to Development did not have a corporate seal and it was proper for Judge Collier to set it aside.

In view of this holding it is unnecessary to discuss the other assignments of error.

Affirmed.

BROCK and MORRIS, JJ., concur.

TOM GREER, PLAINTIFF v. MARION ALLISON GREER, DEFENDANT AND ROBY GREER AND WIFE, RUTH G. GREER; AND ROBERT L. ALLISON AND WIFE, LENA R. ALLISON, ADDITIONAL DEFENDANTS

No. 6924SC203

(Filed 18 June 1969)

1. Infants § 9; Parent and Child § 6— determination of custody of minors

When parents separate and later are divorced, the children of the marriage become wards of the court and their welfare is the determining factor in custody proceedings.

2. Infants § 9; Parent and Child § 6— discretion of court in awarding custody of minor

The decision to award custody of a minor is vested in the discretion of the trial judge who has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion.

3. Infants § 9; Parent and Child § 6— award of custody to grandparents — sufficiency of findings

In this proceeding to determine the custody of minor children, no abuse of discretion is shown in the court's conclusion that the best interests of the children would be served by awarding custody to the grandparents upon findings of fact, supported by the evidence, that pursuant to written agreement by the parents the children have been in the custody of the grandparents since the parents separated, that there has been no criticism of the manner in which the grandparents have cared for the children, that both the father and his present wife would be away from home a substantial portion of the time since he is a law student and she is a teacher, and that the mother would also be away from home a substantial portion of the time since she teaches in another state.

APPEAL by plaintiff from *Bryson, J.*, Judge holding courts for the Twenty-fourth Judicial District, in chambers, in an action pending in Superior Court of WATAUGA.

This action was instituted in the Superior Court of Watauga County on 16 June 1967. The complaint alleged that the plaintiff and the defendant had been married on 10 September 1959, and had separated on 15 June 1966. The plaintiff sought to have the marriage dissolved on the grounds of one year's separation and sought to have custody of the two minor children, ages five and six years old, awarded to him. The defendant filed answer admitting all allegations of the complaint except allegations relating to custody. Robert L. Allison and wife Lena R. Allison, and Roby Greer and wife Ruth G. Greer, parents of plaintiff and defendant, were made additional defendants by order of the court. A divorce was granted the plaintiff at the September 1967 Civil Session of Superior Court of Wa-

tauga County. The matter of custody of the children was not determined at that term of court.

The matter of custody was heard before Bryson, J., in chambers, upon affidavits. After considering the affidavits, the court entered an order on 22 November 1968 awarding custody of the children born of the marriage between the plaintiff and the defendant to the grandparents of the children.

The court made findings of fact to the effect that prior to the institution of this action, the parties executed a written agreement in which it was agreed that the two additional defendants, grandparents of the two minor children, should have the custody and care of the said children; that there has been no complaint or criticism concerning the manner in which the children had been cared for by their grandparents. It was found that the plaintiff had remarried since obtaining a divorce from the defendant and that he would be a student at the Wake Forest Law School in Winston-Salem when school opened; that the plaintiff's wife resides in Greenville, North Carolina, where she holds a teaching position; that the defendant resides with her parents in Sparta, North Carolina, and that she holds a teaching position and will be teaching during the school year. Based upon the fact that the plaintiff would be away from his home for a substantial part of the time, and the fact that the defendant would be away from home for a substantial part of the time, the court concluded that it would not be in the best interest of the minor children to be placed in the custody of the mother or father.

The court further found that the grandparents of the minor children were people of excellent character and fit, suitable, and proper persons to have custody of the minor children; and that they had good and suitable homes within which to care for the children.

The court concluded that it was now in the best interest of the minor children to be placed in the custody of their grandparents. Robert L. Allison and wife were awarded custody of the children during the school term of each year, and Roby Greer and wife were awarded custody during the summer vacation and during the Thanksgiving and Christmas vacation. This order entered by Bryson, J., is substantially in accordance with the separation agreement entered into by the parties prior to the divorce action. From the entry of this order, the plaintiff appealed.

McElwee & Hall by Jerome C. Herring and Stacy C. Eggers, Jr., for plaintiff appellant.

R. F. Crouse and Allen and Henderson by H. F. Henderson for defendant appellees, Marion Allison Greer, Robert L. Allison and wife, Lena R. Allison.

MORRIS, J.

[1, 2] "When parents separate and later are divorced, 'the children of the marriage become the wards of the court and their welfare is the determining factor in custody proceedings.' " *In Re Custody of Ross,* 1 N.C. App. 393, 161 S.E. 2d 623. The guiding principle to be used by the court in a custody hearing is the welfare of the children involved. "While this guiding principle is clear, decision in particular cases is often difficult and necessarily a wide discretion is vested in the trial judge. He has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion." *In Re Custody of Pitts,* 2 N.C. App. 211, 162 S.E. 2d 524. G.S. 50-13.2(a) provides: "An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child." This statute became effective subsequent to the commencement of this action, however, the statute "merely codified the rule which had been many times announced by the North Carolina Supreme Court to the effect that in custody cases the welfare of the child is the polar star by which the court's decision must ever be guided." *In Re Custody of Pitts, supra.*

Also, see *Holmes v. Sanders,* 243 N.C. 171, 90 S.E. 2d 382, where the Supreme Court, in upholding the trial court's decision to award custody of a child to the grandparents, stated that the welfare of the child was the controlling consideration. These same parties were again before the Supreme Court in *Holmes v. Sanders,* 246 N.C. 200, 97 S.E. 2d 683. In the second proceeding the trial court had found that the petitioner, the father, was a person of good reputation but that it would be in the best interest of the children to remain in the custody of their grandparents. The Supreme Court upheld this decision stating:

> "There is plenary competent evidence to support Judge Bickett's findings of fact, and his findings of fact support his judgment. The findings of fact by Judge Williams and Judge Bickett clearly show there are substantial reasons to deprive petitioner of the custody of his child. Judge Bickett's judgment is in accord with our decisions that the child's welfare is the paramount consid-

eration, and that a parent's love must yield to another if, after judicial investigation, it is found that the best interest of the child is subserved thereby."

[3] In the present case, the findings of fact, supported by the evidence, show that the parents of the two minor children agreed, prior to the institution of this action, that the grandparents would have custody of the children; that they have had custody since the separation in 1966 and that no complaint or criticism pertaining to the manner in which the children were being cared for had been brought to the attention of the court; and that the plaintiff, the father, will be a student at Wake Forest College, and his present wife resides in Greenville, North Carolina, where she holds a teaching position. The court found that the defendant, the mother of the children, resided in Sparta, North Carolina, and that she held a teaching position in Virginia.

We think these facts found by the trial court are sufficient to support his conclusion that now the best interest of the children would be served by placing them in the custody of their grandparents. Certainly, the two minor children have been in an emotional strain since the separation of their parents. Judge Bryson apparently felt that the welfare of the children at the present time would be served by leaving them with persons with whom they are familiar, and who have cared for them in a proper manner. As a student at Wake Forest University in Winston-Salem, the plaintiff of necessity will be away from home much of the time. His present wife teaches and thus will not be able to spend the time with the children which, apparently, Judge Bryson felt desirable. The defendant does not appeal from the order of Judge Bryson. In upholding the order of the trial court we recognize that custody cases generally involve difficult decisions. The trial judge has the opportunity to see the parties in person and to hear the witnesses. It is mandatory, in such a situation, that the trial judge be given a wide discretion in making his determination, and it is clear that his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. In the order before us, we find no clear showing of an abuse of the discretion given a trial judge in a custody matter. The order is

Affirmed.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM EVERETT PATTON, JR.

No. 6915SC204

(Filed 18 June 1969)

1. Constitutional Law § 31; Criminal Law § 91— right of confrontation — continuance — absence of witness

Where trial court denied defendant's motion for continuance based on the ground that a material witness had not been located, defendant was not deprived of the right of confrontation where he was allowed to introduce into evidence testimony of the witness taken at the previous trial, which testimony related to the same matter sought to be elicited at the present trial.

2. Criminal Law § 91— continuance — absence of witness — requisites of affidavit

Where application for continuance is made by reason of the expected absence of a witness, the application must state the name and residence of the witness, the facts expected to be proved by him, the grounds for the expectation of his nonattendance, and that the applicant expects to procure his evidence at or before some named subsequent term. G.S. 1-175(2), G.S. 1-176(2).

3. Criminal Law § 91— motion for continuance — discretion of court

Motion for a continuance is addressed to the discretion of the court and should not be disturbed absent a showing of an abuse of this discretion.

4. Criminal Law §§ 18, 177— remand for new trial — jurisdiction of lower courts

Where Court of Appeals orders that a new trial be held in a misdemeanor prosecution originally tried in a municipal court and then tried *de novo* in the superior court, the case on retrial maintains its status as a case "pending in the superior court on appeal from a lower court," G.S. 7A-271(b), and defendant's motion to quash the indictment on the ground that the district court has jurisdiction of the case is properly denied. G.S. 7A-272.

5. Criminal Law § 87— 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, absent an abuse of discretion.

6. Criminal Law § 169— unresponsive answer — prejudicial error

Defendant was not prejudiced by the unresponsive answer of a State's witness where evidence of similar import was later admitted without his objection.

7. Criminal Law § 77— self-serving declarations

In a prosecution charging defendant with speeding in excess of 100 m.p.h. in a 45 m.p.h. zone, testimony that defendant told the officer his accelerator became stuck is incompetent as a self-serving declaration made by defendant.

STATE *v.* PATTON

APPEAL by defendant from *Hall, J.*, at the 5 December 1968 Session, Superior Court of ALAMANCE.

Defendant was tried under a bill of indictment proper in form with speeding in excess of 100 miles per hour in a 45 mile-per-hour zone.

From a verdict of guilty and a sentence of imprisonment for a period of 18 months, defendant appealed to this Court.

This case was previously before us and is reported at 2 N.C. App. 605. In an opinion by Britt, J., defendant was given a new trial because of error committed in the charge to the jury. The testimony offered in the retrial of this case was substantially the same as was offered when the case was first tried in the Superior Court. Officer Bray, with the Burlington Police Department, testified that he observed the defendant operating a 1960 Chevrolet on the streets of Burlington and that the defendant was speeding. He pursued the defendant over the streets of Burlington at speeds in excess of 100 miles per hour.

Harold Tucker, who testified for the defendant at the first trial, was not present at the second trial in the Superior Court. However, his sworn testimony from the first trial was offered. This testimony tended to show that Tucker was riding with the defendant on the night in question; that the accelerator on defendant's car became stuck while they were riding on the streets of Burlington; and that the excessive speed occurred while the accelerator was stuck and before defendant was able to correct the situation.

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

John Xanthos for defendant appellant.

MORRIS, J.

Upon the call of this case for trial the defendant moved for a continuance on the ground that a material witness had not been located, and, upon refusal of the court to continue the case, moved to quash the indictment.

MOTION TO CONTINUE

[1-3] The trial judge in his discretion refused to grant the continuance. Defendant now argues that by this ruling he was denied his constitutional right of confrontation. We do not agree. This case had previously been heard in the Superior Court, and Harold Tucker,

the absent witness, had testified under oath at that trial. In the present case the defendant was allowed to introduce into evidence the testimony taken at the previous trial. G.S. 1-176, entitled "Continuance during term" provides that the trial judge may continue a case during term if satisfied (1) that the applicant has used due diligence to be ready for trial and (2) that a fair trial may not be had by reasons of circumstances stated. Subsection (2) of G.S. 1-176 provides further: ". . . and if the ground of application is the nonattendance of a witness, the affidavit must contain the particulars required by subdivision two of § 1-175." This last mentioned section provides: "If the application (for continuance) is made by reason of the expected absence of a witness, it must state the name and residence of the witness, the facts expected to be proved by him, the grounds for the expectation of his nonattendance, and that the applicant expects to procure his evidence at or before some named subsequent term." Suffice it to say that defendant did not comply with the terms of this statute. Further, the witness testified at a previous trial of this same matter and this sworn testimony was available for submission to the jury. Under these circumstances we do not think the defendant had shown that he could not get a fair trial. The motion for a continuance is addressed to the discretion of the court and should not be disturbed absent a showing of an abuse of this discretion. *State v. Daniels,* 164 N.C. 464, 79 S.E. 953. We do not find such in the present case.

MOTION TO QUASH

G.S. 7A-271 provides:

"(b) When a district court is established in a district, any superior court judge presiding over a criminal session of court shall order transferred to the district court any pending misdemeanor which does not fall within the provisions of subsection (a), and *which is not pending in the superior court on appeal from a lower court.*" (Emphasis supplied.)

G.S. 7A-272 provides:

"(a) Except as provided in this article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors."

[4] Defendant argues that this case should have been transferred to the District Court because of the above statutes.

This case was first tried in Municipal Court in Burlington on 14 February 1968. From this judgment it was appealed to the Superior Court and a trial *de novo* was held. The Superior Court judgment was reversed by this Court in *State v. Patton,* 2 N.C. App. 605, and a new trial was ordered. If defendant's contentions are correct, when the case was called for retrial in accordance with the order of this Court, the Superior Court Judge should have transferred the case to the District Court by reason of the provisions of G.S. 7A-271(b), unless the situation presented here comes within the provisions of the last clause of said section. The last clause of G.S. 7A-271(b) provides that the case is not to be transferred to the district court if it is pending in the superior court on appeal from a lower court. We think this clause applies to the present case. It was tried in the Municipal Court and appealed to the Superior Court. When the Court of Appeals ordered that a new trial be held, that order must be interpreted as meaning that a new trial was to be held in the court where the errors were committed, the Superior Court. On retrial, the case still maintained the status of being "on appeal from a lower court."

[5-7] Defendant brings forth six assignments of error in regard to the evidence offered at the trial. We have examined each of these assignments and find them to be of a technical nature, and involving little substance. Defendant argues that an answer of Officer Bray was not responsive. We do not think the answer was prejudicial, particularly in light of the fact that evidence of similar import was later admitted without objection. 6 Strong, N.C. Index, Criminal Law § 169, p. 132. Defendant argues that the solicitor was allowed to ask a leading question. "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. Officer Bray, on cross-examination, was about to state what the defendant had told him when he was arrested. Objection was made and sustained. Defendant contends that it was error to interrupt the witness when he was about to volunteer a statement. This objection was properly sustained because the answer about to be given was unresponsive and would constitute hearsay evidence. The trial court refused to allow certain testimony concerning what the defendant told Officer Bray about his accelerator being stuck. This objection was properly sustained because the statements solicited were self-serving declarations made by the defendant. See, *State v. McCanless,* 182 N.C. 843, 109 S.E. 62.

We have examined defendant's remaining assignments of error

and find them to be without prejudicial error. The charge when construed contextually is free from objection. The law was fairly and clearly presented to the jury. In the charge, we find no prejudicial error. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548.

Affirmed.

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

SYBIL MANSFIELD BATEMAN v. ELIZABETH CITY STATE COLLEGE, TRAVELERS INSURANCE COMPANY AND U. S. F. & G. COMPANY

No. 691IC139

(Filed 18 June 1969)

State § 8— tort claim proceeding — contributory negligence of person injured

In a proceeding under the Tort Claims Act to recover for injuries sustained by plaintiff in a collision between a pickup truck operated by her and an automobile operated by an employee of a State agency, evidence and findings of fact of the Industrial Commission are sufficient to support the conclusion that plaintiff was contributorily negligent in making a left turn from her lane of travel on a highway without first ascertaining that defendant's automobile was in the left lane of the highway attempting to overtake and to pass the truck.

APPEAL by plaintiff from Order of North Carolina Industrial Commission of 16 September 1968.

This is a proceeding under the Tort Claims Act. G.S. 143-291, *et seq.* Plaintiff on 4 October 1967 filed an affidavit asserting a claim for personal injuries sustained as a result of an alleged negligent act by an agent of the State while acting within the scope of his agency. The defendant, Elizabeth City State College (College), an agency of the State, filed answer admitting the agency and that on the occasion in question one of its professors, Leslye Napoleon Stallworth, was operating a 1962 Chevrolet station wagon within the course and scope of his employment. All acts of negligence were denied and contributory negligence on the part of the plaintiff was alleged.

The case was heard by Deputy Commissioner Delbridge who made findings of fact and conclusions of law and entered an order denying the plaintiff's claim. From this order, the plaintiff appealed to the Full Commission for a review. The Full Commission adopted

as its own, the findings and order of Deputy Commissioner Delbridge, with Commissioner Marshall dissenting.

The pertinent findings were:

"1. Plaintiff is a white married female, age thirty-three, and resides at Route 3, Hertford, North Carolina. She is a housewife and also assists her husband in his farming operations. That the accident giving rise to this claim occurred in Perquimans County at or near Woodville on Highway 17 about five-tenths of a mile south of Woodville on October 16, 1965, at about 9:30 a.m.

2. That the state owned vehicle, a 1962 Chevrolet station wagon, involved herein was operated at the time by Leslye Napoleon Stallworth, an employee of the Elizabeth City State College, Elizabeth City, North Carolina, an agency of the State of North Carolina, and that said employee was acting at the time within the course and scope of his employment.

3. On October 16, 1965, the plaintiff was operating her husband's 1963 Chevrolet pickup truck in a southwardly direction on Highway 17 at the place above indicated. Plaintiff was carrying some grain to a pasture where her husband was working. As the plaintiff approached the entrance to the pasture which was on the east on the left side of the road, she looked in her rear view mirror and observed a blue Falcon behind her also proceeding south.

There was no northbound traffic approaching. Plaintiff saw no other traffic. When she was three hundred to a hundred fifty feet from the entrance to the pasture, she put on her left signal light indicating she was going to make a left turn.

She noticed that the car following her had slowed down. When the plaintiff reached the entrance to the pasture she made her left turn into the pasture and as her front end crossed onto the left shoulder, her pickup truck was struck on its left side behind the door by the defendant's vehicle. Plaintiff never saw the defendant's vehicle prior to the collision nor did she hear a horn or any other warning signal.

4. Visibility was good for over five hundred feet. The road was straight, dry, and the weather was clear. The road at the point of impact was twenty-four feet wide and was eight feet shoulder.

5. The defendant's vehicle was headed south on U. S. High-

way 17 at the place heretofore indicated. The defendant driver came around the curve and saw up ahead of him some five hundred feet or more two vehicles, the Falcon and in front of that a pickup truck.

These two vehicles were travelling at a slower rate of speed than the defendant's vehicle which was going at a rate of approximately fifty or fifty-five miles per hour. As the defendant driver approached the Falcon he tooted his horn and proceeded to pass. After passing the Falcon, he started to pull in between the Falcon and the pickup truck which was operated by the plaintiff, but noticed that the pickup was travelling at a slow rate of speed, and, therefore, he continued in his left lane. As he approached the rear of the pickup truck, he tooted his horn and as the front end of his car was near the rear of the pickup truck, it turned and crossed the left lane in front of his car.

Defendant driver applied his brakes and was unable to stop in time to avoid a collision. The front of the defendant's vehicle struck the left side of the pickup truck knocking it into a ditch on the left side of the road. Both vehicles ended up on the left shoulder of the road. The defendant driver did not see any left turn signal light or arm signal on the plaintiff's vehicle.

. . . .

7. Miss Sherry Creamer (now Mrs. Fields) was driving the Falcon car above referred to. Said Falcon was following the plaintiff's pickup truck about two or three car lengths. Miss Creamer saw the left signal on the pickup truck about three hundred feet before the truck turned left across the highway. Miss Creamer saw the defendant's 1962 Chevrolet station wagon following her and it came up and did not take long to pass her car. As the station wagon approached and passed her car, she heard no horn. Miss Creamer saw the plaintiff make the left turn as the defendant's vehicle was attempting to pass and made the remark to a passenger in the car, 'They are going to hit,' and about this time the two cars collided.

. . . .

10. The defendant driver failed to see that his intended movement could be made in safety and failed to give an audible signal of sufficiency to warn the plaintiff of his intention to pass.

11. Plaintiff failed to observe the vehicle of the defendant even though it was a clear day and there was no obstruction and that she failed to see that her movement into the left lane of travel could be made in safety."

The Commission entered conclusions of law as follows:

"1. The defendant driver was negligent in that he failed to keep his vehicle under control; that he failed to see that his intended movement could be made in safety; that he failed to give an audible signal of his intention to pass and did not act as a reasonable prudent man would have acted under the same or similar circumstances. G.S. 143-291 et seq. G.S. 20-149.

2. Plaintiff was contributorily negligent in that she turned from a direct lane of travel without first ascertaining that such movement could be made in safety; that she failed to see the overtaking car of the defendant. G.S. 143-291 et seq. G.S. 20-154(a)."

Thereupon an order denying the claim was entered.

John T. Chaffin for plaintiff appellant.

Aydlett & White by Gerald F. White for Elizabeth City State College, defendant appellee.

CAMPBELL, J.

The question presented to this Court is whether the evidence supports the findings of fact made by the Commission, and if so, whether those findings of fact support the conclusions of law and order entered. The statute, G.S. 143-293, provides in appeals from the Commission

". . . Such appeal shall be 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. . . ."

The evidence on behalf of the plaintiff tends to show that about 9:30 a.m. on 16 October 1965, plaintiff was driving a 1963 Chevrolet pickup truck in a southerly direction on U. S. Highway No. 17 in Perquimans County and about one-half mile south of Woodville. The pickup truck was loaded with oats which the plaintiff was taking from her home to a field where her husband and two minor sons were working. The plaintiff drove from her home along the road leading to Highway No. 17. On arriving at Highway No. 17 she stopped, and after observing that she could enter Highway No. 17 in safety, she proceeded to do so. This was at a point on Highway No. 17 at the termination of a curve on said highway. The pasture gate, which the

plaintiff intended to enter was located on the east side of Highway No. 17 at a point from 500 feet to a quarter of a mile south of where the plaintiff entered the highway. As plaintiff approached the gate, she observed in the rear view mirror located on the side of the pickup truck, a Falcon automobile being operated by a Mrs. Fields behind the pickup truck. There was no northbound traffic on the highway. Plaintiff, when she was at least 300 feet from the entrance to the pasture, turned on her left signal light indicating she was going to make a left turn. Plaintiff noticed the Falcon automobile behind her had slowed down, and when she reached the entrance to the pasture, she made her left turn. As the front end of the pickup truck crossed onto the left shoulder of the highway, the pickup truck was struck on the left side behind the door by the defendant's station wagon. Plaintiff testified that she never saw the station wagon at all. She testified "(i)t was not in view of my mirror." And she did not know what had hit her until after the accident. She testified that it was a clear day and the sun was shining and that there was nothing to obstruct her vision. The plaintiff's husband testified that the highway was perfectly straight for over a quarter of a mile from the direction in which the station wagon was coming, and that there was nothing on the highway to obscure the view.

Mrs. Fields, the driver of the blue Falcon automobile behind the pickup truck of the plaintiff, testified that when the plaintiff started to make her left turn across the left side of the highway, the station wagon at that time was in the left lane starting to pass the pickup truck, and as the pickup truck continued with the left turn, the station wagon struck it on the left side.

At no time did the plaintiff look to her rear before making her left turn. She testified that she only looked in the mirror located on the side of her truck and saw only what the mirror revealed.

The evidence supports the findings of fact made by the Commission and those findings of fact support the conclusions of law.

Affirmed.

MORRIS and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. GORDON ALONZO McCULLOUGH
No. 6910SC262

(Filed 18 June 1969)

1. Constitutional Law § 32; Criminal Law § 66— lineup identification — representation by counsel who thought lineup related to different crime

In this prosecution for armed robbery, in-court identification of defendant is not rendered incompetent by the fact that the attorney who represented defendant at a previous lineup identification by the witness thought that the purpose of the lineup was to identify defendant in connection with a charge of felonious breaking and entering rather than a charge of armed robbery.

2. Criminal Law § 112— instructions on alibi

In this armed robbery prosecution, the court's instructions did not place the burden of proof of alibi upon the defendant.

APPEAL by defendant from *McKinnon, J.*, 1 January 1969 Regular Session, WAKE County Superior Court.

The defendant was charged in a proper bill of indictment with the felony of robbery by use of firearms, namely a pistol, whereby the life of Sherwood Gene Wallace (Wallace) was endangered and threatened.

The defendant was found to be an indigent, and counsel was appointed to represent him at trial. A plea of not guilty was entered. The State introduced evidence tending to show that Wallace was employed to operate the College View Sunoco filling station; at approximately 10:00 P.M., 26 August 1968, Wallace was in the process of closing the station for the night, when the defendant and a companion pushed the door open and came inside; the defendant, who had a gun in his hand, told Wallace that they would take everything, whereupon they took about $60.00 and a class ring from the cash box and a Timex watch which Wallace was wearing; Wallace last saw the defendant and his companion as "they went around the corner of the station and down the sidewalk." On direct examination Wallace identified the defendant as one of the two robbers. In addition to this in-court identification, Roger G. Perry (Perry) a State's witness, testified on direct examination:

> "I had occasion to be in the vicinity of the College Sunoco station on or about the 26th day of August, 1968. . . . And on this date I had occasion to see (the defendant). When I saw (the defendant), I was in my car leaving the College Inn, . . . but I had to stop for two men . . . running in front of my

car and I had to stop before I could pull out on Western Boulevard. At this time it was approximately 10:07 p.m. . . . They weren't running, they were actually trotting and I stopped here for them and they hesitated to see if I was going to stop and then they ran on to the right and I pulled out. I had my headlights on bright or high beam at the time. . . . They were the length of the hood and two feet (from me), some eight feet. I saw one of those two people whom I saw running and he is in the courtroom today, and is Mr. McCullough, the defendant. I am positive that he is the one. Mr. McCullough was in front of my car headlights approximately thirty seconds."

Before the trial, the police had conducted a lineup, at which time Perry had identified the defendant as the person he had seen. In connection with the lineup, Perry testified at the trial that there were six men in the lineup and that all of them were Negro males of approximately the same height, namely, 5'10" to 6'1". He further testified: "They all looked very similar. They were all about the same age and they looked very similar. There was no doubt in my mind when I saw the defendant that he was the one."

Before the testimony of Perry, the trial judge conducted a *voir dire* examination concerning the validity of the lineup. At this time Ralph Johnson, a detective with the Raleigh Police Department, testified that he had gotten in touch with Perry and arranged for the lineup on the evening of 19 September 1968. Before Perry observed the lineup, Mr. Alton Kornegay, a member of the Wake County Bar, was present representing the defendant as his attorney. The lineup consisted of six male individuals. They were all of the approximate same age, same race and same height, within reasonable limitations. Mr. Kornegay, the attorney representing the defendant, approved the lineup, but before doing so, had the defendant change clothes with one of the others in the lineup. On the *voir dire* the defendant introduced the testimony of Mr. Kornegay. Mr. Kornegay testified that he was present when the lineup was conducted; that he had the defendant change his shirt with one of the other inmates used in the lineup; that he thought the lineup was for the purpose of identifying the defendant in connection with a charge of felonious breaking and entering, and that he did not know that the lineup was being conducted for the purpose of identifying the defendant in connection with the charge of armed robbery. He testified, however, that in his opinion, as an attorney, it did constitute a proper lineup as far as there being people of similar age and weight and similar size. He testified that if he had known that the lineup was in connection

with an armed robbery charge, rather than a charge of breaking and entering, he would have endeavored to have had more people in the lineup rather than the six that were in it. Mr. Kornegay at that time was privately employed by the defendant. The representation by Mr. Kornegay of the defendant subsequently terminated because the defendant did not have the financial resources to continue the employment. There was no disagreement, however, between the defendant and Mr. Kornegay.

After the *voir dire* examination the trial court found that there had been no showing of any unfairness amounting to a denial of any constitutional or legal right of the defendant.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Staff Attorney D. M. Jacobs for the State.

William T. McCuiston for defendant appellant.

CAMPBELL, J.

[1] The defendant now asserts that the lineup identification by the witness Perry was invalid and that this invalidity made the in-court identification of the defendant likewise invalid. The defendant bases his claim of invalidity of the lineup identification on the fact that his attorney at that time, Mr. Kornegay, did not know that the purpose was to identify the defendant in connection with an armed robbery charge and actually thought that the purpose of the lineup was to identify the defendant in connection with a charge of breaking and entering. There is no merit in this position. In order to have a lawful lineup identification, a defendant is entitled to be represented by an attorney if he so desires. In the instant case, the defendant was represented by an attorney. The attorney stated that in his opinion the lineup was proper, fair and legal. The fact that the lineup was for the purpose of identifying the defendant in connection with a felonious armed robbery charge, rather than with a charge of felonious breaking and entering, would make no difference whatsoever in the validity of the lineup itself.

This assignment of error is without merit.

The defendant assigned as error the denial of the defendant's motion for judgment as of nonsuit at the close of all of the evidence. In his brief, however, the defendant states:

> "The defendant at this time expressly abandons assignment of error No. 2."

[2] The remaining assignment of error by the defendant was that the trial court committed error in the charge to the jury as to the defense of alibi. The defendant asserts that the trial judge failed to charge the jury that the defendant was not required to satisfy the jury as to the truth of his allegations of alibi beyond a reasonable doubt, and that the trial court erroneously placed the burden or proof of alibi upon the defendant.

The trial court actually charged the jury as follows:

> "The defendant relies in part upon what is known in law as an alibi. The word 'alibi' means to be elsewhere. If he were elsewhere at the time of the commission of a crime, of course, he could not be guilty of the commission of such a crime. The defendant's evidence of alibi is evidence tending to deny or disprove one of the essential facts which the State must prove and that is the identity of the defendant as the person committing the violation of the law. (The defendant is not required to prove an alibi beyond a reasonable doubt or to the satisfaction of the jury. If the evidence of alibi together with the other evidence, alone or together with the other evidence, raises in the mind of the jury a reasonable doubt as to his identity as the person committing the alleged offense, then he is entitled to a verdict of not guilty)."

The defendant assigns as error the parenthetical portion.

This charge with regard to alibi is in conformity with the legal principles stated by the Supreme Court of North Carolina. The authorities are reviewed in *State v. Allison,* 256 N.C. 240, 123 S.E. 2d 465, and nothing would be gained by a further discussion here.

We think the charge as to alibi in the trial court did not place the burden of proof upon the defendant, and there was no prejudicial error in the charge when considered contextually.

The defendant had a fair and impartial trial, free of prejudicial error.

Affirmed.

MORRIS and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. CHARLIE LENTZ

No. 6921SC221

(Filed 18 June 1969)

Criminal Law §§ 17, 148— orders appealable — federal habeas corpus proceeding — superior court

Where federal district court, upon petition for writ of habeas corpus, orders that the state superior court afford petitioner a hearing as to the voluntariness of incriminating statements introduced at petitioner's trial, no appeal lies from an order of the superior court concluding that the statements were voluntarily and understandingly made, since the order of the superior court was ancillary to the federal habeas corpus proceeding and was not a final order within the purview of G.S. 7A-27.

APPEAL from *Bailey, J.*, 13 December 1968 Session, Superior Court of FORSYTH.

Defendant was tried in the Superior Court of Forsyth County at the 10 October 1966 Criminal Session on an indictment charging robbery with firearms. He entered a plea of not guilty through his court-appointed counsel Clyde Randolph, Jr. He was found by the jury guilty as charged. From judgment thereon of not less than 12 nor more than 20 years imprisonment, he appealed to the Supreme Court of North Carolina. The conviction was upheld. *State v. Lentz*, 270 N.C. 122, 153 S.E. 2d 864. Petition for certiorari to the United States Supreme Court was denied on 9 October 1967. 389 U.S. 866, 88 S. Ct. 133, 19 L. Ed. 2d 139. On 31 July 1968 defendant filed a petition for writ of habeas corpus in the United States District Court for the Middle District of North Carolina, alleging that at his trial testimony as to certain exculpatory statements of defendant was admitted into evidence without evidence from which a knowing and intelligent waiver of his constitutional right against self-incrimination prior to the alleged exculpatory statement could be inferred. On 26 November 1968, Judge Gordon ordered "that unless the State of North Carolina affords the petitioner a hearing on the issue of voluntariness or a new trial by the 1st day of April, 1969, an order will be entered adjudging the petitioner entitled to his release and the writ of habeas corpus prayed for will issue." On 13 December 1968, Judge Bailey conducted a hearing to determine the voluntariness of the statements allegedly made. After hearing the evidence, Judge Bailey found facts and concluded that the statements made by defendant to the officer were freely, understandingly and voluntarily made and that none of defendant's constitutional rights were violated or denied by reason of the taking of the statement or its admission in evidence. On 8 January 1969 Judge Gordon entered an

order denying the petition for a writ of habeas corpus. From the order of Judge Bailey, defendant appealed, and the court appointed counsel to represent him, directing Forsyth County to furnish him a transcript of the proceedings at the expense of the county and also ordered the county to pay the costs of mimeographing the record and defendant's brief.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Trial Attorney Eugene A. Smith for the State.

Randolph and Drum by Clyde C. Randolph, Jr., for defendant appellant.

MORRIS, J.

The preliminary order of Judge Gordon in the habeas corpus proceeding contained the following:

"III. *Relief*

Jackson v. Denno (supra) makes it clear that a full new trial is not required; a hearing in the State Court on the issue of voluntariness suffices. 378 U.S. at 394, 84 S. Ct. at 1792, 12 L. ed. 2d at 925, 926. See, also, *Sims v. State of Georgia,* 385 U.S. 538, 87 S. Ct. 639, 17 L. ed. 2d 593 (1967); *Williams v. Beto,* 5 Cir., 386 F. 2d 16 (1967); *Burns v. Beto,* 5 Cir., 371 F. 2d 598 (1966); *Boles v. Stevenson,* 379 U.S. 43, 85 S. Ct. 174, 13 L. ed. 2d 109 (1964).

If, at this hearing, the State Court should find the exculpatory statement to have been untainted and voluntary, Charlie Lentz will have suffered no prejudice by the fact that the jury which convicted him had the statement before it and his conviction will stand. If, on the other hand, the Court should find that the statement was coerced and involuntary, there will have to be a new trial with the offensive statement excluded.

It is both practical and desirable that a proper determination of voluntariness be made prior to the admission of an exculpatory statement to the jury which is adjudicating guilt or innocence. 'But as to (Lentz), who has already been convicted and now seeks collateral relief, the court cannot say that the Constitution requires a new trial if in a soundly conducted collateral proceeding, the confession which was admitted at the trial is fairly determined to be voluntary.' *Jackson v. Denno (supra).*

ORDER

Accordingly, IT IS ORDERED, ADJUDGED AND DECREED that unless the State of North Carolina affords the petitioner a hearing on the issue of voluntariness or a new trial by the 1st day of April, 1969, an order will be entered adjudging the petitioner entitled to his release and the writ of habeas corpus prayed for will issue.

IT IS FURTHER ORDERED that the Clerk of Court forward certified copies of this Order and the Memorandum Opinion to counsel for the petitioner and the Attorney General of the State of North Carolina.

/s/ EUGENE A. GORDON
United States District Judge

November 26, 1968"

The order of Judge Gordon entered 8 January 1969 is as follows:

"On July 31, 1968, the petitioner Charlie Lentz, a State Court petitioner, through counsel filed a petition for a writ of habeas corpus. The petitioner alleges that he was tried during the October 1966 Term of the Superior Court of Forsyth County on a charge of robbery with firearms, and sentenced to imprisonment for a term of not less than twelve nor more than twenty years; that he was denied due process of law due to the fact that the trial Judge failed to conduct a preliminary examination to determine the voluntariness of petitioner's exculpatory statement made to Detective E. G. Cook.

On November 27, 1968, a Memorandum Opinion and Order were filed whereby it was ordered that unless a hearing on the issue of voluntariness or a new trial was afforded the petitioner by April 1, 1969, the petitioner was entitled to release from confinement.

It has now been certified to the Court that on Friday, December 13, 1968, the petitioner appeared before the Superior Court of Forsyth County for a hearing to determine the voluntariness of the statement made by the defendant to Officer Cook. A hearing was held before the Honorable James H. Pou Bailey, Judge of the Superior Court, and by order entered December 13, 1968, it was found that the statement made to Officer Cook by the petitioner was freely, understandingly, and voluntarily made and that the constitutional rights of the petitioner were not violated or denied by the reason of the taking of the statement or its admission in evidence. The defendant was represented at the hearing by his attorney, Clyde C. Randolph, Jr. By reason of

the fact that the petitioner has now been afforded the relief ordered, the respondent, State of North Carolina, is entitled to have the petition for a writ of habeas corpus denied.

ORDER

For the reasons stated, IT IS ORDERED that the petition of Charlie Lentz, the petitioner herein, for a writ of habeas corpus be, and the same hereby is denied.

IT IS FURTHER ORDERED that the Clerk forthwith send one certified copy of this Memorandum and Order to counsel for the petitioner, one certified copy to the petitioner at his place of confinement, and two certified copies to the Attorney General of the State of North Carolina."

Defendant assigns as error Judge Bailey's finding of fact that defendant knew he had a right to an attorney and could not be forced to answer questions of the officer and the determination that the statement was freely, understandingly, and voluntarily made.

We do not perceive that defendant has any standing to appeal from Judge Bailey's order. Pursuant to the terms of an order of the Federal District Court, the Superior Court of Forsyth County afforded defendant a hearing. Upon the evidence offered at that hearing Judge Bailey found facts and made a determination, all in accord with Judge Gordon's order. Thereupon, the Federal District Court denied the relief sought therein by way of petition for habeas corpus, saying: "By reason of the fact that the petitioner has now been afforded the relief ordered, the respondent, State of North Carolina, is entitled to have the petition for a writ of habeas corpus denied." Judge Bailey's order was ancillary to the habeas corpus proceedings in the Federal District Court and is not a final order of the Superior Court within the purview of G.S. 7A-27. Defendant's remedy, if any he has, is not by way of appeal to this Court.

Appeal dismissed.

CAMPBELL and BRITT, JJ., concur.

FRANCES HENDRICKS v. UNITED STATES FIDELITY AND GUARANTY COMPANY

No. 697SC228

(Filed 18 June 1969)

1. Insurance § 3— statutory provisions as part of the policy

Where a statute is applicable to a policy of insurance, the provisions of the statute enter into and form a part of the policy as if they were written into it, and a provision in the statute favorable to the insured controls over a conflicting provision in the policy.

2. Insurance § 69— uninsured motorist policy — hit-and-run vehicles — requirement of physical contact

There is no conflict between the term "hit-and-run motor vehicles" as used in the statute relating to uninsured or hit-and-run motor vehicle coverage and a policy requirement of "physical contact of such vehicle" with the insured or with an automobile occupied by the insured, and the plaintiff insured is not entitled to recover under an uninsured motorist policy in an action against the insurer where it is stipulated that there was no physical contact between the automobile operated by plaintiff and an automobile operated by an unidentified tort-feasor which forced plaintiff's automobile from the road. G.S. 20-279.21(b)(3).

3. Insurance § 69— purpose of compulsory uninsured motorist statute

The compulsory uninsured motorist statute is to be liberally construed to effectuate its purpose of providing, within fixed limits, some financial recompense to innocent persons who receive bodily injury or property damage and to the dependents of those who lose their lives through the wrongful conduct of an uninsured motorist who cannot be made to respond in damages.

4. Statutes § 5— rules of construction

Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning.

APPEAL by plaintiff from *Mintz, J.*, at the 9 December 1968 Session of NASH Superior Court.

In her complaint, plaintiff alleges: On 13 March 1968, she was insured under the terms of a policy of insurance issued by the defendant providing uninsured motorist coverage. On said date, she was traveling east on R.P.R. 1770 in Nash County. As plaintiff approached a vehicle traveling west, a third vehicle also traveling west drove into the eastbound lane to pass the second vehicle. In order to avoid a head-on collision, it was necessary for plaintiff to apply her brakes and drive onto the left shoulder and into a ditch. Serious injury resulted from the negligent acts of the driver of the third car

who did not stop and whose identity plaintiff has been unable to determine. The policy of insurance was incorporated in the complaint.

Defendant answered, admitting that the policy was in effect and that plaintiff was insured under the policy, but denying that the events of 13 March 1968 were within the terms of the policy.

At the trial, all facts necessary for a determination of the controversy were stipulated, including the negligence of the unidentified motorist, the absence of contributory negligence, the terms of the policy, and that there was no physical contact between the vehicle plaintiff was operating and the automobile operated by the unidentified tort-feasor.

At the close of plaintiff's evidence, defendant's motion for nonsuit was granted. Plaintiff appealed.

Thorp & Etheridge by William D. Etheridge and Stephen E. Culbreth for plaintiff appellant.

Don Evans for defendant appellee.

BRITT, J.

[2] In their brief, plaintiff's counsel state the issue presented on this appeal as follows: "Under North Carolina uninsured motorist law applicable to a policy of uninsured motorist insurance issued in this State February 16, 1968, does the absence of physical contact by the vehicle operated by an insured under such policy with the vehicle of an unknown 'hit-and-run' motorist preclude recovery against the insurer for loss to the insured proximately resulting from the negligence of the unknown motorist?" Our answer is yes.

The policy definition of uninsured automobile incorporates the definition of hit-and-run automobile, which is as follows:

> "(d) Hit-and-Run Automobile. The term 'hit-and-run automobile' means an automobile, other than one in which an Insured is a passenger, which causes an accident resulting in bodily injury to an Insured, *arising out of physical contact of such vehicle* with the Insured or with a vehicle which the Insured is occupying at the time of the accident, * * *." (Emphasis ours)

[1] Despite the policy exclusion of injury occurring in the absence of contact, it is established in this State that "[w]here a statute is applicable to a policy of insurance, the provisions of the statute enter into and form a part of the policy to the same extent as if they were actually written in it. In case a provision of the policy conflicts with

a provision of the statute favorable to the insured, the provision of the statute controls." *Wright v. Casualty Co. and Wright v. Insurance Co.*, 270 N.C. 577, 155 S.E. 2d 100; *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610. See also *Moore v. Insurance Co.*, 270 N.C. 532, 155 S.E. 2d 128.

[2] The applicable statute here is G.S. 20-279.21(b)(3) which provides:

"(3) No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of § 20-279.5, under provisions filed with and approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles *and hit-and-run motor vehicles* because of bodily injury, sickness or disease, including death, resulting therefrom. * * * (Emphasis ours)

In addition to the above requirements relating to uninsured motorist insurance, every policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle, which policy is delivered or issued for delivery in this State shall be subject to the following provisions which need not be contained therein.

a. A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist in any manner provided by law; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. * * *

b. Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury *as the result of collision between motor vehicles* and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action against the insurer: * * *." (Emphasis ours)

A close reading of subsections "a" and "b" quoted above indi-

cates that they provide for the inclusion of certain provisions in the policy, namely, that the insurer shall be bound by a final judgment against the uninsured motorist, under certain conditions, and that suit may be against the insurer directly in case of injury from collision with an unidentifiable motorist. Therefore, if the plaintiff is included in the required statutory coverage, it is by virtue of G.S. 20-279.21(b)(3), quoted above in material part.

[3] This statute was enacted as remedial legislation and is to be liberally construed to effectuate its purpose, that being "to provide, within fixed limits, some financial recompense to innocent persons who receive bodily injury or property damage, and to the dependents of those who lose their lives through the wrongful conduct of an uninsured motorist who cannot be made to respond in damages." *Moore v. Insurance Co., supra;* 4 Strong, N.C. Index 2d, Insurance, § 69, p. 545.

[2] We now come to the question, does the policy exclusion of injury occurring in the absence of contact conflict with the statute.

In *Prosk v. Allstate Ins. Co.*, 82 Ill. App. 2d 457, 226 N.E. 2d 498, 25 A.L.R. 3d 1294, with facts very similar to those in the case before us, it was held that there is no conflict between the term "hit-and-run motor vehicle," as used in the statute relating to uninsured or hit-and-run motor vehicle coverage, and a policy requirement of "physical contact of such automobile" with the insured or with an automobile occupied by the insured.

[4] The applicable statute clearly refers to "hit-and-run motor vehicles." Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give its plain and definite meaning; *Davis v. Granite Corp.*, 259 N.C. 672, 131 S.E. 2d 335; and the courts are without power to interpolate, or superimpose provisions and limitations not contained therein. *Board of Architecture v. Lee,* 264 N.C. 602, 142 S.E. 2d 643.

We are compelled to interpret the statutes as written, leaving to the General Assembly the responsibility of writing and amending statutes.

The judgment of involuntary nonsuit entered by the superior court is

Affirmed.

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

JAMES F. HUDSON v. FLORA MAE OVERTON HUDSON

No. 6919SC158

(Filed 18 June 1969)

1. Pleadings § 11— requisites of counterclaim

The counterclaim must be separately stated and numbered and must set forth the facts constituting such cause with the same precision as if the cause were alleged in the complaint.

2. Pleadings § 10— nature of defendant's pleading — prayer for relief

The nature of defendant's pleading must be determined from the allegations rather than what is contained in the prayer for relief.

3. Divorce and Alimony § 6; Trial § 29— absolute divorce — voluntary nonsuit — nature of defendant's pleading

In plaintiff husband's action for absolute divorce on ground of separation for the statutory period, plaintiff is entitled to take voluntary nonsuit at any time where the wife's pleading does not amount to a counterclaim for alimony without divorce but merely alleges wrongful conduct by plaintiff in defense to his allegation of a separation for the statutory period, and where defendant moved only for subsistence and counsel fees pending the trial.

4. Divorce and Alimony § 18— allowances pendente lite — common law right

The right of defendant wife to an allowance for her subsistence pending trial and for counsel fees in a suit by her husband for absolute divorce was not derived from statute but was grounded in the common law.

APPEAL by defendant from *Exum, J.*, 4 November 1968 Session, RANDOLPH Superior Court.

Plaintiff instituted this action for an absolute divorce on grounds of separation for the statutory period. Defendant filed answer in which she admitted, in paragraphs 1 and 2, the residences of plaintiff and defendant. With respect to the allegations, in paragraph 3 of the complaint, that the parties were separated; and the allegations, in paragraph 4 of the complaint, that the parties had lived continuously separate and apart since their separation, defendant filed the following answer:

"3. Answering the allegations of paragraph 3 of the complaint, it is admitted that the plaintiff and defendant were lawfully married on or about the 11th day of June, 1966, in Montgomery County, North Carolina, and lived together as husband and wife, until on or about the first day of August, 1967, but it is specifically denied that the defendant in any sense abandoned the plaintiff but that on the other hand the plaintiff produced

such intolerable conditions that the defendant was forced to leave the plaintiff for her good health and happiness.

"4. Answering the allegations of paragraph 4, it is specifically denied that there has been any legal separation whatsoever between the plaintiff and defendant, but on the other hand the plaintiff through his diabolical conduct of producing living conditions that were unbearable forced the defendant to leave the plaintiff. That the plaintiff would play golf at all times and would leave the residence of the plaintiff and defendant and would not tell the defendant where he was going and that finally the defendant was forced to leave the residence of the plaintiff and defendant for her mental health and physical health and that the plaintiff has willfully failed and refused to support the defendant since the first day of August, 1967, and that after he failed and refused to adequately support the defendant according to his means and income, he caused a notice to be run in the newspaper while he was still married to the defendant on June 11, 1968, in the Courier-Tribune in which it stated that he announced his engagement to Lynn Ellen Brady and that said insulting announcement constituted intolerable living conditions for the defendant which she could do nothing about even after she was forced to leave the plaintiff by his intolerable conduct and that the defendant attaches to this answer a photostatic copy of the notice that was run in the newspaper — The Courier-Tribune — which has a publication in the State of North Carolina of around 10,000 newspapers and incorporates said photostatic copy of the notice of the 'wedding plans' of the said James Franklin Hudson in this answer as if set out in full. That the defendant is without sufficient funds with which to defray the costs of this action and has only her small wages that she earns while working with which to live on and that she is entitled to alimony pendente lite and support pending the final determination of the issues involved in this matter as well as counsel fees from the plaintiff."

Thereafter defendant prayed that she be granted a jury trial; that plaintiff be denied an absolute divorce; that defendant be awarded alimony and counsel fees pendente lite; and that defendant be granted alimony without divorce, and counsel fees.

Plaintiff filed a motion to strike considerable portions of paragraph 4 of defendant's answer, but this motion was never passed upon. On 11 October 1968, defendant caused notice to be served upon plaintiff that on 21 October 1968 she would request the court to make

an award of alimony and counsel fees pendente lite. On 15 October 1968, without notice to defendant, plaintiff submitted to a voluntary nonsuit before the Clerk of Superior Court of Randolph County.

Defendant filed a motion before Judge Exum, presiding over the 4 November 1968 Session of Superior Court, to set aside the judgment of voluntary nonsuit entered by the clerk, upon the grounds that defendant is entitled to an award of attorney fees and alimony pendente lite and that defendant was not notified nor did she authorize the entry of judgment of voluntary nonsuit. Judge Exum denied the motion, and defendant appealed.

Walker, Bell & Ogburn, by John N. Ogburn, Jr., for the plaintiff.

Ottway Burton for the defendant.

BROCK, J.

[1-3] Defendant argues that she filed a counterclaim for alimony without divorce, and therefore plaintiff could not take a voluntary nonsuit to defeat her counterclaim. If defendant had filed a counterclaim, the principle of law argued by defendant would seem to apply. *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879; McIntosh, N.C. Practice 2d, § 1645. However, in our view defendant has not filed a counterclaim; she has only filed answer making affirmative allegations of wrongful conduct by plaintiff in defense of his allegation of a separation for the statutory period. The defendant is entitled to set forth in her answer such counterclaim as she may have, but the counterclaim must be separately stated and numbered, G.S. 1-138; McIntosh, N.C. Practice 2d; § 1247, and, "[i]t must set forth the facts constituting such cause with the same precision as if the cause were alleged in the complaint . . ." 6 Strong, N.C. Index 2d, Pleadings, § 11, p. 310. While it may be true that in her prayer for relief defendant prayed that she be granted alimony without divorce, nevertheless the nature of defendant's pleading must be determined from the allegations rather than what is contained in the prayer for relief. *Pegram v. Tomrich Corp.,* 4 N.C. App. 413, 166 S.E. 2d 849.

[4] Defendant further argues that because she moved for subsistence pending trial and for counsel fees, plaintiff could not take a voluntary nonsuit to defeat her right to such subsistence and expense money. Defendant cites G.S. 50-15 in support of this contention. The statute relied on by defendant was repealed by Session Laws 1967, effective 1 October 1967. But in any event the right of a defendant wife to an allowance for her subsistence pending trial and for counsel fees in a suit by her husband for absolute divorce

was not derived from the statute but was grounded on the common law. *Branon v. Branon,* 247 N.C. 77, 100 S.E. 2d 209.

Because defendant did not file a counterclaim, but only moved for subsistence and counsel fees pending the trial of her husband's action for absolute divorce, the husband was at liberty to take a voluntary nonsuit. This would hold true and would terminate subsistence had it already been awarded upon her motion. *Caldwell v. Caldwell,* 189 N.C. 805, 128 S.E. 329.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

MILLIE SUMPTER TAYLOR, ADMINISTRATRIX OF THE ESTATE OF MELVIN TAYLOR, DECEASED v. STONEWALL JACKSON MANUAL TRAINING AND INDUSTRIAL SCHOOL

No. 6919IC199

(Filed 18 June 1969)

1. State § 10— tort claim — findings of Industrial Commission — appellate review

If any reasonable view of the evidence supports the critical findings and conclusions of the Industrial Commission, such findings and conclusions must be upheld on appeal.

2. State § 6— tort claim — negligent act by state employee

Before an award of damages can be made under the Tort Claims Act, there must be a finding of a negligent act by an officer, employee, servant or agent of the State.

3. State § 8— tort claim — sufficiency of evidence of negligence

In this action under the Tort Claims Act for the death of a 13-year-old child who ran into the side of a truck operated by a State employee, the evidence *is held* sufficient to support the findings and conclusions of the Industrial Commission to the effect that the truck driver drove at a reasonable speed, kept a proper lookout, applied his brakes when deceased ran into the road toward the side of the truck, and that the driver was therefore not negligent in the operation of the truck.

APPEAL by plaintiff-claimant from an opinion and award of the North Carolina Industrial Commission denying recovery.

Claimant is the administratrix of the estate of her thirteen-year-old son who died on 13 July 1966 as a result of an accident on 12

July 1966. Claimant's intestate was a student at the defendant school at the time of the accident, having been committed to the defendant school in July 1965 for the offense of breaking out a window with a rock. This claim for damages was brought under the provisions of the Tort Claims Act, North Carolina General Statutes, Chapter 143, Article 31.

On 12 July 1966, claimant's intestate was in a group of twelve to fifteen students who were going to the gymnasium. The regulations at the school required that the students travel in single file. The group of which the claimant's intestate was a member was traveling west along a paved street on their right-hand side, or the north side of said street. When they reached a point approximately 20 feet east of the intersection with another paved street which they were to cross in order to get to the gymnasium, a scuffle broke out between two of the boys in the file and they all stopped. The supervisor of the school laundry, which was adjacent to the street at the point the scuffle began, came out of the laundry and told the boys to break it up and go down to the gymnasium. The building in the northeast corner of the intersection was approximately three feet north of the edge of the street in which claimant's intestate was with the group, and approximately three feet from the east edge of the intersecting street. The street on which claimant's intestate was traveling was downgrade to the intersecting street.

At this time an employee of defendant school was driving a dump truck south along the intersecting street. The intersecting street along which the dump truck was traveling was ten to twelve feet in width.

When the laundry supervisor told the boys to break it up and go down to the gymnasium, claimant's intestate, who was at the head of the line, "broke from the line and ran across" the intersecting street. He ran downhill into the intersecting street and into the left front of the dump truck; he threw out both hands and hit the truck approximately four feet from the front and then fell to the pavement, hitting his head and suffering the injury which caused his death the next day. The dump truck had slowed for the intersection and was traveling ten m.p.h. The driver first observed claimant's intestate when he was running downhill towards the truck and about ten feet from the truck. He applied his brakes and stopped the truck within eight to ten feet.

After finding facts approximately as stated above, the hearing commissioner found the following:

"4. The above named employee of defendant drove the

truck at a slow and reasonable rate of speed and kept a proper lookout. He immediately applied the brakes of the truck that he was driving when the deceased ran into the road towards the side of the truck. Such employee of defendant acted the same as a reasonably prudent person would have done under the same or similar circumstances and there was no negligence upon his part.

"5. Deceased was a boy of 13 years of age at the time of his death, he having been born on 21 December 1952. He was a healthy boy and a good student at defendant's school. The deceased, by running into the north-south road and into the side of the truck, did other than a reasonably prudent person of the same age and experience of deceased would have done under the same or similar circumstances. This constituted negligence upon his part and such negligence was the proximate cause of the accident giving rise hereto."

The hearing commissioner thereafter made two conclusions of law as follows:

"1. There was no negligence upon the part of the above named employee of defendant. This is fatal to plaintiff's claim and it must be denied. G.S. 143-291 ET SEQ.

"2. There was contributory negligence upon the part of the deceased. This is fatal to plaintiff's claim and it must be denied. G.S. 143-291 ET SEQ."

The claimant excepted to the two conclusions of law and applied for review by the Full Commission. The Full Commission, after hearing, overruled each of the claimant's exceptions and adopted as its own the findings of fact and conclusions of law of the hearing commissioner. The claimant brings her exceptions forward to this Court and assigns them as error.

West & Groome, by Ted G. West, attorneys for the plaintiff-claimant.

Townsend & Todd, by J. R. Todd, Jr., attorneys for the defendant.

BROCK, J.

[1] Claimant argues that the finding and conclusion by the Industrial Commission that the driver of defendant's dump truck was not negligent is contrary to the greater weight of the evidence. "The Commission is the sole judge of the credibility of the witnesses and

the weight to be given their testimony." *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272. The appellate courts do not retry the facts, notwithstanding that the appellate court, if it had been the fact finding body, might have reached a different conclusion. *McGill v. Lumberton*, 218 N.C. 586, 11 S.E. 2d 873. If in any reasonable view of it, the evidence is sufficient to support the critical findings and conclusions of the Industrial Commission, such findings and conclusions must be upheld. *Keller v. Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342.

[2, 3] It is a sad and tragic event whenever the life of a child is cut short, but the State cannot be an absolute insurer of the safety of everyone committed to its custody. Before an award of damages can be made under the Tort Claims Act, there must be a finding of a negligent act by an officer, employee, servant or agent of the State. G.S. 143-291. In our opinion a reasonable view of the evidence supports the critical findings and conclusions in this case.

Because of what has heretofore been said, the question of the finding and conclusion respecting contributory negligence on the part of claimant's intestate becomes immaterial and we do not pass upon that phase of the appeal.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JOE LEE SMITH, ALIAS JOE LEE MOREHEAD

No. 6919SC229

(Filed 18 June 1969)

1. Criminal Law § 75— applicability of Miranda to retrials — confession obtained prior to June 13, 1966

Miranda v. Arizona, 384 U.S. 436, does not apply to confessions obtained prior to the date of that decision, June 13, 1966, when offered at trials or retrials beginning thereafter, where law enforcement officers relied upon and complied with constitutional standards applicable at the time the confessions were made.

2. Criminal Law § 75— admissibility of confessions — pre-Miranda standards

Prior to *Miranda v. Arizona* the admissibility of a defendant's confession rested upon the determination that the confession was, in fact, freely, voluntarily and understandingly given.

APPEAL by defendant from *Crissman, J.*, October 1968 Session, CABARRUS County Superior Court.

The defendant was charged in a proper three-count bill of indictment with (1) the felony of breaking and entering on 26 June 1965 of a building occupied by Holding Brothers, Inc.; (2) the felony of larceny of $1,820.94 on 26 June 1965, the property of Holding Brothers, Inc.; and (3) the offense of receiving stolen property, namely $1,820.94 belonging to Holding Brothers, Inc., knowing same to have been stolen.

When the case was called for trial, the Solicitor, on behalf of the State, announced that the third count would be dismissed. The case went to trial on the first and second counts, one for breaking and entering and the other for larceny.

The defendant entered a plea of not guilty. The jury returned a verdict of guilty on both counts, and the defendant was sentenced on the count of breaking and entering to a term of not less than eight nor more than ten years, and on the count of larceny, of not less than four nor more than five years, to commence at the expiration of the other sentence. The judgment further provided that the defendant was to be given credit for all time he had previously served on a prior sentence in this case. The record indicates that the defendant had been tried previously, and pursuant to a post-conviction hearing had been given a new trial. This was the new trial.

From the sentence imposed, the defendant appealed to the North Carolina Court of Appeals.

Attorney General Robert Morgan and Staff Attorney Sidney S. Eagles, Jr., for the State.

James C. Davis and Clarence E. Horton, Jr., for defendant appellant.

CAMPBELL, J.

The record and the brief in this case present only one question for determination. Did the trial court commit error in allowing defendant's confession to be admitted into evidence?

The evidence on behalf of the State tends to show that on or about 26 June 1965 Holding Brothers, Inc., occupied a concrete, cement-block building in Concord, North Carolina. A window to the building was broken out, and from a desk drawer a bank money bag containing $1,820.94 was taken. The robbery was discovered on Mon-

day morning, 28 June 1965, and about 11:00 o'clock that morning, two police officers went to the Massey home. The defendant was at that home, and he was observed putting something in a dresser drawer as the officers entered. The officers found $256 in the drawer where they had observed the defendant place something; and also in the room, they found two watches, a pair of new shoes and some other new clothing. The defendant was placed under arrest and taken to the police station. On arrival at the police station the defendant stated that he knew his rights and wished to telephone his attorney, Mr. Llewellyn of the Concord Bar. The officers told him that he had a right to telephone him, but after having been given permission to do so and though the telephone was right in front of the defendant, the defendant did not telephone Mr. Llewellyn. When the defendant stated that he desired to telephone his attorney, the officers discontinued any questioning of the defendant, and proceeded with the issuance of a warrant. While the warrant was being prepared, a brother of the defendant, together with a woman who said that she was the girl friend of the defendant, came into the police station carrying a bag containing $940.00. The woman stated that the defendant had left this money with her to keep. At this time, the defendant stated that he wished to make a statement, and he thereupon proceeded to make a full disclosure as to how he had broken into the building, taken the money, and what he had done with part of it.

Before the statement made by the defendant was introduced in evidence, the Court conducted a hearing in the absence of the jury pertaining to the circumstances under which the statement was made. After conducting this *voir dire* examination the record shows that the trial judge entered the following order:

"LET THE RECORD SHOW THAT THE COURT OVERRULED THE MOTION, AND THAT THE COURT FINDS FROM THE STATEMENT OF THE OFFICERS, FINDS AS A FACT, THAT THE DEFENDANT HIMSELF TOLD THE OFFICERS THAT HE KNEW HIS RIGHTS, AND THEN FOLLOWED THAT BY SAYING HE WANTED TO CALL AN ATTORNEY; AND HE WAS GIVEN AN OPPORTUNITY TO CALL AN ATTORNEY, DIDN'T DO SO, AND THAT NO FURTHER QUESTIONS WERE ASKED BY THE OFFICER; THAT THE NEXT STATEMENT THAT WAS MADE WAS BY THE DEFENDANT WHO VOLUNTARILY STATED THAT HE WANTED TO TALK ABOUT THIS BREAKING AND ENTERING, AND BEGAN TO TELL HOW HE DID IT; AND THAT THE COURT CONSIDERS THIS A VOLUNTARY STATEMENT ON THE PART OF THE DEFENDANT; AND WILL ALLOW THE OFFICERS TO TESTIFY BEFORE THIS JURY AS TO WHAT STATEMENTS THE DEFENDANT MADE AS BEING HIS VOLUNTARY CONFESSION."

It is to be noted that the arrest and confession in this case was in June 1965 which was prior to *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974, which was decided June 13, 1966.

The question as to the applicability of *Miranda* to confessions obtained prior to that decision when offered at trials or retrials is not now open to debate since the Supreme Court of North Carolina has determined this question. The matter has been exhaustively covered in *State v. Lewis,* 274 N.C. 438, 164 S.E. 2d 177, and these words of Bobbitt, J., are controlling on this subject.

> "In our view, *Miranda* should not and does not apply to confessions obtained prior to that decision, when offered at trials or retrials beginning thereafter, where law enforcement officers relied upon and complied with constitutional standards applicable at the time the confessions were made. We perceive a trend towards this conclusion in decisions of the Supreme Court of the United States discussed herein."

Prior to *Miranda* the admissibility of a defendant's confession rested upon the determination that the confession was, in fact, freely, voluntarily, and understandingly given. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. In the instant case, the evidence sustained the findings of facts of the trial judge and the facts found support the conclusion reached. The requirements of *State v. Gray, supra,* having been complied with, we find

No error.

BRITT and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT BOONE

No. 6921SC231

(Filed 18 June 1969)

Criminal Law § 168— instructions — statement of facts not in evidence — prejudicial error

In this prosecution for assault with intent to commit rape, the trial court committed prejudicial error in inadvertently stating facts in the charge which were not in evidence and which related to a critical area of the case, notwithstanding defendant failed to call the error to the attention of the trial court in time for correction.

STATE *v.* BOONE

APPEAL by defendant from *Bailey, J.*, 9 December 1968 Criminal Session, Superior Court of FORSYTH.

Defendant was charged in a valid bill of indictment with assault with intent to commit rape. He was tried on a plea of not guilty and found by the jury to be guilty as charged. From a judgment of 15 years imprisonment, defendant appealed.

Since recapitulation of all the evidence would serve no useful purpose, only those facts necessary for decision are stated in the opinion.

Attorney General Robert Morgan by Assistant Attorney General Parks H. Icenhour, Real Property Attorney Rafford E. Jones, and Real Property Attorney Roy A. Giles, Jr., for the State.

White, Crumpler and Pfefferkorn by William G. Pfefferkorn and Fred G. Crumpler, Jr., for defendant appellant.

MORRIS, J.

Appellant brings forward five assignments of error, three of which are to the charge to the jury. One is to the court's limiting defendant's cross-examination of a witness for the State. The other is to statements made by the court to the jury after they had deliberated for some time and had failed to reach a verdict.

Defendant was charged with assault with intent to commit rape. The prosecuting witness was his 15-year-old stepdaughter. She had testified that she lived with her mother and stepfather, that her mother and stepfather had been married for about 3 years, that she had during that time on occasions found it necessary to leave the home and stay with relatives or friends for periods of time because of her stepfather's attempts to molest her, that she had told her mother about previous occasions but nothing had been done about it. She testified that on this occasion she was at home sick, that her stepfather took her mother to the beauty parlor, that she was asleep and awoke to find that he was on her bed on his knees pulling off her pajama bottoms, that he had his pants off and did not have on any underpants. She then described graphically his actions, her attempts to repel his advances, and his threats that if she fought him he would make her pregnant but if she didn't, he wouldn't. She then testified "After he got over me, well, somebody knocked on the door and he got up and left. He got up and left. I don't remember if I ever saw his pants. I think they were on the bed. When he got off the bed, I could still see his private parts. After he got off the bed,

he went to the door I imagine. I don't know. Somebody knocked at the door and — After he got up and left the room there, I just laid there. I don't know who came to the house. I did not get out of the bed after he left the bedroom. I was crying at the time."

Guy Petty, grandfather of the prosecuting witness, testified that on the day in question he had been fishing in a lake just below the house of his daughter and son-in-law, that he could see the driveway to the house from the lake, that he saw his son-in-law's car pull in the drive, and in about ten minutes went to the house. He did not knock but opened the door and walked in. His son-in-law was in the bathroom fixing to shave. The bathroom, in respect to where he was standing, was right straight through the entrance of the door, back to the left. The bedroom Glenda used was back down to the right to the end of the hall. There was no way a person could get from the bedroom to the bathroom without being seen from where he was standing. He further testified "From where I was standing I did not see anybody come from the bedroom and go into the bathroom. He was standing there at the glass fixing to shave. He had clothes on at the time, he had pants and a shirt on. Pants and shirt. He was fully dressed when I was talking to him. No buttons on his clothes were unbuttoned that I noticed."

The court in its charge stated that "the State of North Carolina has offered certain evidence which in substance tends to show . . . that he did not have intercourse with her, but that as he was attempting to have intercourse with her and his private parts were touching hers; that there was a knock on the door and he got up and left — placed his trousers on — she stated he put his trousers on." In giving defendant's evidence, the court charged that Mr. Guy Petty testified that "Mr. Petty went to the house about ten minutes after Mr. Boone's car drove in; that he did not knock, that he just walked in, and that as he came in Mr. Boone was coming out of the bathroom; that he could see down the hall to the bedroom; that Boone had on his pants and shirt and was, in fact, pulling his pants up as he came out of the bathroom".

It is obvious that the court inadvertently stated facts which were not in evidence. It is well settled that if the trial judge misstates the facts in recapitulating the evidence or the contentions of the parties, it is the duty of the aggrieved party to call it to his attention so that correction may be made before the case is finally given to the jury. *In re Will of McGowan,* 235 N.C. 404, 70 S.E. 2d 189, and cases there cited. However, the circumstances here, we believe, take this case out of the well-established general rule. The facts stated by the court

were not in evidence and related to a critical area of the case, amounting very nearly to the supplying of a missing link in the State's evidence. "It is prejudicial error to submit to the jury for consideration facts material to the issue of which there is no evidence." *Baxley v. Cavenaugh,* 243 N.C. 677, 92 S.E. 2d 68, and cases cited therein. As in *Baxley,* the errors go directly to the crux of the case, and not to a subordinate feature thereof. We have no way of knowing how much, if any, weight the jury gave to these misstatements in their deliberations and verdict. Although inadvertent, we consider the errors sufficiently prejudicial to warrant a new trial.

We do not discuss the other assignments of error. They are not likely to occur in a retrial.

New trial.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. JOHNNY MACK THACKER
No. 6926SC253

(Filed 18 June 1969)

1. Safecracking— instructions — G.S. 1-180

In a prosecution for safecracking, G.S. 14-89.1, instructions of the trial court *are held* to comply with G.S. 1-180 in declaring and explaining the law arising on the evidence.

2. Criminal Law § 113— instructions — application of law to evidence

The trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon.

3. Safecracking— punishment

In prosecution for safecracking, sentence of imprisonment of not less than forty-eight nor more than fifty years is within statutory limits.

APPEAL by defendant from *Falls, J.,* at the 10 February 1969 Schedule B Criminal Session of MECKLENBURG Superior Court.

Defendant was tried under a bill of indictment providing as follows:

"The Jurors for the State upon their oath present, that Johnny Mack Thacker late of the County of Mecklenburg on the 29th day of December 1968 with force and arms, at and in the county

aforesaid, unlawfully, wilfully and feloniously did, by the use of an ax, pick and crow bar force open a safe of Carolina Nurseries, Incorporated, a corporation, N. Tryon Street, Charlotte, North Carolina, used for storing chattels, money and other valuables against the form of the statute in such case made and provided and against the peace and dignity of the State."

The State's evidence is summarized as follows: On and before 29 December 1968, George Coulter operated Carolina Nurseries, Inc., on N. Tryon Street in or near the City of Charlotte. One portion of the building was used for office purposes and an adjoining room was used for storing tools of various types. A medium-sized iron safe, with combination dial and handle, was kept in the office and business records and a small amount of money were kept in the safe. When Coulter left the place of business on Saturday, 28 December 1968, at approximately 5:00 p.m., the safe was locked and the building was secured. On the following Sunday morning between nine and ten, Coulter returned to the place of business for purpose of checking the heat in the greenhouse. He observed that the door leading from the outside to the office was partially open; as he further opened the door, he observed the safe lying on the floor with the door beaten off and the defendant was leaning over in the safe. Close by were a five-pound sledge hammer, two hacksaws, and a pick belonging to Carolina Nurseries, Inc., which tools had been removed from the tool room. Various papers that had been removed from the safe were scattered over the office floor. Coulter went across the street and called police who immediately went to the scene but could not find the intruder. He was later arrested in the area and identified by Coulter.

The defendant offered no evidence. The jury found him guilty as charged and from a prison sentence of not less than forty-eight nor more than fifty years, defendant appealed.

Attorney General Robert Morgan and Staff Attorney Dale Shepherd for the State.

William L. Pender for defendant appellant.

BRITT, J.

[1] In his sole assignment of error, defendant contends that the trial judge did not properly "declare and explain the law arising on the evidence" and did not "state the evidence to the extent necessary to explain the application of the law thereto" as required by G.S. 1-180.

G.S. 14-89.1 under which defendant was indicted provides as follows:

"Any person who shall by the use of explosives, drills, or other tools unlawfully force open or attempt to force open or 'pick' the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of from ten years to life imprisonment in the State penitentiary."

[2] Among other things, G.S. 1-180 provides that the trial judge "shall declare and explain the law arising on the evidence in the case." As was said by Moore, J., in *State v. Spratt*, 265 N.C. 524, 144 S.E. 2d 569, "* * * the trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon."

[1] A review of the instructions to the jury in this case discloses that they included a summarization of the charge as contained in the bill of indictment, a recapitulation of the evidence, an explanation of the effect of a not guilty plea and the presumption of innocence, a reading of the statute, and the following:

"Therefore, members of the jury, if the State of North Carolina has satisfied you from the evidence in this case and beyond a reasonable doubt that * * * the defendant by the use of tools did unlawfully force open the safe belonging to Carolina Nurseries, Incorporated, wherein money or valuables were being kept, if you find that to be the facts in this case from the evidence and beyond a reasonable doubt, it would be your duty to return a verdict of guilty as charged against this defendant. If you fail to so find, it would be your duty to render a verdict of not guilty or if upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to his guilt, it would be your duty to give him the benefit of this doubt and to acquit him."

Considering the instructions contextually, and particularly the portion above-quoted, together with the facts and circumstances in this case, we hold that the charge complied with G.S. 1-180 and the assignment of error related thereto is overruled.

[3] The defendant received a fair trial, free from prejudicial error. Although a young man, the record reveals that he had been convicted of serious offenses in three different states and was an escaped prisoner from South Carolina at the time of the offense complained of here. The sentence imposed was within statutory limits.

No error.

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

NORMA LEE KUYRKENDALL v. CLARK'S DISCOUNT DEPARTMENT STORE

No. 6921SC299

(Filed 18 June 1969)

1. False Imprisonment § 3; Damages § 16— compensatory damages — instructions

In action for false imprisonment, trial court's instructions on the issue of compensatory damages that the jury could consider such elements as prospective injuries, bodily pain, injury to fame and character, general impairment of social and mercantile standing, injury to credit, and decrease in earning capacity *are held* erroneous in not being supported by plaintiff's allegations or evidence, the plaintiff testifying, *inter alia*, that she has lost no time from employment nor has her credit been damaged as a result of the incident complained of and that she suffered from a "problem of nerves" for approximately two months.

2. Damages § 16— instruction on damages

It is incumbent upon the trial judge to give the jury sufficiently definite instructions on the issue of damages to guide them to an intelligent determination of the question.

3. Trial § 33— instructions

It is error to charge on an abstract principle of law not supported by the evidence.

APPEAL by defendant from *Seay, J.*, 3 February 1969 Civil Session, FORSYTH County Superior Court.

Norma Lee Kuyrkendall (plaintiff) instituted this civil action to recover compensatory and punitive damages resulting from an alleged false imprisonment of the plaintiff by Clark's Discount Department Store (defendant) on 10 June 1967.

About 7:00 p.m. on Saturday, 10 June 1967, the plaintiff went to the defendant's store located on Peters Creek Parkway in the City of Winston-Salem, Forsyth County, for the purpose of shopping. She left her two children in her automobile, which was parked in the parking lot, while she went into the store. She purchased some anklet socks, and after going through the check-out counter and paying for this purchase, she went into the grocery department. While selecting a can of dog food in this department, a store detective stopped her, showed her a card and said, "Come quietly or make a resistance." The plaintiff testified that she asked him, " 'What did I do?' He did not answer me. Then I accompanied him." She was taken into a private office where inquiry was made as to where she had procured the blouse and slacks which she was wearing. She had inadvertently failed to remove some tags from her clothes when she left her home

that night. These tags were fastened to a string and pinned onto her slacks.

The plaintiff was in the store about thirty-five minutes before she was requested to go to the office. She was in the office about ten minutes before she was permitted to leave.

The following issues were submitted to the jury:

"1. Did the defendant wrongfully and unlawfully restrain the plaintiff of her liberty, as alleged in the Complaint?

ANSWER: Yes.

2. If so,

(a) What amount of compensatory damages, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: $5,000.00.

(b) What amount of Punitive damages, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: $5,000.00."

From a judgment of $10,000.00 entered on the answers to the issues, the defendant appealed to this Court.

Green, Teeter and Parrish by Carol L. Teeter and Harrell Powell, Jr., for plaintiff appellee.

Womble, Carlyle, Sandridge and Rice by Allan R. Gitter and Jimmy H. Barnhill for defendant appellant.

CAMPBELL, J.

The defendant presents twenty-seven assignments of error. However, we will refrain from discussing all of them since we think a new trial is required and many, if not all, of these various assignments of error may not occur again.

[1] We are of the opinion that the trial judge committed prejudicial error in his charge on the issue of compensatory damages.

In the complaint the plaintiff alleged that by reason of her detention and imprisonment she was "subjected to great indignities, humiliation and disgrace" and "greatly injured in her credit and circumstances, and was caused to suffer such pain in both mind and body, for all of which she has sustained damages in the amount of $25,000.00."

In the evidence offered by the plaintiff to sustain a recovery of compensatory damages, there was no showing of any loss of earnings. In fact, the plaintiff's testimony was to the effect that she lost no time from her employment, and she was still doing the same work which she had been doing at the time of this incident. She testified that she was scared and very nervous and was worried by this incident; she had crying spells for several days thereafter; she went to see a doctor some three or four days thereafter and "he gave me . . . a green liquid nerve medicine. I took one bottle of it"; she lost some sleep during a period of three or four nights because "I was worried about that incident. That problem of nerves, and so forth, lasted around two months"; she felt self-conscious of people looking at her in different stores when she went shopping. A friend of the plaintiff observed her coming out of the defendant's store immediately after this incident. The friend described her at that time as being "real shook up, real nervous. She appeared differently than she had at the time I saw her previous to that in the store at the sock counter. She was real pale and scared to death."

In describing this incident, the plaintiff testified that no one put a hand on her and that

> "[o]ther than talking to my friends about it, there wasn't anyone who knew about this incident outside of the detective there in the store. Anyone that learned about this . . . has learned about it from me. As far as my credit rating being damaged, I don't know of that happening. . . ."

She further testified that her "credit hasn't actually been damaged in any way since this incident".

[2] In the light of the allegations in the complaint and the evidence introduced by the plaintiff, it was incumbent upon the trial judge "to give the jury sufficiently definite instructions to guide them to an intelligent determination of the question." *Kee v. Dillingham,* 229 N.C. 262, 49 S.E. 2d 510. *Adams v. Service Co.,* 237 N.C. 136, 74 S.E. 2d 332.

[1] On the issue of compensatory damages, the trial judge instructed the jury that they could consider, in awarding damages, such elements as "prospective" injuries; "bodily pain"; "injury to fame, reputation and character"; "general impairment of social and merchantile standing"; "injury to credit"; "deprivation of use of property"; and "decrease in her earning capacity". The trial judge charged:

"Members of the jury, that verdict may be any amount from one cent to $25,000, or any amount in between."

Neither the allegations in the complaint nor the evidence on behalf of the plaintiff justified the charge as given by the trial judge.

G.S. 1-180 provides:

"No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the contentions of the plaintiff and defendant in a civil action, and to the State and defendant in a criminal action."

In *Cummings v. Coach Co.*, 220 N.C. 521, 17 S.E. 2d 662, the trial judge committed prejudicial error by referring to a hospital bill for $118.00 in the charge to the jury when there was no evidence in the record of any such bill.

[3] It has likewise been held to be error to charge on an abstract principle of law not supported by the evidence. *Pressley v. Pressley*, 261 N.C. 326, 134 S.E. 2d 609.

Applying these principles to the instant case, it would seem that the charge of the trial judge failed to give to the jury a rule of damages supported by allegations and evidence.

New trial.

BROCK and MORRIS, JJ., concur.

BENJAMIN DANIEL HOOD v. GERTRUDE BUTLER KENNEDY

No. 698SC28

(Filed 18 June 1969)

1. Damages §§ 3, 16— permanent injuries

The court should not give an instruction allowing the jury to assess damages for permanent injuries unless there is evidence from which a conclusion of permanent injury proximately resulting from the wrongful act complained of may properly be drawn.

2. Damages §§ 3, 16— proof of permanent injuries — instructions — objective or subjective injury

Upon proof of an objective injury from which it is apparent that the plaintiff must of necessity continue to undergo pain and suffering in the future, the jury may award damages for the permanent injury without the necessity of expert testimony; where the injury is subjective and of such a nature that laymen cannot with reasonable certainty know whether there will be future pain and suffering, plaintiff must offer expert medical testimony that he, with reasonable certainty, may be expected to experience future pain and suffering as a result of the injury proven in order to warrant an instruction authorizing the jury to award damages for permanent injury.

3. Damages §§ 3, 16— instructions allowing damages for permanent injuries — sufficiency of evidence

In this action for injuries received when plaintiff's bicycle was struck by defendant's automobile, the trial court erred in instructing the jury that the plaintiff could recover "prospective" damages where the evidence does not reveal such objective injury resulting from the wrongful act of defendant as to permit the jury to award damages for permanent injuries and plaintiff presented no expert medical testimony as to his injuries.

APPEAL by defendant from *Parker, J.*, 23 September 1968 Civil Session of Superior Court of WAYNE County.

This is a civil action for damages received by the plaintiff when the bicycle he was riding was struck by an automobile operated by the defendant. The parties stipulated that the defendant was negligent in the operation of the automobile and that the only issue before the jury would be the issue of damages. The plaintiff testified that he was hit in the left ankle bone, and he grabbed and held to the hood of the defendant's automobile which traveled some distance before stopping; while he was holding to the hood of the car, his feet dragged on the road and that he fell from the hood to the road as the car stopped; he was seen in the emergency room of the Wayne County Memorial Hospital by Dr. Winfield Thompson; he was not hospitalized but returned home where he stayed in bed; later he was seen by Dr. Paul Bennett who had x-rays taken of the plaintiff and prescribed pain medications. There is no evidence in the record that plaintiff sustained any broken bones. He also testified he was in bed approximately six weeks; he suffered from pain and swelling of the left ankle, continuous headaches and that his stomach was still in "bad shape"; he feels dizzy at times, has headaches, and has some trouble with his left ankle. The plaintiff further testified that he had incurred total medical expenses of $122.30. The plaintiff testified that he was not gainfully employed at the time of the accident, and in fact, was drawing 100 per cent disability from the Government because of service connected injuries. The defendant offered no evi-

dence. The jury returned a verdict awarding the plaintiff $5,000.00 in damages.

From the judgment entered in accordance with the verdict, the defendant appeals to the Court of Appeals, assigning error *inter alia* in the charge of the trial court.

Taylor, Allen, Warren & Kerr by John H. Kerr, III for defendant appellant.

John S. Peacock and Joseph H. Davis for plaintiff appellee.

MALLARD, C.J.

In instructions to the jury the trial court used the following language:

> "The sum fixed should be such as fairly compensates the plaintiff for injuries suffered in the past and those likely to occur in the future as the direct and proximate result of the negligent act or acts of the defendant.
>
> The Court further instructs you that in assessing prospective damage, that is any damage in the future, by reason of a possibility of pain he will suffer, or any of the elements constituting damage in this action, then you are to award only the present worth or the present cash value of any future damages, as the plaintiff is to have a judgment in advance for any alleged future loss, and the award on this issue is to be made on the basis of a cash settlement and should be a fair and reasonable compensation to the plaintiff for his injuries, present, past and prospective, occurring as a direct and proximate result of the negligent act or acts of the defendant."

In several other portions of the charge the trial court refers to "prospective" damages that might be suffered by the plaintiff.

[1] "Where there is evidence from which a conclusion of permanent injury proximately resulting from the wrongful act may properly be drawn, the court should charge the jury so as to permit its inclusion in an award of damages. On the other hand, where there is not sufficient evidence of the permanency of an injury proximately resulting from the wrongful act, the court should not give an instruction allowing the jury to assess damages for permanent injuries. . . . (N)o such instruction should be given where the evidence respecting permanency and that it proximately resulted from the wrongful act is purely speculative or conjectural." *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40.

The question arises as to whether the plaintiff has presented sufficient evidence of the permanency of his injuries resulting from the wrongful act of the defendant to warrant an instruction as to "prospective" damages.

[2] In the case of *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753, it is stated:

> "There can be no recovery for a permanent injury unless there is some evidence tending to establish one with reasonable certainty. . . . Upon proof of an *objective* injury from which it is apparent that the injured person must of necessity continue to undergo pain and suffering in the future, the jury may award damages for it without the necessity of expert testimony. Where, however, the injury is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize the jury to award damages for permanent injury, that there 'be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from hypothetical questions based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering as a result of the injury proven.' "

[3] The evidence in this case does not reveal that plaintiff in the collision complained of suffered permanent injuries. If he does have permanent injuries the evidence leaves unanswered the question as to whether they are caused by his service connected injuries or the collision of his bicycle with the automobile operated by defendant. The evidence does not reveal such objective injury proximately resulting from the wrongful act of defendant as to permit the jury to award damages for permanent injuries. There was no testimony concerning plaintiff's injuries from expert medical witnesses. In the absence thereof, it was prejudicial error in this case to charge the jury that the plaintiff could recover "prospective" damages.

Defendant's other assignments of error are formal ones that need not be discussed since, for the reason stated, there must be a

New trial.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM DON YARBOROUGH
No. 6910SC271

(Filed 18 June 1969)

1. Robbery § 4— nonsuit — sufficiency of evidence

In this armed robbery prosecution, the evidence *is held* sufficient to be submitted to the jury where it tends to show that two men robbed the prosecuting witness at the point of a knife, that defendant and another man identified by the robbery victim as a participant in the crime were seen running from the crime scene, and that defendant at that time was carrying a long knife in his hand.

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

There must be substantial evidence of all material elements of the offense to withstand a motion for nonsuit, it being immaterial whether the substantial evidence is circumstantial, direct or both.

APPEAL by defendant from *McKinnon, J.*, 13 January 1969 Session of Superior Court of WAKE.

Defendant was charged in a valid bill of indictment with armed robbery. Through his court-appointed counsel he entered a plea of not guilty. The jury found him to be guilty as charged, and, from judgment entered on the verdict, defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Trial Attorney Charles M. Hensey for the State.

Larry D. Johnson for defendant appellant.

MORRIS, J.

[1] Defendant's only assignment of error is to the court's overruling his motion for judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence.

The evidence presented taken in the light most favorable to the State tends to show: On 15 October 1968, at approximately 8:50 p.m., Harold Kenneth Wall was getting into his car which was parked in the Allright Parking Lot on Wilmington Street in Raleigh, North Carolina. He felt a sharp object in his back and was directed to do as he was told. A Negro man came in front of him and took his watch, and a man behind him took his billfold and some loose change and a five dollar bill from his pockets. He was told by the man behind him to get in his car. As he was doing so, the man who was behind him came around to the front of the car and he had in his hand a shiny object which appeared to be a knife which looked to be about six inches long. He was able to identify the one in front of him as Raymond DeWhit Howard. The two ran easterly toward

Hargett Street. They did not leave from the Wilmington Street exit, and the Hargett Street and Wilmington Street exits are the only two exits from the parking lot. Wall went immediately to the police station, a distance of some four blocks, and reported the robbery.

Detective A. E. Morris and another officer were in an unmarked patrol car on the same night between 8:50 and 9 o'clock and had stopped for the traffic light at Hargett and Blount Streets headed west. He saw two Negro males running very fast across Hargett Street from the Allright Parking Lot. They went into an alley which had no other exit than on Blount Street — there being no doors along the alley, but solid walls down both sides. The lights on the patrol car were turned off, as the officers turned left on Blount Street and headed south where they could see the two males come from the alley. In just a few seconds, they saw the two running very fast come from the alley headed due east toward them and the officer turned the car lights on and ran the car in front of the two Negro males. One of them, Howard, ran up to the right-hand door of the car and the other, Yarborough, ran up to the right front fender and stopped. One officer grabbed Howard, and Officer Morris, who was driving, jumped out to grab Yarborough, but he ran. Officer Morris chased him for a short distance, but came back and got the car and drove around the block. When he got to the corner of Person and Martin Street, Yarborough was "angling" toward him but made a turn and headed out the other corner of Nash Square, ran through the Rescue Mission Parking Lot and into some bushes. Officer Morris was not able to apprehend him but did arrest him the following Sunday morning. He testified that though he could not that night call Yarborough by name, he knew him, having seen him for several years in and around Raleigh — court, jail, and different places. He was positive that the man who ran in front of the police car was William Don Yarborough. He had in his hand a knife that appeared to be a butcher knife, it had a round blade on one side and the blade appeared to be approximately eight inches long. The knife was in his right hand and his left hand was clutched. Yarborough was wearing dark pants and a short sleeved knit shirt which was dark. His hair was "sort of in a pompeii type process, same way it was on Sunday morning when I arrested him."

Defendant contends that the evidence does no more than raise a suspicion that the defendant was a participant in the robbery, and, therefore, the case should not have been submitted to the jury. We disagree.

[2] As was said by Higgins, J., in *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431:

" '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.' The above is another way of saying there 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. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. *S. v. Simpson, ante,* 325; *S. v. Duncan, ante,* 374; *S. v. Simmons, supra* [240 N.C. 780, 83 S.E. 2d 904]; *S. v. Grainger,* 238 N.C. 739, 78 S.E. 2d 769; *S. v. Fulk,* 232 N.C. 118, 59 S.E. 2d 617; *S. v. Frye,* 229 N.C. 581, 50 S.E. 2d 895; *S. v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469; *S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Ewing,* 227 N.C. 535, 42 S.E. 2d 676; *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868; *S. v. Johnson, supra* [199 N.C. 429, 154 S.E. 730]."

[1] The evidence here amply meets the test, and the trial court committed no error in submitting it to the jury for decision.

No error.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. PAUL DAVID KELLY

No. 6927SC227

(Filed 18 June 1969)

Criminal Law §§ 138, 144— credit for invalid sentence — separate valid sentence

Superior court judge had no authority to order that credit be given on defendant's valid sentence, which was previously imposed in another county by another judge, for the time which defendant had served on a separate invalid sentence.

ON certiorari from *Grist, J.*, 12 September 1968 Criminal Session, Superior Court of GASTON.

The State of North Carolina petitioned for a writ of certiorari to have the order entered by Grist, J., on 12 September 1968 reviewed by this Court.

On 24 August 1962 in the Gaston Superior Court, the defendant entered a plea of guilty to the crime of arson and was sentenced to be imprisoned for ten years. In August 1967 the defendant was paroled by the North Carolina Paroles Authority, and while he was on parole, five separate indictments charging breaking and entering and larceny were returned against the defendant in Martin County. On 11 June 1968 defendant entered guilty pleas to each of these charges, and the court, after consolidating the five cases for judgment, sentenced the defendant to be imprisoned for ten years. Upon the imposition of this sentence, defendant's parole was revoked and he, again, began serving time on the arson conviction.

On 29 July 1968, in a post-conviction hearing, it was determined that the defendant's constitutional rights were violated at the August 1962 trial for arson held in Gaston County and a new trial was ordered. The matter was calendared for trial at the September 1968 Session of the Gaston Superior Court. However, upon the call of the case, the solicitor announced that the evidence then available was the same evidence which was available at the original trial and that this evidence had been declared inadmissible at the post-conviction hearing. The solicitor, therefore, declined to prosecute. Following this statement by the solicitor, Grist, J., entered the following order:

> "It appearing to the court that the defendant was originally charged in this case with the crime of arson, in violation of G.S. 14-60; and it further appearing to the court that the defendant has been granted a new trial under a post-conviction review of the constitutionality of his original trial; and it further appearing to the court upon statement of the solicitor that the evidence which is available to the State is the same evidence which was originally used in the trial of the matter and which was declared invalid at the post conviction hearing; and it further appearing to the court upon statement of the solicitor, Honorable Henry M. Whitesides, that the defendant has served approximately six years in the penal system of the State of North Carolina; and it further appearing to the court that the defendant should be given credit for the time he has already served in the penal system of the State of North Carolina towards a sentence he is now serving which has heretofore been entered against the

defendant in Martin County, N. C., wherein he was convicted of the crime of breaking and entering, at the June 10, 1968, Term of Criminal Court for said county;

NOW, THEREFORE, IT IS HEREBY ORDERED that the defendant, Paul David Kelly, be given credit by the Department of Correction for the time served in Case No. 4558 towards the service of his sentence entered at the June 10, 1968, Term of the Superior Court for Martin County, N. C., wherein the defendant was convicted of the crime of breaking and entering. IT IS FURTHER ORDERED that the defendant be forthwith returned by the sheriff of Gaston County to the Department of Correction."

Attorney General Robert Morgan by Staff Attorney Dale Shepherd for the State.

Robert H. Forbes for defendant appellee.

MORRIS, J.

This case presents for determination the question of whether a superior court judge may order that credit be given on a valid sentence, previously imposed in another county and by another judge, for time which a party has served on a separate invalid sentence. We think the answer is "no".

At the outset, we note that we are not dealing with a case in which the party has been tried, sentenced, and served part of the sentence and then obtained a new trial on the same charge. If this were the situation, it is clear that the defendant would be entitled to credit for time served under the previous sentence. *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371; and cases there cited.

We think the answer to the problem presented here may be derived by drawing an analogy to the situation in which a judge imposes a sentence, and then after term attempts to change this sentence in some manner. This may not be done, for it is stated in *State v. Gross,* 230 N.C. 734, 55 S.E. 2d 517:

> "*As the term of court had not expired* the whole matter was *in fieri* and the right of the judge to modify, change, alter or amend the prior judgment, or to substitute another judgment for it, cannot be questioned. *S. v. Godwin,* 210 N.C. 447, 449, 187 S.E. 560; *S. v. McLamb,* 203 N.C. 442, 166 S.E. 507; *S. v. Manley,* 95 N.C. 661; *S. v. Stevens,* 146 N.C. 679, 61 S.E. 629; *S. v. Whitt,* 117 N.C. 804, 23 S.E. 452." (Emphasis added.)

Our interpretation of the North Carolina cases applied to this situation would logically result in holding that after the June 1968 Session of Superior Court of Martin County had ended, Judge Cohoon, the presiding judge, did not have the authority to modify the sentence imposed upon the defendant at that term. Obviously, if Judge Cohoon did not have the authority to alter the sentence after term, we cannot perceive of Judge Grist having the authority to alter the sentence at a session of court held in Gaston County three months after the Martin County session of court had ended.

While the judgment of Judge Cohoon was not before Judge Grist for attack or upon an allegation that it was erroneous, the practical effect of Judge Grist's order was to change the judgment entered by Judge Cohoon. A cardinal principle of law in this State has always been that a decision of one judge of the superior court is not reviewable by another judge of the superior court. "The power of one judge of the Superior Court is equal to and coordinate with that of another. A judge holding succeeding terms of a Superior Court has no power to review a judgment rendered at a former term upon the ground that such judgment is erroneous. *Phillips v. Ray,* 190 N.C., 152." *Newton and Co. v. Manufacturing Co.,* 206 N.C. 533, 536, 174 S.E. 449.

For the reasons stated herein, the order entered by Judge Grist on 12 September 1968 must be vacated.

Error.

CAMPBELL and BROCK, JJ., concur.

HAROLD WILLIAM RATHBURN v. DONALD FRANKLIN SORRELLS AND JAY EDWIN SORRELLS

No. 6928SC155

(Filed 18 June 1969)

1. Automobiles §§ 19, 90— accident at intersection controlled by signals — instruction as to right of way

In this action for property damage resulting from an automobile collision at an intersection, the trial court erred in instructing the jury as to the duty of the driver on the left to yield the right of way when two vehicles approach an intersection at approximately the same time, where the evidence disclosed that plaintiff and defendant were proceeding in opposite directions and that the intersection was controlled by automatic traffic signals, G.S. 20-155(a) being inapplicable in such a situation.

2. Trial § 33— instructions — erroneous view of the law on a substantive phase of the case

An instruction which presents an erroneous view of the law on a substantive phase of the case is prejudicial error.

APPEAL by defendant from *Froneberger, J.*, at the 4 November 1968 Civil Session, Superior Court of BUNCOMBE.

This is a civil action commenced 3 July 1967 to recover for property damages arising out of an automobile accident which occurred on 8 April 1967 in the City of Asheville, North Carolina. Plaintiff alleges that the defendant, Donald Franklin Sorrells, negligently drove an automobile, owned by Jay Edwin Sorrells and maintained for the general use, pleasure, and convenience of his family, into the path of the plaintiff's vehicle. The defendants answered, denying negligence, alleged contributory negligence on the part of the plaintiff as an affirmative defense, and set up a counterclaim for damages to the vehicle owned by Jay Edwin Sorrells. Plaintiff, in his reply, alleged contributory negligence as an affirmative defense to the defendants' counterclaim.

The accident occurred on Hendersonville Road at the point where Vanderbilt Road and All Souls Crescent intersect said road. Hendersonville Road at this point is a divided four-lane highway and runs in a north-south direction with Vanderbilt Road entering Hendersonville Road from the southwest. All Souls Crescent enters Hendersonville Road north of Vanderbilt Road and from the northwest and exits toward the east. In order for one traveling in a northeastwardly direction on Vanderbilt to enter All Souls Crescent in a northwestwardly direction, it is necessary to make a left turn on Hendersonville Road, travel northerly for a short distance, and then make a left turn on All Souls Crescent, crossing the southbound lanes of Hendersonville Road. Each of these turns are governed by traffic signals.

The plaintiff offered testimony which tended to show that he was traveling south on Hendersonville Road when the defendant, Donald Franklin Sorrells, entered Hendersonville Road from Vanderbilt Road, and traveled north for a short distance on Hendersonville Road. Defendant, Donald Franklin Sorrells, then attempted to make a left turn onto All Souls Crescent when he and the plaintiff collided. Both parties stated that the traffic signal controlling their movement was green when the accident occurred. The defendant, Donald Franklin Sorrells, testified that prior to the time the accident occurred, he was traveling north on Hendersonville Road and that he had not been on Vanderbilt Road. He stopped in the left hand lane at the

intersection of All Souls Crescent and Hendersonville Road in order to make a left turn onto All Souls Crescent. Donald Franklin Sorrells testified that when the traffic light in front of him exhibited a green arrow pointing toward All Souls Crescent, he proceeded with his turn as planned. That he saw the plaintiff's automobile just before the collision but that he thought the plaintiff would stop. Plaintiff's car and the car driven by Donald Franklin Sorrells collided in the center of the southbound lanes of Hendersonville Road.

The jury answered the issues of negligence and contributory negligence favorable to the plaintiff and awarded him damages. From judgment entered on this verdict defendants appealed.

Thomas E. L. Lipsey and Uzzell and Dumont by Harry Dumont for plaintiff appellee.

Williams, Morris and Golding by William C. Morris, Jr., and Robert G. McClure, Jr., for defendant appellants.

MORRIS, J.

[1] The trial judge instructed the jury as follows:

> "When two vehicles approach or enter an intersection and/or junction, at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right, except as otherwise provided in another chapter of this law . . ."

The portion of the charge quoted above is essentially the rule of law stated in G.S. 20-155(a). The defendants argue that this rule of law is not applicable to the facts in the present case and that to so charge the jury was prejudicial error. We agree.

In *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543, the plaintiff and defendant, as in the present case, were traveling in opposite directions on a four-lane street when the defendant made a left turn in front of the plaintiff. The defendant had entered the four-lane street from the east and had traveled only a short distance before making the left hand turn. The intersection, as in the present case, was governed by traffic signals. Our Supreme Court held that G.S. 20-155(a) was not applicable to these facts. "Where motorists are proceeding in opposite directions and meeting at an intersection controlled by automatic traffic lights, G.S. 20-155(a) has no application." *Shoe v. Hood, supra.*

[2] "An instruction which presents an erroneous view of the law upon a substantive phase of the case is prejudicial error. *Parker v.*

Bruce, 258 N.C. 341, 128 S.E. 2d 561." *White v. Phelps,* 260 N.C. 445, 132 S.E. 2d 902.

For error committed in the instruction to the jury there must be a New trial.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. RAYMOND VICTOR CROSS

No. 6922SC270

(Filed 18 June 1969)

1. Criminal Law § 145.1— revocation of probation judgment — appeal

Where revocation of judgment of probation is based upon a conviction of defendant which is reversed on appeal, the order of revocation must be reversed on defendant's appeal from such order.

2. Criminal Law § 145.1— probation — act of grace — compliance with terms

Where a defendant complies with the valid conditions of a judgment placing him on probation and suspending the execution of a sentence, the suspension should stand; but probation or suspension of sentence comes as an act of grace to one convicted of a crime, and not as a matter of right.

3. Criminal Law § 145.1— revocation of probation — findings of fact

Order of trial court revoking defendant's judgment of probation on ground that defendant had violated a condition of probation in failing to work at suitable employment, *held* supported by the evidence and the findings of fact.

APPEAL by defendant from *McConnell, J.,* 27 January 1969 Mixed Session of Superior Court of DAVIDSON County.

In July 1968 defendant was arrested on charges of forgery and uttering a forged instrument. He was tried and convicted of these crimes in November 1968. Prayer for judgment was continued until January 1969 at which time he was sentenced and gave notice of appeal to the Court of Appeals. The forgery case, in an opinion filed the same date herewith by Campbell, J., has been reversed because of a defective bill of indictment.

After the defendant was sentenced for the crimes of forgery and uttering a forged instrument, the court held a probation revocation hearing. Defendant was represented by counsel. Defendant and his

counsel participated in the hearing. A verified written report of the probation officer was filed in which it was stated that the defendant wilfully violated the terms and conditions of the probation judgment in that: (1) he failed to work faithfully at suitable employment as far as possible, and (2) he violated the penal laws of the State and did not remain of general good behavior. The evidence tended to show that the defendant was on probation and that the probation officer received the defendant in May 1968. That the defendant got a job on June 24, 1968, and worked through June 26, 1968. The probation officer testified, on being cross examined by defendant's counsel, that "(a)s far as his attitude, he has been very nice, as nice as anybody I ever supervised, as far as that is concerned, but I could not get him to work; the whole time I had him, he would not work."

The judge found, among other things, that the defendant was then on probation, that he had wilfully violated the terms of the probation in that he had failed to work at suitable employment and that he had violated the penal laws of the State of North Carolina in committing the crime of forgery.

The judge, after finding specific facts entered the following order:

> "IT IS, THEREFORE, ORDERED, in the discretion of the Court, that the probation be, and the same is hereby, revoked and the sentence to the State Prison to be assigned to work under the supervision of the State Department of Corrections for a term of five years, heretofore suspended, is hereby ordered into immediate effect and commitment shall be issued by the Clerk of Court."

The defendant gave notice of appeal to the Court of Appeals.

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

P. G. Stoner, Jr., for the defendant appellant.

MALLARD, C.J.

Defendant contends that the court abused its discretion in revoking the probation of the defendant and placing the sentence heretofore suspended into immediate effect without hearing any competent evidence relating to the violation of the conditions of probation.

[1] The conviction of the defendant on the forgery charge has been (as of this date) reversed by this Court. If the finding of the trial judge that the defendant had violated the conditions of the probation judgment was based solely upon his being found guilty of this

violation of the criminal law, the judgment of revocation would have to be reversed. *State v. Glenn,* 251 N.C. 160, 110 S.E. 2d 794; *State v. Harrelson,* 245 N.C. 604, 96 S.E. 2d 867.

[2] Where a defendant complies with the valid conditions of a judgment placing him on probation and suspending the execution of a sentence the suspension should stand. But probation or suspension of sentence comes as an act of grace to one convicted of a crime, and not as a matter of right. *State v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53; *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476. In this case the judge found that the defendant had violated another valid condition of the probation judgment in that he had wilfully failed to work at suitable employment.

[3] There was ample competent evidence upon which to base the finding by the trial judge that the defendant had wilfully failed to work at suitable employment. There is nothing to show any abuse of discretion by Judge McConnell in the entry of the judgment ordering the prison sentence into immediate effect.

The judgment revoking probation herein is affirmed.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. RAYVON CROSS

No. 6922SC269

(Filed 18 June 1969)

Forgery § 2— indictment — insufficiency of allegations

An indictment for the forgery of a money order which follows the language of the statute but fails to aver the manner in which the money order was altered or defaced is fatally defective.

APPEAL by defendant from *Johnston, J.,* 4 November 1968 Mixed Session, DAVIDSON County Superior Court.

Defendant was charged in a two-count bill of indictment with forgery and with uttering the same forged instrument. The bill of indictment accused the defendant on the 29th day of July 1968 with ". . . forging and counterfeiting a certain American Express Money Order which said forged and altered American Express Money Order

is as follows, that is to say: (there was attached a photostatic copy of the money order) with intent to defraud, against the form of the statute. . . ." From a verdict of guilty on both counts and a sentence of imprisonment of not less than seven nor more than ten years, the defendant appealed to this Court.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

P. G. Stoner, Jr., for the defendant appellant.

CAMPBELL, J.

The defendant assigns several errors in the trial of the case, but we find it necessary to discuss only the first, which is the denial of the defendant's motion to quash the bill of indictment for failure to describe the charge with sufficient exactness to allow the defendant to prepare a defense.

The bill of indictment did not set out wherein the American Express Money Order had been altered, changed or defaced so as to constitute the claimed forgery. A photostatic copy of the money order itself was attached to the bill of indictment. The evidence, however, disclosed that the money order as originally issued was for 1.00 Dollar. The forgery consisted of extending the base of the one (1) so as to eliminate the period between the one (1) and the first zero (0), and thereby making the money order appear to be for 100 Dollars. The alteration was so cleverly done that the Assistant Cashier of the bank which cashed the money order thought it was for 100 Dollars and directed the teller to give that sum of money in payment for the money order.

The bill of indictment did not in any way set out the manner and method in which the money order had been altered, changed or defaced. The warrant which was issued in this case for the original arrest, did set out, among other things, that the defendant ". . . did wittingly, and falsely make, forge, and alter an American Express Money Order, from $1.00 to read $100.00, with intent to defraud. . . ."

In this case, however, the defendant was tried on a bill of indictment for the felony of forgery. He was not tried on the warrant, and the warrant was not a part of the charge.

Even though the offense of forgery is charged in statutory language in the bill of indictment, in order to be a valid bill of indictment, it is necessary that the statutory words be supplemented by

other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. *State v. Coleman*, 253 N.C. 799, 117 S.E. 2d 742. In the instant case, the bill of indictment failed to do this, and since the warrant was not a part of the charge in the bill of indictment and since the defendant was placed on trial for the charge contained in the bill of indictment, the motion to quash should have been sustained.

> "Where the alteration of a genuine instrument is charged, an indictment for forgery must clearly set forth the alteration alleged, with the proper allegations showing alteration of a material part of the instrument. Thus, in an indictment for forgery effected by interpolating words in a genuine instrument, as by raising the amount of a note, the added words should be quoted and their position in the instrument shown, so that it may appear how they affect its meaning." 36 Am. Jur. 2d, Forgery, § 35, p. 700.

Reversed.

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

GASTONIA PERSONNEL CORP. v. BOBBY L. ROGERS

No. 6927DC225

(Filed 18 June 1969)

1. Infants § 2— liability of minors on contracts

A minor is obligated to pay for necessaries, as an exception to the general rule that a minor may disaffirm a contract made by him.

2. Infants § 2— contract liability — questions of law and of fact

The question of whether a particular item or service is a necessity is a mixed question of law and fact; whether the article or service is within one of the classes for which a minor is liable is a question of law; whether the item or service is in fact necessary and of reasonable price is a question for the jury.

3. Infants § 2— contract liability — employment agency

A minor is not liable for services rendered by a professional employment agency in finding him a job.

APPEAL by plaintiff from *Mason, (William A.), J.*, 24 February 1969 Civil Session, District Court for the 27th Judicial District sitting in the County of GASTON.

The plaintiff, a corporation, is a professional employment agency in Gastonia, North Carolina. On 29 May 1968 the defendant, Bobby Rogers, went to the plaintiff's place of business seeking aid in finding employment. At this time the defendant was 19 years of age, married, and was a student at Gaston Tech. However, it was going to be necessary for him to quit school and go to work because his wife was expecting a baby in September. Defendant entered into a contract with the plaintiff providing that if he accepted employment as a result of a lead given by the employment agency, defendant would pay the agency a fee according to a schedule set out on the face of the contract. Maurine Finley, a personnel counselor with the plaintiff corporation, conferred with the defendant and arranged for him to interview Spratt-Seaver, Inc. in Charlotte, North Carolina, on 1 June 1968. As a result of this interview, the plaintiff obtained employment with Spratt-Seaver, Inc., with a starting salary of $4,784. According to the schedule set out on the face of the contract between the plaintiff and defendant, plaintiff's fee for this service was $295.

Plaintiff seeks to recover this amount. At the end of the plaintiff's evidence, the trial court entered a judgment dismissing the plaintiff's action. From this judgment the plaintiff appealed.

Joseph B. Roberts, III, for plaintiff appellant.

Henry M. Whitesides by T. Lamar Robinson, Jr., for defendant appellee.

MORRIS, J.

This appeal presents but one question: that is, whether the employment of the services of a professional employment agency may be considered a "necessary" expense so that an infant is obligated to pay for them.

[1, 2] The general rule is that a minor may disaffirm a contract made by him. The exception to this rule is that a minor is obligated to pay for necessaries. *Turner v. Gaither,* 83 N.C. 357; and *In Re Peacock,* 261 N.C. 749, 136 S.E. 2d 91.

What are necessaries?

> "In *Freeman v. Bridger,* 49 N.C., 1, *Pearson, J.*, speaking to the subject: *'Lord Coke* says, Co. Lit., 172a, "It is agreed by all the books, that an infant may bind himself to pay for his necessary

meat, drink, apparel, physic and such *other* necessaries." These last words embrace boarding; for shelter is as necessary as food and clothing. They have also been extended so as to embrace schooling and nursing (as well as physic) while sick. In regard to the quality of the clothes and the kind of food, etc., a restriction is added, that it must appear that the articles were suitable to the infant's degree and estate.' " *Barger v. Finance Corp.*, 221 N.C. 64, 18 S.E. 2d 826.

In North Carolina the question of whether a particuler item or service is a necessity is a mixed question of law and fact. Whether the article or service is within one of the classes for which he is liable is a question of law. Whether the item or service was in fact necessary and of reasonable price is a question for the jury. *Smith v. Young*, 19 N.C. 26.

[3] We do not think that the services of a professional employment agency may be considered "necessary" so that a minor may not disaffirm a contract for such services. It makes no difference that the defendant has profited by the efforts of the plaintiff. He is still free to disaffirm the contract. *Fisher v. Motor Co.*, 249 N.C. 617, 107 S.E. 2d 94. The plaintiff's services were advantageous to the defendant, and clearly he was in need of a job when they were rendered; however, it does not appear that they were necessary for him to earn a livelihood. The judgment below is

Affirmed.

CAMPBELL and BROCK, JJ., concur.

BLANCHE SLOAN GAY, EMPLOYEE v. NORTHAMPTON COUNTY SCHOOLS, EMPLOYER; STATE BOARD OF EDUCATION, INSURER

No. 696IC176

(Filed 18 June 1969)

Master and Servant § 77— change of condition — review of award — notice to employee — finding of fact

In a hearing to review an award for a change of condition, failure of the Industrial Commission to make finding of fact whether employer and its insurer gave employee notice required by rule of the Commission (Form 28B) that if the employee claimed further benefits he would have to notify the Commission in writing within a year, *held* error, and the cause is remanded to the Commission for a finding thereon.

APPEAL by defendants from the North Carolina Industrial Commission order of 11 September 1968.

On 9 March 1965, plaintiff filed with the North Carolina Industrial Commission a request for hearing due to change of condition. Hearing was had in Charlotte on 26 March 1968 before Commissioner Shuford who subsequently entered an opinion and award in favor of plaintiff. Defendants appealed to the Full Commission which affirmed the award. Defendants appealed assigning as error certain portions of the findings of fact and conclusions of law.

No appearance for plaintiff.

Attorney General Robert Morgan by Staff Attorney Richard N. League for defendant appellants.

MORRIS, J.

Defendants except to that portion of finding of fact No. 1 which reads ". . . but copy of such form was not received by plaintiff", to conclusion of law No. 1 which reads "Plaintiff's claim is not barred by the limitations contained in G.S. 97-47. *White v. Boat Corporation, supra*", and that portion of conclusion of law No. 2 as follows: "Plaintiff is therefore entitled to additional compensation".

Defendants contend that plaintiff's claim is barred by the provisions of G.S. 97-47 which provides that the Commission may, on its own motion or upon application of any party in interest, review an award on the grounds of a change in condition, but "no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article, . . ."

There seems to be no dispute as to the last payment of compensation. No exception is made to the finding of fact that it was made in January 1964.

Rule XIV(2) promulgated by the Industrial Commission provides: "No insurance carrier or employer shall cease payment of compensation before the terms of the award have been fully complied with, unless and until such insurance carrier or employer shall have filed with the Commission a request to discontinue the payment of compensation upon the form prescribed, in which the reasons supporting such request shall be stated in full, *and a copy thereof shall have been mailed to or served upon the employee.*" (Emphasis added.) North Carolina Workmen's Compensation Act and the North

Carolina Tort Claims Act Annotated and Rules and Regulations Governing Administration (1968), p. 219-220.

A copy of this form appears in the record. It bears the designation I. C. FORM 28B. At the bottom thereof in boldface print appears the following: "NOTICE TO EMPLOYEE: If the answer to Item No. 14 above is 'Yes', this is to notify you that upon receipt of this form your compensation stops. If you claim further benefits, you must notify the Commission in writing within one (1) year from the date of receipt of your last compensation check."

In *White v. Boat Corporation,* 261 N.C. 495, 498, 135 S.E. 2d 216, Justice Rodman, speaking for the Court and referring to a similar situation, said:

> "Did the carrier execute Form 28B and *furnish the employee* with a copy of that form? If so, was it furnished within 16 days as required by the Commission's order? What date does that form show as the date of last payment? If *that form was not given the employee,* as the rules require, he was deprived of information which the Commission specifically directed the carrier to furnish for his protection. It had legislative authority to require the insurance carrier to give employee this information. If the carrier failed to comply with the rule by giving employee notice of the limited time within which he could claim additional compensation, it failed to put the statute of limitations in operation." (Emphasis added.)

We find no finding of fact with respect to whether defendants complied with the rules of the Commission. We do not consider the finding that the plaintiff did not receive such a form sufficient compliance, nor the finding that it was the custom and practice of defendant to send compensation recipients Form 28B when a case was closed sufficient finding of defendants' compliance. In the light of the provisions of Rule XIV(2) and the opinion in *White v. Boat Corporation, supra,* we hold that such a finding is necessary, and the case is remanded to the Industrial Commission for findings of fact in accord with this opinion and conclusions of law thereon.

Remanded.

CAMPBELL and PARKER, JJ., concur.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF O. R. BAKER, DECEASED

No. 6920SC164

(Filed 18 June 1969)

Wills § 23— caveat proceeding — undue influence — instructions

In this caveat proceeding in which it was contended that the original of the paper writing offered for probate had been destroyed by the testator *animo revocandi*, the trial court did not err in refusing to give an instruction requested by propounder that the jury should find that testator had not revoked his will if he burned his will because of the undue influence of his ex-wife or one or more of his children, where there was no evidence of undue influence and the request was not presented to the trial court prior to the commencement of the charge to the jury.

APPEAL by propounder from *Seay, J.*, 3 September 1968 Civil Session, MOORE County Superior Court.

On 29 October 1966 Tishia Williams Baker (propounder) filed a petition propounding for probate in common form a paper writing purporting to be a copy of the will of her husband, O. R. Baker, who died 20 September 1966. The original of the purported will had been lost or misplaced. On 13 February 1967 the clerk of superior court filed an order denying the petition and refusing probate in common form of the paper writing. On appeal to the presiding judge of superior court, the cause was remanded to the clerk for his order citing all interested parties to caveat the will or, if no caveat be filed, to probate the paper writing. This order was filed on 8 March 1967.

The clerk issued a citation under date of 7 April 1967 to each of the children of O. R. Baker, notifying them that a motion had been made to probate the paper writing as the Last Will and Testament of O. R. Baker and that, if a caveat should not be filed within thirty days after service of the citation, the paper writing would be admitted to probate. The children constituted all of O. R. Baker's heirs at law.

A caveat under date of 17 May 1967 was filed by Otis Ray Baker (caveator), a son and heir at law of O. R. Baker. It was alleged that the paper writing was not the Last Will and Testament of O. R. Baker because the original of said paper writing "was destroyed by the testator prior to his death animo revocandi, and that the copy presented for probate [was] void and of no effect."

Three issues were submitted to the jury and answered as follows:

"1. Was the paper writing propounded, dated the 18th day of February, 1965, executed by O. R. Baker, according to the

formalities of the law required to make a valid last will and testament?

ANSWER: Yes.

2. Was the paper writing referred to in Issue #1 revoked by O. R. Baker, deceased?

ANSWER: Yes.

3. Is the said paper writing referred to in Issue No. 1, propounded in this cause, and every part thereof, the last will and testament of O. R. Baker, deceased?

ANSWER: ....."

The presiding judge thereupon entered a judgment based upon the above issues and answers thereto adjudging that the paper writing was null and void and of no legal effect because it had been legally and lawfully revoked *animo revocandi* by the purported testator prior to his death. The propounder excepted and appealed to this Court.

John Randolph Ingram for propounder appellant.

Barrett and Wilson by W. Clement Barrett for caveator appellee.

CAMPBELL, J.

At the conclusion of his charge to the jury, the presiding judge inquired if there was anything further, whereupon counsel for the propounder requested a further instruction as follows:

" 'Members of the jury, if you should find that O. R. Baker did in fact burn his will, which the propounder contends he did not, but that he did so because of the undue influence of his ex-wife, Mrs. Oakley, or one or more of his children, then you would answer the second issue No.' "

The presiding judge refused to give this further instruction. The propounder thereupon excepted and assigned this as error.

There was no error in refusing to give this further instruction for two reasons. First, the request was inopportune and should have been presented to the presiding judge prior to the commencement of his charge to the jury. Second, there was no evidence to support such an instruction, and in the absence of any evidence of undue influence, it would have been error so to instruct the jury. 2 McIntosh, N.C. Practice 2d, § 1517.

The only other assignment of error brought forward in the propounder's brief is to the introductory statement in the charge to the

jury, wherein the presiding judge explained to the jurors how this case had been instituted. We have reviewed the record and charge, and we find no prejudicial error.

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. FREDDIE THOMAS GRIFFIN

No. 6919SC306

(Filed 18 June 1969)

1. Criminal Law § 23— plea of guilty — voluntariness and understanding of plea

Before defendant entered pleas of guilty to four misdemeanors, the fact that trial judge incorrectly stated that the maximum punishment defendant could receive was four years, when in fact the maximum was eight years, does not result in prejudice to defendant when the total sentence imposed was not more than two years.

2. Criminal Law § 167— appeal — burden to show error — presumption of regularity

On appeal the burden is on defendant not only to show error but also to show that the error complained of was prejudicial to him, the presumption being in favor of the regularity of the trial below.

3. Criminal Law § 167— appeal — harmless and prejudicial error

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.

APPEAL by defendant from *Seay, J.*, at the 9 December 1968 Session of ROWAN Superior Court.

In bill of indictment in case No. 4052, defendant was charged with breaking and entering the Stalling Memorial Church on 13 December 1967 and with larceny of two record players of the total value of $60.00; also receiving said property knowing the same to have been stolen. In bill of indictment in case No. 4053, defendant was charged with breaking and entering the Salisbury Investment Company Warehouse on 23 December 1967 and with the larceny of two mag wheel covers of the value of $20.00; also with receiving said mag wheels knowing them to have been stolen.

When the cases were called for trial, defendant, through his counsel, tendered a plea of guilty to nonfelonious breaking and entering and nonfelonious larceny in each case, a total of four misdemeanors. The solicitor, on behalf of the State, agreed to accept the pleas. Before the court would accept the pleas, the trial judge asked defendant numerous questions to determine if the pleas were entered knowingly and understandingly, and if defendant fully understood the consequence of the pleas.

Upon being satisfied that the pleas were knowingly and understandingly made, the court accepted them, consolidated the cases for purpose of judgment, and sentenced the defendant to an active prison term of not less than eighteen months nor more than twenty-four months. Defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General George A. Goodwyn for the State.

Graham M. Carlton for defendant appellant.

BRITT, J.

[1] Defendant's only assignment of error relates to one of the questions asked the defendant by the trial judge in determining if the pleas were knowingly and understandingly made. The question was: "Do you understand that upon your plea of guilty you could be imprisoned for as much as four years?" Defendant contends that on his pleas he could have been imprisoned for as much as eight years.

Admittedly, the trial court incorrectly stated the maximum sentence the defendant could receive as a result of his pleas; however, we are unable to perceive how the defendant was prejudiced by the error when he received a total sentence of not more than two years.

[2, 3] It is well established in this jurisdiction that on appeal to the appellate division the burden is on defendant not only to show error but also to show that the error complained of was prejudicial to him, the presumption being in favor of the regularity of the trial below. 3 Strong, N.C. Index 2d, Criminal Law, § 167, pp. 126, 127. 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. *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406.

The judgment of the superior court is

Affirmed.

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

IN THE MATTER OF: ESTATE OF J. ROBERT CONNOR, DECEASED

No. 6918SC167

(Filed 2 July 1969)

1. Wills § 61— right of dissent of surviving spouse

The qualified right of a surviving spouse to dissent from the deceased spouse's will arises when the value of property passing under the will added to the value of property passing outside the will as a result of the testator's death is less than the intestate share, or is less than one-half the net estate of the deceased spouse if neither lineal descendant nor parent survives. G.S. 30-1.

2. Descent and Distribution § 1— intestate share of surviving spouse

When an intestate has no lineal descendants but is survived by a spouse and a parent, the intestate share of the surviving spouse is a one-half undivided interest in the real property and the first ten thousand dollars in value plus one-half of the remainder of the personal property. G.S. 29-14(3).

3. Descent and Distribution § 1— what constitutes the "intestate share"

The intestate share does not include the value of property passing by survivorship (which includes property owned as tenants by the entirety), joint accounts with right of survivorship, and insurance payable to the surviving spouse.

4. Wills § 61— right of dissent of surviving spouse — G.S. 30-1 — intestate share

"Intestate share," as used in G.S. 30-1 providing for spouse's right of dissent from will, means the amount of real and personal property that the surviving spouse would receive under the Intestate Succession Act, G.S. Ch. 29, had the deceased spouse died intestate, and does not include property received by surviving spouse as a tenant by the entirety, or from insurance contracts, or from joint accounts with right of survivorship.

5. Wills § 61— right of dissent — valuation of the estate

Requirement of G.S. 30-1, which permits dissent by surviving spouse from deceased spouse's will, that the property of the estate shall be determined and valued as of the date of death of the testator is mandatory and must be complied with before there can be a proper determination as to the right of the surviving spouse to dissent.

6. Executors and Administrators § 23; Descent and Distribution § 1— intestate share of surviving spouse — year's support allowance

The year's allowance for the surviving spouse under the provisions of G.S. 30-15 is not a part of the "intestate share" passing to a surviving spouse under the Intestate Succession Act. G.S. Ch. 29.

APPEAL by surviving spouse Lucille M. Connor from *Exum, J.*, 17 December 1968 Session of Superior Court of GUILFORD County.

J. Robert Connor died testate on 18 October 1967. The testator had no lineal descendants. At the time of his death he was survived by his second wife, Lucille M. Connor, and his mother, Daisy Lee Connor. The will was probated and the executor named in the will, North Carolina National Bank, qualified on 7 November 1967. Under the terms of the will, the testator created a trust for the benefit of his wife during her lifetime, and in addition granted to her a power of appointment by will over the principal of the trust estate. The amount provided to fund this trust was that amount of property which would be equal to the maximum marital deduction allowable for federal estate tax purposes — that is, one-half of the adjusted gross estate as computed for federal tax purposes — less the value of all other property interests included in testator's gross estate for federal estate tax purposes and which passed to his widow either under other provisions of the will or in any other manner outside of the will in such manner as to qualify for the marital deduction. On 6 May 1968, Lucille M. Connor filed with the Guilford County Clerk of Court a dissent to the will of her late husband. The attorneys for the executor and the surviving spouse on 7 May 1968 stipulated:

"1. That the actual valuation of the various properties of the probate estate of the decedent and the properties passing outside the will to the surviving spouse are indeterminate at this time; however, estimated values of the properties in the probate estate are:

Real Estate, stocks, tangible personal property, cash and other assets	$203,000.00

Estimated valuations of properties passing to the surviving spouse outside the will:

Real estate by the entirety, insurance and survivorship property	61,600.00

2. The surviving spouse, pursuant to the terms of the Last Will and Testament of J. Robert Connor, Deceased, is the beneficiary of the maximum marital deduction allowable for Federal Estate Tax purposes, thereby giving the surviving spouse one-half (½) of the adjusted gross estate including property passing under the will and properties passing outside the will to said surviving spouse.

3. The decedent is survived by the surviving spouse, LUCILLE

MARTIN CONNOR, and his mother, DAISY LEE CONNOR, therefore, the intestate share of the surviving spouse is:

— ½ of the real property

— The first $10,000.00 in value plus ½ of the remainder of the personal property (GS 29-14)

— A Widows Years Allowance for the surviving spouse (GS 30-15 et seq)

4. In the particular instance of this estate, the question for determination is whether or not the surviving spouse has a right to dissent and the actual valuation of the properties are incidental to said conclusion.

5. The estimated value of properties set forth hereinabove are estimated and are subject to inaccuracies and corrections and the parties hereto shall in no ways be bound by said values, other than for the purpose of estimating values for the court in determining the surviving spouse's right to dissent.

6. Actual values will be provided to the court upon final determination by the parties to this Stipulation and Agreement, or in the event it should be determined that the valuations have a bearing upon the determination of the right of the surviving spouse to dissent, and the parties cannot agree to such values, neither party shall be deemed to have waived any rights either has for determination of values pursuant to the Statutes of the State of North Carolina."

On 28 August 1968 the attorneys for the executor and the surviving spouse moved that the matter be heard by the Clerk of Superior Court of Guilford County on 28 August 1968, or as soon thereafter as might be set by the court, and both moved "the court for judgment determining the right of the surviving spouse" to dissent, and made further stipulations as follows:

"1. That J. Robert Connor died October 18, 1967.

2. That North Carolina National Bank is the duly appointed, qualified and acting Executor of the Estate of J. Robert Connor, Letters Testamentary having been issued on November 7, 1967.

3. That the decedent, J. Robert Connor, died leaving his wife, Lucille Martin Connor, as the surviving spouse, and his mother, Daisy Lee Connor; that no children were born of the marriage between the decedent and said surviving spouse; that said surviving spouse is a second or successive spouse of the decedent, but no children were born of the first marriage of the decedent.

4. That the decedent, J. Robert Connor, died leaving a Last Will and Testament under which the said surviving spouse is the beneficiary of the maximum marital deduction allowable for Federal Estate Tax purposes, to wit: One-half of the adjusted gross estate including properties passing under the will and properties passing outside the will to said surviving spouse.

5. That the surviving spouse, in apt time, filed a dissent from the Last Will and Testament of J. Robert Connor on the 6th day of May, 1968, with a Stipulation and Agreement between the North Carolina National Bank, Executor of the Estate of J. Robert Connor, and Roberson, Haworth & Reese, Attorneys for the surviving spouse, being filed on the 7th day of May, 1968.

6. That the intestate share of said surviving spouse is:

— One-half undivided interest in the real property, and

— The first $10,000.00 in value plus one-half of the remainder of the personal property

(See GS 29-14)

In addition to said share of the surviving spouse, the surviving spouse is entitled to a Widows Year's Allowance under GS 30-15 et seq.

7. That the surviving spouse received properties passing outside the will as a result of an estate by the entirety, insurance contracts and joint accounts with right of survivorship.

8. That the actual values of the properties passing outside the will and those passing under the will are not necessary for the determination of the surviving spouse's right to dissent from the will for the reason that the surviving spouse's share under the will is the maximum marital deduction allowable for the Federal Estate Tax purposes, and the intestate share of the surviving spouse under the facts in this cause, is fixed by the Laws of the State of North Carolina."

On 11 September 1968, J. P. Shore, Clerk of the Superior Court of Guilford County, entered a judgment based upon the stipulated facts wherein he found that Lucille M. Connor was entitled "to dissent from the Will of J. Robert Connor." The executor gave notice of appeal to the Superior Court of Guilford County. On 18 December 1968, Judge Exum entered a judgment reversing the judgment of the Clerk of Court, and concluded as a matter of law that the surviving spouse, Lucille M. Connor, was not entitled to dissent from the will of her late husband. From the judgment of the Superior

Court, the surviving spouse, Lucille M. Connor, appeals to the Court of Appeals assigning error.

Sprinkle, Coffield & Stackhouse for North Carolina National Bank, appellee.

Roberson, Haworth & Reese for Lucille M. Connor, appellant.

MALLARD, C.J.

[1] The qualified right of a surviving spouse to dissent arises under G.S. 30-1. This right arises when the value of property passing under the will added to the value of property passing outside the will as a result of the testator's death is less than the intestate share, or is less than one-half the net estate of the deceased spouse if neither lineal descendant nor parent survive.

[2, 3] Under G.S. 29-14(3) when an intestate has no lineal descendants but is survived by a spouse and a parent, the intestate share of the surviving spouse is a one-half undivided interest in the real property and the first ten thousand dollars in value plus one-half of the remainder of the personal property. See *Smith v. Smith*, 265 N.C. 18, 143 S.E. 2d 300 (1965). The intestate share does not include the value of property passing by survivorship (which includes property owned as tenants by the entirety), joint accounts with right of survivorship, and insurance payable to the surviving spouse.

The question the parties attempt to present is whether Lucille M. Connor, as surviving spouse, can dissent from the will of her deceased husband. The will provides that she is to receive the income for life of a trust established for her benefit and provides further that the trustee, in its discretion, may invade the principal in order to make such payments as it may deem requisite or desirable to meet her reasonable needs. The only direct control the surviving spouse has over this trust property is the power to dispose of the principal of the trust remaining at her death. The trust property consists of that part of the "residuary estate which will equal the maximum marital deduction allowable in determining the federal estate tax payable by reason of my death, diminished by the value of all other property interests which will be included in my gross estate for federal estate tax purposes and which pass or have passed from me to my wife (either under any other provisions of this Will or in any other manner outside of this Will) in such manner as to qualify for the marital deduction."

The question of whether a surviving spouse can dissent from the

will of her deceased husband when the will gives her the maximum marital deduction allowable to such spouse for federal estate tax purposes, and the deceased also leaves a parent surviving, should be determined under G.S. 29-14(3) by following the statute [G.S. 30-1(c)] with respect to determining the property involved and its value.

[4] "Intestate share," in this case, means the amount of real and personal property that Lucille M. Connor, the surviving spouse, would receive under the provisions of Chapter 29 of the General Statutes of North Carolina, known as the Intestate Succession Act, if J. Robert Connor, her husband, had died intestate. "Intestate share" in this case does not include any property received by Lucille M. Connor as a tenant by entirety, or from insurance contracts, or from joint accounts with right of survivorship.

In this case it was stipulated that J. Robert Connor is survived by his mother Daisy Lee Connor, and that Lucille Martin Connor is the second wife and the surviving spouse of J. Robert Connor, deceased, and that no children were born to either of the two marriages of J. Robert Connor. The right of a surviving spouse to dissent from the will of the deceased spouse is governed by Art. 1 of Chapter 30 of the General Statutes. G.S. 30-1(c) provides that:

> "For the purpose of establishing the right of dissent, the estate of the deceased spouse and the property passing outside of the will to the surviving spouse as a result of the death of the testator *shall be determined and valued as of the date of his death,* which determination and value the executor or administrator with the will annexed and the surviving spouse are hereby authorized to establish by agreement subject to approval by the clerk of the superior court. If such personal representative and the surviving spouse do not so agree upon the determination and value, or if the surviving spouse is the personal representative, or if the clerk shall be of the opinion that the personal representative may not be able to represent the estate adversely to the surviving spouse, the clerk shall appoint one or more disinterested persons to make such determination and establish such value. Such determination and establishment of value made as herein authorized *shall be final for determining the right of dissent and shall be used exclusively for this purpose."* (Emphasis added).

[5] This statute which permits dissent in certain instances also requires that the property involved shall be determined and valued as of the date of death of the testator. The procedure is mandatory.

It was not followed in the case before us. This statute also provides that when the values are determined as set out therein such are final for determining the right of dissent and shall be used exclusively for this purpose. No doubt when this legislation was enacted it was contemplated that the right to dissent would be thus mathematically established. In the hearing before the Clerk of Court and again before the judge of the Superior Court the parties by stipulation attempted to circumvent the provisions of the statute relating to the determination of what property and the values thereof is involved in the dissent.

In his judgment dated 17 December 1968, Judge Exum made the following finding of fact, "(t)hat the values of the properties in the Estate have not been agreed upon by the parties and approved by the clerk as provided for in G.S. 30-1(c), but that the parties have agreed that the following are the *present* values of the property passing both under the Will and outside of the Will:" (Emphasis added). In the record before us there is no determination and valuation of the property passing to the surviving spouse under the will and outside the will as of the date of the death of J. Robert Connor as provided by the statute. In the absence of such determination and valuation there can be no proper determination of whether the right to dissent has been established. When the property involved is determined and valued as provided by statute, then the right of dissent can be determined mathematically.

[6] If there had been no will, Mrs. Connor would have received, under G.S. 29-14(3), in addition to one-half of the real property, the first $10,000.00 of personal property, plus one-half of the remainder of the personal property belonging to the estate of her deceased spouse, J. Robert Connor. Also, the parties in this case stipulated that the intestate share of the surviving spouse is a "one-half undivided interest in the real property, and the first $10,000.00 in value plus one-half of the remainder of the personal property." Also, the parties have stipulated that the widow's years allowance under G.S. 30-15 is "in addition to said share of the surviving spouse." We are of the opinion and so hold that the year's allowance for the surviving spouse under the provisions of G.S. 30-15 is not a part of the "intestate share" passing to a surviving spouse under the provisions of Chapter 879, Session Laws of 1959, codified as Chapter 29 of the General Statutes and known as the Intestate Succession Act.

[1, 4, 5] In order to ascertain if Mrs. Connor has the right to dissent in this case, it will be necessary to determine two figures. The first figure is the aggregate value of the provisions of the will

for her benefit added to the value of the property passing to her outside the will (in this case, entireties real property, joint accounts with right of survivorship, and life insurance). By virtue of the language of her husband's will, which was designed to take advantage of the maximum marital deduction allowable for federal estate tax purposes, this first figure will equal exactly one-half of her husband's adjusted gross estate as computed for federal estate tax purposes. The second figure, with which this first figure is to be compared, is the value of her "intestate share." Under our interpretation, these words do not refer to, and consequently her "intestate share" does not include, the value of the entireties real property, joint accounts with right of survivorship, or the proceeds of life insurance policies payable to Mrs. Connor as beneficiary. Only if the first figure, referred to above, is less than the second figure, will Mrs. Connor have the right to dissent. G.S. 30-1(a). Since in this case the first figure includes, and the second figure does not include, the entireties real property, joint accounts with right of survivorship, and the life insurance, it would appear that in this case the first figure will probably be larger than the second. If so, Mrs. Connor will not have the right to dissent. Had there been no entireties real property, no accounts with right of survivorship, or life insurance, then obviously the result might be different, since in such event the first and second figures would be computed on the basis of the same properties, and by the provisions of G.S. 29-14(3) the amount of Mrs. Connor's intestate share would include the first $10,000.00 of personal property before division of the remainder. In any event, for purposes of establishing whether Mrs. Connor has the right to dissent in this case, the provisions of G.S. 30-1(c) relating to the determination of the property involved and its value must be complied with. The values determined under G.S. 30-1(c) will not necessarily be the same as the values finally determined for federal estate tax purposes. In addition, the impact of estate and inheritance taxes, which under the will are to be paid out of that portion of the estate not passing to Mrs. Connor but which, in event of her dissent, would be payable out of the entire estate, must be taken into account. In this connection see: G.S. 29-13; G.S. 30-3; *Tolson v. Young,* 260 N.C. 506, 133 S.E. 2d 135 (1963). Accordingly, the judgment of the Superior Court is vacated and this case is remanded to the Superior Court of Guilford County with instructions that it be remanded to the Clerk of the Superior Court in order that the provisions of the Statute may be complied with relating to the determination and value of the prop-

erty involved herein for the purpose of establishing the right to dissent.

Error and remanded.

BRITT and PARKER, JJ., concur.

INTERNATIONAL SERVICE INSURANCE COMPANY v. IOWA NATIONAL MUTUAL INSURANCE COMPANY

No. 6921SC288

(Filed 2 July 1969)

Insurance § 88— automobile dealers' liability insurance — coverage — transfer of automobile title

Although automobile dealer did not effect execution, assignment and delivery of title certificate to the purchaser of a used automobile until the day after occurrence of the accident involving the automobile, trial court properly concluded that the automobile was not owned by the dealer on the accident date and therefore was not within the coverage of the dealer's liability policy, where there is evidence sufficient to support findings of fact that (1) prior to the accident the purchaser agreed to buy the automobile at a stated price, paid a down payment thereon, executed a note for balance of the purchase price, received a written bill of sale and took possession of the automobile, (2) the assignment of title and application for new title were signed in blank by the purchaser and the dealer, and (3) the automobile, with no license plate thereon, was delivered and parked at the purchaser's home with the understanding that the purchaser was to return to the dealer the following week with an FS-1 form showing insurance coverage and was at that time to receive the completed title certificate. G.S. 20-72(b), G.S. 20-75.

APPEAL by plaintiff from *Armstrong, J.*, 6 January 1969 Session, FORSYTH Superior Court.

This is an action for a declaratory judgment instituted by International Service Insurance Company (plaintiff) against Iowa National Mutual Insurance Company (defendant) for a declaration of its rights and duties based upon questions of automobile ownership, permission, coverage and duty to pay under policies of automobile liability insurance issued by plaintiff and defendant. The parties waived jury trial and submitted the case to the trial court on stipulated facts and exhibits. The court entered judgment making findings of fact substantially as follows:

On and prior to 27 May 1963 plaintiff had in effect an assigned risk automobile liability policy issued to James Walter Zimmerman. On and prior to 27 May 1963 defendant had in effect an automobile liability insurance policy issued to Piedmont Auto Finance Company of High Point, North Carolina (Piedmont). Defendant's policy provided in pertinent part that coverage was afforded on vehicles owned by the named insured, Piedmont, and that coverage was afforded to any person while using a vehicle owned by Piedmont provided the actual use of the vehicle was with Piedmont's permission.

On or prior to 24 May 1963, Piedmont took lawful possession of a 1958 Ford automobile by repossession. On Saturday, 25 May 1963, John Wesley Zimmerman agreed to purchase the 1958 Ford automobile from Piedmont for the sum of $695.00, paid a $100.00 down payment, received a bill of sale on said automobile, and signed a note for the balance of the purchase price and interest charges. On the same date, 25 May 1963, an official of Piedmont signed in blank the assignment of title on the back of the title certificate to said automobile, and John Zimmerman signed in blank the purchaser's application for new certificate of title on the back of the title certificate. It was the understanding of W. E. Keck, an official of Piedmont, that John Zimmerman was to obtain liability insurance over the weekend and return to Piedmont on Tuesday, 28 May 1963, with an FS-1 form, at which time the title certificate was to be completed and turned over to him, and he would purchase a license plate. Also, on the same date, 25 May 1963, the automobile was delivered to John Zimmerman's home and parked behind his house; the dealer license plate was removed at that time and the automobile was left without a license plate on it; John Zimmerman went to the Statewide Insurance Agency of High Point, North Carolina, and filled out an application for automobile liability insurance under the North Carolina assigned risk plan, which application was mailed to North Carolina Department of Insurance in Raleigh; and, John purchased, through Piedmont, collision insurance on the automobile with American Security Insurance Company.

James Walter Zimmerman is the brother of John Zimmerman. Both were over 21 years of age at all times pertinent to this action and they did not reside at the same household. On 27 May 1963, James Zimmerman was driving the 1958 Ford with the permission of his brother John, and was involved in an accident with a vehicle being operated by James Floyd Pendry. John Zimmerman was not present in the automobile at the time of the accident. At the time of the accident the 1958 Ford displayed a 1963 North Carolina license

plate previously issued to James Zimmerman on a vehicle other than the one he was driving when involved in the accident.

On Tuesday, 28 May 1963, John Zimmerman received by mail an FS-1 form dated 27 May 1963 and showing effective date of 28 May 1963 stating that his application for insurance had been approved and assigned to American Motorist Insurance Company. On this date he returned to the office of Piedmont; he did not advise Piedmont that the 1958 Ford had been involved in an accident on the previous day; at that time, the transfer of title and application for new title certificate on the back of the title were completed and notarized; and, shortly thereafter, he took the FS-1 form and completed title certificate and purchased a license plate for the 1958 Ford.

In August 1963, plaintiff was notified of possible claims arising out of the accident. Pendry instituted a civil action against James Zimmerman in November 1963, alleging damages in excess of $5,000.00 and answer was filed on behalf of James Zimmerman in December 1963, by attorneys retained by plaintiff.

The first notice of the accident received by defendant was on 8 April 1964 when plaintiff's attorney notified defendant that plaintiff was taking the position that defendant had primary coverage with regard to the Pendry suit. On 5 May 1964 defendant denied coverage and so notified plaintiff. On 22 May 1964 plaintiff's attorney again notified defendant that plaintiff contended primary coverage was with defendant and forwarded to defendant copies of the complaint and answer in the Pendry action. Later notice was sent by plaintiff's attorney to defendant that the case was scheduled for trial on 26 October 1964; that there was a possibility of settlement; and that unless plaintiff's attorney heard from defendant by 26 October 1964 the case would be settled if possible. Defendant continued its denial of coverage and plaintiff continued to defend James Zimmerman, but maintained its position that its coverage was secondary. On 26 October 1964 the case was settled for $3,800.00. Plaintiff paid this judgment on behalf of James Zimmerman and in addition paid court costs of $32.75 and attorneys' fees in the amount of $738.08.

The amount of settlement, the costs and attorneys' fees paid by plaintiff were fair and reasonable. Employees of Piedmont had not met James Zimmerman prior to the accident, and he had no part in the dealings between John Zimmerman and Piedmont.

Pursuant to the foregoing findings of fact, the trial judge concluded as a matter of law:

"1. Ownership of the 1958 Ford automobile involved in the accident passed from Piedmont to John prior to May 27, 1963.

"2. Ownership of said automobile having passed from Piedmont prior to the date of the accident, the automobile was not owned by Piedmont on the accident date, and the Iowa policy therefore does not afford coverage on the automobile.

"3. Further, irrespective of ownership, the stipulated facts and reasonable inferences to be drawn therefrom do not establish that James was operating the automobile with the permission, express or implied, of Piedmont at the time of the accident; and for this additional reason, no coverage is afforded by the Iowa policy."

Pursuant to these findings of fact and conclusions of law, judgment was entered that the plaintiff recover nothing of the defendant. From this judgment, plaintiff appealed.

Deal, Hutchins & Minor, by William K. Davis and Edwin T. Pullen, for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by J. Robert Elster and C. P. Craver, Jr., for defendant appellee.

BROCK, J.

Plaintiff assigns as error the conclusions of law by the trial judge. Plaintiff argues that the statutory provisions relating to transfer of ownership were not complied with until 28 May 1963, one day after the accident, and that ownership of the 1958 Ford remained in Piedmont until that date; that Piedmont gave "broad and unfettered custody, dominion and control "of the automobile to John Zimmerman on 25 May 1963 and impliedly permitted him to allow his brother, James Zimmerman, to use it, thereby bringing James within the coverage of defendant's policy. Plaintiff, however, concedes that the question of permission arises only if ownership remained in Piedmont at the time of the accident on 27 May 1963. Thus the question before us for determination is whether the facts found by the trial court support the conclusion of law that ownership of the automobile involved in the accident passed from Piedmont to John Zimmerman prior to the date of said accident for purposes of tort liability and insurance coverage.

The statutes pertinent to the transfer of title or interest in a motor vehicle were amended in 1961, and as amended in 1961, they are applicable to the present case. G.S. 20-72(b) and G.S. 20-75, as

amended by Chap. 835, Session Laws 1961, provide: "Transfer of ownership in a vehicle . . . is not effective until the provisions of this subsection have been complied with." It is stipulated that there was no execution, assignment and delivery of the title certificate from Piedmont to John Zimmerman until the day after the accident occurred.

The 1961 amendment to G.S. 20-72(b) and G.S. 20-75 was interpreted by our Supreme Court in *Indemnity Co. v. Motors, Inc.*, 258 N.C. 647, 129 S.E. 2d 248. There the defendant motor company had purchased an automobile from an individual, and thereafter resold it to another individual. Upon receipt of the purchase price, the dealer endorsed the title certificate to the purchaser, but did not forward it to the Department of Motor Vehicles in Raleigh prior to the accident; but rather delivered it to a finance company which had a lien on the automobile. The purchaser was involved in an accident while operating the automobile, and claimants sought to establish ownership of the automobile in the motor company so as to recover under the motor company's liability insurance policy. The insurance company brought a declaratory judgment action seeking an adjudication that ownership had passed to the purchaser; and that it therefore had no coverage as to the accident. Under the 1961 amendment, the Supreme Court held that ownership had passed to the purchaser prior to the accident, even though the title certificate had not been forwarded to Raleigh. In so holding, the Supreme Court held that the 1961 amendment did not change the pre-existing law with regard to ownership for purposes of tort liability or insurance coverage. The court pointed out that the preamble to the amendments as contained in Chap. 835, Session Laws 1961, made it clear that the purpose of the amendments was to clarify and strengthen the *lien law* with regard to transfer of title. In reference to G.S. 20-73 which requires the transferee of a motor vehicle to make application for a new certificate of title within twenty days of the transfer, the Court stated: "There is nothing in the statute which suggests dealer, a vendor, should be penalized and held liable because of the failure of Bradshaw, a purchaser, to perform his statutory duty." *Indemnity Co. v. Motors, Inc., supra,* p. 652.

Another case in point in this regard is *Luther v. Insurance Co.*, 262 N.C. 716, 138 S.E. 2d 402. There the plaintiff had obtained a judgment against one Lamm arising out of an automobile accident which occurred between the plaintiff's automobile and a 1956 Ford automobile being operated by Lamm. The plaintiff alleged that the 1956 Ford automobile was actually owned by Lee Motor Company at the time of the accident, and was being operated by Lamm with

the permission of Lee Motor Company. On such allegations, the plaintiffs sought to collect their judgments from the liability insurance carrier for Lee Motor Company. The plaintiffs' evidence tended to show that about three weeks prior to the accident Lamm had traded in another automobile to Lee and agreed to purchase the 1956 Ford which he was operating at the time of the accident. The trade-in automobile was treated as a down payment on the 1956 Ford. *The title certificate on the 1956 Ford had not been transferred to Lamm prior to the accident.* Lamm was not to obtain title to the 1956 Ford until he completed making payments. The trial court entered judgment of nonsuit, and the plaintiffs appealed. The Supreme Court affirmed the judgment of nonsuit, holding that the plaintiffs had failed to establish ownership in Lee Motor Company for purposes of tort liability and insurance coverage.

In the present case, the evidence is sufficient to support findings of fact that prior to the accident John Zimmerman had agreed to purchase the automobile at an agreed price of $695.00, paid a down payment of $100.00, executed a note for the balance of the purchase price, taken a written bill of sale, taken possession of the automobile, and that the assignment of title and application for new title had been signed in blank by the parties. The automobile had been delivered and parked at John Zimmerman's house, with no license plate on it, and with the understanding that John was to return to Piedmont after the weekend with an FS-1 form, and was at that time to pick up the completed title certificate and obtain a license plate.

The stipulated facts and exhibits support the findings and the conclusion of the trial judge that at the time of the accident the 1958 Ford was not owned by Piedmont and, therefore, did not come within the coverage of defendant's policy.

The judgment of the court below is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

HAZEL WAY MORSE v. CATHERINE W. ZATKIEWIEZ, EXECUTRIX OF THE ESTATE OF JULIETTE ORRELL WAY

No. 695SC236

(Filed 2 July 1969)

1. Divorce and Alimony § 21— alimony as debt

An allowance for alimony is a debt.

2. Divorce and Alimony § 21— alimony — statute of limitations

The statute of limitations does not apply to a judgment directing the payment of alimony. G.S. 1-306.

3. Divorce and Alimony § 20— alimony — effect of divorce decree

A decree for absolute divorce on ground of two years' separation does not destroy the wife's right to receive alimony *pendente lite* under a prior judgment entered in wife's separate action instituted under [former] G.S. 50-16.

4. Executors and Administrators § 19— claims against the estate — six months' limitation

Although a creditor who does not present his claim within six months from the date of the first publication of notice cannot hold the personal representative liable for any assets which he may have paid out prior to the commencement of an action by the creditor, he can share in any assets which remain in the hands of the personal representative.

5. Executors and Administrators § 19; Divorce and Alimony § 21— claims against the estate — enforcing alimony payments

Testatrix died 6 January 1967 leaving a will which provided that "all of my son's debts and funeral expenses shall be paid out of my estate." Her executor filed the final account on 20 July 1967. Plaintiff, who was granted an absolute divorce from testatrix' son in 1951, filed notice of claim against the executrix on 26 July 1967 seeking $11,955 in alimony payments allegedly due her on a 1950 judgment entered in her separate action for alimony *pendente lite*. *Held:* (1) The unpaid alimony *pendente lite* payments constitute a debt of the son, (2) the statute of limitations does not run against the indebtedness, (3) the indebtedness is not affected by the 1951 divorce decree, (4) plaintiff's claim against the estate is not barred by her failure to file claim within six months after the executrix' first publication of notice to creditors.

6. Wills § 73— action to construe will — patent ambiguity as to intent of testator

The first item of testatrix' will provided that "all of my son's debts and funeral expenses shall be paid out of my estate" and the second item bequeathed and devised all of testator's property to her daughter. Plaintiff, who was granted an absolute divorce from testator's son in 1951, seeks to recover from the estate $11,955 in alimony *pendente lite* payments allegedly due her on a judgment entered in 1950. At the time the will was executed in 1966, testatrix' son was an inebriate, completely dependent upon his mother; he died two months later. Plaintiff's claim, if allowed,

will consume all of the personal property of the estate and a substantial portion of the real estate. *Held:* Assuming that plaintiff, as creditor of testatrix' son, became a beneficiary under item one, the conflict between the first and second items presents a patent ambiguity as to the intent of testatrix, and extrinsic evidence as to facts and circumstances surrounding testatrix at the time she executed the instrument should be considered.

7. Wills § 28— rule of construction

If the terms of a will are set forth in clear, unequivocal and unambiguous language, judicial construction is unnecessary; but when doubt exists as to what the testatrix intended, the court may be called on to construe the will.

8. Wills § 28— rules of construction — patent ambiguity — intent of testator

Where a will contains a patent ambiguity, extrinsic evidence is not admissible to explain the meaning of the words used, and it is the duty of the court to declare the testatrix' intent as expressed in the instrument; but where the patent ambiguity relates to intent, extrinsic evidence as to the facts and circumstances surrounding the testatrix at the time she executed the instrument is competent to aid the court in ascertaining the intent of testatrix from the language of the instrument.

9. Wills § 73; Appeal and Error § 1— construction of wills — jurisdiction of Court of Appeals

The Court of Appeals has no original jurisdiction in matters relating to the construction of a will, but is limited to a review of the decisions of the superior court.

APPEAL by plaintiff from *Peel, J.*, at the 21 January 1969 Session of NEW HANOVER Superior Court.

Plaintiff filed her complaint 15 September 1967, alleging the following: Juliette Orrell Way died 6 January 1967 leaving a will which provided that "all of my son's, Robert Orrell [sic] Way, Sr., debts and funeral expenses shall be paid out of my estate." Plaintiff had been married to Robert O. Way, Sr., and an order for alimony and support was docketed in the office of the Clerk of Superior Court of New Hanover County on 16 September 1950. This order provided for payment of $15.00 per week until further orders of the court. There has been no subsequent change or modification of the order. Defendant filed her final account on 20 July 1967 without making any payment to plaintiff. Plaintiff prayed that the final account by the defendant executrix be set aside and that plaintiff receive $11,955.00 plus interest.

Defendant answered admitting the terms of the will, the marriage and the order for alimony but denying that the alimony constituted a debt of Robert O. Way, Sr., at the date of Juliette Orrell Way's

death, as Robert O. Way, Sr., died 5 May 1966. Defendant further alleged that the alimony payments to Hazel Way Morse were not debts of Robert O. Way, that the statute of limitations was applicable, that plaintiff's claim was barred by her failure to file her claim after advertisement for claims by the defendant, and that any obligation of Robert O. Way terminated at his death.

The evidence indicated the following: Plaintiff and Robert O. Way were married 12 June 1941 and separated in 1947, one child having been born of the marriage. On 16 September 1950, Burney, J., entered the following order in the action of Hazel K. Way vs. Robert O. Way:

> "This action having been called and heard and the Court having heard the evidence submitted and being of the opinion plaintiff is entitled to receive from the defendant alimony pendente lite, and an allowance to her for attorney's fee; she having produced evidence to support her allegations.
>
> IT IS NOW * * * Ordered and ADJUDGED, That the Defendant pay in to the office of the Clerk of this Court the sum of $15.00 weekly for the support of Plaintiff and her minor child pending the trial of the court * * * until the further orders of this Court. * * *"

In a separate action, an absolute divorce was granted to Hazel K. Way in the Superior Court of New Hanover County on 28 May 1951. Plaintiff offered evidence to show that only a few payments on the Burney judgment were ever made. Her son by Robert Way was twenty-three years old in February 1966.

Robert O. Way, Sr., died 5 May 1966 and there was no administration of his estate. Juliette O. Way died 6 January 1967. The executrix of her estate duly notified creditors of the estate to file their claims by 23 July 1967 and the final account was filed 19 July 1967. Plaintiff filed her notice of claim on 26 July 1967. Other pertinent facts are stated in the opinion.

At the close of plaintiff's evidence, the court granted defendant's motion for nonsuit. Plaintiff appealed.

Robert Calder for plaintiff appellant.

Marshall & Williams by Lonnie B. Williams for defendant appellee.

BRITT, J.

[1-4] The following principles applicable to this case appear to be well settled in this jurisdiction:

(1) An allowance for alimony is a debt. *Barber v. Barber,* 217 N.C. 422, 8 S.E. 2d 204; 2 Lee, N.C. Family Law, § 158, p. 248.

(2) The statute of limitations does not apply to a judgment directing the payment of alimony. G.S. 1-306; 2 Lee, N.C. Family Law, § 164, p. 269.

(3) A decree for absolute divorce on ground of two years' separation granted on 28 May 1951 does not destroy the wife's right to receive alimony pendente lite under a judgment entered on 16 September 1950 in a separate action instituted by her under G.S. 50-16. *Yow v. Yow,* 243 N.C. 79, 89 S.E. 2d 867; 2 Lee, N.C. Family Law, § 154, p. 239.

(4) Although a creditor who does not present his claim within six months from the date of the first publication of notice cannot hold the personal representative liable for any assets which he may have paid out prior to the commencement of an action by the creditor, he can share in any assets which remain in the hands of the personal representative. 2 Wiggins, Wills and Administration of Estates in N. C., § 237, p. 713, and cases therein cited.

[5] Applying the foregoing principles to the instant case, (1) the unpaid payments on the 16 September 1950 alimony pendente lite judgment entered in favor of plaintiff against Robert O. Way constituted a debt of Robert O. Way; (2) the statute of limitations did not run against said indebtedness; (3) the indebtedness was not affected by the 28 May 1951 divorce decree; and (4) plaintiff's "claim" against Mrs. Way's estate was not cut off by plaintiff's failure to file the same with the executrix within six months after first publication of notice to creditors.

In his brief, plaintiff's counsel contends that plaintiff is not a *creditor* of Mrs. Way's estate and asserts no *claim* against the estate; he contends that plaintiff "was a creditor of and had a claim against the son of the decedent and by the terms of her will the decedent made the plaintiff a beneficiary by providing that the debts of her deceased son should be paid from the estate."

The final account filed by defendant discloses that the executrix received personal property consisting of receipts from savings and loan shares aggregating $6,545.59; that disbursements, consisting of funeral expenses, a doctor bill, state inheritance taxes, and costs of

administration of the estate, aggregated $1,503.82; that the balance of the personal property in amount of $5,041.77 was paid to Catherine Way Zatkiewiez as the sole beneficiary under the will. The record indicates that the only other property left by the decedent was real estate of the value of approximately $22,000.00. Plaintiff contends that she is entitled to receive $11,955.00 plus interest calculated on the alimony payments from the dates they were due.

[6] The first and second items of the will provided as follows:

> "FIRST: I direct all of my just debts and funeral expenses shall be paid as soon after my death as can be conveniently done, and I further direct and hereby provide that all of my son's, ROBERT R. [sic] WAY, SR., debts and funeral expenses shall be paid out of my estate.
>
> SECOND: I give, bequeath and devise all of my property, both real, personal and mixed, wherever situate, to my beloved daughter, Catherine W. Zatkiewiez * * *"

[6, 7] It will be noted that if plaintiff's "claim" is allowed, it will consume all of the personal property of the estate and a substantial portion of the real estate. Proceeding on plaintiff's theory that she is a beneficiary by virtue of the first item of the will, we think there is a conflict between the first item and the second item which purports to make Mrs. Zatkiewiez the sole beneficiary. If the terms of a will are set forth in clear, unequivocal and unambiguous language, judicial construction is unnecessary; but when doubt exists as to what the testatrix intended, the court may be called on to construe the will. 1 Wiggins, Wills and Administration of Estates in N. C., § 132, pp. 396, 397, and cases therein cited.

[8] Where a will contains a patent ambiguity, extrinsic evidence is not admissible to explain the meaning of the words used, and it is the duty of the court to declare the testatrix's intent as expressed in the instrument in accordance with established rules of construction; but where the patent ambiguity relates to intent, extrinsic evidence as to the facts and circumstances surrounding the testatrix at the time she executed the instrument is competent to aid the court in ascertaining the intent of the testatrix from the language of the instrument. 7 Strong, N. C. Index 2d, Wills, § 28, pp. 601, 602.

Defendant contends that the court should construe the will of Mrs. Way in light of circumstances existing at the time she executed the will. The record discloses that the will was executed on 16 February 1966 and at that time Robert O. Way was an inebriate, com-

pletely dependent on his mother; that he died less than two months later and Mrs. Way died eight months thereafter.

Although the facts in *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246, were different from those in the case at bar, we think the principles of law applied by the Supreme Court in that case are applicable to this case. We quote from the opinion written by Bobbitt, J.:

> *"Barnhill, J.,* now C.J., in *Trust Co. v. Waddell, supra,* says: 'In ascertaining the intent of the testator, the will is to be considered in the light of the conditions and circumstances existing *at the time the will was made. Scales v. Barringer,* 192 N.C. 94, 133 S.E. 410; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *In re Will of Johnson,* 233 N.C. 570, 65 S.E. 2d 12.
>
> '". . . the court should place itself as nearly as practicable in the position of the testator . . . at the time of the execution of the will." *In re Will of Johnson, supra.*'
>
> *Clark, C.J.,* in *Patterson v. McCormick,* 181 N.C. 311, 107 S.E. 12, in a sentence frequently quoted, puts it this way: 'The will must be construed, "taking it by its four corners" and according to the intent of the testator as we conceive it to be upon the face thereof and according to the circumstances attendant.'
>
> Generally, 'the circumstances attendant' when the will was made refers to the relationships between the testator and the beneficiaries named in the will, and the condition, nature and extent of his property. *Hubbard v. Wiggins,* 240 N.C. 197, 81 S.E. 2d 630; *Heyer v. Bulluck, supra; Herring v. Williams,* 153 N.C. 231, 69 S.E. 140; *Woods v. Woods,* 55 N.C. 420.
>
> It is frequently said, as in *Heyer v. Bulluck, supra,* that 'the attendant circumstances' are to be considered 'where the language is ambiguous, or of doubtful meaning.' In such case, the court undertakes 'to put itself in the testator's armchair.' In so doing, as well expressed by *Torrance, C.J.,* in *Thompson v. Betts,* 74 Conn. 579, 51 Atl. 566, 92 Am. St. Rep. 235: 'In short, the court may, by evidence of extrinsic facts, other than direct evidence of the intention of the testator, put itself as near as may be "in the condition of the testator in respect to his property and the situation of his family," for the purpose of rightly understanding the meaning of the words of his will.' "

[9] We think Mrs. Way's will requires judicial construction. The question then arises, should this Court perform the judicial function of construing the will. This question was answered in *Woodard v.*

Clark, 234 N.C. 215, 66 S.E. 2d 888, in an opinion by Barnhill, J. (later C.J.), in the following language:

> "Why doesn't this Court perform this judicial function and be done with it? Simply because this Court possesses no original jurisdiction in such matters. Its duty is to review the decisions of the Superior Courts of the State. The court below must exercise its original jurisdiction. If the parties are not then satisfied with the judgment entered they may bring the cause back for review."

Having decided that the superior court must make the determination, how will it perform the task? This question is answered in *Trust Co. v. Wolfe, supra,* where it was held that "the question posed was for the court, without a jury. In the absence of stipulation, 'the circumstances attendant' are to be established by findings of fact by the court." However, the trial judge, in his discretion, *may* submit questions of fact to a jury for determination. *Trust Co. v. Wolfe, supra.*

[6] Considering this case in the light of plaintiff's theory — that as a creditor of Robert O. Way she became a beneficiary under item one of the will — and in view of the fact that item two of the will purports to name Mrs. Zatkiewiez sole beneficiary, we conclude that the will contains a patent ambiguity relating to the intent of the testatrix, making it necessary for the court to determine the intent of the testatrix and that extrinsic evidence as to the facts and circumstances surrounding the testatrix at the time she executed the instrument should be received to ascertain such intent. Therefore, the judgment of the superior court dismissing the action as in case of nonsuit is vacated and the cause is remanded to the Superior Court of New Hanover County for further proceedings not inconsistent with this opinion.

Error and remanded.

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

FORD MOTOR CREDIT COMPANY v. HAZEL FRANKLIN JORDAN

No. 6921SC250

(Filed 2 July 1969)

1. Courts § 21— conflict of laws — sale of car in another state

Where all the evidence shows that the sale and delivery of the automobile in suit took place in Tennessee, the conditional sales contract covering the purchase of the automobile should be governed by the laws of Tennessee unless contrary to the public policy of this State.

2. Contracts § 18— modification of written contract

A written contract may be modified by a subsequent parol agreement, even though the contract provides that it constitutes the entire agreement between the parties and that no modification of the terms therein shall be valid.

3. Contracts § 18— modification of contract — burden of proof

The burden of proving the subsequent modification to a written contract rests upon the person asserting the modification.

4. Contracts § 18— modification of contract — proof

Evidence of an oral agreement which modifies a written contract should be clear and convincing.

5. Chattel Mortgages § 16; Contracts § 26— exclusion of evidence — modification of contract

In finance company's action to recover possession of an automobile under a conditional sales contract providing for payments on the seventh day of each month, defendant purchaser was not prejudiced by the exclusion of his testimony, ordinarily admissible, that an official of the company told him he could make payments by the fifteenth day of each month, where the evidence, if allowed, would not be sufficient to be submitted to the jury on issue of modification of contract.

6. Chattel Mortgages § 16; Contracts § 18— waiver of contract — acceptance of late payments

In finance company's action to recover possession of an automobile under a conditional sales contract, the fact that the company consistently accepted late payments and levied late charges *is held* insufficient, standing alone, to constitute waiver by the company of a contract provision providing for payments on the seventh day of each month.

7. Contracts § 18— modification of contract — effect of ambiguous dealings

Modification of an existing contract cannot arise from an ambiguous course of dealing between the parties from which diverse inferences might reasonably be drawn as to whether the contract remained in its original form or was changed.

APPEAL by defendant from *Armstrong, J.*, 8 July 1968 Civil Session, Superior Court of FORSYTH.

Plaintiff instituted this action on 10 October 1967 to recover possession of a 1967 Mercury station wagon. Plaintiff alleges that on 23 November 1966 the defendant purchased the station wagon from O'Neil Linc-Merc, Inc. of Knoxville, Tennessee, the seller retaining a security interest in the vehicle for the purpose of securing the obligation of the purchaser. At the time this contract was entered into, defendant was residing in Knoxville, Tennessee. It is alleged that the security agreement executed by the defendant was assigned to the plaintiff; that the defendant has defaulted in the payment of his obligation under this agreement; that by reason of this default plaintiff is entitled to the possession of the vehicle; and that plaintiff has demanded that defendant return this vehicle, but that such demand has been refused. On 10 October 1967 an order in claim and delivery was entered by the Clerk of Superior Court of Forsyth County on behalf of the plaintiff.

Defendant answered the plaintiff's complaint, denying that he defaulted in payment under the security agreement, and as a further answer and defense the defendant alleged that subsequent to the execution of the security agreement, he was given until the fifteenth of each month to make the installment payments; that because of this extension he was not in default at the time of the institution of this action and the seizure of his automobile; and that plaintiff's actions constitute a rescission of the agreement entitling defendant to recover all payments made to plaintiff under the said agreement.

The contract entered into between defendant and O'Neil Linc-Merc, Inc., on 23 November 1966 provides for thirty-six monthly payments in the amount of $100.84, the first payment was due on 7 January 1967 and a like payment was due on the 7th day of each succeeding month. The following provisions of the contract are pertinent to the decision of this case:

> "3. . . . Purchaser shall not use the property illegally, improperly or for hire (unless stated herein) and shall not without the written permission of Seller, remove the Property from the county of his residence or transfer or otherwise dispose of any interest in this contract or the Property.
>
> . . .
>
> 7. Time is of the essence of this contract. In the event Purchaser defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any of the terms and conditions hereof, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or

against Purchaser or his property, or Seller deems the Property in danger of misuse or confiscation, or Seller otherwise reasonably deems the indebtedness or the Property insecure, Seller shall have the right, at its election to declare the unpaid portion of the Deferred (time) Balance, together with any other amount for which Purchaser shall have become obligated hereunder, to be immediately due and payable. Further in any such event, Seller, its agents or representatives, may take immediate possession of the Property, including any equipment or accessories, and for this purpose Seller, its agents or representatives, may enter upon the premises where the Property may be and remove same,

. . .

8. This contract constitutes the entire agreement between Purchaser and Seller and no modification of any of the terms and conditions herein shall be valid in any event, and Purchaser expressly waives the right to rely thereon, unless made in writing duly executed by Seller. Any provision of this contract prohibited by the law of any state, shall as to such state be ineffective to the extent of such prohibition without invalidating the remaining provisions of this contract. This contract shall be governed by the law of the state in which the Original Seller is located as shown on the face of this contract."

The parties stipulated that payments were made by the defendant as follows:

(Due Date)	*Payment No.*	*Date of Check Or Money Order*	*Company's Record Payment Date*
(Jan. 7)	1	January 9	January 12
(Feb. 7)	2	February 13	February 16
(Mar. 7)	3	April 6	April 11
(Apr. 7)	4	May 6	May 8
(May 7)	5	May 20	May 22
(June 7)	6	July 26*	July 27
(July 7)	7	July 26	July 27
(Aug. 7)	8	September 28	October 6
(Sept. 7)	9	October 2	October 10

* Plus $10 late charge.

The evidence tends to show that the plaintiff accepted the June 1967 payment and the July 1967 payment from the defendant on 26 July 1967. On 22 August 1967, 29 August 1967, 7 September 1967, and 14 September 1967 the plaintiff wrote the defendant from its office in Knoxville, Tennessee, concerning past due payments. At this time the defendant was residing in Winston-Salem, North Car-

olina. On 25 September 1967 Givan Hutchinson, collection supervisor for the plaintiff in Knoxville, Tennessee, assigned the account to the plaintiff's office in Greensboro, North Carolina, to repossess the automobile. On 28 September 1967, Charles William Glass, an employee of the plaintiff, contacted the defendant and told him that his instructions were to repossess the automobile. Defendant advised Glass that he would have to get the sheriff if he wanted possession of the automobile. On 6 October 1967, the payment allegedly due on 7 August 1967 was recorded by the plaintiff at its Knoxville office as being paid. This payment was made by money order dated 28 September 1967. On 10 October 1967 (the same date this action was begun) the payment allegedly due on 7 September 1967 was recorded by the plaintiff at its Knoxville office as being paid. This payment was made by money order dated 2 October 1967.

At the close of the evidence the trial judge nonsuited the defendant's counterclaim, and a peremptory instruction was given in favor of the plaintiff. From a judgment in favor of the plaintiff the defendant appealed.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Jr., for plaintiff appellee.

Hatfield, Allman & Hall and Hayes, Hayes & Sparrow by W. Warren Sparrow for defendant appellant.

MORRIS, J.

Defendant argues that the trial judge erroneously excluded evidence which would have tended to show that the plaintiff had extended the time for payment under the installment contract to the fifteenth of each month.

[1] All the evidence shows that the sale and delivery of this automobile took place in Tennessee. The contract in question should be governed by the laws of Tennessee unless contrary to the public policy of this State. *Motor Co. v. Wood,* 237 N.C. 318, 75 S.E. 2d 312; *Roomy v. Insurance Co.,* 256 N.C. 318, 123 S.E. 2d 817. This is in accordance with the agreement of the parties.

[2] The contract entered into by the defendant contains the following language: "This contract constitutes the entire agreement between Purchaser and Seller and no modification of any of the terms and conditions herein shall be valid in any event, and Purchaser expressly waives the right to rely thereon, unless made in writing duly executed by Seller." It is clear that under Tennessee law a written

contract may be modified by a parol agreement after it is made. See *Co-Operative Stores Co. v. United States Fidelity & G. Co.*, 137 Tenn. 609, 195 S.W. 177, where the Tennessee Supreme Court stated:

> "A written contract may be changed by parol, and this although it stipulate that it shall only be changed in writing, for the obvious reason that men cannot tie their hands or bind their wills so as to disable them from making any contract allowed by law, and in any mode in which it may be entered into. . . . A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." (citations omitted.)

This same rule prevails in North Carolina. "The exclusion of parol evidence on the theory that it is inadmissible to amend, vary or contradict a written instrument has no application to subsequent agreements which change or modify the original contract." *Whitehurst v. FCX Fruit and Vegetable Service,* 224 N.C. 628, 32 S.E. 2d 34.

[3-5] The only testimony in this record concerning a subsequent agreement to change the date for making payments was elicited from the defendant out of the presence of the jury. Defendant stated that an official of Ford Motor Credit Company told him that he could make payments by the fifteenth of each month. Although the above evidence was admissible under the rule that a written contract may be changed by a subsequent oral agreement, we do not think its exclusion was prejudicial. Under Tennessee and North Carolina law the defendant had the burden of proving the subsequent modification to the written contract. *Balderacchi v. Ruth,* 36 Tenn. App. 421, 256 S.W. 2d 390; *Russell v. Hardwood Co.,* 200 N.C. 210, 156 S.E. 492. Evidence of an oral agreement which modifies a written contract should be clear and convincing. *Wertheimer v. Byrd,* 278 Minn. 150, 153 N.W. 2d 252. We do not think the statement that "[an official of Ford Motor Credit Company] said that it would be acceptible (sic) to make my payment between the 10th and 15th of each month — until the 15th of each month" satisfies this requirement. The evidence, if allowed, would not be sufficient for submission to the jury.

[6, 7] Defendant next argues that the plaintiff should not have been allowed to repossess the automobile because late payments were consistently accepted, late charges levied, and that he had not been notified that it was necessary to make payments on the due date specified in the contract. We need not decide whether under certain

situations a creditor may waive the right to receive payments at the time specified in the installment contract. We need only say that under the facts now before us, we do not think such a waiver has been shown. Notices mailed to the defendant during August and September of 1967 state that the installments were due on the seventh of each month. This is inconsistent with defendant's argument that he had not been notified that it was necessary to make payments on the date specified. "[M]odification of an existing contract cannot arise from an ambiguous course of dealing between the parties from which diverse inferences might reasonably be drawn as to whether the contract remained in its original form or was changed." *Balderacchi v. Ruth, supra.* This rule applied to the present case leads to a result which is in accord with sound policy. Should the rule be that the mere acceptance of late payments waives the right to receive subsequent payments on time, financial institutions would have to take the position that it would never be prudent to accept late payments. Flexibility would be severely hampered. This is not to say that acceptance of late payments along with evidence of unconscionable or improper actions on the part of a financial institution would not constitute a waiver. Such a situation is not before us. Moreover, the contract in the present case provides that "Waiver by Seller of any default shall not be deemed a waiver of any other default." We do not agree that plaintiff has waived the right to demand that payments be made according to the provisions of the contract.

Evidence offered by plaintiff and defendant shows that the defendant violated other provisions of this agreement by bringing the automobile to North Carolina without written permission from the plaintiff, and by declaring bankruptcy. Since these actions were not relied on by the plaintiff as grounds for the repossession of the automobile, we do not discuss them. The undisputed evidence shows that the October 1967 payment has never been made by the defendant.

The judgment below is

Affirmed.

CAMPBELL and BROCK, JJ., concur.

CLARA S. INGRAM, ADMINISTRATRIX OF THE ESTATE OF CHRISTOPHER KING INGRAM v. NATIONWIDE MUTUAL INSURANCE COMPANY, ORIGINAL DEFENDANT, AND PREMIUM PAYMENT COMPANY, ADDITIONAL DEFENDANT

No. 6918SC171

(Filed 2 July 1969)

1. Insurance § 94— assigned risk insurance — cancellation — notice to insured

Where cancellation of assigned risk policy of automobile liability insurance was made at the request of insured's attorney-in-fact, the insurer was not required to give insured notice of the cancellation.

2. Insurance § 94— proof of cancellation — burden of insurer

The burden is on the insurance company to prove cancellation of an assigned risk automobile insurance policy by the insured or his agent.

3. Insurance § 94— improper cancellation — insurer's cross-action for indemnification

Assigned risk automobile liability insurer states a cause of action for indemnification against premium finance company arising out of alleged improper cancellation of insured's policy for nonpayment of premium, where the insurer alleges the receipt of a request for cancellation from the finance company, together with a copy of the power of attorney executed by the insured to the finance company and certification that insured and his insurance agent had been given ten days' written notice of the request of cancellation pursuant to G.S. 58-60.

4. Rules of Civil Procedure § 1— effective date

The Rules of Civil Procedure become effective on 1 January 1970 and will apply to pending litigation.

5. Insurance §§ 94, 106— improper cancellation — insurer's cross-action against finance company

In administratrix' action against automobile liability insurer to recover upon judgment obtained against a motorist allegedly insured by defendant, the insurer, who was compelled by G.S. 58-60(3) to cancel insured's assigned risk policy upon receipt of request for cancellation from premium finance company acting under a power of attorney executed by insured, *is held* entitled to join the finance company as an additional party defendant in a cross-action for indemnification arising out of the improper cancellation of the policy.

APPEAL by original defendant from *Gambill, J.*, at the 13 January 1969 Session of GUILFORD Superior Court, High Point Division.

The allegations of plaintiff's complaint are summarized as follows: Defendant Nationwide Mutual Insurance Company (Nationwide) issued a policy of insurance on or prior to 26 August 1966 by which Nationwide obligated itself to pay on behalf of Napoleon Wall (Wall), the insured, all sums which the insured should become

legally obligated to pay as damages because of bodily injury, sickness or disease, including death, arising out of an accident in the operation of an automobile by the insured. The policy was incorporated by reference and provided coverage in the principal amount of $5,000. On 4 November 1966, plaintiff's intestate was killed by the negligence of Wall, operating a 1959 Pontiac belonging to Ellios Franking Tyson, with Tyson's permission. On 4 May 1967, plaintiff brought suit against Wall for the wrongful death of her intestate. On 21 August 1967, plaintiff obtained judgment against Wall in the amount of $50,000 with interest and costs. No other insurance is in existence and the judgment remains unsatisfied.

Nationwide answered denying all material allegations of the complaint and alleging the following: Nationwide issued a policy of insurance to Wall on or about 20 August 1966, providing coverage for bodily injury liability incurred by reason of the operation by Wall of a vehicle owned by another, and further providing that "this policy may be cancelled by the named Insured by mailing to the Company written notice stating when thereafter the cancellation shall be effective." On 20 October 1966, Wall, acting through his attorney-in-fact, delivered a written notice to Nationwide instructing Nationwide to cancel the policy as of noon 25 October 1966. The policy was cancelled and notice of the cancellation was mailed to and received by the Department of Motor Vehicles.

Nationwide further alleged that Wall neglected to give it any notice whatever of the accident, thus violating the requirements of the policy; that Wall also failed to forward suit papers to Nationwide in violation of the terms of the policy. Both these failures were pleaded in bar of plaintiff's claim.

On 5 August 1968, Nationwide, pursuant to permission from the court, filed an amendment to its answer alleging that simultaneously with the purchase of the policy Wall borrowed the amount of the premium from Premium Payment Company (Payment Co.) and executed a power of attorney authorizing Payment Co. to cancel the policy on his behalf; that on 6 October 1966, Payment Co. mailed notice to Wall that it would exercise the power of attorney to cancel the policy if unpaid installments totaling $14.00 were not paid to Payment Co. in ten days; and no payment being made, Payment Co., as attorney-in-fact for Wall, delivered written notice to Nationwide to cancel on 25 October 1966.

On 19 August 1968, Nationwide filed a motion to join Payment Co. as an additional party defendant for purpose of a cross-action for indemnification. The motion was allowed and Nationwide filed

its cross-action against Payment Co. on 4 September 1968. Payment Co. demurred 11 October 1968. The demurrer was sustained 6 November 1968 with thirty days allowed Nationwide to amend its cross-action.

The amended cross-action was filed 21 November 1968 and alleged, in substance, the following: Payment Co. was an insurance premium finance company within the meaning of Chapter 58 of the North Carolina General Statutes. On 12 August 1966, Wall applied to J. M. Nurney, d/b/a Statewide Insurance Agency, for insurance under the North Carolina Assigned Risk Plan. This policy was assigned to Nationwide and became effective 20 August 1966. Simultaneously with the execution of the application for insurance, Wall executed an insurance premium finance agreement as defined in G.S. 58-55(2), and also executed a power of attorney constituting Payment Co. his attorney-in-fact to authorize cancellation of the policy later issued by Nationwide. On or about 21 October 1966, Nationwide received from Payment Co., as attorney-in-fact for Wall, a request for cancellation effective 25 October 1966. Included with the cancellation request was a copy of the power of attorney executed by Wall on 12 August 1966 and certification that Wall and J. M. Nurney had been given ten days' notice as required by G.S. 58-60. Nationwide adjusted its records to show cancellation by the insured as of noon 25 October 1966, notified the Department of Motor Vehicles, and refunded the unearned premium to Payment Co. Nationwide received its first notice of the accident of 4 November 1966 on 7 February 1967. Acting on the representations of Payment Co., Nationwide refused to investigate the claim or defend the suit and default judgment was taken against Wall.

Nationwide alleged that if the policy was not properly cancelled, the improper cancellation was the result of the failure of Payment Co. to properly notify Wall of the cancellation, as required by G.S. 58-60. Nationwide further pleaded that it did not investigate or defend the claim and suit against Wall because of reliance upon the representations of Payment Co. Therefore, Nationwide prayed for indemnification from Payment Co. Payment Co. demurred 17 December 1968 on grounds of misjoinder of parties and causes and pleaded *res judicata* based on the previous sustained demurrer. The demurrer was allowed 6 January 1969 and Nationwide appealed.

Robert R. Gardner and Haworth, Riggs, Kuhn & Haworth by John Haworth for original defendant appellant.

Smith, Moore, Smith, Schell & Hunter by Stephen Millikin for additional defendant appellee.

BRITT, J.

The first issue is whether Nationwide has stated a cause of action against Payment Co. We answer in the affirmative.

[1] Unless required by Article 4 of Chapter 58 of the General Statutes, Nationwide was not required to give Wall notice of the cancellation, since, on this record, the cancellation was made at the request of Wall's attorney-in-fact. *Daniels v. Insurance Co.*, 258 N.C. 660, 129 S.E. 2d 314.

[2] The case of *Grant v. Insurance Co.*, 1 N.C. App. 76, 159 S.E. 2d 368, although an action between the judgment creditor of the insured and insurance company only and which dealt with a request for cancellation somewhat different from that alleged in this case, placed the burden of proving cancellation by the insured or his agent on the insurance company.

[3] Here, Nationwide has alleged receipt of a request for cancellation from Payment Co., to which was attached a copy of the notarized power of attorney executed by Wall and certification that Wall and J. M. Nurney had been given the notice required by G.S. 58-60. Assuming such a request was received, we think Nationwide stated a cause of action against Payment Co., since upon receipt of the request Nationwide lacked further discretion in the matter under the mandate of G.S. 58-60(3) as follows:

> "(3) Upon receipt of a copy of *such* request for cancellation notice by the insurer or insurers, the insurance contract *shall* be cancelled with the same force and effect as if the aforesaid request for cancellation had been submitted by the insured himself, without requiring the return of the insurance contract or contracts." (Emphasis added.)

Moreover, the *Grant* case expressly states that "[i]f the premium finance company misleads the insurance company wrongfully by requesting cancellation of the policy, the insurance company can seek redress from the premium finance company."

The second issue is whether this cause of action against Payment Co. may be asserted in the action of Clara S. Ingram against Nationwide.

[4] It may be noted that this cross-action would seem clearly correct under our new Rules of Civil Procedure, § 1A-1, Rule 13(h) and Rule 14. These rules, originally slated to become effective 1 July 1969, will, by recent legislative enactment, become effective on 1 January 1970 and will apply to pending litigation. Session Laws,

1967, c. 954, s. 10. However, the new rules were not in effect when the superior court made its ruling and will not control this decision.

The problem facing the trial judge in making this determination under our present rules is fully appreciated. See the excellent treatment of the problems in 1 McIntosh, N.C. Practice 2d, 1969 Supplement, §§ 722, 722.5. Clearly, the superior court *could* have allowed the cross-claim to be prosecuted in the same action in order to handle the entire matter in one action and avoid a second suit. 1 McIntosh, N.C. Practice 2d, § 721, and citations therein.

The relationship between Nationwide and Payment Co. was not contractual, as all action by Payment Co. was as agent of the insured under G.S. 58-60 and not in its own right; therefore, the case does not fall within the rulings of *Clark v. Freight Carriers,* 247 N.C. 705, 102 S.E. 2d 252, or *Gaither Corp. v. Skinner,* 238 N.C. 254, 77 S.E. 2d 659.

[5] G.S. 58-60 provides that the insurance contract "shall not be cancelled unless such cancellation is effectuated in accordance with the following provisions: * * *." Liberally construed, Nationwide appears to be alleging that if the provisions relating to notice to the insured by Payment Co. were not followed and if the insurance contract is found to be still in effect because of this non-compliance, then Nationwide is entitled to be indemnified for losses incurred by it resulting from the failures of Payment Co., as Nationwide was compelled to cancel by G.S. 58-60(3).

On this basis, the case falls within the category of cross-claim for indemnification and thus the cross-claim is asserted as a matter of right. I McIntosh, N.C. Practice 2d, § 721. We conclude that the cross-claim should have been allowed.

The order of the superior court sustaining the demurrer to the amended cross-action and dismissing same is

Reversed.

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

STATE OF NORTH CAROLINA v. FLOYD WILLIAMS

No. 699SC294

(Filed 2 July 1969)

1. Criminal Law § 75— inculpatory statements to law officers — admissibility

The trial court did not err in the admission of inculpatory statements made by defendant to law officers at defendant's home prior to his arrest, the trial court having found upon voir dire that the *Miranda* warnings were given to defendant and that the statements were made freely, voluntarily and understandingly, and defendant not having been in custody when the statements were made.

2. Criminal Law §§ 84, 162— admissibility of weapon connected with crime — failure to object — search and seizure

The trial court did not err in the admission of a shotgun taken from defendant's home by a law officer, where defendant made no objection to the introduction of such evidence and the testimony shows that defendant voluntarily delivered the shotgun to the officer.

3. Criminal Law § 132— motion to set verdict aside — appellate review

Motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial court, and the court's refusal to grant the motion is not reviewable on appeal.

4. Criminal Law § 127— motion in arrest of judgment

Judgment in a criminal prosecution may be arrested on motion duly made only when some fatal error or defect appears on the face of the record proper.

APPEAL by defendant from *Bailey, J.*, at the Regular February 1969 Criminal Session of FRANKLIN Superior Court.

Defendant was charged in a bill of indictment, proper in form, alleging: (1) that on 29 July 1967 he feloniously broke and entered a dwelling house occupied by Clementine Wilson and Earl Alexander with intent to feloniously assault the said Clementine Wilson with a shotgun, and (2) that on said date defendant feloniously assaulted Clementine Wilson with a deadly weapon, to wit: a shotgun, with the intent to kill and murder the said Clementine Wilson, inflicting serious injuries not resulting in death.

Considered in the light most favorable to the State, the evidence tended to show: Defendant and Earl Alexander (Alexander) occupied houses adjoining each other in the Town of Louisburg. Prior to 29 July 1967, defendant had "lived with" Clementine Wilson (Clementine), but on that date she was residing in another section of Louisburg. Around 12:00 on Saturday night, defendant on returning

to his home overheard Clementine and Alexander talking in the latter's house. Defendant got his shotgun, forced open the door to Alexander's house, shot a hole in the floor between Alexander's feet, turned over the television set, heater and other furniture in the house, and hit Clementine about her head and neck several times with the shotgun. Clementine ran from the house and eventually obtained medical aid and went to the police station where she reported what had happened. Defendant continued to threaten Alexander but finally left and returned to his own home. The next morning Sheriff William Dement went to defendant's home and, among other things, defendant told the sheriff that he knocked the door down, went into Alexander's house, shot in the floor, beat Clementine with the shotgun and "that he ought to have killed both of them." Louisburg Police Chief Earl Tharrington went to defendant's home that afternoon and talked with defendant, at which time he told Chief Tharrington that he hit Clementine with the shotgun and that "he wished he had killed her when he was hitting her."

For its verdict, the jury found the defendant guilty of breaking and entering as charged in the bill of indictment but found him not guilty of the felonious assault count. The court imposed an active prison sentence of ten years, to begin at the expiration of a probationary sentence invoked at the same session of the court. Defendant appealed.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

W. M. Jolly for defendant appellant.

BRITT, J.

[1] Defendant assigns as error the introduction into evidence of certain inculpatory statements made by defendant to Chief of Police Tharrington and Sheriff Dement, contending that the safeguards of defendant's rights as set forth in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, were not provided.

The evidence disclosed that Sheriff Dement went to defendant's home on Sunday morning around 9:30 or 10:00 after the altercation on Saturday night. He did not place the defendant under arrest but merely talked with defendant in his home on that occasion. Chief Tharrington went to defendant's home that Sunday evening and there talked with defendant before he was taken into custody. When the solicitor asked witnesses Dement and Tharrington about statements made to them by defendant on those occasions, the trial judge

excused the jury and conducted a voir dire, following which he found that the *Miranda* warnings were given to the defendant in each instance and that the statements were made freely, voluntarily and understandingly.

In *State v. Inman,* 269 N.C. 287, 152 S.E. 2d 192, our Supreme Court held that a statement voluntarily made by defendant to an officer prior to any custodial or interrogatory relationship between them is competent.

In *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638, defendant was charged with murder. The evidence disclosed that the deceased was killed by a shotgun blast during an altercation in the home of the defendant. A police officer went to the scene of the shooting shortly after it occurred and defendant made a statement to the effect that he had shot the deceased. Defendant was not warned as to any of the constitutional rights set forth in *Miranda* and the question before the Supreme Court was whether, under the circumstances, such warning was necessary. In the opinion by Bobbitt, J., it is said:

> "In *Miranda,* the majority opinion, delivered by Mr. Chief Justice Warren, states that the constitutional issue decided 'is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way.' Repeatedly, reference is made to 'custodial interrogation.' Thus, the opinion states: '(T)he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' The opinion stated further: 'Our decision is not intended to hamper the traditional function of police officers in investigating crime. See *Escobedo v. Illinois,* 378 U.S. 478, 492, 12 L. Ed. 2d 977, 986, 84 S. Ct. 1758. . . . Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily

present.' The opinion also states: 'Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.' "

Our Supreme Court held that the *Miranda* warning was not necessary and that the evidence was competent.

We hold that the evidence of Officers Dement and Tharrington in the instant case was admissible and the assignments of error relating thereto are overruled.

[2] Defendant assigns as error the taking of a shotgun from defendant's home by Officer Tharrington and the introduction of the shotgun into evidence. Defendant contends that the officer did not have a search warrant, therefore, the shotgun was illegally obtained and by virtue of G.S. 15-27 was not admissible in evidence.

The record discloses that when the shotgun was identified and offered in evidence, there was no objection by defendant. An objection to the admission of evidence is necessary to present defendant's contention that the evidence was incompetent. 3 Strong, N.C. Index 2d, Criminal Law, § 162, pp. 114, 115. Furthermore, the testimony was to the effect that the defendant voluntarily delivered the shotgun to the officer, and there was no evidence that the gun was found in the house pursuant to a search of the premises. The assignment of error is overruled.

Three of defendant's assignments of error relate to the trial judge's charge to the jury. We have carefully considered the charge and find that it was free from prejudicial error. The assignments of error are overruled.

[3, 4] Defendant's assignment of error 7 is to the failure of the court to set aside the verdict as being against the greater weight of the evidence and to arrest the judgment. It is well settled in this jurisdiction that a motion to set aside the verdict as being against 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. 3 Strong, N.C. Index 2d, Criminal Law, § 132, pp. 55, 56. It is also well established that a judgment in a criminal prosecution may be arrested on motion duly made when, and only when, some fatal error or defect appears on the face of the record proper. Defendant has not brought to our attention, nor do we find, any fatal error or defect on the face of the record proper. 3 Strong, N.C. Index 2d, Criminal Law, § 127, p. 43.

We have considered each of the assignments of error brought forward and discussed in defendant's brief, but finding them with-

out merit, they are overruled. Defendant received a fair trial and the sentence imposed was within statutory limits.

No error.

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

ODESSA W. STAPLES v. EUGENE D. CARTER, TRADING AS CARTER'S ESSO SERVICE CENTER, AND WAYNE CARTER

No. 6918SC246

(Filed 2 July 1969)

1. Automobiles § 71— accident involving wrecker — sufficiency of evidence

Plaintiff's evidence that he was traveling in the southbound lane of traffic at night, that defendant's wrecker was standing in the northbound lane of traffic facing north with its headlights on bright, that the wrecker displayed no warning signals of any kind, that a cable extended from the wrecker across the southbound lane to a disabled vehicle located partially on the west end of the highway, and that plaintiff was injured when his car ran into the cable and the disabled vehicle, *held* sufficient to be submitted to the jury on the issue of defendant's negligence in allowing the wrecker to be parked or left standing on the highway at night with bright lights on in violation of G.S. 20-161 and G.S. 20-161.1.

2. Negligence § 29— prima facie case

When a prima facie case of negligence is shown by the evidence or admission, the trial court, nothing else appearing, should submit the case to the jury.

3. Automobiles § 90— instructions in accident cases — leaving standing a vehicle at night

Trial court properly instructed the jury as to the effect of G.S. 20-161.1 upon the conduct of the operator of a wrecker in leaving standing the wrecker on the highway at night, in order to aid a disabled vehicle, where the evidence was conflicting with respect to whether the bright lights were burning on the wrecker and to whether the emergency signaling lights were flashing.

APPEAL by plaintiff from *Martin, S.J., (Robert M.)* 12 December 1968 Session of the Greensboro Division of the Superior Court of GUILFORD County.

Plaintiff first included Edgar Staples and Dean Goins in this case but submitted to a voluntary nonsuit as to each of them and

amended her complaint to allege a cause of action only against the Carters.

In this action plaintiff seeks to recover for personal injuries alleged to have been sustained by her on 9 December 1961. Plaintiff was a guest passenger riding in the front seat of an automobile being operated by her husband south on Dolly Madison Road in Guilford County near Greensboro at about 8:30 P.M. The car in which plaintiff was riding collided with a disabled automobile owned by Dean Goins which was located partially on the road and partially in a yard west of the road. The disabled automobile had no lights on it, was connected or attached by a cable extending across the southbound lane to a wrecker truck (wrecker) owned by defendant Eugene D. Carter, operated by defendant Wayne Carter and which was stopped in the northbound lane on the Dolly Madison Road for the purpose of moving the disabled automobile of Mr. Goins.

The Dolly Madison Road runs generally north and south. It is an asphalt paved road 21 feet wide with shoulders about five feet wide. The road is straight and level for more than 100 yards north of the point of collision.

Plaintiff's husband, and driver of the automobile, testified he saw the headlights on the wrecker were on bright facing north and he thought the vehicle was meeting him; he dimmed his headlights but the lights on the wrecker were not dimmed; there were no other lights on or about it, and no warning signals or signs of any kind were visible. He was traveling at a speed of about 30 miles per hour in a 35 miles per hour zone. When he got even with the wrecker he found out it was not moving, and when he passed by it he ran into the car and the cable. The wrecker was standing still with its bright lights burning in the northbound lane of the highway with a cable, about twice the size of a pencil, extending from it across the southbound travel lane and attached to the disabled vehicle. No flares were out and no warnings of any kind were given that a cable was extending across the southbound travel lane. Plaintiff suffered injuries in the collision.

Defendants' evidence tends to show that the wrecker had been there 5 or 10 minutes with its emergency lights burning, consisting of 2 large flasher lights on each front fender, a red revolving light on top with four flashing lights in it, 2 hundred watt back-up lights, flood lights and blinker lights on each side of the boom and 2 on the rear, and that the wrecker headlights were on dim. The vehicle plaintiff was riding in was going about 50 miles per hour; ran off the road,

hit a mail box and then crashed into the disabled vehicle without colliding with the wrecker.

The issues of negligence and damages were submitted to the jury. The jury answered the issue of negligence in favor of the defendants. From the judgment entered upon the verdict, plaintiff assigned error and appealed to this Court.

Silas B. Casey and Haworth, Riggs, Kuhn and Haworth by John Haworth for plaintiff appellant.

Perry C. Henson and Daniel W. Donahue for the defendant appellees.

MALLARD, C.J.

[1] Plaintiff contends that the trial court committed error in leaving to the jury the question of whether the wrecker was parked or left standing on the highway in violation of G.S. 20-161. Plaintiff contends that the trial court should have instructed the jury as a matter of law that under all the facts in this case the wrecker was parked or left standing in violation of G.S. 20-161.

The pertinent parts of G.S. 20-161 read as follows:

> "(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway:"

In the case of *Montford v. Gilbhaar*, 265 N.C. 389, 144 S.E. 2d 31 (1965), cited by appellant, it is said:

> "Plaintiff's exception to the judgment of nonsuit was well taken. In our opinion the evidence that defendants left the wrecker standing on the highway in such manner that the wrecker and the cable attached blocked the entire highway, the existing circumstances affected visibility of the cable, and no meaningful warning was given that the highway was completely obstructed and traffic, to avoid collision, would have to come to a complete stop, makes out a *prima facie* case of actionable negligence on the part of defendants. G.S. 20-161."

[2] When a *prima facie* case is shown by the evidence or admission, the trial court, nothing else appearing, should submit the case to the jury. In the case of *Vance v. Guy*, 224 N.C. 607, 31 S.E. 2d 766 (1964), it is said:

> "The defendants were not compelled to go forward or lose their case, simply upon a *prima facie* showing by the plaintiff. *Speas v. Bank,* 188 N.C., 524, 125 S.E., 398. A '*prima facie* case' means and means no more than evidence sufficient to justify, but not to compel an inference of liability, if the jury so find. It furnishes evidence to be weighed, but not necessarily to be accepted by the jury. It simply carries the case to the jury for determination, and no more."

[1] We are of the opinion and so hold that the evidence in this case required the submission of the case to the jury but did not establish as a matter of law that a violation of G.S. 20-161(a) and G.S. 20-161.1, if any, was a proximate cause of the collision, and the trial judge properly submitted to the jury the question of whether the wrecker was parked or left standing in violation of the statutes, and if so, whether such was a proximate cause of the collision. See *Saunders v. Warren,* 264 N.C. 200, 141 S.E. 2d 308 (1965); *Chandler v. Bottling Co.,* 257 N.C. 245, 125 S.E. 2d 584 (1962); *Pollock v. Chevrolet Co.,* 1 N.C. App. 377, 161 S.E. 2d 642 (1968).

[3] Plaintiff's last contention is that the trial court committed reversible error in instructing the jury as to the effect of G.S. 20-161.1 upon the conduct of the operator of the wrecker. G.S. 20-161.1 reads as follows:

> "Regulation of night parking on highways. — No person parking or leaving standing a vehicle at night on a highway or on a side road entering into a highway shall permit the bright lights of said vehicle to continue burning when such lights face oncoming traffic."

Plaintiff alleged (1) the wrecker was parked and left standing without leaving at least 15 feet of clear and unobstructed width upon the main-traveled portion of the roadway in violation of G.S. 20-161; (2) the wrecker was parked and left standing at night on a public road with its bright lights burning in the face of oncoming traffic, thereby violating G.S. 20-161.1; and (3) there was failure to give adequate and reasonable warning to approaching traffic that the road was blocked, thereby violating the applicable common law duty.

The evidence was conflicting with respect to whether the bright lights were burning on the wrecker. Plaintiff's evidence tended to show that the wrecker's bright lights were burning and defendants' evidence tended to show that they were not. The evidence for the plaintiff tended to show that there were no lights on the wrecker other than the bright headlights. The defendants' evidence tended to show

that all of the emergency lights on the wrecker were burning and flashing, and the headlights were on dim. Plaintiff's evidence in this case also tended to show that the car in which she was riding was going about 30 miles per hour in a 35 mile per hour speed zone. Defendants' evidence tends to show that the Staples car was traveling at a speed of 50 miles per hour, and that before the collision it ran off onto the shoulder of the road, struck a mail box, struck the disabled vehicle of Goins and knocked it 25 or 30 feet and then continued on to the left side of the highway and struck a bank and stopped.

We have carefully examined the charge and all of the assignments of error and exceptions brought forward in plaintiff's brief and are of the opinion that no prejudicial error is made to appear.

Affirmed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. NATHAN RONNIE WITHERSPOON

No. 6921SC279

(Filed 2 July 1969)

1. Burglary and Unlawful Breakings § 5; Larceny § 7— nonsuit — sufficiency of evidence

The State's evidence *is held* sufficient to be submitted to the jury as to defendant's guilt of breaking and entering with intent to steal and felonious larceny where it tends to show that the home of the prosecuting witness was broken and entered and articles stolen therefrom, and that the stolen articles were found the next day in defendant's automobile.

2. Criminal Law §§ 95, 162— corroborative evidence — failure to object or request that admission be restricted

The trial court did not commit prejudicial error in the admission of testimony by a State's witness which tended to corroborate some of the testimony of another State's witness, where defendant failed to object or except to such testimony and made no request that its admission be restricted to the purpose for which it was competent.

3. Criminal Law § 113— failure to charge on corroborative evidence — request for instructions

The trial court did not err in failing to charge the jury as to how it should consider corroborative evidence and the purpose and effect thereof where defendant made no request for such instructions.

ON Writ of Certiorari dated 14 March 1969 to Superior Court of Forsyth County as a substitute for an appeal from *Armstrong, J.*, at the 16 November 1967 Session of the Superior Court of FORSYTH County.

Defendant was tried upon a proper bill of indictment charging him with three felonies. The first count charges breaking and entering with intent to steal, the second count charges him with the felony of larceny of property after breaking and entering of the value of two hundred twenty-five dollars, and the third count charges him with receiving said property of the value of two hundred twenty-five dollars knowing it to have been stolen.

Trial was by jury. The jury found the defendant guilty of the breaking and entering charge and the larceny charge. On the breaking and entering charge the defendant was given an active prison sentence of not less than seven nor more than ten years. On the larceny charge the defendant was given a prison sentence of nine to ten years to begin at the expiration of the prison sentence imposed in the breaking and entering charge, and this judgment was suspended for a term of five years upon the condition that the defendant be of general good behavior and not violate any laws of North Carolina.

The defendant filed petition for a writ of certiorari as a substitute for an appeal which writ was issued.

Attorney General Robert Morgan and Assistant Attorney General Bernard A. Harrell for the State.

Richard C. Erwin for defendant appellant.

MALLARD, C.J.

The defendant offered no evidence. The evidence for the State was that on the morning of 4 October 1967, James Seivers, who lived on the Walkertown Road in Forsyth County, left his house to go to work at about 7:30 A.M. His wife also left the house to visit Seivers' cousin. When Seivers left home his house was in good order. When he returned about 5:00 P.M. on that date the screen had been torn off the bedroom window. The house had been entered. A ladder was at the back window. A bureau drawer had been opened in the bedroom and contents scattered. Missing from the house were a handbag, movie projector and 5 rolls of film. These articles were taken from the bedroom.

The witness on direct examination identified State's Exhibit 3,

a handbag, as his property that had been stolen from a chair in his bedroom. He likewise identified State's Exhibit 4, a movie projector, as his property that had been stolen from off the sewing machine in his bedroom, and the 5 rolls of film in an envelope, marked State's Exhibit 5, were identified by the witness as his property that had been stolen from his bedroom.

On October 5, 1967, the day after the breaking, entry and theft, Seivers saw the three exhibits in the Sheriff's office. On cross-examination, the witness Seivers admitted that there were no particular identifying marks on the projector or on the film. On the handbag (or overnight bag) the witness identified black marks that were on it before it was stolen.

Mrs. Dorothy Vanhoy, another State's witness, testified that she lived across the road from Seivers' house and that at approximately 9:00 A.M. on the morning of October 4, 1967, she saw a blue car parked across from her driveway. The hood of the car was up; she saw no one near it. About 20 minutes later, she looked out her window and saw a colored man going from Seivers' house carrying something large in his hand, running toward the car. The car left toward Walkertown. She could not identify defendant as being the colored man she saw leaving Seivers' house.

J. R. Trivette testified that he is a Deputy Sheriff of Forsyth County and that on the afternoon of October 4, 1967, at about 5:30 P.M., he went to Seivers' house along with another officer. Seivers told the officer about the entry and the items stolen from his house. Trivette also talked to Mr. Vanhoy and his testimony as to that conversation was in all essentials substantially the same as her testimony.

Trivette testified that on October 5, 1967, the day following the breaking and entering and larceny, at about 9:00 A.M., he saw the defendant at a Texaco Station where he worked about three and one-half miles from Seivers' house. Trivette asked defendant if he could look in the 1965 blue Chevrolet in which the officers had seen him arrive at the station. Defendant consented and opened the trunk of the car, where State's Exhibits 3, 4 and 5 were found. The witness put the market value of the stolen property at approximately $125.00.

[1] Defendant's assignment of error that the court erred in failing to allow his motion for judgment of nonsuit is overruled. Applying the rule enunciated in *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956), we think there was such substantial direct or circum-

stantial evidence of each element of the crimes of breaking and entering, and larceny, as to require submission of the case to the jury.

[2] The witness Trivette was permitted to testify, without objection or exception, to matters that tended to corroborate some of the testimony of the witness Mrs. Vanhoy. The testimony was thus admitted generally. The appellant did not ask at the time of its admission that its purpose be restricted to the use for which it is competent. Defendant contends that some of the testimony of the witness did not tend to corroborate Mrs. Vanhoy but was inconsistent with her testimony. In the absence of an objection and exception to such testimony, and in the absence of a request to restrict such testimony, we are of the opinion and so hold that in the admission thereof no prejudicial error appears. Even if its admission was error, it is not properly presented on this record.

[3] Defendant also contends that the failure of the judge to charge the jury as to how it should consider corroborative evidence and the purpose and effect thereof was prejudicial error. G.S. 1-180 requires the trial judge when instructing the jury to state the evidence given in the case to the extent necessary to explain the application of the law thereto; to instruct the jury on all substantive features; to define and apply the law thereto; and to state the contentions of the parties. In 3 *Strong, N.C. Index* 2d, *Criminal Law,* § 113, it is said:

> "Instructions to scrutinize the testimony of an alleged accomplice, or that the jury should not consider evidence withdrawn by the court, *or explaining the difference between corroborative and substantive evidence,* or charging how evidence relating to the credibility of a witness should be considered, *or that certain evidence had been admitted solely for the purpose of corroboration,* or that the jury should take its own recollection of the evidence, or instructions on defendant's evidence of good character, *relate to subordinate features* upon which the court is not required to charge in the absence of request for special instruction aptly made." (Emphasis added).

We are of the opinion and so hold that in this case it was not error, in the absence of a proper and specific request, to fail to instruct the jury on the subordinate feature of corroborative evidence.

Defendant contends that the court committed other errors in the charge, but after carefully considering the entire charge we are of the opinion and so hold that no prejudicial error appears therein.

The defendant contends that the court ought to find some error in the sentences imposed but fails to point out any error. The defend-

ant, however, concedes that the sentences are within the statutory limits.

No prejudicial error has been made to appear, and in the trial we find

No error.

BRITT and PARKER, JJ., concur.

AMMIE W. TRUELOVE v. NATIONWIDE MUTUAL INSURANCE COMPANY, A CORPORATION

No. 6911SC280

(Filed 2 July 1969)

1. **Insurance § 87— automobile liability policy — omnibus clause — permission of owner's son to drive vehicle**

Driver who was operating an automobile with permission of the owner's son is not covered by the omnibus clause of the owner's liability policy where the son, although having permission to operate the automobile, had no specific authorization from the owner to select another permittee to operate the automobile.

2. **Insurance § 87— automobile liability policy — omnibus clause — non-owned vehicle — permission of owner to drive vehicle**

Insured's son was not covered under the omnibus clause of insured's automobile liability policy while driving an automobile owned by the mother of a casual friend where the son, an unlicensed minor, drove the automobile with permission of the owner's son but had no express permission from the owner to drive the automobile and had no grounds reasonably to believe that he had such permission.

APPEAL by plaintiff from *Ragsdale, S.J.*, February 1969 Civil Session, HARNETT County Superior Court.

Ammie W. Truelove (plaintiff) sustained personal injuries and property damage on 21 June 1965 as the result of the actionable negligence of Stephen Ray Godwin (Stephen), who was operating a 1962 Pontiac automobile owned by Louise McMillan Smith (Louise). Plaintiff procured a judgment on 22 March 1968 against Stephen in the amount of $10,000.00 for personal injuries and $500.00 for property damage. Execution was issued on this judgment, and it was returned unsatisfied on 12 August 1968.

On 21 June 1965 Stephen was living with his father, Thurman

Columbus Godwin, (Thurman) as a member of his family. Thurman owned a Plymouth automobile which was covered by an insurance policy issued by Nationwide Mutual Insurance Company (defendant). This policy designated Thurman as the named insured and provided under the omnibus clause that a resident of his household was covered when operating the Plymouth automobile or when operating a non-owned automobile if same was being operated "with the permission, or reasonably believed to be with the permission, of the owner" of the non-owned automobile.

The Pontiac automobile was also covered by an insurance policy issued by the defendant. The omnibus clause of this policy provided coverage for "any other person using such automobile, provided the actual use thereof is with the permission of the named insured."

At the close of the evidence for the plaintiff, the defendant moved for judgment of involuntary nonsuit. This motion was allowed and the action was dismissed. The plaintiff thereupon excepted and appealed to this Court.

Bryan, Bryan & Johnson by Robert Bryan for plaintiff appellant.

Smith, Leach, Anderson & Dorsett by Willis Smith, Jr., for defendant appellee.

CAMPBELL, J.

The only question presented by this appeal is whether Stephen was covered under the omnibus clause of either the Plymouth or Pontiac automobile liability insurance policy as an insured at the time of the collision with the plaintiff on 21 June 1965.

On 21 June 1965 Louise's seventeen-year-old son, E. W. Smith, III, (Gene) lived with his parents as a member of the family. Gene, a licensed driver, had his own set of keys to the Pontiac automobile, which he drove whenever he wanted to, subject to the priority of his mother and father. Gene had never been instructed one way or the other as to whether he could permit anyone else to drive this vehicle. He remembered having let only one person drive it prior to 21 June 1965. Gene had known Stephen for about three or four weeks prior to the collision, but he did not know how old Stephen was. Gene had seen Stephen driving Thurman's Plymouth automobile on at least two occasions, but he had never seen a member of the Godwin family present. On the evening of 21 June 1965, Gene was driving the Pontiac automobile and Stephen was riding with him. After taking Louise to a meeting, Gene drove to Erwin, where he stopped at a friend's house. He told Stephen that he wanted to

stay there for about five or ten minutes and "he asked Stephen to take the car and drive it around for five or ten minutes and then come back and pick [him] up." It was during this interval that Stephen had the wreck wherein the plaintiff was injured and his automobile damaged.

Louise testified that, although Gene had general use of the Pontiac automobile, he always got her permission to drive it; she had never given Gene any instructions one way or the other about letting anyone else drive the vehicle and, as far as she knew, Gene had never permitted anyone else to drive it; she did not know of any occasion when any person other than a member of her family had driven her automobile; she had not given Stephen permission to use it and she had never known Stephen to drive it; Gene had met Stephen a few weeks prior to the collision at a church camp; Stephen had been to her home once or twice with Gene, and on those occasions he had been brought to her home by members of the Godwin family.

On 21 June 1965 Stephen was fifteen years old and he had no operator's license or learner's permit.

[1] When viewed in the light most favorable to the plaintiff, giving him the benefit of all legitimate inferences and resolving all contradictions and inconsistencies in his favor, the nonsuit was improper if the evidence would have permitted a legitimate inference that, at the time of the accident, Stephen was driving the Pontiac automobile with the permission of Louise, the named insured. In this case the facts were not in dispute and a question of law alone is presented.

In *Bailey v. Insurance Co.*, 265 N.C. 675, 144 S.E. 2d 898, the daughter of the named insured customarily used the vehicle and frequently permitted others to drive it. On the occasion there involved, she had taken the vehicle out of town to visit a schoolmate, whom she frequently let drive and with whom she left the vehicle while she went elsewhere. The schoolmate in turn let her boyfriend drive the vehicle and he was driving at the time of the accident there involved. The Supreme Court held that the boyfriend did not have permission, express or implied, to operate the vehicle, and he was, therefore, not covered by the omnibus clause of the liability insurance policy. The Supreme Court stated:

> "The owner's permission for the use of the insured vehicle may be expressed or, under certain circumstances, it may be inferred. 'Where express permission is relied upon it must be of an affirm-

ative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. On the other hand, implied permission involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent'. . . . However, the relationship between the owner and the user, such as kinship, social ties, and the purpose of the use, all have bearing on the critical question of the owner's implied permission for the actual use. . . .

. . .

. . . Ordinarily, one permittee does not have authority to select another permittee without specific authorization from the named insured. . . ."

[1] In the instant case Gene, as a permittee to drive the Pontiac automobile, was "without specific authorization" from Louise, the named insured, to select another permittee. The omnibus clause of the policy on the Pontiac automobile did not cover Stephen under these circumstances.

[2] Stephen knew he was under age and had no license or permit to drive an automobile. He knew Louise, the owner of the Pontiac, only casually as the mother of his new friend Gene. He knew he had no express permission from Louise to drive her Pontiac automobile. He knew he had never driven the Pontiac before. He had absolutely no grounds reasonably to believe he had permission to drive the Pontiac. Therefore, Stephen was not protected or covered by the omnibus clause of the Plymouth automobile.

North Carolina has interpreted the omnibus clause in automobile liability insurance policies "according to the 'moderate' rule." *Bailey v. Insurance Co., supra. Torres v. Smith,* 269 N.C. 546, 153 S.E. 2d 129; *Rhiner v. Insurance Co.,* 272 N.C. 737, 158 S.E. 2d 891.

Affirmed.

BROCK and MORRIS, JJ., concur.

SARAH G. BEANE v. WEIMAN COMPANY, INC., LOUIS J. GALVAN, INDIVIDUALLY, GEORGE FRICELLA, INDIVIDUALLY, AND RICHARD GODDARD, INDIVIDUALLY

No. 6919SC265

(Filed 2 July 1969)

1. Libel and Slander § 1— slander defined

Slander is the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business or means of livelihood.

2. Libel and Slander § 1— slander per se and per quod

Slander *per se* consists of false remarks which in themselves form the basis of an action for damages, in which case both malice and damage are, as a matter of law, presumed; slander *per quod* consists of false remarks which are such as to sustain an action only when causing some special damage, in which case both the malice and the special damage must be alleged and proved.

3. Libel and Slander § 5— slander per se — false accusations to plaintiff's employer

Alleged false accusations by defendants to an official of plaintiff's employer that plaintiff had called defendants' wives and reported them running around with other women, and alleged statement by one defendant that he would not work for the employer as long as plaintiff was employed there, *are held* not actionable *per se*.

4. Libel and Slander § 4— slander per quod

An utterance is actionable only *per quod* where the injurious character of the words do not appear on their face but only in consequence of extrinsic, explanatory facts showing their injurious effect, in which case the injurious character of the words and some special damage must be pleaded and proved.

5. Libel and Slander § 5— slander per quod — injurious effect — sufficiency of allegations

In this action for slander, plaintiff's complaint fails to allege sufficient facts showing injurious effect of the remarks complained of to render them actionable *per quod* where it alleges that defendants falsely told an official of plaintiff's employer that she had called defendants' wives and reported them running around with other women, that one defendant told the official that he would not work for the employer as long as plaintiff worked there, and that plaintiff consequently lost her job and has been unable to obtain equally satisfactory employment elsewhere.

APPEAL by plaintiff from *Lupton, J.*, at the 6 January 1969 Session of RANDOLPH Superior Court.

In her complaint, plaintiff alleged the following: On 3 June 1968, she was employed by Weiman Company (Weiman) and was called to the office of defendant Goddard, an official of the company. God-

dard told her he "had no choice but to sever the plaintiff's relations with the Company because Lou Galvan and George Fricella said that the plaintiff had called their wives and reported them running around with other women. Lou Galvan said he would not work with the Company as long as the plaintiff was employed. Therefore, he (Goddard) had no other choice because he had to have a production man." Plaintiff alleged these words were spoken by Galvan and Fricella with malice and for the purpose of harming the plaintiff's reputation and employment. Plaintiff further alleged that Goddard made the same statement to several other named persons in the scope of his employment but with malice and injury to the plaintiff in her occupation.

Defendants demurred, the demurrer was sustained and plaintiff appealed.

Alston, Pell, Pell & Weston by E. L. Alston, Jr., for plaintiff appellant.

Block, Meyland & Lloyd by A. L. Meyland for defendant appellees.

BRITT, J.

It is noted in the record on appeal and in the briefs that defendant Galvan is variously referred to as Louis J. Galvan, James J. Galvin, Lou Galvin, Lewis J. Galvin, Louis J. Galvin, Galvan, and Galvin; we proceed on the assumption that his correct name is Louis J. Galvan.

The question presented is whether the allegations of the complaint are sufficient to state a cause of action.

[1, 2] Slander is commonly defined as "the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood." 33 Am. Jur., Libel and Slander, § 3, p. 39. 53 C.J.S., Libel and Slander, § 1, p. 33; Black's Law Dictionary, 4th Ed. Slander, as distinguished from libel, may be actionable *per se* or only *per quod*. That is, the false remarks in themselves (*per se*) may form the basis of an action for damages, in which case both malice and damage are, as a matter of law, presumed; or the false utterance may be such as to sustain an action only when causing some special damage (*per quod*), in which case both the malice and the special damage must be alleged and proved. 5 Strong, N.C. Index 2d, Libel and Slander, § 1, pp. 204-205. *Penner v. Elliott,* 225 N.C. 33, 33 S.E. 2d 124.

In *Penner v. Elliott, supra,* the defamatory language complained of was: "J. R. Penner is a man who will not pay his honest debts; that he will not work and is a man that respectable people had best not have anything to do with." In an opinion by Seawell, J., the court said:

> "The policy of the law has much restricted the range of defamatory utterances which are actionable *per se.* Some statutes, with which we are not here concerned, make a limited number of defamations slanderous *per se;* but ordinarily we must look to the history of the subject in the common law, under the guidance of our own decided cases, in order to determine which are of that character. Included amongst them are accusations of crime or offenses involving moral turpitude, defematory statements about a person with respect to his trade, occupation or business, imputations of having a loathesome disease, and the like. It is sufficient to say that the words alleged of the defendant do not come within any of the categories recognized as actionable *per se;* * * *."

[3] We hold that the words alleged in the instant case are not actionable *per se.*

[4] Where the injurious character of the words do not appear on their face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing their injurious effect, such utterance is actionable only *per quod.* Where the words spoken or written are actionable only *per quod,* the injurious character of the words and some special damage must be pleaded and proved. 5 Strong, N.C. Index 2d, Libel and Slander, § 4; *Badame v. Lampke,* 242 N.C. 755, 89 S.E. 2d 466.

[5] In her complaint, plaintiff alleges as a fact that, for approximately two years prior to the occasion complained of, defendants Galvan and Fricella openly and notoriously associated with women other than their wives; that their wrongful conduct was carried on at Weiman's place of business and in other places in Randolph County. She then alleges on information and belief that some person called the "wife of Galvan and/or Fricella" in Illinois and advised her or them of the improper associations of Galvan and Fricella with "other women"; that said defendants falsely accused plaintiff of being the person who made the telephone call and as the result of said false accusation plaintiff lost her job with Weiman and had been unable to obtain equally satisfactory employment elsewhere. She contends that the false accusation by Galvan and Fricella and repeated by Goddard "was intended to convey and did convey * * *

the impression that the plaintiff was an untrustworthy person, not fit to hold a job of confidence, and the same was calculated to, and did, hold the plaintiff up to public scorn, hatred and ridicule * * *."

We do not think the complaint alleges sufficient facts showing injurious effect of the words complained of to render them actionable *per quod*.

The judgment of the superior court sustaining the demurrer to the complaint is

Affirmed.

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

SARAH G. BEANE v. WEIMAN COMPANY, INC., LOUIS J. GALVAN AND GEORGE FRICELLA

No. 6919SC264

(Filed 2 July 1969)

1. Contracts § 32— malicious inducement of breach of contract

In an action for maliciously inducing a third party to breach his contract with plaintiff, plaintiff must show (1) that a valid contract existed between him and the third party, which conferred upon plaintiff some contractual right against the third person, (2) that defendant had knowledge of plaintiff's contract with the third party, (3) that defendant intentionally induced the third person not to perform his contract with plaintiff, (4) that in so doing defendant acted without justification, and (5) that defendant's act caused plaintiff actual damages.

2. Contracts § 32— malicious inducement of breach of contract — sufficiency of allegations

Allegations that two defendants falsely accused plaintiff to an official of her employer of calling defendants' wives and reporting improper associations by defendants with other women, that plaintiff consequently lost her job, and that an official of the company told her that one defendant had stated that he would no longer work for the company while plaintiff worked there, *are held* insufficient to state a cause of action against either defendant for malicious interference with contractual relations, plaintiff having failed to allege facts to show that the decision to terminate plaintiff's employment at will resulted from defendants' statements or that the statements were intended to result in the termination of plaintiff's employment, and defendants having the right to announce the condition under which they would continue their employment.

APPEAL by plaintiff from *Lupton, J.*, at the 6 January 1969 Civil Session of RANDOLPH Superior Court.

In her complaint, plaintiff alleged that: She had been employed by the Weiman Company and its predecessors for some twenty years and Louis Galvan and George Fricella were officers of the company. Galvan and Fricella lived in and around Asheboro, N. C., during the week but visited their families in Illinois each weekend. The individual defendants openly and notoriously associated with women other than their wives during the week, this practice having continued for some period of time. On 29 May 1968, some person called the wives of the individual defendants and informed them of the associations of their husbands. The plaintiff then alleged the following:

"VIII. Thereafter, the plaintiff is informed, and therefore alleges the same on information and belief, that Galvan and Fricella intentionally, willfully, maliciously and recklessly accused the plaintiff of being the party responsible for said telephone call.

IX. The plaintiff is informed and believes, and therefore alleges the same on information and belief, that said intentional, willful, malicious and reckless accusation was transmitted to Goddard, the President of The Company, by Galvan and Fricella.

X. On June 3, 1968, the plaintiff was summoned to the office of Mr. Goddard, the President as aforesaid. At that time, Mr. Goddard stated to the plaintiff that he (Goddard) 'had no choice but to sever the plaintiff's relations with The Company because Lou Galvan and George Fricella had said that the plaintiff had called their wives and reported their running around with other women, and Lou had said that he would not work with The Company as long as the plaintiff was employed. Therefore he (Goddard) had no other choice because he had to have a production man.' "

The remaining allegations are conclusory statements as to malice and proximate cause and that the quoted passages constitute a malicious interference with the contractual relations of plaintiff with the company.

As a second cause of action, plaintiff repeated the above allegations and alleged in addition that the individual defendants acted in the scope of their employment in making the accusation to Goddard.

Defendants demurred, the demurrer was sustained and plaintiff appealed.

Alston, Pell, Pell & Weston by Jerry S. Weston for plaintiff appellant.

Block, Meyland & Lloyd by A. L. Meyland for defendant appellees.

BRITT, J.

It is noted in the record on appeal and in the briefs that defendant Galvan is variously referred to as Louis J. Galvan, James J. Galvin, Lou Galvan, Lewis J. Galvin, Louis J. Galvin, Galvan, and Galvin; we proceed on the assumption that his correct name is Louis J. Galvan.

The question presented is whether the facts alleged in the complaint, when construed liberally, state a cause of action.

Both in her complaint and in arguments before this Court, plaintiff contends that her relief is on the theory of malicious interference with contractual relations, rather than breach of contract. The plaintiff was an employee at will.

[1] The leading case in North Carolina on interference with contractual relations is *Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176. The elements of the tort, according to that case, are the following: First, that a valid contract existed between the plaintiff and a third person, conferring some contractual right against the third person; second, that the outsider had knowledge of the plaintiff's contract with the third person; third, that the outsider intentionally induced the third person not to perform his contract with the plaintiff; fourth, that in so doing the outsider acted without justification; and fifth, that the outsider's act caused the plaintiff actual damages.

[2] The corporate defendant is clearly excluded by the terms of the first requisite, since the contract was with it and not with a third person. As to defendant Fricella, no act is alleged except the communication to Mr. Goddard of Fricella's opinion as to the identity of the person who called his wife. There is no allegation as to the purpose of this communication or that it induced Goddard, as agent of the company, to refuse to continue the employment of the plaintiff. Thus, there are no facts alleged tending to show "that the outsider intentionally induced the third person not to perform his contract with the plaintiff." *Childress v. Abeles, supra.* "* * * [P]laintiff must allege every fact necessary to constitute his cause of action so as to disclose the issuable facts determinative of his right to relief, and recovery must be had, if at all, on the theory of liability set forth in the complaint. * * * A mere allegation of

the legal conclusion which the pleader conceives should be drawn from the evidence he intends to offer is insufficient." 6 Strong, N.C. Index 2d, Pleadings, § 2, p. 292 (numerous citations). See also 30 Am. Jur., Interference, § 28, p. 77.

As to defendant Galvan, there is a similar deficiency in plaintiff's allegations, except that plaintiff alleges she was told by Goddard that Galvan had said he would not work for the company while plaintiff was employed there. This statement does not amount to an attempt to induce the company to terminate its contract with the plaintiff. Galvan had a legitimate right to announce the condition under which he would continue his employment. The plaintiff has not alleged facts which would indicate that the decision by Goddard, though perhaps regrettable, was the result of any outside influence, or that any outside influence was intended to result in termination of the contract at will. Appellees have properly relied upon 57 C.J.S., Master and Servant, § 630, p. 435, where it is said: "Thus, it has been said that, if persons in the employment of a master consider others in that employment obnoxious, either personally or because of their character or conduct, they have a perfect right to put to their employer the alternative whether he will discharge the obnoxious person or persons and retain their services, or lose them and retain the obnoxious persons." To the same effect, see 30 Am. Jur., Interference, § 33, p. 79. (Note the thorough annotations in 26 A.L.R. 2d 1227.)

The judgment of the superior court sustaining the demurrer is Affirmed.

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

STATE OF NORTH CAROLINA v. JERRY WAYNE HOPKINS

No. 6918SC303

(Filed 2 July 1969)

1. Criminal Law § 146— conviction upon plea of guilty — scope of appellate review

An appeal from a sentence imposed upon defendant's plea of guilty, voluntarily and understandingly made, presents only the face of the record proper for review, and the judgment must be affirmed when the sentence is within the limits prescribed by statute and no fatal defect appears upon the face of the record proper.

2. Criminal Law § 23— plea of guilty — determination of voluntariness

There is no merit in defendant's contention that his pleas of guilty were coerced or needlessly encouraged by action of the trial court, where record shows that defendant not only answered orally the questions of the trial judge relating to the voluntariness of the pleas, but also executed an affidavit encompassing the questions and answers.

3. Indictment and Warrant § 8— merger of offenses

In prosecution upon indictments charging defendant with armed robbery and with assault with a deadly weapon upon the same person on the same date, trial court did not err in failing to merge the offenses charged in the indictment, where there was no evidence in the record to show that the two offenses arose out of the same occurrence and where defendant entered a plea of guilty to both charges.

APPEAL by defendant from *Beal, S.J.*, at the 20 January 1969 Session of GUILFORD Superior Court, High Point Division.

By indictments proper in form, defendant was charged with armed robbery and assault with a deadly weapon with intent to kill resulting in serious injury not resulting in death. The offenses were alleged to have occurred on 26 October 1968, and C. R. Johnson, a State highway patrolman, was the alleged victim.

When the cases were called for trial, defendant pleaded not guilty. After evidence was introduced, arguments and charge to the jury were made, and while the jury was deliberating, the defendant tendered a plea of guilty of armed robbery, a felony, and guilty of assault with a deadly weapon, a misdemeanor. The court interrogated defendant regarding his pleas and, after finding that they were voluntarily and understandingly made, accepted the pleas. On the armed robbery charge, the court imposed an active prison sentence of not less than twenty-four nor more than thirty years; on the assault with deadly weapon charge, the court imposed a prison sentence of two years, this sentence to run concurrently with sentence imposed on the armed robbery charge. Defendant appealed.

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

Haworth, Riggs, Kuhn & Haworth by Walter W. Baker, Jr., for defendant appellant.

BRITT, J.

[1] It is well settled in this jurisdiction that an appeal from a sentence imposed upon defendant's plea of guilty, voluntarily and

understandingly made, presents only the face of the record proper for review, and the judgment must be affirmed when the sentence is within the limits prescribed by statute and no fatal defect appears upon the face of the record proper. 3 Strong, N.C. Index 2d, Criminal Law, § 146, p. 88.

[2] Defendant contends that his pleas of guilty were "coerced or needlessly encouraged by the action of the trial court, in violation of constitutional due process." The record is completely void of any evidence to support this contention. To the contrary, the record contains the questions which the trial court asked the defendant before the court accepted his pleas; the defendant not only answered the questions orally but executed an affidavit encompassing the questions and answers. Based upon the court's interrogation of the defendant and the answers given by him, orally and in writing, the court determined that the defendant's pleas were freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. The record fully supports the court's conclusion. The assignment of error relating to the pleas has no merit.

[3] In defendant's other assignment of error, he contends that the trial court erred in failing to merge the felonious assault indictment with the armed robbery indictment and in accepting the plea of guilty to assault with a deadly weapon and entering judgment thereon. In support of this assignment of error, defendant relies on *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496, in which case defendant was charged with armed robbery and felonious assault; the defendant pleaded not guilty but was found guilty and was sentenced in each case. In an opinion by Higgins, J., the court held:

> "In this case, all the evidence shows the assaults on Erskine Hill with the pistol and axe handle were committed in connection with, as a part of, and included in the robbery. A conviction of that charge includes all elements of assault with a deadly weapon. This Court, *ex mero motu,* takes notice of the duplication, quashes the indictment charging the assault, sets aside the verdict, and arrests the judgment. * * *"

We do not think that *State v. Parker, supra,* is controlling in the instant case. In the first place, the record does not support defendant's contention that the alleged assault with a deadly weapon was a part of the alleged armed robbery. A transcript of the testimony is not included in the record on appeal. It is true that both indictments indicate that the offenses occurred on the same day and that C. R. Johnson was the victim in each case, but we do not deem these

two facts sufficient for us to conclude that the two offenses arose out of the same occurrence.

Furthermore, in *Parker* defendant pleaded not guilty to the charges; in the instant case defendant pleaded guilty. In *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34, in an opinion by Parker, C.J., the following was quoted with approval from *Brisson v. Warden of Connecticut State Prison,* 25 Conn. Sup. 202, 200 A. 2d 250:

> "The plea of guilty waives any defect which is not jurisdictional. It is a confession of guilt in the manner and form as charged in the indictment. An accused by pleading guilty waives all defenses other than that the indictment charges no offense. He also waives the right to trial and the incidents thereof and the constitutional guarantees with respect to the conduct of criminal prosecutions. . . . See 4 Wharton, Criminal Law and Procedure, § 1901; 5 *id.* § 2012; 2 Underhill, Criminal Evidence (5th Ed.) § 398; 14 Am. Jur., Criminal Law, § 272; 22 C.J.S. Criminal Law, § 424; see also *Grasso v. Frattolillo,* 111 Conn. 209, 212, 149 A. 838; *Weir v. United States,* 92 F. 2d 634, 114 A.L.R. 481 (7th Cir.), cert. denied, 302 U.S. 761, 58 S. Ct. 368, 82 L. Ed. 590, rehearing denied 302 U.S. 781."

The assignments of error are overruled and the judgment of the superior court is

Affirmed.

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

STATE OF NORTH CAROLINA v. ELVIS PULLEY

No. 6910SC351

(Filed 2 July 1969)

1. Constitutional Law § 32— right to counsel — preliminary hearing

Indigent defendant's constitutional rights were not violated in that counsel was not appointed to represent him until after the preliminary hearing at which he was bound over to superior court, counsel being appointed for defendant within eight days after his arrest and more than five months prior to his trial.

2. Criminal Law § 176— review of nonsuit — circumstantial evidence

An appeal from the refusal of defendant's motion to nonsuit in a case

in which the State relies upon circumstantial evidence presents the question whether the record, considered in light most favorable to the State, discloses substantial evidence of all material elements constituting the offense for which accused was tried.

3. Criminal Law § 106— nonsuit — consideration of evidence — function of jury

It is for the jury, and not for the court, to determine whether the evidence is such as to exclude every reasonable hypotheses except that of guilt.

4. Criminal Law § 166— the brief — abandonment of assignments

Assignment of error is deemed abandoned where no reason or argument is stated or authority cited in support thereof in appellant's brief. Rule of Practice in the Court of Appeals No. 28.

5. Criminal Law § 161— requisites of assignment of error

An assignment of error must be based on an appropriate exception and should show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself.

ON *Certiorari* from *Hobgood, J.*, 26 September 1968 Session of WAKE Superior Court.

On 10 April 1968 defendant was arrested on a warrant charging him with felonious breaking and entering and larceny. After preliminary hearing before a justice of the peace, he was bound over to superior court. On 18 April 1968, upon a finding of the defendant's indigency, the judge of superior court appointed counsel to represent him. Defendant was tried at the 26 September 1968 Session of Wake Superior Court upon a bill of indictment which charged him with felonious breaking and entering, larceny, and receiving. At the trial he was represented by his court-appointed counsel and pleaded not guilty. Upon close of the State's evidence, the court nonsuited the counts in the bill of indictment charging larceny and receiving. The jury found defendant guilty of felonious breaking and entering, and the court thereupon sentenced defendant as a youthful offender, under the provisions of G.S. 148-49.4, for a maximum term of eighteen months. Defendant gave notice of appeal to the Court of Appeals, but failed to perfect his appeal within the time prescribed by law. Defendant then filed a petition for certiorari to perfect a delayed appeal, which was allowed by the Court of Appeals on 28 March 1969.

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

Malcolm B. Grandy for defendant appellant.

PARKER, J.

[1] Defendant's first assignment of error is that his constitutional rights were violated in that counsel was not appointed to represent him until after the preliminary hearing at which he was bound over to the superior court. This assignment of error is overruled. Counsel was appointed to represent defendant, an indigent, within eight days after his arrest and more than five months prior to his trial in superior court. Nothing in the record indicates that any right of the defendant was in the slightest degree prejudiced by the fact that he did not have counsel during the first eight days following his arrest. Here, as in *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740, "(t)here is nothing in the record before us to indicate that appellant was asked any question by the committing inferior judge or that he made any statement of any kind whatsoever before the committing inferior judge. No evidence of the preliminary hearing was introduced at the trial in the Superior Court. No evidence of an admission or confession by the appellant was admitted at the trial in the Superior Court."

[2, 3] Appellant also assigns as error the overruling of his motion for nonsuit. In this case, the State relied upon circumstantial evidence. "An appeal from the refusal of defendant's motion to nonsuit in a case in which the state relies upon circumstantial evidence presents the question whether the record, considered in the light most favorable to the state, discloses substantial evidence of all material elements constituting the offense for which the accused was tried." 3 Strong, N.C. Index 2d, Criminal Law, § 176, p. 151. In the present case, considering the evidence in the light most favorable to the State, the record discloses substantial evidence of all material elements constituting the offense for which appellant was tried. It was for the jury, and not for the court, to determine whether the evidence was such as to exclude every reasonable hypotheses except that of guilt. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. There was no error in overruling appellant's motion for nonsuit.

[4, 5] Appellant's final assignment of error, addressed to the charge of the court to the jury, has been abandoned since no reason or argument is stated or authority cited in support thereof in appellant's brief. Rule 28, Rules of Practice in the Court of Appeals. In any event, the exception upon which this assignment of error purports to be based refers only to those pages in the record where the court's charge in its entirety appears. An assignment of error must be based on an appropriate exception and should show specifically what question is intended to be presented for consideration without

the necessity of going beyond the assignment of error itself. "A mere reference in the assignment of error to the record page where the error may be discovered is not sufficient." *Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729.

In the entire trial, we find

No error.

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

STATE OF NORTH CAROLINA v. WILLIAM H. SIMS

No. 6915SC295

(Filed 2 July 1969)

1. Constitutional Law § 32— right to counsel — serious offense

A defendant who is charged with a serious offense has a constitutional right to the assistance of counsel during his trial in the superior court; a serious offense is one for which the authorized punishment exceeds six months' imprisonment and a $500 fine.

2. Constitutional Law § 37— waiver of counsel

Waiver of counsel may not be presumed from a silent record.

3. Constitutional Law § 32— right to counsel — serious offense — findings of fact

On appeal from conviction in the superior court for driving a motor vehicle on a public street while under the influence of intoxicating liquor, a misdemeanor amounting to a serious offense, defendant is entitled to a new trial for failure of the trial judge to determine at the time of trial whether defendant had waived counsel and in absence of waiver to determine defendant's indigency and appoint counsel to represent him if he should be found indigent.

4. Automobiles § 125— driving under influence — warrant — second offense

In order to charge a second offense of driving a motor vehicle on a public highway while under the influence of intoxicating liquor, the warrant should contain a clear allegation as to when and in what court defendant had been convicted of a prior offense.

5. Automobiles § 125— driving under influence — second offense — validity of warrant

Warrant charging defendant with the operation of a motor vehicle on a public street "while under the influence of intoxicating liquor, in violation of G.S. 20-138, second offense" *is held* defective insofar as it purports

to charge a second offense, although it is sufficient to charge defendant with a first offense violation of G.S. 20-138.

APPEAL by defendant from *Bowman, J.*, January 1969 Session of ALAMANCE Superior Court.

Defendant was tried in the municipal court of the City of Burlington on a warrant charging him with operating a motor vehicle on a public street in the City of Burlington "while under the influence of intoxicating liquor, in violation of G.S. 20-138, second offense. . . ." He was not represented by counsel, was found guilty, and was sentenced to six months in jail, suspended on condition that he pay a fine of $100.00 and the costs. He appealed to the superior court and entered a plea of not guilty. At his trial in superior court he was not represented by counsel. He was found guilty by the jury of the offense of driving under the influence of intoxicating liquor in violation of G.S. 20-138. Upon this verdict judgment was entered on 24 January 1969, sentencing defendant to jail for a term of not less than twelve or more than eighteen months. In apt time and in open court defendant excepted to the entry of this judgment and gave notice of appeal to the Court of Appeals.

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

John D. Xanthos for defendant appellant.

PARKER, J.

[1] The judgment here appealed from was entered on 24 January 1969. On 21 January 1969 the North Carolina Supreme Court filed opinion in the case of *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245. That case, as does this one, involved an appeal from a judgment rendered upon a conviction of violation of G.S. 20-138. In that case, in an opinion by Huskins, J., the Court held that a defendant 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 a serious offense, in the context of that holding, is one for which the authorized punishment exceeds six months' imprisonment and a $500.00 fine.

[2, 3] In the case before us the defendant was not represented by counsel at his trial in the municipal court or in the superior court. The record is silent as to whether he waived the right to counsel. Waiver of counsel may not be presumed from a silent record. *State v. Morris, supra.* The record before us does disclose that at the

March 1969 Criminal Session of Alamance Superior Court the judge then presiding entered an order finding defendant to be an indigent, granting him the right to appeal to this Court *in forma pauperis,* and appointing counsel to represent him on this appeal. There was no such determination of indigency made at the time of defendant's trial. For failure of the trial judge to determine whether defendant had waived counsel and in absence of waiver to determine defendant's indigency and appoint counsel to represent him if he should be found indigent, the judgment must be vacated and a new trial ordered. *State v. Morris, supra.*

[4, 5] We note that the warrant on which defendant was tried is defective insofar as it purports to charge a second offense. For that purpose the warrant should have contained a clear allegation as to when and in what court defendant had been convicted of a prior offense. See, *State v. Broome,* 269 N.C. 661, 153 S.E. 2d 384. The warrant was, however, sufficient to charge defendant with a first offense violation of G.S. 20-138.

The State had sufficient evidence to carry the case to the jury, and defendant's assignment of error to the failure of the court to enter judgment of nonsuit is without merit. It is not necessary that we discuss defendant's remaining assignments of error, most of which relate to the judge's charge to the jury, since in any event there must be a new trial and the questions presented will probably not recur.

For the reasons set forth in *State v. Morris, supra,* which is controlling in this case, defendant is entitled to a

New trial.

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

STATE OF NORTH CAROLINA v. ALEXANDER BRINSON

No. 6916SC334

(Filed 2 July 1969)

1. Bribery § 3— bribery of deputy sheriff — instructions — misstatement of the evidence

In prosecution charging defendant with the felony of offering a $25 bribe to a deputy sheriff in order to influence him to permit defendant to

operate a whiskey still, trial court's inaccurate statement, in recapitulating the evidence of the State, that there were "five hundred gallons of mash at the still site, ready to be run" does not warrant reversal, since the amount of mash fermenting at the site is not a material fact of the offense charged.

2. Bribery § 1— elements of the offense

The elements of the offense of bribing a public officer are (1) offering a sum of money (2) to a public officer (3) with corrupt intent to influence the recipient's action as a public officer in the discharge of a legal duty.

3. Criminal Law § 113— recapitulation of evidence — inadvertence

An inadvertence in recapitulating the evidence must be called to the trial court's attention in time to permit correction.

APPEAL by defendant from *Bailey, J.*, December 1968 Session, SCOTLAND County Superior Court.

Alexander Brinson (defendant) was charged in a proper bill of indictment with the felony of offering a bribe in the amount of $25.00 to a Scotland County deputy sheriff in order to influence him to permit the defendant to operate a whiskey still. The defendant entered a plea of not guilty to the charge. The jury returned a verdict of guilty. From the imposition of a sentence of not less than one year nor more than five years, the defendant appealed to this Court.

Attorney General Robert Morgan, Deputy Attorney General Jean A. Benoy and Special Assistant Thomas J. Bolch for the State.

Walter J. Cashwell, Jr., for defendant appellant.

CAMPBELL, J.

The defendant assigns as error a portion of the trial judge's charge to the jury, wherein the trial judge, in recapitulating the evidence and the contentions of the State, referred to "five hundred gallons of mash at the still site, ready to be run". The defendant contends that there was no evidence in the record pertaining to any quantity of mash at the still site.

The evidence on behalf of the State was to the effect that Scotland County Deputy Sheriff Wayne Davis, Jr., located the still in question. Although no manufactured liquor was found at the site, he did find mash which was in the process of fermenting. Upon learning that the still had been located, the defendant gave the deputy sheriff $25.00 for the purpose of getting the deputy sheriff to take no

action with regard to this still, to permit the defendant to complete the run of mash which was in the process of fermenting, and to thereafter permit the removal of the still. There was no evidence as to the amount of mash found at the site and no testimony concerning five hundred gallons.

[1] The defendant contends that the reference to "five hundred gallons of mash" was prejudicial to him, and in support thereof he refers to the following statement contained in *State v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921:

> ". . . While an inaccurate statement of facts contained in the evidence should be called to the attention of the [trial] court during or at the conclusion of the charge in order that the error might be corrected, *a statement of a material fact* not shown in the evidence constitutes reversible error. . . ." (Emphasis added)

[2] The defendant, however, was not being tried for illegally manufacturing whiskey. He was charged with and tried for offering a bribe to a public officer. The elements of this offense are (1) offering a sum of money (2) to a public officer (3) with corrupt intent to influence the recipient's action as a public officer in the discharge of a legal duty. *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917; *State v. Noland,* 204 N.C. 329, 168 S.E. 412.

[1, 3] The evidence disclosed that the defendant gave $25.00 to Wayne Davis, Jr., with the knowledge that he was a deputy sheriff and with the intent to dissuade him from interrupting the illegal manufacture of whiskey by the defendant. The amount of mash fermenting at the site had no bearing on the crime charged in the bill of indictment. Therefore, the amount of mash fermenting at the site was not "a statement of a material fact". It thus follows that the misstatement by the trial court of the evidence, with particular regard to the reference to "five hundred gallons of mash", was an inadvertence, and such inadvertence should have been called to the trial court's attention in time to permit correction. *State v. Cornelius,* 265 N.C. 452, 144 S.E. 2d 203; 3 Strong, N.C. Index 2d, Criminal Law, § 113, p. 10.

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES HOLDEN

No. 6910SC348

(Filed 2 July 1969)

Rape § 12— carnal knowledge of 13-year-old female — appeal

On appeal from defendant's conviction of carnal knowledge of his thirteen-year-old stepdaughter, the record fails to disclose prejudicial error.

APPEAL by defendant from *McKinnon, J.*, 8 January 1969 Session, WAKE County Superior Court.

James Holden (defendant) was charged in a proper bill of indictment with unlawfully, willfully and feloniously abusing and carnally knowing his thirteen-year-old stepdaughter. The jury found the defendant guilty as charged, and from a judgment of not less than seven nor more than ten years in the State Prison, the defendant appealed to this Court.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Staff Attorney D. M. Jacobs for the State.

Larry D. Johnson for defendant appellant.

CAMPBELL, J.

The court-appointed attorney representing the defendant candidly and frankly made the following statement in his brief:

> ". . . I carefully examined the record in this case with a view of determining whether any errors had been committed in the trial which were prejudicial to the defendant. After careful and diligent review, the court appointed counsel advised the defendant that he could find no error in the trial. However, the defendant insisted that counsel proceed with the appeal, and, in compliance with the defendant's demand, and in compliance with the court's appointment, counsel has prepared the record as is now before the court. Counsel therefore submits the record to the court and respectfully requests that the court review the record, and give defendant the benefit of any error it may find."

This Court is constantly being called upon to review criminal cases where there is absolutely no merit in the appeal. See *State v. Hedrick*, 4 N.C. App. 521, 167 S.E. 2d 43; *State v. Carver*, 4 N.C. App. 520, 167 S.E. 2d 57; *State v. Henderson*, 4 N.C. App. 519, 166 S.E. 2d 880; *State v. Flanders*, 4 N.C. App. 505, 167 S.E. 2d 43; *State v. Campbell*, 3 N.C. App. 592, 165 S.E. 2d 341; *State v. Wil-*

liams, 3 N.C. App. 233, 164 S.E. 2d 404; *State v. Fowler,* 3 N.C. App. 232, 164 S.E. 2d 387; *State v. Thompson,* 3 N.C. App. 231, 164 S.E. 2d 391; *State v. Sutton,* 3 N.C. App. 230, 164 S.E. 2d 392; *State v. Price,* 1 N.C. App. 629, 162 S.E. 2d 98; *State v. Hamlin,* 1 N.C. App. 175, 160 S.E. 2d 513. The taxpayers of the State are being called upon to defray the costs and expense of such appeals and to pay attorneys for the time which they must devote in perfecting such appeals. It represents a great waste and imposes an unjustified expense and burden upon society. Perhaps this problem could be at least partially alleviated by a requirement that, before an indigent criminal defendant is permitted to impose further expense upon society, the merits of his appeal be certified to by an attorney. Such a procedure would protect the rights of indigent defendants and the certifying attorney would thereby assume some responsibility for the expense imposed upon the taxpayers. Under the present situation, attorneys not only feel impelled to perfect such appeals, but they are exposed to numerous charges by criminal defendants of incompetence and dereliction of duty if such appeals are not perfected. Certainly society and members of the Bar should have some relief without sacrifice to the rights of defendants.

We have reviewed the record of this case and find no prejudicial error. The defendant had a fair and impartial trial free of prejudicial error.

No error.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. THOMAS JACKSON AND WILLIE UTLEY

No. 6910SC352

(Filed 2 July 1969)

Criminal Law § 155.5— failure to aptly docket record on appeal

Appeal is dismissed for failure of defendants to docket the record on appeal within the time allowed by order of the Court of Appeals.

APPEAL by defendants from *Bickett, J.,* 16 September 1968 Session, WAKE Superior Court.

Defendants were charged jointly with the offense of robbery with

the use of a dangerous weapon. The trial court appointed Mr. Malcolm B. Grandy to represent defendants.

Upon their pleas of not guilty the defendants were jointly tried before a jury and were found guilty of common law robbery. Active sentences were imposed.

Defendants gave notice of appeal and the trial court appointed Mr. Grandy to represent them in their appeal.

On 6 March 1969, over two months after the time allowed by our rules for docketing the record on appeal in this Court, defendants filed a petition for certiorari to perfect a late appeal. For reasons which appeared satisfactory to this Court, an order was entered on 25 March 1969 allowing a late docketing of the appeal, and directing that the record on appeal be docketed by ten o'clock a.m., Tuesday, 20 May 1969. The record on appeal was not docketed within the time allowed by our Order.

Robert Morgan, Attorney General, by Harry W. McGalliard, Deputy Attorney General, for the State.

Malcolm B. Grandy for defendants.

BROCK, J.

It is obvious that the transcript of the trial proceedings was available to defendants in ample time to docket the record on appeal within the time allowed by the 25 March 1969 Order of this Court. Defendants had the transcript as early as 6 March 1969 when they filed their petition for certiorari.

The effect of our Order allowing the late docketing was to grant to defendants a total of approximately eight months to perfect their appeal. Even so they failed to timely docket their record on appeal.

For failure to comply with the Order of this Court we dismiss the appeal.

Dismissed.

CAMPBELL and MORRIS, JJ., concur.

JOHN R. SPECK v. MIRIAM N. PARTRIDGE SPECK

No. 6910DC338

(Filed 23 July 1969)

1. Statutes § 8— retroactive effect

Ordinarily, a statute will not apply to litigation pending on the effective date of the statute unless there is a legislative intent to the contrary.

2. Divorce and Alimony § 22— child support and custody — applicability of statutes

G.S. 50-13.1 through G.S. 50-13.8, relating to the custody and support of minor children, do not apply to litigation pending on 1 October 1967, the effective date of the statutes.

3. Divorce and Alimony § 22— child support and custody — jurisdiction — child over 21

Although child of the parties was 34 years old, was residing in another state and had not been adjudged incompetent, trial court had authority to award custody of and support for the child to the mother and to determine visitation rights of the father, where the parents were before the court and subject to its *in personam* jurisdiction and where there was psychiatric and medical evidence that the child was mentally and physically disabled.

4. Parent and Child § 7— father's duty to support child over 21

The presumption that a child reaching the age of 21 will be capable of maintaining himself is rebutted by the fact of the child's mental or physical incapacity, and the obligation of the father to support the child continues. This rule is codified by G.S. 50-13.8.

5. Divorce and Alimony § 18— alimony without divorce — subsistence pendente lite — abandonment — allegations

Wife's allegations to the effect that the husband was irritable and difficult to live with, that he had a fear of death, diseases and illness which affected the relationships with his son who was suffering from permanent brain damage and with the wife after she underwent surgery for removal of a malignant cancer, that the wife was forced to seek employment in another town to alleviate the financial position of herself and the children, that the husband told her to discontinue visits to the home and later sold the home without finding a new one, and that he secretly went to live in another state, *are held* sufficient to state a cause of action under [former] G.S. 50-16 for subsistence *pendente lite* in wife's cross-action for alimony without divorce on ground of abandonment.

6. Divorce and Alimony § 18— subsistence pendente lite — determination by judge

In passing upon motions for subsistence *pendente lite*, the trial judge is expected to look into the merits of the action and determine in his sound legal discretion, after considering the allegations of the complaint and the evidence of the parties, whether or not the movant is entitled to the relief sought.

7. Divorce and Alimony § 18— subsistence pendente lite — finding that husband was wrongdoer — presumption

In a hearing under [former] G.S. 50-16 to award the wife counsel fees *pendente lite*, it is unnecessary for the trial judge to make finding of fact that the husband was a wrongdoer, since it will be presumed that the court, for purposes of the hearing, found that the husband had wrongfully abandoned the wife as alleged in the wife's cross-action.

8. Divorce and Alimony § 24— visitation rights — jurisdiction

Where both husband and wife were before the court, trial judge could properly establish visitation rights, regardless of the child's residence.

9. Divorce and Alimony § 23— order requiring child support — validity

Order requiring that the husband pay the wife for child support *pendente lite* the sum of $200 per month commencing 15 February 1969, and on or before the 15th day of each month thereafter, *is held* not impossible of being carried out in that the order was rendered on 17 February, since husband could have reasonably complied with the order by making the February payment at anytime after 17 February.

10. Divorce and Alimony § 23— child support — review of judge's discretion

The amount the husband is required to pay for the support of his child is determined by the trial judge in the exercise of his sound discretion, and his decision is not reviewable in the absence of abuse of discretion.

11. Divorce and Alimony § 23— child support pendente lite — sufficiency of evidence

Evidence that the income of the father was $888.65 per month and that he owned 24 acres of land, and that the expenses of his 34 year old son, who was mentally and physically disabled, consisted of vocational rehabilitation at $10 a week, psychiatric treatment at $60 a month, dental treatment at $5 a month, transportation at $25 a month and cost of an attendant at $120 a month, *is held* to support an award pendente lite of $200 per month for the support of the child.

12. Divorce and Alimony § 18— counsel fees pendente lite — sufficiency of findings

In determining an award of counsel fees *pendente lite* for the wife, trial court's finding of fact that the wife's monthly normal expenses are approximately equal to her income *is held* supported by evidence that the wife's monthly income is $1,333.34 and that her monthly expenses amounted to at least $1,263.03.

13. Divorce and Alimony § 18— counsel fees pendente lite — reasonableness of award

Although wife's yearly income amounted to $16,000, an award to the wife of counsel fees *pendente lite* in the sum of $1500 *is held* supported by evidence that (1) the wife's normal monthly expenses are approximately equal to her monthly income — such expenses resulting in large part from the care of a mentally and physically disabled son — (2) exten-

sive preparations for the hearing were necessitated by the son's condition, and (3) counsel has represented the wife throughout all the proceedings, including a trial which ended in mistrial.

APPEAL by plaintiff from *Ransdell, J.*, February 1969 Civil Session, WAKE County District Court.

John R. Speck (plaintiff) commenced this civil action to obtain an absolute divorce from Miriam N. Partridge Speck (defendant) on 10 January 1967. An amended complaint was filed on 15 March 1967 in which it was alleged that the plaintiff was a resident of the City of Raleigh, Wake County; the defendant was a resident of Haymarket, Prince William County, Virginia; they had been married on 25 August 1941 in Baltimore, Maryland; on 22 March 1963 they separated and they remained continuously separate and apart from each other "for more than one year next preceding the institution of this action"; they had one emancipated child, David Newcombe Speck (David), who was 34 years of age, and two emancipated adopted children.

An amended answer was filed by the defendant on 8 June 1967 in which it was admitted that the plaintiff and defendant were married and that they had "lived separate and apart since" 22 March 1963. It was alleged that the marriage ceremony had been performed in Charleston, South Carolina; "this separation was caused by plaintiff's unlawful and wilful abandonment of her"; and David was not emancipated. By way of a further answer and defense and a cross-action, it was alleged that they were first married on 15 September 1931 in Baltimore, Maryland; "a decree of divorce absolute was entered in behalf of this defendant by the Baltimore City Court of Baltimore, Maryland" on 24 September 1935; the decree awarded custody of David to the defendant; they "were again married on 25 August, 1941, in the State of South Carolina"; the defendant was "a dutiful and loving wife at all times"; the "plaintiff was always a distant and inapproachable husband"; he was irritable and difficult to live with; he "was guilty of acts of cruelty and misconduct which made defendant's life burdensome and intolerable"; he "failed and steadfastly refused to provide adequately or even decently for his family"; he "had an . . . illogical dread and fear of death, disease and illness", and this was manifested in his relationship with David, who was suffering from permanent brain damage and poor physical health, and in his relationship with the defendant after she underwent surgery for the removal of a "malignant cancer"; she was forced to seek employment in an effort "to alleviate and improve the economic and financial position of her-

self and her children"; she accepted employment in Haymarket, Prince William County, Virginia, "with the encouragement and acquiescence of plaintiff" who continued to live at their Springfield, Virginia, home: he later told her that she should discontinue visiting their home and should remain at her place of employment; the plaintiff sold their home in Springfield, Virginia, and made no attempt to find a new home in Haymarket, as he had previously agreed to do; he then abandoned the defendant and his family "and went secretly to the State of Maryland to live"; the "acts of cruelty, misconduct and abandonment by the plaintiff were done without any provocation whatever on the part of the defendant"; David is physically and mentally disabled and he "is absolutely dependent upon the defendant, . . . in whose care and custody he was left, for sustenance, care and support"; the plaintiff "has steadfastly refused and failed to make any contribution whatever toward the support of his wife and son David since the parties separated in 1963"; and he has threatened to cancel a policy of health, medical, surgical and hospital insurance which extends coverage to the defendant and David. She expressly pled the "abandonment by plaintiff in bar of plaintiff's right to the relief prayed for in the [amended] complaint". She sought reasonable support, maintenance and subsistence for herself and David and reasonable counsel fees *pendente lite*. She further sought an order *pendente lite* restraining the plaintiff from cancelling the insurance policy, *supra*. The answer was to be treated as an affidavit in support of her prayer and motion for relief *pendente lite*. Upon final trial, she sought a judgment for reasonable support, maintenance, subsistence and counsel fees, a permanent restraining order against cancellation of the insurance policy, and custody of David.

A reply to the further answer and defense and the cross-action was filed by the plaintiff on 11 July 1967, in which he alleged that "the separation was brought about by the abandonment of the plaintiff by the defendant"; "the marriage was not a happy one" because "the defendant was more interested in her career as a psychologist than being a wife and mother" and because she was domineering; he "remained constantly in debt in an attempt to supply the needs of his family and . . . applied all of his earnings to the support and maintenance" of his family; "the defendant received half of the gross sale price [of their home] less the commission therefrom which she converted to her own use"; "the defendant had refused to permit the plaintiff to have any control over [David]; that the defendant has humored said child to such an extent that he has never been required to obey anyone or to perform any task or work and that if he is not capable of supporting himself, it is a result of

the conduct of the defendant toward said son and not due to his mental and physical condition"; on the contrary, "David . . . is able and capable to work and earn sufficient sums to meet his living expenses if required to do so"; since "no guardian has been appointed for said child nor has said child been adjudicated incompetent", "the proper forum relating to David . . . is a guardianship proceeding, adjudication and ancillary procedure for support"; the defendant "has been earning in excess of $20,000.00 per year" and is not "in any dire financial need".

In his reply the plaintiff denied that the defendant was a loving and dutiful wife; the plaintiff was guilty of any misconduct or cruelty or had any dreads or phobia which "made the defendant's life burdensome or intolerable"; "he forced the defendant to seek outside employment" or gave her any encouragement to seek such employment; he agreed to find a new home in Haymarket after the house in Springfield was sold; he moved from Springfield to Maryland in secrecy; David was permanently disabled; or the plaintiff threatened to cancel any insurance policy.

A hearing was held and both parties testified. Judge Ransdell then entered an order under date of 17 February 1969. It was found as a fact that the plaintiff and defendant were married on 25 August 1941 in Baltimore, Maryland; "they have not lived together as husband and wife for at least six . . . years prior to the date of this hearing"; David is "so handicapped both mentally and physically as to be incapable of earning his livelihood; that he is in such condition mentally and physically as to require constant supervision, care, attendance and attention and is totally dependent upon the defendant"; David "has continuously been in the custody of the defendant", who "is a fit and proper person"; "it is in the best interest of . . . David . . . that he be placed in the custody of the defendant"; and the defendant's "normal expenses are approximately equal to her income". It was further found as a fact that the plaintiff instituted this civil action for divorce absolute and "[t]hat the matter has been placed on the trial calendar numerous times, finally being tried at the January 1969 Term of Wake County District Court, resulting in a mis-trial". It was thereupon concluded as a matter of law that David is incompetent and unemancipated; it is in his best interest to be placed in the custody of the defendant; "the defendant is entitled to receive from plaintiff support for said David . . . and counsel fees, pendente lite"; the "plaintiff should be restrained, pendente lite, from canceling or otherwise voluntarily allowing to lapse" the insurance policy, *supra.* It was then ordered that the defendant was to have custody of David; the plain-

tiff was to pay to the defendant *pendente lite* $200.00 per month for the use and benefit of David; the plaintiff was restrained *pendente lite* from cancelling or otherwise voluntarily allowing to lapse the insurance policy, *supra;* the plaintiff was to pay $1,500.00 for counsel fees incurred by the defendant.

To the signing and entry of this order, the plaintiff excepted and appealed to this Court.

Vaughan S. Winborne for plaintiff appellant.

Joyner, Moore & Howison by Henry S. Manning, Jr., for defendant appellee.

CAMPBELL, J.

The plaintiff's first contention is that the trial judge erred in entering an order as to the custody and support of David. It is argued that the trial judge lacked jurisdiction to enter such an order because David was a resident of Virginia; he was not a minor; he had not been adjudged incompetent; and the defendant had not been appointed his custodian or guardian.

[1, 2] Since this civil action was commenced on 10 January 1967, G.S. 50-13 applies, even though it was repealed and replaced by G.S. 50-13.1 through 50-13.8, which became effective from and after 1 October 1967. Unlike Chapter 1152 of the 1967 Session Laws, there is no provision in Chapter 1153 pertaining to pending litigation. However, there is nothing to indicate a legislative intent to apply the new statutes to pending litigation.

> "The General Assembly has the power to enact retroactive laws provided that they do not impair the obligation of contracts or disturb vested rights. There is no vested right in procedure, and therefore statutes affecting procedural matters solely may be given retroactive effect when the statutes express the legislative intent to make them retroactive. . . .
>
> Ordinarily, a statute will be given prospective effect only, and will not be construed to have retroactive effect unless such intent is clearly expressed or arises by necessary implication from its terms." 7 Strong, N.C. Index 2d, Statutes, § 8, p. 80.
>
> "Statutes ought not to act retrospectively and will not be so construed unless their terms require it. . . . A plain expression of legislative intent, that it shall have retroactive effect, is necessary. . . .

. . . 'There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. . . .'" *Comrs. v. Blue,* 190 N.C. 638, 130 S.E. 743.

". . . The rights of the parties [under the cross-action] are governed by G.S. 50-16, since this litigation began prior to the repeal of that statute by the Session Laws of 1967, chapter 1152. The 1967 Act provides expressly that it shall not apply to pending litigation." *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5.

[3] Prior to the 1967 legislative changes, the Supreme Court had held that it was not necessary for a minor child to be in the jurisdiction in order to award custody and payment of "an allowance to the mother for the child's support". *Romano v. Romano,* 266 N.C. 551, 146 S.E. 2d 821. This could be done if both the husband and wife were before the trial "court and subject to its *in personam* judgments". *Romano v. Romano, supra.*

"The rationale of the rule seems to be that when both parties to a marriage are before the court in a divorce proceeding, the court may adjudicate their respective rights, duties, and obligations involved in the custody of their children, even though the children are not actually before the court. The court enforces its decrees by dealing with the offending parent since, because of its absence, the court cannot deal 'with the person of the infant.'" *Romano v. Romano, supra.*

[4] The fact that a child has attained majority does not necessitate a contrary holding where the child is mentally and physically disabled.

"Ordinarily the law presumes that when a child reaches twenty-one years of age he will be capable of maintaining himself, and in such case the obligation of the father to provide support terminates. But in North Carolina and a number of other states it has been held that a father is under a legal obligation to continue to provide necessary support to a child who prior to and after reaching the age of twenty-one years is and continues to be insolvent, unmarried, and incapable, mentally or physically, of earning a livelihood. The Supreme Court of North Carolina, in so holding in *Wells v. Wells,* [227 N.C. 614, 44 S.E. 2d 31], created an exception to the general rule and reached a result commensurate with sound public policy and progressive

social principles." 3 Lee, North Carolina Family Law, § 229, p. 54, at p. 60.

"[O]rdinarily the law presumes that when a child reaches the age of twenty-one years he will be capable of maintaining himself, and in such case the obligation of the father to provide support terminates. But where this presumption is rebutted by the fact of mental or physical incapacity, it no longer obtains, and the obligation of the father continues." *Wells v. Wells, supra.*

This rule was codified in 1967 by the General Assembly in G.S. 50-13.8. 3 Lee, North Carolina Family Law, § 229, p. 30 of 1968 Cumulative Supplement.

[3] Neither the record nor the decision of the Supreme Court in *Wells v. Wells, supra,* disclose that the child there involved had been adjudicated an incompetent or that a custodian or guardian had been appointed. The holding was not preconditioned upon such an adjudication. In the instant case, Judge Copeland entered an order under date of 13 March 1968 for a psychiatric examination of David. Judge Hobgood entered an order under date of 1 May 1968 appointing as psychiatrists to conduct said examination the staff of the Psychiatric Department of the North Carolina Memorial Hospital in Chapel Hill. Judge Ransdell entered an order under date of 17 February 1969 in which he made the following finding of fact:

". . . David . . . has continuously been and remains unmarried, insolvent, and so handicapped both mentally and physically as to be incapable of earning his livelihood; that he is in such condition mentally and physically as to require constant supervision, care, attendance and attention and is totally dependent upon the defendant."

He thereupon concluded as a matter of law that:

". . . David . . . is not competent, by reason of mental and physical disability to be self-supporting or to earn his own livelihood and that said David . . . is an incompetent and unemancipated child . . .; that it is in the best interest of the said David . . . that he be placed in the custody and care of his mother, the defendant. . . ."

At the time Judge Ransdell made the finding of fact and conclusion of law, he had before him the report from the Psychiatric Department and five medical affidavits which had been filed with the district court and duly introduced into evidence at the hearing.

This contention is without merit.

[5] The plaintiff's second contention is that the trial judge erred in overruling his demurrer to the defendant's cross-action. It was argued that the defendant failed to state facts sufficient to state a cause of action for abandonment.

> ". . . To state a cause of action under G.S. 50-16 it is necessary to allege (1) the marriage, (2) the separation of the husband from the wife and his failure to provide the wife and children of the marriage reasonable subsistence, i.e., abandonment, *or* some conduct on the part of the husband constituting cause for divorce, either absolute or from bed and board, and (3) want of provocation on the part of the wife. . . ." *Murphy v. Murphy,* 261 N.C. 95, 134 S.E. 2d 148. See 1 Lee, North Carolina Family Law, § 80, p. 302.
>
> "*Denny, J.,* said for the Court in *Blanchard v. Blanchard,* 226 N.C. 152, 36 S.E. 2d 919: 'It is unnecessary for a husband to depart from his home and leave his wife in order to abandon her. By cruel treatment or failure to provide for her support, he may compel her to leave him. This, under our decisions, would constitute abandonment by the husband.'" *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696.

The cross-action stated a cause of action under G.S. 50-16. This contention is without merit.

[6] The plaintiff's third, fourth and fifth contentions are that there was not sufficient evidence to support Findings of Fact Numbers Three and Four. The trial judge complied with the following general rule stated in *Ipock v. Ipock,* 233 N.C. 387, 64 S.E. 2d 283, (although the facts are distinguishable):

> "Consequently, in passing on such motion the judge is expected to look into the merits of the action and determine in his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, whether or not the movant is entitled to the relief sought. . . ."

We have reviewed the record and find no merit in these contentions.

We have likewise reviewed the record in respect to the sixth contention and find no merit. The question of jurisdiction has been dealt with *supra* and further discussion is unnecessary.

[7] The plaintiff's seventh contention is that the trial judge erred in awarding counsel fees *pendente lite* to the defendant, because there was no testimony taken to determine whether he was a wrong-

doer and because there was no finding of fact in the order under date of 17 February 1969 that he was a wrongdoer. It was unnecessary for the trial judge to make findings of fact in this hearing on the cross-action under G.S. 50-16. It is presumed "that the court, for the purposes of the hearing, found that [the plaintiff] had wrongfully abandoned the [defendant], as alleged in the" cross-action. *Southard v. Southard,* 208 N.C. 392, 180 S.E. 665. Judge Ransdell made findings of fact, some of which were set out in his order. A finding of fact that the plaintiff was a wrongdoer was not set out. This, however, did not preclude the presumption that the plaintiff was found to have wrongfully abandoned the defendant.

This contention is without merit.

[8] The plaintiff's eighth contention is that the trial judge erred in its conclusion of law because it was not supported by the evidence and because the trial judge lacked express authority to determine the questions of incompetency and visitation rights. Suffice it to say that, since the husband and wife were before the court, visitation rights could be established, regardless of the child's residence. This contention is without merit.

[3] The plaintiff's ninth contention is that, since the trial judge had "no authority over the conduct, rights or privileges of David . . ., a citizen and resident of the State of Virginia", it was error to enter the following order:

> "[T]hat the plaintiff (defendant?) be and she is hereby given custody and control of David . . . and that the plaintiff may have the said David . . . visit with him at reasonable times; and that the plaintiff also shall have the right to visit said David . . . at his home at reasonable times and under reasonable circumstances."

Based upon the reasoning of *Romano v. Romano, supra,* we hold that this contention is without merit.

[9] The plaintiff's tenth contention is that the trial judge erred in entering the following order:

> "[T]hat the plaintiff pay to the defendant pendente lite, the sum of Two Hundred and no/100 Dollars ($200.00) per month commencing the 15th day of February, 1969, and on or before the 15th day of each month thereafter for the use and benefit of said David . . . incompetent and unemancipated son of the parties."

It is argued that "[t]his order is impossible of being carried out

since it was rendered on the 17th day of February while $200.00 is required to be paid out on the 15th day of that month". Under the express terms of the order, the plaintiff was required to pay to the defendant $200.00 for the month of February. Although the requirement relates back to the 15th of February, the plaintiff could have complied with the order by making the payment at anytime during the month of February. Unlike the provision for subsequent months, the payment for February did not have to be made "on or before the 15th day".

[10] It is further argued that the justified expenses for the use and benefit of David is $80.00. "[T]he amount the [plaintiff] is required to pay for the support of his child and for reasonable subsistence of the [defendant] *pendente lite* and for compensation to her counsel, is determinable by the [trial] judge in the exercise of his sound discretion. And in the absence of an abuse of discretion, his decision is not reviewable." *Rock v. Rock,* 260 N.C. 223, 132 S.E. 2d 342. No abuse of discretion has been made to appear.

This contention is without merit.

[11] The plaintiff's eleventh contention is that the trial judge erred in entering the order under date of 17 February 1969 "for that it is contra to the law, is not supported by substantial and competent evidence and fails to find sufficient and adequate findings of fact and conclusion to answer the issues raised by the pleadings." It is argued that the findings of fact "were attempted but failed to establish the needs of the son and failed to determine the ability of the father. The expenses of the father are not considered, much less established." In respect to the plaintiff's ability to pay, the testimony revealed that his income was $888.65 per month from his civil service annuity and that he owned a twenty-acre tract and a four-acre tract of land. In respect to the needs of David, the testimony of the defendant revealed that the part-time vocational rehabilitation cost $10.00 per week, the psychiatric treatment cost $60.00 for two sessions a month, the dental treatment cost on the average of $5.00 per month, the transportation to and from the vocational rehabilitation school and the psychiatric treatment cost on the average of $15.00 per month, and his clothing cost on the average of $25.00 per month. Mrs. Sooley was also paid $120.00 per month for staying with David. This testimony and the cross-action, which was treated as an affidavit in support of the prayer and motion for relief *pendente lite,* support the order.

This contention is without merit.

[12] The plaintiff's twelfth contention is that the trial judge erred in making the following finding of fact:

> "That although defendant is gainfully employed, her normal expenses are approximately equal to her income, and she is therefore financially unable to pay a reasonable fee to her attorneys."

It is argued that the finding of fact is contrary to the evidence. The defendant testified that the total of her household expenses, personal and those in connection with a trust for the benefit of David, was $1,317.51 per month. She further testified that her income was $1,333.34 per month.

The defendant's testimony indicates that her gross income for 1969 will be $16,000.00, or $1,333.34 per month. Her federal and state taxes and social security are $313.66 per month. Her expenses per month in connection with David include $40.00 for part-time vocational rehabilitation, $60.00 for psychiatric treatment, $5.00 for dental treatment, $15.00 for transportation costs, $25.00 for clothing, and $120.00 for an attendant. These total $265.00 per month. In addition, her expenses per month include $150.00 for food, $15.00 for telephone, $50.00 for personal expenses such as lunches, cleaning and clothing, $37.50 for dental work, $7.00 for Medicare, $10.00 for car insurance, $30.00 for transportation and car maintenance, $10.00 for hospitalization insurance policy, $13.00 for accidental death policy, and $17.00 for other insurance. These total $339.50. Her expenses per month in connection with a trust created for the benefit of David include premiums of $35.50, $18.99, $269.71, $16.67, and $4.00. These total $344.87. Therefore, her expenses for each month, according to these figures, equal at least $1,263.03. The difference between her monthly income of $1,333.34 and her monthly expenses of $1,263.03 is $70.31.

In his order, the trial judge found that "her normal expenses are approximately equal to her income." He did not find that they were exactly equal. This contention is without merit.

The thirteenth contention is likewise without merit and further discussion of the point raised is unnecessary.

[13] The plaintiff's fourteenth contention is that the trial judge erred in entering the following order:

> ". . . that the plaintiff pay to Joyner, Moore and Howison, counsel for the defendant, the sum of One Thousand Five Hundred Dollars ($1,500.00) to apply upon attorneys' fees incurred by defendant to the date of this order, such sum to be paid on

> or before the 15th day of February, 1969, or at such other time and under such other terms and conditions as may be satisfactory to said counsel for defendant."

Since the order was dated 17 February 1969, the plaintiff could not have complied with the provision for payment "on or before the 15th day of February". However, he could have fully complied with the alternative provision for payment. In so doing, it is not to be presumed that counsel for defendant would have exercised the power to determine the time and the terms and conditions of payment to the detriment and prejudice of the plaintiff.

It is argued that "[t]he evidence presented does not justify ordering counsel fees for the defendant in that . . . her income and financial reserves are amply sufficient to pay her own fees". In view of her monthly expenses, the defendant was not able to pay a reasonable fee to her attorneys.

It is further argued that "[t]he evidence presented does not justify ordering counsel fees for the defendant in that . . . the plaintiff has not been held to have abandoned her". However, there is a presumption that the trial judge found that the plaintiff abandoned the defendant. *Southard v. Southard, supra.*

In respect to the amount of counsel fees *pendente lite,* the plaintiff argued that $1,500.00 was excessively liberal. In support of his position he cited *Schloss v. Schloss, supra.* The Supreme Court there stated:

> "[L]ess than two months elapsed between the separation and the entry of the order. The order directed the husband to pay $2,500 to the wife's counsel 'as a fee for services rendered *to date.*' (Emphasis added.) There is nothing to indicate that the wife consulted her counsel prior to the husband's departure from the home. No evidence was introduced at the hearing by the plaintiff except her verified complaint, a short affidavit by her with reference to the effect of the full allowance prayed for upon the husband's income tax liability, and a copy of the joint income tax return. The entire evidence for the defendant consisted of his counter affidavit and three very short affidavits of other persons. Nothing in the record indicates that extensive preparation for the hearing was necessary or was made."

In the instant case, the record indicates that extensive preparation for the hearing was necessary and was made. Much of the preparation was necessitated by the mental and physical condition of David. In his order, Judge Ransdell made the following finding of fact:

"That the matter has been placed on the trial calendar numerous times, finally being tried at the January 1969 Term of Wake County District Court, resulting in a mistrial, and that counsel for defendant has represented her throughout these proceedings."

The Supreme Court further stated in *Schloss v. Schloss, supra:*

"The [wife] alleges in her complaint that she is the owner of a $48,000 residence which is free of encumbrances, she owns a new automobile and has over $13,000 in bank accounts and other investments. When to these resources there is added by the court's order an income from her husband at the rate of $18,000 per year, it cannot be said, in the absence of any findings of fact, that she is financially unable to pay a reasonable fee to her attorney and so is unable to employ counsel to represent her in her litigation with her husband."

In the instant case, the monthly expenses would prevent the defendant from meeting the plaintiff, as litigant, on substantially even terms without an allowance of counsel fees *pendente lite.* Judge Ransdell found as a fact that the defendant's normal expenses were approximately equal to her income.

This contention is without merit.

The fifteenth contention is likewise without merit and further discussion of the points raised is unnecessary.

Affirmed.

BROCK and MORRIS, JJ., concur.

JAMES C. LENTZ v. JACK HAYNES LENTZ

No. 6812SC340

(Filed 23 July 1969)

1. Vendor and Purchaser § 1— option defined — construction of option

An option is a unilateral agreement by which the maker grants the optionee the contractual right to accept or reject a present offer within a limited or reasonable time, and because it is unilateral, an option is construed strictly in favor of the maker.

2. Vendor and Purchaser § 3— property covered by option to purchase

An option granting plaintiff the right to purchase from defendant all the right, title and interest which defendant has or may hereafter acquire from the estate of his grandfather by will *is held* not to include an interest in property acquired by defendant after execution of the option by inheritance from his mother, who had acquired the property by devise from defendant's grandfather.

3. Vendor and Purchaser § 5; Trial § 33— failure to explain law arising on the evidence

In this action to enforce specific performance of an option wherein an issue was submitted to the jury as to whether plaintiff was the owner of the option at the time in question, the trial court failed to declare and explain the law arising on the evidence as required by G.S. 1-180 where the jury was given no guidance as to what facts, if found by them to be true, would justify them in answering the issue either in the affirmative or the negative.

4. Vendor and Purchaser § 5; Trusts § 6— specific performance of option — assignment of option by trustee — failure to qualify as trustee

In this action to enforce specific performance of an option granting plaintiff the right to purchase real property from defendant, the pleadings having established that plaintiff had assigned the option to another, and plaintiff having introduced evidence that the assignee devised the option to his wife, individually and as trustee for his two children, with full power of disposition, and that the assignee's wife, individually and as trustee, and two children executed a reassignment of the option to plaintiff, the trial court erred in giving the jury instructions from which the jury may have inferred that if the assignee's wife had failed to "qualify" as trustee in the office of the clerk of superior court, her execution of the instrument purporting to reassign the option to plaintiff was thereby rendered void, since an otherwise valid conveyance by a testamentary trustee is not made void by reason of his failure to first qualify under the laws applicable to executors as now required by G.S. 28-53.

5. Trusts §§ 2, 6— creation of powers and title of trustee

A trustee derives his title, powers and duties from the instrument creating the trust which names him trustee and conveys title of the trust properties to him.

6. Trusts §§ 2, 6— derivation of trustee's legal existence

A trustee's legal existence is derived from the instrument creating the trust, not from adminicular proceedings relating to qualification and posting bond or from authority of the court, and the court cannot prevent the transmission and vesting of title of property devised in trust in the trustee named in the instrument.

7. Trusts § 2— disclaimer by trustee — acceptance presumed

Since the duties of a trustee may not be imposed upon one without his consent, he may disclaim if he has not theretofore in some way, by word or conduct, manifested his consent to act, but the trustee's acceptance of the trust is presumed until he declines.

8. Trusts § 2— person named as executrix and trustee — failure to qualify as executrix — disclaimer as trustee

The fact that a person named in a will as executrix and trustee failed to qualify as executrix and acquiesced in the qualification of another as successor executor does not evidence a disclaimer on her part to act as trustee, where there is nothing in the will to manifest any intention of the testator that such person could not disclaim as executrix and still act as trustee.

APPEAL by plaintiff from *Brewer, J.*, February 1968 Civil Session of HOKE Superior Court.

This is a civil action in which plaintiff seeks judgment to enforce specific performance of an option to purchase an interest in real property from defendant. By allegations and admissions in the pleadings and by stipulation of the parties, the following facts were established: Plaintiff and defendant are brothers and are sons of Ina Thomas Lentz and grandsons of J. C. Thomas, both of whom are deceased. On 19 August 1957, the defendant, for a valuable consideration paid him by plaintiff, executed a written option agreement under seal, dated 15 August 1957, by which defendant, referred to as the "grantor," granted plaintiff, referred to as the "grantee," "the exclusive option or right to purchase the following described tract or parcel of real estate:

> "All the right, title and interest which I now have or may hereafter acquire in the estate of my grandfather, J. C. Thomas, deceased, late of Hoke County by will as of the public record as appears in the Office of the Clerk of Superior Court of Hoke County and especially but not limited to that 214-acre tract of land located on the west of the Town of Raeford and on both sides of N.C. Highway #211 and including the Lentz residence, now divided into apartments and all outbuildings and being the same property in which the mother of both parties to this option has a life interest."

The option agreement provided that defendant agreed "to convey said interest above described upon compliance with the following TERMS AND CONDITIONS:

> "1. That the duration of this option shall be for a period of *two* years from the date of the grantor's interest in said premises becomes vested in possession.
>
> "2. That the grantee, herein, pay to the grantor the sum of Eight Thousand Dollars ($8,000)."

J. C. Thomas, grandfather of the parties, died testate in 1926.

By Item Four of his will, which was duly admitted to probate, he devised the northern portion of his home farm situated in Raeford Township, Hoke County, N. C., and lying west of the Town of Raeford, to his daughter, Ina Thomas Lentz, for life, with the remainder in fee to her children living at the time of her death. (A metes and bounds description of this tract, attached as exhibit "B" to the complaint, states that it contains 235 acres, more or less; the parties in their pleadings and briefs have referred to it as containing 214 acres. For convenience and in accordance with the designation adopted by the parties, this tract will be referred to hereinafter as the "214-acre" tract.)

By Item Two of his will, J. C. Thomas devised two other tracts, one consisting of 52 acres and the other of 142 acres, the two together totaling 194 acres (for convenience being hereinafter referred to as the "194-acre" tract) to his son, William Marshall Thomas, for life, then to his son's wife, Agnes Thomas, for her life, with remainder in fee to the children of said son living at the time of his death, and if there be no child living, then to the brothers and sister of said son. William Marshall Thomas died on 2 May 1961, having been predeceased by his wife, and without leaving natural children surviving. (He did leave an adopted son surviving, but a majority of the North Carolina Supreme Court held that an adopted child was not included in the devise in remainder to a child or children of the life tenant; see *Thomas v. Thomas*, 258 N.C. 590, 129 S.E. 2d 239.) William Marshall Thomas left surviving two brothers and one sister, Ina Thomas Lentz, mother of the plaintiff and defendant. Ina Thomas Lentz died intestate on 19 April 1964, without having disposed of her interest in the 194-acre tract, and leaving surviving six children, including the plaintiff and defendant in this action. Upon her death intestate, plaintiff and defendant each became the owner of a 1/18 (a 1/6 of a 1/3) undivided interest in the 194-acre tract which had been devised by Item Two of the will of their grandfather, J. C. Thomas.

Upon the facts stipulated by the parties and alleged and admitted in their pleadings in this action, the trial court entered an order ruling as a matter of law that the property described in the written option agreement between the parties did not include the defendant's 1/18 undivided interest in the 194-acre tract acquired by inheritance from his mother, Ina Thomas Lentz, upon her death intestate on 19 April 1964. Plaintiff excepted to this ruling, and this exception is the basis for plaintiff's first assignment of error.

Plaintiff in his complaint had alleged and defendant by answer

admitted that on 30 March 1963 plaintiff had assigned to C. L. Thomas, an uncle, all of plaintiff's rights in the option agreement and that C. L. Thomas had died a resident of Hoke County in the year 1963. Plaintiff also alleged, but defendant by answer denied, either outright or by denial of knowledge or information sufficient to form a belief, that C. L. Thomas left a last will by the terms of which all right, title and interest in his estate vested in his wife, Marguerite F. Thomas, individually, and as trustee for Marguerite Iris Davis and Crawford L. Thomas, Jr., children of said deceased; that for valuable consideration Marguerite F. Thomas, individually and as trustee, and Marguerite Iris Davis and Crawford L. Thomas, Jr., both of whom were of age, executed and delivered to plaintiff on 28 February 1966 a reassignment of the option; that the plaintiff is now the owner and holder of the option and entitled to enforce the same; that on 9 March 1966 plaintiff had notified defendant in writing that he desired to exercise the option and that he was ready, able and willing to tender to the defendant the purchase price; that the defendant ignored this notice and that physical tender of the money became vain and useless and was not required by law. In his complaint plaintiff expressly tendered to defendant the sum of $8,000.00 by payment of that amount into the office of the clerk of Superior Court of Hoke County at the time of instituting this action.

Defendant in his answer admitted that on 30 March 1963 plaintiff had conveyed his interest in the option to C. L. Thomas, but denied knowledge or information relative to the allegations concerning the estate of C. L. Thomas and the reconveyance of the option by Marguerite F. Thomas and her children to the plaintiff; and defendant expressly denied that plaintiff was entitled to enforce the option. By way of further answer, defendant alleged that the plaintiff had never at any time, while the owner and holder of the option, paid or tendered payment of the $8,000.00 as required by the option, and that the option had now expired.

After presentation of evidence by the plaintiff, and no evidence being offered by defendant, the case was submitted to the jury upon the following issues:

"1. Did the defendant, Jack Haynes Lentz, execute and deliver to James C. Lentz the written option contract dated August 15, 1957, registered in Book 107, page 207, Hoke County, North Carolina, Registry?

"2. If so, was the plaintiff James C. Lentz the owner and holder of such agreement from February 28, 1966, until the expiration of the option period on April 19, 1966?

"3. Did the plaintiff, James C. Lentz, between the dates of February 28, 1966, and April 19, 1966, notify the defendant Jack Haynes Lentz of his intention to exercise the option rights under the agreement?

"4. If so, did the plaintiff at such time and thereafter, during the option period, stand ready, willing and able to comply with its terms of payment to the defendant?

"5. Did the defendant, by his acts and conduct, disavow the contract and render physical tender of the purchase price unnecessary?"

By stipulation of the parties the jury answered the first issue "Yes." For its verdict, the jury answered the second issue "No," and did not answer the remaining issues. From judgment decreeing that plaintiff is not entitled to specific performance of the option, plaintiff appeals.

Nance, Collier, Singleton, Kirkman & Herndon, by James R. Nance for plaintiff appellant.

Quillin, Russ, Worth & McLeod, by Joe McLeod for defendant appellee.

PARKER, J.

[2] Appellant's first assignment of error presents the question whether the option here sued upon relates solely to defendant's 1/6 undivided interest in the 214-acre home tract, which defendant received as one of the remainderman under Item Four of his grandfather's will, as defendant contends, or whether in addition thereto it includes defendant's 1/18 undivided interest in the 194-acre tract, which was originally devised to William Marshall Thomas for life by Item Two of said will, as plaintiff contends. On the admitted and stipulated facts, the trial court ruled as a matter of law that defendant's 1/18 undivided interest in the 194-acre tract is not included in the option. We agree.

[1] An option is a unilateral agreement by which the maker grants the optionee the contractual right to accept or reject a present offer within a limited or reasonable time. It is unilateral because only the maker is bound; the other party is not obligated in any way to perform by purchasing. Because options are unilateral, they are construed strictly in favor of the maker. *Ferguson v. Phillips,* 268 N.C. 353, 150 S.E. 2d 518; *Carpenter v. Carpenter,* 213 N.C. 36, 195 S.E. 5.

[2] The option before us grants to plaintiff the right to purchase "the following described *tract* or *parcel* of real estate," not *tracts* or *parcels,* indicating that the subject matter would be a single tract of land. It also refers to the rights which the maker held or might thereafter acquire in the estate of his grandfather by *will;* defendant acquired his 1/18 interest in the William Marshall Thomas 194-acre tract by inheritance from his mother, not by will of his grandfather. Furthermore, he acquired this interest almost seven years after the option agreement was prepared and only after the death of William Marshall Thomas without natural born children surviving, after a decision of the North Carolina Supreme Court, and after the subsequent death of his mother intestate without having previously disposed of the property. Finally, the option refers to the property as "being the same property in which the mother of both parties has a life interest." The only property in which the mother had a life interest was the 214-acre home tract devised to her for life by Item Four of her father's will.

Considering all of these factors together, and construing the option in favor of the maker, it is abundantly clear that the only property which the parties contemplated and which they intended to include in the option at the time it was executed in 1957, was the defendant's interest under Item Four of his grandfather's will in the 214-acre home tract in which his mother then held a life estate. Nothing in the language of the option indicates that the parties intended to include therein other tracts, devised by his grandfather to other persons, and in which defendant years later acquired an interest only as result of a series of fortuitous events.

The cases cited by appellant relating to the doctrine of after-acquired property are not apposite. These cases deal with the situation which arises when a grantor conveys rights in a definitely described tract of land, in which at the time of conveyance he has no title, but in which he thereafter acquires some title. Here we are concerned with the description of the tract itself.

While the trial court's ruling was made on the basis of facts admitted and stipulated prior to trial, it may be noted that at the trial plaintiff himself testified on cross-examination that he "never made any claim for any property other than the homeplace until after the suit was filed," and then when he filed suit he "asked for the homeplace plus two other pieces of property." Plaintiff further testified that in a letter to defendant he had made a notation about a release on the Marshall Thomas property, and that "my option that I had with him only concerned my mother's place and that I did not

know that these other two shares were included in it." We think it abundantly clear that the option by its express provisions did not include any interest in the William Marshall Thomas 194-acre tract and that the parties never intended that it should. There is no merit in appellant's first assignment of error.

Appellant assigns as error portions of the judge's charge to the jury relating to the second issue. In this connection it had been established by the pleadings that on 30 March 1963 plaintiff had assigned his rights in the option to his uncle, C. L. Thomas, and that C. L. Thomas had died a resident of Hoke County later in the year 1963. Plaintiff introduced in evidence the will of C. L. Thomas, which had been duly admitted to probate. This instrument made no express mention of the option, but did devise and bequeath the residuary estate to testator's wife and two children, 1/3 to each. The will directed that the wife's 1/3 should be paid to her directly upon settlement of the estate, and that the children's shares should be placed in the hands of the wife, Marguerite F. Thomas, as trustee until the younger of the two children should reach 25 years of age. The will granted the trustee during continuance of the trust full power and authority "at her discretion, to sell at such price, upon such terms and in such manner as she may deem best, any property which at any time constitutes a part of this trust." The will further provided that in event testator's wife, Marguerite F. Thomas, should predecease him, "or otherwise be unwilling or unable to serve as trustee, as hereinabove set forth," then J. L. McNeill should serve as first alternate trustee and J. W. McPhaul as second alternate trustee. The will also named the wife as executrix, with the same provisions that J. L. McNeill and J. W. McPhaul should serve as first and second alternates. Plaintiff introduced in evidence a written "Release and Reassignment of Options," dated 28 February 1966, executed by Marguerite F. Thomas, both individually and in her capacity as trustee under the will of C. L. Thomas, and also executed by the son and daughter of C. L. Thomas, and joined in by the daughter's husband. This instrument recites that the parties who executed it were the sole heirs at law and sole beneficiaries under the will of C. L. Thomas, deceased. By this instrument, which was duly recorded, the parties who executed it reassigned to the plaintiff all rights they had in the option.

Marguerite F. Thomas, appearing as a witness for plaintiff, testified that her husband, C. L. Thomas, died on 29 May 1963; that she had never qualified as executrix under her husband's will and that Mr. McNeill had qualified as executor; that at the time the instrument reassigning the option to plaintiff was executed on 28

February 1966, her husband's estate was settled; that on that date her youngest child was 22 years old and would become 25 years old on 26 August 1968. The clerk of Superior Court of Hoke County was also called as a witness and testified to the qualification of J. L. McNeill as executor under the will of C. L. Thomas on 6 June 1963 and further testified there had never been any separate order of appointment of any trustee under said will. The clerk also testified that he knew "that Mr. J. L. McNeill is acting in the capacity as trustee under the will of C. L. Thomas." Marguerite F. Thomas, the widow, had also testified that Mr. McNeill "also qualified as trustee under the will of my husband and is at this time acting as trustee for both of my children and will act in that capacity until my youngest reaches 25 years of age and that will be August 26." Marguerite F. Thomas also testified that her attorneys, one of whom was Mr. McNeill, had advised her and prepared the papers for her at the time she executed the reassignment of the option to plaintiff.

[3, 4] When charging the jury on the second issue, the court stated the contentions of the parties, including the defendant's contention that no one had qualified as trustee of the C. L. Thomas estate. The court then charged the jury as follows:

> "Now, members of the jury, if the plaintiff has satisfied you by the greater weight of the evidence that the plaintiff was the owner of the option contract in issue in this case from February 28, 1966, to April 19, 1966, it would be your duty to answer this issue YES. If the plaintiff has failed to satisfy you of these facts by the greater weight of the evidence, it would be your duty to answer the issue No."

This charge completely failed to "declare and explain the law arising on the evidence," as required by G.S. 1-180. The jury was given no guidance as to what facts, if found by them to be true, would justify them in answering the issue either in the affirmative or the negative. The jury may well have been left with the impression that if the trustee named in the will had failed to "qualify" as trustee in the office of the clerk of superior court, her execution of the instrument purporting to reassign the option to plaintiff was thereby rendered void. In this connection the court gave no explanation of the legal effect of G.S. 28-53 which provides:

> "Trustees appointed in any will admitted to probate in this State, into whose hands assets come under the provisions of the will, shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets which come into his

hands and annual and final accounts thereof, such as are required of executors and administrators. The power of the clerk to enforce the filing and his duties in respect to audit and record shall be the same as in such cases. This section shall not apply to the extent that any will makes a different provision."

The requirement that a testamentary trustee shall "first qualify under the laws applicable to executors," became part of this statute effective 1 July 1961 by amendment enacted by Chap. 519 of the 1961 Session Laws. By Chap. 1176 of the 1965 Session Laws this requirement was made inapplicable to trustees appointed by will executed prior to 1 July 1961, unless the will had been admitted to probate prior to the effective date of that chapter, which was 1 July 1965.

[4-6] An otherwise valid conveyance by a testamentary trustee is not made void by reason of his failure to first qualify as now required by G.S. 28-53. The statute does not so provide. A trustee derives his title, powers, and duties from the instrument creating the trust which names him trustee and conveys title to the trust properties to him. See 2 Wiggins, Wills and Administration of Estates in North Carolina, §§ 293, 300. His legal existence is derived from the instrument creating the trust, not from adminicular proceedings relating to qualification, posting bond, etc. "(T)he Trustee takes his position by virtue of the donative acts of the grantor and not from the authority of the court." *In re Neill's Estate,* 195 Misc. 690, 89 N.Y.S. 2d 394; see also, Bogert, Trusts and Trustees 2d, § 151. Nor can the court prevent the transmission and vesting of title to property devised in trust in the trustee named in the will. *Riggs v. Moise,* 344 Mo. 177, 128 S.W. 2d 632, citing *Parker v. Sears,* 117 Mass. 513; *Monk v. Everett,* 277 Mass. 65, 177 N.E. 797; *Mullanny v. Nangle,* 212 Ill. 247, 72 N.E. 385; *LaForge v. Binns,* 125 Ill. App. 527; *In re Goulden,* 102 Misc. 642, 170 N.Y.S. 154; *City Council of Augusta v. Walton,* 77 Ga. 517, 1 S.E. 214.

[7, 8] It is true that since the duties of a trustee may not be imposed upon one without his consent, he may disclaim if he has not theretofore in some way, by word or conduct, manifested his consent to act. Lee, North Carolina Law of Trusts 3rd, § 4c; Bogert, Trusts and Trustees 2d, § 150, p. 64, *et seq.* However, a trustee's acceptance of the trust is presumed until he declines, *Benevolent Society v. Orrell,* 195 N.C. 405, 142 S.E. 493, and the evidence here is such that the jury could have found that *at the time of the execution of the reassignment* in 1966 Marguerite F. Thomas had done nothing to indicate her unwillingness to serve. On the contrary, her

execution of the reassignment would tend to indicate her acceptance of the trusteeship, particularly in view of her evidence that the papers were prepared for her by attorneys who advised her, one of them being Mr. McNeill. There is no evidence of any act of anyone as trustee other than this, occurring prior to the time the reassignment was executed. The testimony of the clerk of superior court as to who was serving as trustee related to the time of trial, some two years after the execution of the reassignment. Mrs. Thomas's statement that Mr. McNeill "is still serving" related to the time of the trial. Nor would the fact that Mrs. Thomas had failed to qualify as executrix of her husband's will and had apparently acquiesced in the qualification by Mr. McNeill as successor executor, evidence a disclaimer on her part to act as trustee. "Unless a different intention of the settlor is properly manifested, if the same person is appointed both executor and trustee under a will, he may accept as executor and disclaim as trustee, and conversely he may disclaim as executor and accept as trustee." Restatement of the Law of Trusts 2d, § 102. Nothing in the will of C. L. Thomas manifests any intention of the testator that his wife could not disclaim as executrix and yet still act as trustee.

[4] The court's instruction as given was misleading in that the jury could have understood therefrom that unless Marguerite F. Thomas "qualified" as trustee in the office of the clerk of superior court, she could not validly execute the reassignment and that without such qualification there was no trustee who could act in any capacity. This constituted prejudicial error and entitles plaintiff to a

New trial.

BROCK and BRITT, JJ., concur.

EDWARD EARL WHALEY v. LENOIR COUNTY AND RICHARD WHALEY, BILLY BREWER, LUBBY EDWARDS, IKE WHITFIELD, AND MILTON WILLIAMS, CHAIRMAN AND MENBERS OF THE BOARD OF COUNTY COMMISSIONERS OF LENOIR COUNTY

No. 698SC272

(Filed 23 July 1969)

1. Constitutional Law § 12— police power — regulation of occupations — limitations on power

The State cannot, under the guise of protecting the public, arbitrarily

interfere with private business or prohibit lawful occupations or impose unnecessary or unreasonable restrictions on them.

2. Constitutional Law § 12— police power — regulation of ambulance service

The regulation of ambulance service is a valid and legitimate exercise of the police power. G.S. 153-9(58).

3. Counties § 1— authority to regulate ambulance service

Authority of a county to regulate ambulance service — whether it be by franchise, permit, certificate of public convenience or necessity, license or whatever name is given — can only come from and cannot exceed that given by the enabling Act, G.S. 153-9(58).

4. Constitutional Law §§ 12, 20; Counties § 1— regulation of ambulance service — grandfather clause — equal protection

In statute authorizing the several counties to enact an ordinance making it unlawful for anyone to provide ambulance service without first obtaining a franchise from the county, grandfather clause providing that county commissioners shall grant a franchise, without a finding of public convenience and necessity, to any ambulance operator who was furnishing ambulance service on 9 May 1967 — the effective date of the statute — and who continues to provide such service up to and including the effective date of the ordinance, *is held* unconstitutional in not affording equal protection to all ambulance operators who are lawfully doing business on the effective date of the ordinance, since there must be a finding of public convenience and necessity as to those operators who lawfully and in good faith began ambulance services after 9 May 1967 but before the effective date of the ordinance. G.S. 153-9(58)(a)(2); N. C. Constitution Art. I, §§ 1, 7, 17, 31.

5. Carriers § 2; Statutes § 8— purpose of a "grandfather clause"

The purpose of a grandfather clause is to protect and preserve *bona fide* rights existing at the time of the passage of the legislation which contains such clause.

6. Constitutional Law § 19; Counties § 1— regulation of ambulance service — insurance — monopolies and exclusive emoluments

In statute authorizing the several counties to enact an ordinance regulating the operation of ambulance service, section of the statute granting to the counties the power to "set minimum limits of liability insurance coverage for ambulances," *is held* not void as being in contravention of constitutional prohibitions against monopolies and exclusive emoluments, since the section does not provide that liability insurance shall be the exclusive method of indemnifying persons or property against loss due to negligent operation of the ambulance service. G.S. 153-9(58)(a)(6); N. C. Constitution, Art. I, §§ 7, 31.

7. Constitutional Law § 19; Counties § 1— ordinance regulating ambulance service — insurance — monopolies and exclusive emoluments

County ordinance requiring all certified operators of ambulance services within the county to submit evidence of public liability and property damage insurance in stated amounts with an insurance company licensed to conduct business in this State, *is held* void as being in con-

travention of N. C. Constitution, Art. I, § 7, prohibiting separate or exclusive emoluments, and Art. I, § 31, prohibiting perpetuities and monopolies, since the ordinance excludes other methods of indemnifying persons or property against loss.

APPEAL by plaintiff from *Mintz, J.*, 25 February 1969 Session of Superior Court of LENOIR.

The Board of County Commissioners of Lenoir County, pursuant to the provisions of G.S. 153-9(58), and after notice and public hearing, enacted, on 9 December 1968, "An Ordinance to Franchise, Control and Regulate Ambulance Service in Lenoir County." The effective date of the ordinance was 8 January 1969. Both the enabling Act, G.S. 153-9(58), and the ordinance contained a "grandfather clause". Plaintiff began operating an ambulance service on 25 November 1968. On 6 January 1969, plaintiff filed an application for a franchise to continue operating his ambulance service in Lenoir County. In addition to plaintiff, one other firm, Manhattan Ambulance Service, filed an application for a franchise to operate an ambulance service, and three firms filed applications under the grandfather clause of the statute and ordinance. Plaintiff does not contend that he is entitled to a franchise pursuant to the grandfather clause contained in the statute and the ordinance. On 6 January 1969 the applications of the three firms under the grandfather clause were approved by the Board of Commissioners. The applications of plaintiff and Manhattan Ambulance Service were heard at public hearing on 7 January 1969 and denied.

Plaintiff then instituted this action to obtain an injunction to restrain and enjoin defendants from enforcing the ordinance against plaintiff, from interfering with the operation of his ambulance service, and from prosecuting him on account of said ordinance.

When the matter came on for hearing, plaintiff waived all contentions other than his contention that the statute and ordinance are unconstitutional. The court made findings of fact, entered conclusions of law, and thereupon adjudged the ordinance to be valid. Plaintiff appealed.

Turner and Harrison by J. Harvey Turner for plaintiff appellant.

Thomas B. Griffin for defendant appellees.

MORRIS, J.

Only one question arises on this appeal: Is the ordinance adopted by the Board of Commissioners of Lenoir County entitled "An Ordi-

nance to Franchise, Control and Regulate Ambulance Service in Lenoir County" unconstitutional in whole or in part?

Plaintiff contends that the franchising, licensing, and control of ambulance services is not a proper and legitimate exercise of the police power, but that if within the police power of the State, the retroactive provision of § (a)(2) thereof is unconstitutional as is the provision of § (a)(6) thereof.

The pertinent provisions of G.S. 153-9(58) are:

"a. Upon finding as fact, after notice and public hearing, that exercise of the powers enumerated below is necessary to assure the provision of adequate and continuing ambulance services and that exercise of the powers enumerated below are necessary to preserve, protect and promote the public health, safety and general welfare, boards of county commissioners within their respective counties are hereby granted powers to:

1. Enact an ordinance making it unlawful to provide ambulance services or to operate ambulances without having been granted a franchise to do so;

2. Grant franchises to ambulance operators, based within or without the county; provided, that any ambulance operator providing ambulance services in any county upon May 9, 1967, and who continues to provide such services up to and including the effective date of any ordinance adopted pursuant to this subdivision, and who submits to the board of commissioners of any such county evidence satisfactory to the board of such continuing service, shall be entitled to a franchise to serve at least that part of said county in which such service has been continuously provided, and the board of commissioners of any such county shall, upon finding that all other requirements of this act are met, grant such franchise; . . .

. . .

6. Set minimum limits of liability insurance coverage for ambulances."

The effective date of the Act was 9 May 1967. 1967 Session Laws of North Carolina, c. 343, p. 373.

The pertinent portions of the ordinance are:

"Sec. 6. Existing ambulances.

Every owner operating an ambulance or ambulances in Lenoir County on the 9th day of May 1967, and who has continued to provide such services up to and including the effective

date of this ordinance, shall be deemed, in the absence of evidence and finding by the Board to the contrary, to be operating under public convenience and necessity and, provided, that all other requirements of this ordinance have been met, the Board shall grant a certificate to such owner or owners upon written request therefor."

"Sec. 9. Rules governing general operation.

The following rules shall govern the general operation of ambulances under a certificate of public convenience and necessity:

. . .

(C) INSURANCE REQUIRED. Every owner operating ambulances under a certificate shall submit to the Board evidence of public liability and property damage insurance in force with an insurance company licensed to conduct business in this state in the following amounts:

Bodily Injury —	$100,000 per person
Bodily Injury —	$300,000 per accident
Property Damage —	$100,000 per accident."

Plaintiff and defendants stipulated: (1) That on or shortly before 22 November 1968, plaintiff, through a third party, inquired of one of the defendants whether the Board of County Commissioners was considering the adoption of an ordinance to control and franchise ambulance services in Lenoir County, and the answer was, "No, but that it had been discussed." (2) That on 23 November 1968 a policy of insurance was issued by a company licensed to do business in North Carolina covering the ambulance of plaintiff with limits of liability as follows: Bodily injury — $10,000 per person; bodily injury — $20,000 per accident; property damage — $5,000 per accident with an uninsured motorist clause providing $10,000 for bodily injury per person and $20,000 per accident. (3) That the ambulance of plaintiff was contracted for on 1 November 1968 and equipment and appurtenances required by the North Carolina State Board of Health were purchased and installed. Certificate transferring title to the ambulance was executed 21 November 1968. (4) That between 1 November and 24 November 1968 plaintiff and three of his employees received instructions in and completed first aid courses required by the State Board of Health for ambulance attendants and were so certified. (5) That on 25 November 1968 the State Board of Health approved said ambulance, its equipment and location, and the ambulance attendants and drivers. (6) That

on 25 November 1968 plaintiff began operating his business and continued to so operate to the effective date of the ordinance.

Plaintiff concedes that if the franchising or licensing of ambulance service is within the police power of the State, then generally speaking G.S. 153-9(58) and the ordinance before us are constitutional, although specific sections of each may not be. But he contends that the statute and the ordinance cannot be sustained as a legitimate exercise of the police power because they have no substantial relation to the public health, morals, order or safety, or general welfare. He relies on *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854, and *Roller v. Allen,* 245 N.C. 516, 96 S.E. 2d 851. In the *Harris* case, the Court held that the statute providing for the licensing of cleaners and pressers was unconstitutional, and in the *Roller* case, the Court held that a statute requiring a license for persons or firms undertaking to lay, set or install ceramic tile, marble or terrazzo floors or walls was unconstitutional as an unwarranted interference with the fundamental right to engage in an ordinary and innocuous occupation in contravention of Article I, §§ 1, 7, 17 and 31 of the Constitution of North Carolina. In both cases the Court held that the statute before the Court could not be upheld as an exercise of the police power, because their provisions had no substantial relation to the public health, safety or welfare but tended to create monopolies. The *Roller* case was decided in 1957, and Justice Higgins therein noted that the "regimentation and control over trades and industry by law reached its high water-mark about 1937" and quoted the *Harris* case wherein the Court expressed its concern over the tendency.

[1] The State cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unnecessary or unreasonable restrictions on them, *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731, and the Court has held unconstitutional statutes providing for the licensing of real estate brokers only in certain designated areas of the State, *State v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521; for the licensing of cleaners and pressers, *State v. Harris, supra;* photographers, *State v. Ballance, supra;* and ceramic tile contractors, *Roller* and *Allen, supra.*

The Court has recognized the following as professions and occupations so affected with the public interest as to warrant their regulation for the public good: licensing of physicians and surgeons, *State v. Call,* 121 N.C. 643, 28 S.E. 517; pilots, *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885; attorneys, *Baker v. Varser,* 240 N.C. 260, 82 S.E. 2d 90; barbers, *Motley v. State Board of Barber Exam-*

iners, 228 N.C. 337, 45 S.E. 2d 550; plumbing and heating contractors, *Roach v. Durham,* 204 N.C. 587, 169 S.E. 149; dentists, *Allen v. Carr,* 210 N.C. 513, 187 S.E. 809; real estate brokers, *State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660; pharmacists, *North Carolina Board of Pharmacy v. Lane,* 248 N.C. 134, 102 S.E. 2d 832; and taxicab operators, *Suddreth v. Charlotte,* 223 N.C. 630, 27 S.E. 2d 650.

[2] We believe the regulation of ambulance service is a valid and legitimate exercise of the police power. As was said by Barnhill, J. (later C.J.), speaking for the Court in *Suddreth v. Charlotte, supra,* and quoting 37 Am. Jur. 535: "No person has an absolute right to use the streets of a municipality in the operation of power-driven vehicles for hire. Such operation is a privilege which the municipality, under proper legislative authority, may grant or withhold."

> "The business of carrying passengers for hire is a privilege, the licensing, regulation, and control of which is peculiarly and exclusively a legislative prerogative. So is the power to regulate the use of public roads and streets. The General Assembly in the exercise of this police power may provide for the licensing of taxicabs and regulate their use on public streets, or it may, in its discretion, delegate this authority to the several municipalities. 37 Am. Jur., 534, Sec. 21; Anno. 144 A.L.R. 1120." *Suddreth v. Charlotte, supra.*

In this instance the General Assembly has delegated this authority to the several counties.

We now turn to the specific portions of the ordinance and enabling statute which plaintiff contends are unconstitutional.

[3] Of course the authority of the county to regulate ambulance service — whether it be by franchise, permit, certificate of public convenience or necessity, license or whatever name is given — can only come from and cannot exceed that given by the enabling Act. *Smith v. City of Winston-Salem,* 247 N.C. 349, 100 S.E. 2d 835.

[4] The enabling Act [G.S. 153-9(58)] contains a grandfather clause in that it provides in section (a) (2) thereof that any ambulance operator providing ambulance services in any county on 9 May 1967, and who continues to provide such service up to and including the effective date of any ordinance adopted pursuant to the statute shall be entitled to a franchise to serve at least that part of the county in which such service had been continuously provided. If satisfactory evidence of such continuous service is submitted and

other requirements of the Act are met, the county commissioners shall grant such franchise.

The ordinance provides that all owners operating an ambulance service in Lenoir County on 9 May 1967 who have continuously provided such service to the effective date of the ordinance "shall be deemed, in the absence of evidence and finding by the Board to the contrary, to be operating under public convenience and necessity" and if all other requirements of the ordinance are met, the Board shall grant a certificate to such owner upon written request therefor.

[4, 5] Grandfather clauses have been upheld in this State in previous instances. *State v. Call, supra,* (license to practice medicine); *Utilities Commission v. Fleming,* 235 N.C. 660, 71 S.E. 2d 41 (grandfather clause under the Bus Act of 1949). As was said in *Utilities Commission v. Fleming, supra:* "The purpose of a grandfather clause is to protect and preserve *bona fide* rights *existing at the time of the passage of the legislation which contains such clause.* Other provisions in such Act intended to apply to applicants seeking rights thereunder, separate and apart from any grandfather rights confirmed therein, will not be permitted to impinge upon or defeat such rights as are intended to be protected by the grandfather clause." (Emphasis supplied.) Here, however, the rights existing at the time of the passage of the ordinance may *not* be protected. Certainly, the rights of those people in every county who were in the business of furnishing ambulance service on 9 May 1967 and who continue to furnish such service to the effective date of the ordinance are protected. There is nothing, however, to protect the rights of those who, in good faith, enter the business in any county after 9 May 1967 but *before* the enactment or effective date of an ordinance. Thus the rights of *all* who are in the business at the effective date of the ordinance are not protected. As is the case here, plaintiff entered the business on 25 November 1968, after much good faith, preparation and investment of capital, well before the effective date of the ordinance on 9 January 1969, and at a time when it was perfectly legal for him to do so without first obtaining permission from anybody, except approval of the State Board of Health. Yet, although he was conducting the business on the *effective date of the ordinance,* there had to be a finding of public convenience and necessity as to him which was not required of those in a similar business who had been operating on 9 May 1967, and were still operating on the effective date of the ordinance.

We find no other enabling Act in this or any other jurisdiction which authorizes municipalities or counties prospectively to enact

regulatory ordinances using the effective date of the enabling Act as the cutoff date rather than the effective date of the ordinance to be enacted, if at all, at sometime in the future.

Because of the possible retroactive application of the grandfather rights provided for in the enabling Act, we are led to the ineluctable conclusion that § (a)(2) of G.S. 153-9(58) and § 6 of the ordinance invade the personal and property rights guaranteed and protected by Article I, §§ 1, 7, 17 and 31 of the Constitution of North Carolina.

[6, 7] Plaintiff also contends that § (a)(6) of G.S. 153-9(58) and § 9(C) of the ordinance must fall as violative of Article I, § 7 of the Constitution of North Carolina prohibiting separate and exclusive emoluments and § 31 prohibiting perpetuities and monopolies. He relies on *State v. Sasseen,* 206 N.C. 644, 175 S.E. 142. There, the City of Charlotte had enacted an ordinance prohibiting the operation of taxicabs, U-Drive-It, or for-hire cars or automobiles unless there shall have first been filed with the Treasurer of the City of Charlotte a policy or policies of liability insurance in stated minimum amounts covering personal injury and property damage issued by some reliable and responsible company authorized to do business in North Carolina or in lieu thereof the deposit of like amounts in cash or securities to indemnify persons who might be injured or whose property might be damaged by the negligent operation of the vehicles named in the ordinance. The Supreme Court noted that the policy of the ordinance with reference to protecting persons injured or property damaged through negligence was not under discussion but the legality of the ordinance as adopted was. In holding that that section of the ordinance violated Article I, §§ 7 and 31 of the Constitution of North Carolina, the Court said: "The act, as written, has a tendency to create a monopoly and turn the business over to a privileged class without allowing personal surety or sureties, which was, until recent years, the kind of bond usually required and given."

The following year, in *Watkins v. Iseley,* 209 N.C. 256, 183 S.E. 365, the Court approved a section of the Raleigh ordinance dealing with the same subject matter requiring every person, firm or corporation, as a condition precedent to operating taxicabs or motor vehicles for hire in the City of Raleigh, on or after 1 September 1935, to secure liability insurance, or enter into bond with personal or corporate surety in stated minimum amounts for personal injury and property damage. In so doing, the Court quoted Mr. Justice

Sutherland, delivering the opinion of the Supreme Court of the United States in *Packard v. Banton,* 264 U.S. 140, 68 L. Ed. 596:

> "The contention most pressed is that the act unreasonably and arbitrarily discriminates against those engaged in operating motor vehicles for hire in favor of persons operating such vehicles for their private ends, and in favor of street cars and motor omnibuses. If the State determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper. . . . Decisions sustaining the validity of legislation like that here involved are numerous and substantially uniform. (Citing authorities.) . . . The fact that, because of circumstances peculiar to him, appellant may be unable to comply with the requirement as to security without assuming a burden greater than that generally borne or excessive in itself, does not militate against the constitutionality of the statute. Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition, and may justify a degree of regulation not admissible in the former. See *Davis v. Massachusetts,* 167 U.S., 43."

[6] The section of the enabling Act to which objection is raised merely grants to the counties the power to "set minimum limits of liability insurance coverage for ambulances" but does not provide that this shall be the exclusive method of indemnifying persons or property against loss by injury of damage due to negligent operation nor does it require that insurance shall be obtained. We find this unobjectionable.

[7] The section of the ordinance under attack is § 9(C) thereof which reads as follows:

> "INSURANCE REQUIRED. Every owner operating ambulances under a certificate shall submit to the Board evidence of public liability and property damage insurance in force with an insurance company licensed to conduct business in this state in the following amounts:

Bodily Injury —	$100,000 per person
Bodily Injury —	$300,000 per accident
Property Damage —	$100,000 per accident."

In *Cab Co. v. Shaw,* 232 N.C. 138, 143, 59 S.E. 2d 573, Seawell, J., speaking for the Court, said:

"By whatever designation given, be it franchise, certificate of public convenience and necessity, permit or license, the privilege of operating vehicles for hire on the streets of a municipality is not a common, fundamental or natural right, and must give way to reasonable regulation bottomed on a *bona fide* promotion of the public safety, security and welfare.

In this instance the power to create carries with it the power to control. The constitutionality of the legislative delegation to the municipality to grant and regulate motor vehicles franchises carries with it *ex vi terminis* the power to apply such measures and means of regulation as are reasonably necessary to the public interest to secure the result. *Suddreth v. City of Charlotte, supra; Rio Bus Lines Co. v. Southern Bus Line Co.,* 272 S.W. 18.

The municipality may name such terms and conditions as it sees fit to impose for the privilege of transacting such business, and the courts cannot hold such terms unreasonable, except for discrimination between persons in a like situation. The wisdom and expediency of the regulation rests alone with the lawmaking power. *Lawrence v. Nissen,* 173 N.C. 359, 91 S.E. 1036; *Turner v. New Bern,* 187 N.C. 541, 122 S.E. 469; *Suddreth v. Charlotte, supra.*"

We do not question the policy of requiring protection for persons injured or property damaged by the negligent operation of an ambulance, but for the same reasons set out in *State v. Sasseen, supra,* we hold that this section of the ordinance contravenes Article I, §§ 7 and 31 of the Constitution of North Carolina.

For the reasons stated herein, the cause must be remanded to the Superior Court of Lenoir County for the entry of judgment in accordance with this opinion.

Error and remanded.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. HORACE KEEL
No. 6910SC329

(Filed 23 July 1969)

1. Constitutional Law §§ 20, 30— equal protection — denial of free transcript of prior trial

In this prosecution for armed robbery, indigent defendant was not denied a basic essential of his defense at his second trial in violation of the equal protection clause of the Fourteenth Amendment by the trial court's denial of his motion that he be provided, at public expense, with a transcript of the evidence presented at his first trial which ended in a mistrial, where defendant was represented by the same attorney at both trials, the second trial was held only two months after the first, and there is nothing in the record to indicate that the court reporter was unavailable to testify if necessary to impeach the State's witnesses.

2. Constitutional Law § 32; Criminal Law § 66— in-court identification of defendant — pretrial confrontation in courtroom — absence of counsel

In-court identification of defendant by robbery victim was not rendered incompetent by fact that defendant was submitted to robbery victim's view in the courtroom prior to trial in the absence of his counsel when he was placed in the prisoner's box with other prisoners and the victim, upon being asked by a police officer whether he recognized any of the three persons who robbed him, told the officer that he recognized defendant.

3. Constitutional Law § 32; Criminal Law § 66— in-court identification of defendant — prior photographic identification — right to counsel

In-court identification of defendant by robbery victim was not rendered incompetent by victim's pretrial identification of defendant from police photographs without the presence of counsel to represent defendant when the photographs were exhibited to the witness, where defendant's photograph was selected by the witness from a large group of photographs without suggestion from anyone and without knowledge of defendant's name.

4. Criminal Law § 99— expression of opinion by court — clarifying questions

In this prosecution for armed robbery, the trial court did not express an opinion on the evidence in asking the prosecuting witness what defendant was doing while another person held a gun in the witness' back, where the witness had previously stated more than once that defendant was one of the three persons who robbed him, the court's question being within the context of the testimony of the witness and of a clarifying nature.

5. Criminal Law § 66— testimony that defendant looked like one of the robbers

In this prosecution for armed robbery, the court did not err in the admission of testimony by one of the robbery victims that although she could not state positively that defendant was one of the robbers, he looked

very much like one of them, the lack of positiveness by the witness affecting the weight and not the admissibility of the testimony.

APPEAL by defendant from *Carr, J.*, February 1969 Session of Superior Court of WAKE County.

Defendant was tried on a bill of indictment, proper in form, charging him with the felony of armed robbery.

The evidence for the State tended to show that Gilbert Tart (Tart) was manager of Bremson Diamond Company (Bremson) and was at its place of business on 6 September 1968. At about 9:15 on the morning of that date the defendant and two other persons came into the place of business. One of the three men asked the witness Tart to show him two rings which were displayed in the showcase. While Tart was doing so one of the other persons seized him from behind, and one of them put a pistol to his back. The defendant and one of the other persons then took the rings from the showcase and put them in a paper bag which they had brought with them. One of the men went into another part of the premises, called the Silver Shop, and at gun point forced Mrs. Mable Long, another employee, to come around where they were. They forced Tart and Mrs. Long to the back of the premises where they were required to lie face down upon the floor and were tied with cords that the three men brought with them. The defendant and the other two then proceeded to take unmounted diamonds and coins from the safe, and left Tart and Mrs. Long tied up on the floor. The value of the property taken was about thirty-five thousand ($35,000.00) dollars. The defendant was apprehended in Richmond, Virginia, and positively identified by the witness Tart in the courtroom as one of the three men who had robbed him.

The defendant offered evidence which tended to show by the witness Johnny Merriman, that he, Merriman, was from Richmond, Virginia, and on 6 September 1968 he was involved in a robbery by the use of pistols of Bremson Diamond Company. There were two other persons involved with him, but the defendant Horace Keel was not one of those persons. He refused to divulge the names of the other two persons who were with him because he said they had threatened him and he was afraid. The defendant further offered evidence tending to show by Mrs. Mable Long that she could not positively identify the defendant as being one of the three men who robbed the place of business of Bremson Diamond Company on this occasion.

Defendant's plea was not guilty, trial was by jury, verdict was guilty of armed robbery as charged.

From a judgment of imprisonment of not less than fifteen years nor more than eighteen years, the defendant appealed to the Court of Appeals.

Attorney General Robert Morgan and Assistant Attorney General Bernard A. Harrell for the State.

Charles R. Hassell, Jr., for the defendant.

MALLARD, C.J.

[1] Defendant was tried first on this charge at the December 1968 Session of Superior Court of WAKE County. This trial resulted in a mistrial due to the inability of the jurors to agree upon a verdict. After this mistrial the defendant, an indigent, on 17 January 1969, filed a motion requesting that he be provided, at public expense, with a transcript of the evidence presented at the December 1968 trial which ended in a mistrial. The reason stated in the motion is "that he deems it necessary to have a transcript of the evidence presented at his first trial in order that he may properly prepare his defense for a second trial; that he is indigent and unable to pay the costs of preparation of said transcript." No other reason is set forth in the motion requesting the transcript which was signed by his attorney Charles R. Hassell, Jr., who represented the defendant at both his trial in December 1968 which resulted in a mistrial, and his trial the following February which resulted in his conviction. The court, after considering the motion found, *inter alia*, that the motion "is not founded upon a showing of necessity" and denied the motion. The defendant assigns this denial as error.

The question may be stated thus: Is the failure to provide the defendant with a transcript of the evidence taken by the court reporter at his first trial, nothing else appearing, a denial of a basic essential of his defense at a second trial and therefore a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States? In this case we hold that it does not.

The cases of *Griffin v. Illinois*, 351 U.S. 12, 100 L. ed. 891, 76 S. Ct. 585 (1956), and *Williams v. Oklahoma City*, 395 U.S. 458, 23 L. ed. 2d 440 (1969), are distinguishable from this case. There it was held that the due process and equal protection clauses of the Fourteenth Amendment were violated by the State's denial of an appellate review solely because of a defendant's inability to pay for a transcript. Here, the same lawyer who represented the defendant at the first trial which resulted in the mistrial, signed the motion re-

questing the transcript of the evidence and the reason given was to assist him in the preparation of the defense for the second trial. No appellate review was involved here. The judge, based upon the motion filed, found that no necessity was shown for the transcript of the evidence and denied the motion.

A transcript of the evidence taken at a trial is only the court reporter's version of what the evidence was. It does not become the official record of the transcript of the evidence of a trial until the opposing parties agree thereto or it is settled by the trial judge. No doubt the judge, in finding that such was not necessary, recognized the fact that most lawyers take their own notes during the trial of what a witness says, and also that if a question arises as to a conflict in what a witness said, the court reporter is ordinarily available to testify from his notes. There is nothing in this record to indicate that the court reporter was not available to testify if necessary to impeach the State's witnesses.

In the case of *Peterson v. United States,* 351 F. 2d 606 (9th Cir. 1965), new counsel was substituted for the defendant after the conclusion of the first trial and he promptly moved that he be supplied, at public expense, with a transcript of the first trial. The court held:

> "The Government need not then provide an indigent defendant with every advantage which money could buy for a litigant. The question is whether denial of access to this material in the circumstances of this case amounted, on the one hand, to a loss of mere advantage, or, on the other hand, to the deprivation of a basic essential of defense. * * *
>
> In our judgment, where new counsel is involved and the testimony subject to impeachment is crucial to the Government's case, a transcript of the earlier testimony is the only adequate means for providing this material. The holding of this court in *Forsberg v. United States,* 351 F. 2d 242 (9th Cir. 1965) is thus distinguishable.
>
> Where access to such essential material can be had for a fee, this 'money hurdle' must, under *Griffin,* be met for the indigent at Government expense. In this case means for meeting it is provided by Title 28, § 753(f), U.S.C."

In the case of *Forsberg v. United States, supra,* the same court upheld the denial of a transcript where a defendant was represented by the same counsel at the first and second trials and the trial court ruled that it would permit the reporter during the second trial to

privately read the testimony of any witness used on the first trial to defendant's lawyer.

In the case of *Williams v. United States,* 358 F. 2d 325 (9th Cir. 1966), the defendant, who was also represented by new counsel, and was denied a complete transcript of the first trial, for the first time in his brief contended that the primary use of the transcript of the evidence given at the first trial would have been for the impeachment of the State's witness.

The court held that such an assertion under the circumstances of that case was too conjectural and speculative to base a holding that the District Court had abused its discretion in entering the order complained of.

In the case before us, the first trial was held in December 1968. The second trial was held in February 1969. The defendant was represented by the same attorney at both trials as well as in this court. Defendant does not say that his attorney failed to take notes at the first trial of what the witnesses said. The first trial ended in a mistrial on 10 December 1968. The second trial began on 10 February 1969. It thus does not appear that sufficient time had elapsed between the two trials to cause one's memory of what the witnesses said to grow dim. Although not stated in his request for the transcript of the evidence, the defendant now contends that the primary use of the transcript of the testimony would have been for the purpose of impeaching the State's witness. Whether defendant's counsel could have actually impeached the State's witness with a transcript of what the court reporter said the evidence was is not shown. The defendant made no contention that the court reporter was not available and, in the absence of such a contention, we assume that he was available to the defendant, if desired, as a witness for the purpose of testifying to what his notes show the witnesses testified on the first trial. The only way, other than on cross-examination, the evidence in a reporter's transcript could be utilized to show conflicts in the testimony of the State's witnesses would be to have the reporter sworn and testify with respect thereto. There has been no showing here that defendant was restricted in his cross-examination of the State's witnesses. There is nothing on this record to reveal that the prosecution had a copy of the court reporter's transcript of the testimony. Both the defendant and the State had the right to use the court reporter's testimony if there was a conflict in the testimony of the witnesses.

The circumstances of this case do not reveal such a need for the transcript of the evidence that the failure of the court to require that

defendant be supplied with a copy of the reporter's transcript of the evidence, at public expense, was a deprivation of a basic essential of his defense.

[2] Defendant contends that his constitutional rights to counsel and due process of law were violated by the refusal of the trial court to suppress all identification evidence. This contention is without merit.

Defendant cites the now familiar case of *United States v. Wade,* 388 U.S. 218, 18 L. ed. 2d 1149, 87 S. Ct. 1926 (1967), relating to a line-up. In the case before us there was no line-up.

After the robbery a police officer brought some pictures on two different occasions to the witness Tart to look at. Mr. Tart identified the defendant's picture on the latter of these occasions as being a picture of one of the three men who robbed him. Defendant's picture had not been included in the first group of pictures shown Tart. The defendant's picture was selected by Tart from a group of twenty-five or more photographs from Raleigh, Kinston and Richmond, Virginia, without any suggestions from anyone and without knowing his name. Tart testified he had seen the defendant for several minutes at the time of the robbery. Neither the officer nor the witness Tart knew the defendant prior thereto. There was no suggestion by the officer at any time to the witness Tart that the defendant or any one of the persons whose photographs were being shown was one of the persons taking part in the robbery. After the date of the robbery, the next time the witness Tart actually saw the defendant was when he, Tart, was attending court as a witness in response to a subpœna in this case. Mr. Tart stated that he arrived at court at ten o'clock and was sitting in the courtroom. The courtroom was full and there were from nine to fifteen people in the prisoner's box. The defendant was among this group, and no one had suggested to Mr. Tart that the defendant was in this group of people. The evidence is conflicting as to whether defendant's counsel was present in the courtroom when Tart first observed the defendant was in the courtroom. Later that day, after Tart had been "in the court room for some time," the police officer who had shown him the photographs came to him and asked him if he recognized any of the three persons who robbed him and he told the officer that he recognized the defendant.

We are of the opinion and so hold that this was not such a line-up identification process, or confrontation, in the absence of defendant's counsel, if counsel was indeed absent, as to deprive the de-

fendant in any way of his constitutional right to a fair trial. See *State v. Hunsucker,* 3 N.C. App. 281, 164 S.E. 2d 507 (1968).

[3] Defendant asserts that the "photographic confrontation was a critical stage of the prosecution at which the defendant was entitled to the representation of counsel," and cites in support thereof the case of *Simmons v. United States,* 390 U.S. 377, 19 L. ed. 2d 1247, 88 S. Ct. 967 (1968). The *Simmons* case does not support this contention. In *Simmons* the defendant did *not* contend that he was entitled to the presence of counsel at the time the pictures were shown to the witnesses.

In *Simmons* the court said:

> "Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eye-witnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in *Stovall v. Denno,* 388 U.S. 293, 301-302, 18 L. ed. 2d 1199, 1206, 87 S Ct 1967, and with decisions of other courts on the question of identification by photograph."

In the case before us, at the time the pictures were shown to Tart, the defendant's name was not known to the officer or Tart. In the "totality of the circumstances" of this case, to hold that defendant was entitled to the representation of counsel at the time the photographs were exhibited to Tart would be as unreasonable in many respects as a holding that an indigent defendant was entitled to the presence of a court appointed lawyer at the time and place the crime was committed. When this case is considered on its own facts under the applicable rules, we are of the opinion and so hold that the photographic identification was not the result of any sug-

gestion and certainly was not so "impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification."

[4] The defendant also contends that the court committed error and expressed an opinion when the following occurred in the questioning of the witness Tart:

"COURT: Did you say that some diamonds were taken out of the safe?

A. Yes, sir, and also out of the showcase, yes, sir.

COURT: What part did the defendant have to do with, you say there was some other man that had a gun in your back, what was the defendant doing while he was holding the gun in your back?

A. He was with the other, the third man emptying the window."

When these questions were asked by the judge, the witness Tart had already stated more than once, that the defendant was one of the three persons who robbed him. The questions asked by the judge were within the context of the testimony of the witness, of a clarifying nature, and we do not think could have reasonably been interpreted as an expression of opinion. It was not error under the circumstances disclosed by this record for the trial judge to ask these questions. *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24 (1968).

[5] Defendant offered the witness Mrs. Mable Long, who testified on direct examination that she was one of the two employees of Bremson Diamond Company who were tied up by the three persons who committed the robbery. She did not identify any one of the robbers by the photographs shown to her and testified that she could not positively identify the defendant as being one of them. On cross-examination immediately following this testimony, the solicitor asked her what was her best opinion about it. Objection was sustained. Later the solicitor asked the witness if, based upon her observation of the people who committed the robbery, she had an opinion that the defendant was one of the people involved. The witness answered by saying that she could not answer positively but the defendant looked very much like one of them.

In Stansbury, N.C. Evidence 2d, § 129, it is said: "A lay witness may give his opinion as to the identity of a person whom he has seen, and his lack of positiveness affects only the weight, not the admissibility, of his testimony."

The defendant's assignment of error to the admission of the

opinion of the defendant's witness Long, on cross-examination by the solicitor, is overruled.

Defendant has other assignments of error and contentions which we do not think merit discussion.

We are of the opinion that the defendant has had a fair trial free from prejudicial error.

No error.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. BOYD STRICKLAND

No. 6921SC310

(Filed 23 July 1969)

1. Criminal Law § 43— photographs and motion pictures of misdemeanants — G.S. 114-19

G.S. 114-19 does not prohibit the taking and use in evidence by the State of photographs or motion pictures of a defendant charged with a misdemeanor.

2. Constitutional Law § 33; Criminal Law §§ 43, 64; Automobiles § 126— self-incrimination — motion pictures of defendant

In a prosecution for operating a motor vehicle upon the public highways while under the influence of intoxicating liquor, defendant's constitutional right against self-incrimination is not violated by the admission of photographs or motion pictures of defendant for the restricted purpose of illustrating competent and relevant testimony of a police officer concerning his observation of defendant during the time he was being photographed.

3. Constitutional Law § 33; Criminal Law § 43— self-incrimination — sound motion pictures of defendant

Talking motion pictures of an accused in a criminal action are not *per se* testimonial in nature, and where they are properly used to illustrate competent and relevant testimony of a witness, their use does not violate an accused's privilege against self-incrimination.

4. Automobiles § 126; Criminal Law §§ 43, 64— intoxication of defendant — sound motion pictures for illustrative purposes

Testimony describing an accused's actions as observed by the witness is competent upon the question of the extent of accused's intoxication, and sound motion pictures may be used for the limited purpose of illustrating the testimony of the witness, but if the motion pictures contain additional

evidence going beyond the testimony of the witness, the State is not entitled to introduce this new evidence under a claim of illustrating the testimony of a witness.

5. Criminal Law § 43— sound motion pictures for illustrative purposes — slight variations

If sound motion pictures are generally illustrative of the witness' testimony, slight variations between the sound motion pictures and the testimony will not render the pictures inadmissible, such variations affecting only the credibility of the evidence, which is for the jury.

6. Criminal Law §§ 43, 95— objection to motion pictures competent in part — duty to point out objectionable portion

Where portions of a sound motion picture are competent to illustrate the testimony of a witness and other parts are incompetent for this purpose, it is the duty of the objecting party to point out to the court the objectionable portions, and objection to the motion picture *en masse* will not ordinarily be sustained if any part thereof is competent.

7. Criminal Law §§ 43, 95; Automobiles § 126— general objection to motion picture — failure to point out objectionable portions

In this prosecution for operating a motor vehicle on the public highways while under the influence of intoxicating liquor, the trial court properly overruled defendant's general objection to the admission of sound motion pictures for the purpose of illustrating the testimony of a police officer as to defendant's intoxicated condition, where defendant failed to point out to the court any portions of the motion pictures to which he objected and they were generally illustrative of the description of defendant given by the officer.

8. Constitutional Law § 32; Criminal Law §§ 43, 66— sound motion pictures for illustrative purposes — U. S. v. Wade

Decision of *United States v. Wade*, 388 U.S. 218, relating to police lineup procedures, has no application to the admission of sound motion pictures for the purpose of illustrating the testimony of a police officer as to defendant's intoxicated condition where there is no question of identification of the accused in the motion pictures.

APPEAL by defendant from *Seay, J.*, 3 March 1969 Session, FORSYTH Superior Court.

Defendant was charged with the offense of operating a motor vehicle upon the public highways while under the influence of intoxicating liquor. From a verdict of guilty and from judgment entered thereon, defendant appealed.

Robert Morgan, Attorney General, by Roy A. Giles, Jr., Real Property Attorney, for the State.

White, Crumpler & Pfefferkorn, by William G. Pfefferkorn, for the defendant.

BROCK, J.

After defendant was placed under arrest, he was requested by the officer to perform certain tests to demonstrate whether there was appreciable impairment of his physical faculties. The officer stated that he gave defendant "the finger-to-nose test," and the officer testified that "he completely missed with both hands." The officer next placed several coins on the floor and requested the defendant to pick them up. The officer testified that "he fumbled with them." Thereafter the officer gave defendant "the balance, the walking test." The officer testified that defendant's speech was rambling and mumbled, and that when he was walking, he was stumbling. During the time the arresting officer was observing defendant, another officer took sound motion pictures of the defendant. After the arresting officer had completed his testimony and had stated his opinion that the defendant had consumed a sufficient quantity of alcoholic beverage to appreciably impair his mental and physical faculties, these sound motion pictures were projected onto a screen for viewing by the jury. The use of these sound motion pictures was over defendant's objection and constitutes his sole perfected assignment of error.

[1] Defendant contends that a motion picture is only a series of single pictures and should be treated as a photograph; and, therefore, he contends that the second sentence of G.S. 114-19 prohibits the use of photographs of persons accused of a misdemeanor, as was defendant in this case. G.S. 114-19 reads as follows:

> "Taking fingerprints and photographs of suspects and convicts; criminal statistics. — Every chief of police and sheriff in the State of North Carolina is hereby authorized to take, or cause to be taken, the fingerprints and photographs of any person charged with the commission of a felony and of any person who has been committed to jail or prison upon conviction of a crime. No officer shall take the photograph of a person arrested and charged with a misdemeanor, unless such person is a fugitive from justice or unless such person shall, at the time of arrest, have in his possession property or goods reasonably believed by such officer to have been stolen, or unless the officer has reasonable grounds to believe that such person is wanted by the Federal Bureau of Investigation, the State Bureau of Investigation or some other law enforcement officer or agent.
>
> "Any fingerprints or photographs taken pursuant to this section may be forwarded by the chief of police or sheriff to the Director of the State Bureau of Investigation.
>
> "It shall be the duty of the State Bureau of Investigation to

receive and collect police information, to assist in locating, identifying, and keeping records of criminals in this State, and from other states, and to compare, classify, compile, publish, make available and disseminate any and all such information to the sheriffs, constables, police authorities, courts or any other officials of the State requiring such criminal identification, crime statistics and other information respecting crimes local and national, and to conduct surveys and studies for the purpose of determining so far as is possible the source of any criminal conspiracy, crime wave, movement or cooperative action on the part of the criminals, reporting such conditions, and to cooperate with all officials in detecting and preventing."

In *State v. Chapman*, 4 N.C. App. 438, 166 S.E. 2d 873, this Court considered the statute now relied on by defendant. In *Chapman* we said:

"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."

It is clear that the Legislature did not consider it advisable to have photographs taken and filed of every person accused of committing a misdemeanor. The volume of such photographs would overtax the office of the State Bureau of Investigation, and a file of them would be of little or no value to law enforcement; that is the reason for the prohibitory wording of the statute. The Legislature did not intend to tie the hands of law enforcement officers in gathering evidence for prosecution of persons accused of a misdemeanor.

We reiterate what we said in *Chapman*. "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." We hold that G.S. 114-19 has no application to the taking and use in evidence by the State of photographs or motion pictures of a defendant charged with a misdemeanor. The use of motion pictures is permissible, provided that the rules of evidence applicable to the use of photographs are followed, and provided that no constitutional right of the defendant is infringed upon.

[2] Defendant next contends that the rule of evidence which prevails in this State is that photographs may not be admitted as sub-

stantive evidence; and he reasons therefrom that photographs or motion pictures of a defendant are of a testimonial or communicative nature and therefore should be excluded because they violate his constitutional privilege against self-incrimination. Defendant concedes that under the ruling of *Schmerber v. California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), and the ruling of *Branch v. State,* 269 N.C. 642, 153 S.E. 2d 343, an accused can be compelled to become the source of real or physical evidence without violating his privilege against self-incrimination; but, since photographs or motion pictures are testimonial or communicative, the constitution forbids their use. With this appraisal we do not agree.

The rule of evidence in this State does not change the character of the photographs from *physical* to *testimonial* merely because they cannot be offered as substantive evidence. The nature of the photographs or motion pictures would be *physical* or *testimonial* depending upon whether they record physical or testimonial conduct of the accused, and upon whether the testimony they are offered to illustrate concerns physical or testimonial conduct of the accused. Clearly the officer could properly testify concerning his observation of the accused during the time he was being photographed; he could describe accused's looks, manner of speaking, and manner of walking as those things might bear upon accused's intoxication at the time of observation. There is no violation of the constitutional privilege against self-incrimination in allowing the photographs or motion pictures of the accused for the restricted purpose of illustrating competent and relevant testimony of the officer, provided they do fairly illustrate his testimony.

[3] Defendant further urges that because the photographs in question were sound motion pictures and defendant's voice was recorded and played to the jury while the pictures were projected for their view, this makes them testimonial in nature and therefore violative of his privilege against self-incrimination. "The distinction which has emerged, often expressed in different ways, is that the privilege [against self-incrimination] is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Schmerber v. California, supra.*

In support of his argument that these motion pictures should not have been allowed in evidence, even to illustrate the testimony of the officer, defendant cites cases from the State of Oklahoma. At least two of these cases, *Ritchie v. State,* Okla. Cr., 415 P. 2d 176, and *Spencer v. State,* Okla. Cr., 404 P. 2d 46, are squarely in point,

and support defendant's position. Nevertheless, it appears that Oklahoma has taken an indefensible position which can find no support from other State or Federal Courts.

Although not squarely in point with the case *sub judice,* we think the better and prevailing view of allowing motion pictures is shown by the following cases where they were held properly admitted: Motion pictures of coordination tests of defendant charged with driving intoxicated, *Lanford v. People,* 159 Colo. 36, 409 P. 2d 829, and *Housewright v. State,* 154 Tex. Crim. 101, 225 S.W. 2d 417; motion pictures of the act where defendant was charged with oral copulation, *People v. Bowley,* 230 Cal. App. 2d 269, 40 Cal. Rptr. 859; sound motion pictures of defendant making a confession, *Commonwealth v. Roller,* 100 Pa. Super. 125; and *People v. Hayes,* 21 Cal. App. 2d 320, 71 P. 2d 321; motion pictures of defendant in company with public official whom he was charged with attempting to bribe, *Jones v. State,* 151 Tex. Crim. 519, 209 S.W. 2d 613; motion pictures of defendant testifying before Senate subcommittee in prosecution of defendant for perjury before the subcommittee, *United States v. Moran,* 194 F. 2d 623, cert. denied 343 U.S. 965, 72 S. Ct. 1058, 96 L. Ed. 1362; motion picture of defendant re-enacting the crime, *Grant v. State,* Fla., 171 So. 2d 361.

The admission of motion pictures in evidence in civil actions, when properly authenticated and relevant, is now well established. Annot., 62 A.L.R. 2d 686 (1958). For a discussion of the development of the use of motion pictures in evidence, see, The Celluloid Witness, 37 Univ. of Colo. Law Rev. 235 (1965).

[3-5] Talking motion pictures of an accused in a criminal action are not *per se* testimonial in nature, and, where they are properly used to illustrate competent and relevant testimony of a witness, their use does not violate accused's privilege against self-incrimination. A witness's testimony describing an accused's actions as observed by the witness is competent and relevant upon the question of the extent of his intoxication, and sound motion pictures may be used for the limited purpose of illustrating the testimony of the witness. If the illustrative evidence (sound motion pictures) contains additional evidence going beyond the testimony of the witness, the State is not entitled to introduce this "new" evidence under a claim of illustrating the testimony of a witness. However, if the sound motion pictures are generally illustrative of the witness's testimony, slight variations between the sound motion pictures and the testimony will not render the pictures inadmissible. Such variations affect only the credibility of the evidence, which is always for the jury. See *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354.

[6] Where portions of sound motion pictures are competent as illustrating the testimony of a witness and other parts are incompetent for this purpose, it is the duty of the party objecting to the evidence to point out to the trial judge the objectionable portions. Objections to evidence *en masse* will not ordinarily be sustained if any part thereof is competent. See *State v. Brooks, supra.*

[7] In this case, counsel for the defendant made a general objection as follows: "Your Honor, I object to the movie, and I would like to be heard, if necessary, in the absence of the jury on it." The court took a recess, indicating that the argument on the objection would be heard in chambers. After the recess, the trial judge overruled the objection and instructed the jury that they were to consider the motion pictures, which were going to be shown, solely for the purpose of illustrating the testimony of the witness and they were not to be considered as substantive evidence, and thereafter the sound motion pictures were projected before the jury. Then there appears in the record the following: "Objection overruled and defendant in apt time excepts. EXCEPTION No. 1." It does not appear anywhere in the record that counsel pointed out to the trial court any particular portions of the sound motion pictures to which he objected. The motion pictures were generally illustrative of the description given by the officer of the defendant, and therefore the general objection was properly overruled.

[8] Defendant further argues that the sound motion pictures should be rejected on the authority of *United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). *Wade* was concerned with the conduct of a lineup for the purpose of having the accused identified as the participant in a crime. There is no question of identification of the accused in these motion pictures; he had already been identified and placed under arrest. The principles enunciated in *Wade* have no application here.

In the trial we find no prejudicial error.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

LETTIE W. HUGHES v. KENDALL GENE LUNDSTRUM

— AND —

TONY JAMES HUGHES, BY HIS NEXT FRIEND, LETTIE W. HUGHES v. KENDALL GENE LUNDSTRUM

No. 695SC333

(Filed 23 July 1969)

1. Trial § 15— objection to evidence — voir dire hearing

Upon suggestion of opposing counsel that the testimony of plaintiff on direct examination was incompetent in that on a previous trial plaintiff had admitted on cross-examination that the matters being testified to were not within his knowledge, trial court properly interrupted the examination of plaintiff and conducted a *voir dire* hearing in the absence of the jury to determine the admissibility of the proffered evidence.

2. Appeal and Error § 49; Witnesses § 7— error in exclusion of evidence — witness' loss of memory

Any error in trial court's exclusion of testimony by plaintiff that his memory was not as good six months or a year after an automobile accident as it was two years later at the trial arising out of the accident, *is held* cured when plaintiff is allowed to testify (1) that he suffered loss of memory as to portions of the accident a few months after the accident occurred and (2) that when he was adversely examined by defendant a year after the accident he did not recall but two-thirds of the facts pertaining to the accident.

3. Automobiles § 45— automobile accident — relevancy of evidence — plaintiff's pre-accident conduct

In plaintiff passenger's action to recover for injuries received when the automobile driven by defendant ran across railroad tracks at an excessive rate of speed and went out of control, trial court properly admitted defendant's testimony that (1) prior to the accident plaintiff asked him for a ride in defendant's Corvette automobile in order "to see how my car turned on in comparison with his" and that (2) at the time plaintiff made his request plaintiff was driving his own automobile and was accelerating rapidly at the change of a stop light.

4. Automobiles § 92— injury to passenger — wilful or wanton negligence — sufficiency of evidence

In plaintiff passenger's action to recover for injuries received when the automobile driven by defendant ran across railroad tracks at an excessive rate of speed and went out of control, trial court properly refused to submit to the jury the issue of wilful and wanton negligence on the part of defendant, where plaintiff's evidence was to the effect that on the night of the accident plaintiff and defendant struck up an acquaintance at a drive-in, that they both had an interest in automobiles and drag racing, that after nearly five hours of drinking beer and discussing automobiles plaintiff requested defendant to take him on a ride in defendant's Corvette, that plaintiff knew the road on which they were traveling narrowed from a three-lane highway to a two-lane highway at a point where the road crossed the railroad tracks, and that although plaintiff knew de-

fendant was unfamiliar with these road conditions he did not warn defendant but instead urged him "to turn it on."

APPEAL by plaintiffs from *Peel, J.*, 16 February 1969, Civil Session, NEW HANOVER County Superior Court.

Lettie W. Hughes instituted a civil action to recover for the loss of earnings of her son, Tony James Hughes (Tony), during his minority and for the medical expenses incurred by her for the treatment of personal injuries sustained by him in an automobile accident. Tony instituted a civil action by his next friend to recover damages for the personal injuries. The two cases were consolidated for purposes of trial.

In his amended complaint, Tony alleged that Kendall Gene Lundstrum (defendant) was driving his 1961 Chevrolet Corvette automobile (Corvette) in such a manner as to constitute "wilful and wanton negligence, purposely and deliberately in violation of the motor vehicle laws of North Carolina, and with the deliberate purpose not to discharge the duty necessary to the safety of his passengers, and with a wicked purpose to endanger his passengers, needlessly and with a reckless indifference to the rights of his passengers."

In his amended answer, the defendant denied any negligence and pleaded contributory negligence on the part of Tony "in that he knowingly begged, pleaded and cajoled with the defendant to show [him] how fast the defendant's car would go, even though [he] knew at the time he was urging the defendant to go faster that the road decreased from three lanes to two lanes and entered a relatively narrow bridge at the end of a curve and [he] further knew that . . . defendant was not familiar with the road at the point at which the collision occurred."

The evidence revealed that, about 6:30 p.m. on 7 May 1967, Tony and a male companion, Daryl Howard (Daryl), went to the Chic Chic Drive-In Grill in the City of Wilmington, New Hanover County; they saw an automobile in the parking lot with two girls in the front seat, and, since they knew the girls, they got into the rear seat; while sitting in this automobile, they observed the Corvette, which was parked next to them. The Corvette was occupied by the defendant and a companion, Earl Bucko (Bucko), both of whom were members of the United States Marine Corps stationed at Camp Lejeune, North Carolina. Although Tony did not know either occupant, he got out of the girls' automobile and went over to the Corvette. He immediately told the defendant how much he liked

his automobile and thus began an extended conversation with regard to cars. It developed that both Tony and the defendant were interested in automobiles and drag racing. The defendant and Bucko left the Corvette and joined Tony and Daryl, and the four proceeded in Tony's automobile to another drive-in grill some five miles away. They spent nearly five hours drinking beer at this second grill and talking about automobiles. They discussed engines, bodies, makes, models, speed, the respective speeds of their vehicles, drag racing and racing cars. Tony testified:

"I talked about speed, about watching people race on drag strips and things of that sort."

"I told him that I had raced my car and worked on it, fixed different things that had torn up about it, and things like that."

Tony knew that the Corvette had four forward gears and that it was designed for speed, greater pickup and more rapid acceleration, which are important factors in drag racing. Since he had never ridden in a Corvette automobile and since he was anxious to do so, Tony requested the defendant to take him for a ride. The four thereupon returned to the place where the Corvette had been left. While Bucko remained in Tony's automobile, the defendant took Tony and Daryl for a demonstration drive. The Corvette's two seats were of the bucket type. Tony was in the passenger's seat and the defendant was in the driver's seat. Daryl was seated between them on the console.

At this time, Tony knew that the defendant was from the State of Michigan; he was in North Carolina with the Marine Corps; and he was not generally familiar with the area around Wilmington.

The defendant drove in a northerly direction for about four miles. He then turned the Corvette around and started back in the direction of Wilmington on U. S. Highway No. 117. The road on which they were traveling had three lanes and it was approximately 33 feet in width. As a vehicle proceeded in a southerly direction and when it was approximately 100 yards from the bridge crossing Smith Creek where the accident occurred, the road went across some railroad tracks at grade. The road then decreased in width from 33 feet at the grade crossing to 27 feet at the bridge entrance. The bridge was 27 feet wide. There was a curve between the grade crossing and the bridge.

Tony was familiar with the road, grade crossing, curve and bridge. However, he did not advise the defendant about this curve, the railroad tracks or the decreased width because the defendant

had driven over the road just shortly before when they were going out of town, and Tony assumed that he remembered it.

Tony testified that the defendant was driving at a normal rate of speed until they approached the railroad tracks at which point he accelerated to approximately 80 miles per hour. Tony based this estimation upon seeing the lines in the road rushing by. When the automobile hit the railroad tracks, the defendant lost control and the vehicle started "fishtailing, the rear end started trying to catch up with the front." The vehicle struck the bridge on the northeast corner. Tony, who remembered nothing about striking the bridge, was thrown out of the Corvette, thereby sustaining personal injuries.

The trial judge submitted issues of negligence, contributory negligence and damages to the jury. The issues of negligence and contributory negligence were answered in the affirmative. A judgment was entered in each case that the plaintiff have and recover nothing of the defendant. Both plaintiffs thereupon excepted and appealed to this Court.

James, James & Crossley by John F. Crossley and J. C. Wessell, Jr., for plaintiff appellants.

W. G. Smith for defendant appellee.

CAMPBELL, J.

[1] The first assignment of error was to the action of the trial judge in interrupting the direct examination of the plaintiff in order to permit defense counsel to conduct a *voir dire* examination in the absence of the jury. At the time plaintiff was in the process of describing to the jury what occurred immediately prior to the automobile striking the bridge. The defense counsel interrupted and suggested to the judge that on a previous trial, the plaintiff had testified pertaining to the accident and then on cross-examination had stated that he did not know those things of his own knowledge and the testimony had been stricken. The Court suggested that the *voir dire* examination be conducted in order to eliminate any incompetent testimony by the plaintiff.

In this, there was no error, for the trial judge, in the interest of a fair and impartial trial, must frequently conduct *voir dire* examinations in order to eliminate incompetent and prejudicial testimony before the jury which might otherwise necessitate a mistrial.

[2] The second assignment of error was to the refusal of the trial court to permit the plaintiff to testify that his memory was not as good six months or a year after the accident as it was at the time of the trial. Any error in this regard was cured, however, by the fact that the court did permit the plaintiff to testify that when he was adversely examined in July 1968 by the defendant, he did not recall but about two-thirds of the facts pertaining to the accident. He was permitted then to testify that he was able to recall more now than he was at the time "because my memory came back to me". The plaintiff also testified, "Well when you have a loss of memory, well my loss of memory, after the accident a few months after the accident I could remember portions of it but not all of it and then as I familiarized myself with the area where the accident happened and thinking about it constantly, it comes back to me like pieces to a puzzle or something." Plaintiff also testified as to the length of time that he remained unconscious and his various head injuries.

The evidence which was thus admitted, eliminated any prejudicial effect of the evidence which the plaintiff was not permitted to testify. There is no merit in this assignment of error.

[3] The third assignment of error by the plaintiff was to the effect that the trial court permitted the introduction of evidence as to the manner in which the plaintiff drove his automobile during the early part of the evening just prior to the accident.

In this regard, the plaintiff was asked on cross-examination whether he tried to induce drivers of other vehicles to race with him when he was driving the defendant across the City of Wilmington in the plaintiff's automobile in order to show the defendant how his automobile operated and to compare its speed with the speed of the Corvette. The defendant denied that he had endeavored to get others to race with him. He did admit, however, that he talked about the speed of his automobile when he was racing it. He denied, however, doing anything to demonstrate its speed to the defendant. The defendant testified over objection that the plaintiff requested him to take the plaintiff for a ride in the Corvette, and that the plaintiff "said he would like to see how my car turned on in comparison with his". The defendant also testified that when this conversation took place, the plaintiff was driving the plaintiff's automobile, and that he would drive up to a stop light and then would accelerate fast when the light changed.

All of this evidence was relevant and material to show the background of what had been going on between the plaintiff and the

defendant with regard to testing and demonstrating automobiles and their respective speeds and ability to accelerate shortly before the accident.

There is no merit in this assignment of error.

The fourth assignment of error was to the effect that the defendant was permitted to cross-examine his own witness.

This assignment of error is directed to the fact that sometime prior to the trial the defendant had taken the deposition of Earl Bucko, a witness for the defendant whose testimony the defendant desired to preserve in the event the witness could not be present for the trial. This witness was the defendant's companion at the time the defendant became acquainted with the plaintiff. The witness Bucko was present at the trial and testified on behalf of the defendant.

On cross-examination of this witness, plaintiff questioned him about the deposition and some of the testimony contained in the deposition. On redirect examination, this witness was asked if he recalled some of the questions that defendant's attorney had asked him at the time of the deposition, and his answers thereto. The court restricted this testimony to corroboration of the witness Bucko in the event that the jury found that it did corroborate him. This testimony did not constitute a cross-examination of the witness Bucko, and it having been restricted to the purpose of corroboration, there was no error.

This assignment of error is without merit.

[4] The fifth assignment of error was to the refusal of the court to submit an issue of willful and wanton negligence on the part of the defendant. Such an issue was tendered in apt time by the plaintiff, and the court refused to submit same.

The evidence on behalf of the defendant was to the effect that the plaintiff asked him several times to take him for a ride in the Corvette automobile in order that the plaintiff would have an opportunity to see it and experience a ride in it as the plaintiff had never ridden in a Corvette. The defendant at first refused to do so, but finally acceded to the request of the plaintiff. He took the plaintiff out for a demonstration and was requested on this trip on at least two occasions "to turn it on", and by that it was meant to speed it up. When requested the last time to "turn it on", the defendant was then driving about 60 or 65 miles per hour. Pursuant to this request, the defendant stated, "I just kicked it" meaning "I stepped on the accelerator". At that time, he did not know how close he was to the bridge. In the language of the defendant:

"Well, it accelerated and I saw the bridge coming up and I felt a bump, I didn't know what it was, but the back end of the car started drifting.

. . .

Well, there is a curve there and the back end of the car started sliding to the right.

. . .

Well, I tried to correct it with the steering.

. . .

Before I knew it the road narrowed down to two lanes and I was in the outside lane and I didn't realize that the lane ended before the bridge, and to get on the bridge, I would have had to move one complete lane almost to the left and the car was drifting to [*sic*] badly to make that much of a correction.

. . .

I struck the bridge.

. . .

. . . everything went black, there was a lot of noise, I don't actually remember striking the bridge, the next thing I remember was sliding down the road on my back."

The defendant testified that he did not apply the brakes as that would accentuate the skidding and that he tried to get out of the skid by turning the front wheels in the direction of the skid, but that he did not have time to do so.

All of the evidence in this case taken in the light most favorable to the plaintiff reveals two young men very much interested in automobiles, particularly with regard to the speed of automobiles and the respective performance of automobiles with regard to rapid acceleration. They had discussed these matters for nearly five hours. The plaintiff was familiar with the area where the automobile was being driven; knew that the particular automobile was designed for high speed and rapid acceleration; knew that the driver was not familiar with the area and the road conditions. With this background and knowledge, plaintiff still urged the defendant driver to demonstrate the Corvette automobile. The defendant driver did do as requested. Did this constitute willful and wanton negligence?

In *Wagoner v. R. R.*, 238 N.C. 162, 77 S.E. 2d 701 we find:

" 'The term "wanton negligence" . . . always implies something more than a negligent act. This Court has said that the word "wanton" implies turpitude, and that the act is committed

> or omitted of willful, wicked purpose; that the term "willfully" implies that the act is done knowingly and of stubborn purpose, but not of malice . . . Judge Thompson says: "The true conception of willful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract or which is imposed on the person by operation of law. Willful or intentional negligence is something distinct from mere carelessness and inattention, however gross. We still have two kinds of negligence, the one consisting of carelessness and inattention whereby another is injured in his person or property, and the other consisting of a willful and intentional failure or neglect to perform a duty assumed by contract or imposed by operation of law for the promotion of the safety of the person or property of another." Thompson on Neg. (2d Ed.), Sec. 20, *et seq.' Bailey v. R. R.*, 149 N.C. 169, 62 S.E. 912.
>
> To constitute willful injury there must be actual knowledge, or that which the law deems to be the equivalent of actual knowledge, of the peril to be apprehended, coupled with a design, purpose, and intent to do wrong and inflict injury. A wanton act is one which is performed intentionally with a reckless indifference to injurious consequences probable to result therefrom. Ordinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act. Wanton and willful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results. *Everett v. Receivers*, 121 N.C. 519, 27 S.E. 991; *Ballew v. R. R.*, 186 N.C. 704, 120 S.E. 334; *Foster v. Hyman, supra; S. v. Stansell*, 203 N.C. 69, 164 S.E. 580; 38 Am. Jur., Negligence, Sec. 48.
>
> 'In strictly accurate use, the terms "willfulness" and "wantonness" express different ideas and are clearly distinguishable, the distinction resting chiefly in the nature and extent of intent involved. It has been said that "the difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not." ' 65 C.J.S., Negligence, p. 379."

It was not error under the facts of this case, for the trial court to refuse to submit the issue of willful and wanton negligence tendered by the plaintiff.

Plaintiff relies upon the case of *Pearce v. Barham,* 271 N.C. 285, 156 S.E. 2d 290 in support of the proposition that an issue of willful and wanton negligence should have been submitted to the jury. The *Pearce* case is clearly distinguishable on its facts from the case *sub judice.* The charge of the court to the jury in the instant case was not brought forward and no error was assigned to any portion of the charge.

We find from the record as a whole that the plaintiff received a fair and impartial trial, and the case was submitted to the jury upon the issues raised by the pleadings and the evidence and under a charge to which no error has been assigned. In the trial we find

No error.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. IKE PHILLIPS

No. 6916SC359

(Filed 23 July 1969)

1. Criminal Law § 169— appeal and error — exclusion of testimony

The exclusion of testimony cannot be held prejudicial when the record fails to show what the answer of the witness would have been had he been permitted to testify.

2. Criminal Law §§ 99, 170— comment by trial court — prejudice to defendant

Defendant was not prejudiced by trial court's comment, during discussion between defense counsel and the Solicitor as to the identity of a picture, that the witness had previously identified the picture as a photo of defendant's car.

3. Criminal Law § 162— objection sustained to witness' answer — failure to instruct jury to disregard answer

Where the trial court sustained defendant's objection to the answer of a witness, failure of the court to instruct the jury not to consider the witness' answer is not error absent a request for such instruction.

4. Assault and Battery § 15— nonsuit as to felonious assault — assault with deadly weapon submitted — instructions as to difference between the crimes

In this prosecution upon bill of indictment charging defendant with felonious assault wherein the court allowed defendant's motion for non-

suit of such charge and submitted the case to the jury upon the lesser charge of assault with a deadly weapon, it was not incumbent upon the trial judge to instruct the jury as to the difference between felonious assault and assault with a deadly weapon and that the felonious assault charge had been dismissed.

5. Criminal Law §§ 114, 170— instructions — expression of opinion by court

In this prosecution for kidnapping and assault with a deadly weapon, references in the court's instructions to "the importance of this case" and "a case as serious and important as this," when considered in context, *are held* not to constitute an expression of opinion on the evidence.

6. Criminal Law § 113— instructions on defense of alibi

In prosecution for kidnapping and assault with a deadly weapon, the evidence of defendant having raised the defense of alibi, charge of the trial court *is held* to have properly instructed the jury on the law of alibi and to have applied the law to defendant's evidence with sufficient particularity for the jury to have obtained a clear understanding of its significance.

APPEAL by defendant from *Ragsdale, S.J.*, February 1969 Regular Session, ROBESON County Superior Court.

Defendant was charged in proper bills of indictment, the first one charging him with a felonious assault of Billy Landis Meares on 5 January 1969, and the second bill of indictment charging him with the felony of kidnapping Billy Landis Meares on 5 January 1969.

The two bills of indictment were consolidated for the purpose of trial. The defendant entered a plea of not guilty to each charge. At the close of all of the evidence, the court sustained a motion to dismiss the charge of a felonious assault, and the case was submitted to the jury on the lesser assault charge, namely, an assault with a deadly weapon and the charge of kidnapping. The jury returned a verdict of guilty as to each offense. The cases were consolidated for judgment. The court entered a judgment in the consolidated cases that the defendant be imprisoned in the State's prison for a term of twenty (20) years.

From this judgment the defendant appealed to this court.

The evidence on behalf of the State tended to show that on the evening of 5 January 1969, Meares, a nineteen-year-old boy who lives in Fair Bluff, North Carolina, drove his automobile to Fairmont to the home of Betty Butler. Meares and Betty Butler then drove some 10 or 15 miles to a place known as "Theo's" located in South Carolina between Lake View and Dillon. They went there to pick up a girl friend of Betty Butler's. On arriving at Theo's Betty

Butler pointed out the defendant to Meares and likewise pointed out the defendant's automobile to Meares. Meares did not know the defendant. Betty Butler did know the defendant and previously had had dates with the defendant. Meares on this occasion had with him a one-half pint bottle of whiskey which was not full. While at Theo's, Meares, Betty Butler and a girl friend of Betty Butler's drank some of the whiskey from the bottle. Meares and Betty Butler remained at Theo's for some two or three hours and then returned to the home of Betty Butler in Fairmont. They left Theo's about 10:30 p.m. and arrived at Betty Butler's home in Fairmont about 10:50 p.m. They sat outside Betty Butler's home in Fairmont in Meares' automobile for some 10 or 15 minutes, and during this time, the automobile of the defendant drove by about four times.

Meares left Betty Butler's home to return to his own home in Fair Bluff. Meares was going on Highway No. 41. When he reached Ashpole Swamp on that highway, an automobile which had been following him pulled up alongside his car and forced Meares' automobile off the road by coming in contact with the left front fender of Meares' car. The other automobile was the defendant's automobile. The defendant and two other boys got out of the defendant's automobile and came back to Meares' car. Meares got out of his automobile when he saw the defendant coming towards him. The defendant had a pistol and threatened to kill Meares. The defendant and his two companions then proceeded to whip Meares. They took turnabouts striking Meares while two would hold him. They not only whipped Meares with their hands and fists, but they kicked him with their feet, and they struck him with the butt of the pistol. During the beating the defendant fired the pistol several times into the ground in front of Meares and at the time threatening to kill him. In the words of Meares:

> ". . . This went on for at least ten minutes. As it was going on Ike Phillips kept saying 'You went to the wrong place tonight, boy.' And he said 'You are not coming back to Fairmont, are you?' And he said 'Are you dating Betty anymore?' And said that they hated the Fair Bluff boys, and was going to do them the same way they did me if they could catch them."

After the beating the defendant ordered Meares at pistol point into the defendant's automobile, and the companions of the defendant likewise got into the automobile. They then drove to Fair Bluff which is in Columbus County and took him to the home of Archie Bullard. The defendant then ordered Meares out of the car

and to go into the Bullard home and show the Bullard boy what had been done to him and to tell the Bullard boy that he was going to get the same thing.

As a result of the beating in the words of Meares:

> "I went to the hospital. My face was bruised all over; both eyes hemorrhaged; and bone under my eye broken. My nose was broken, and my right ear was torn so badly that it had to be sewn up — two stitches I believe."

The defendant did not testify in his own behalf but offered evidence tending to show that while he had been at Theo's Place on Sunday night, 5 January 1969, he left there a few minutes before 11:00 o'clock and went to Dillon, South Carolina, where he remained until about midnight and then went to Rowland where he stayed until about 1:30. The defendant took his friend and witness, J. L. Williams, home about 1:30, and that was the last time that evening that his friend and witness, J. L. Williams, saw him. The witnesses for the defendant accounted for the defendant's presence from 8:30 p.m. until about 1:30 a.m., and at no time during this interval was the defendant in Fairmont or on Highway 41 between Fairmont and Fair Bluff.

Attorney General Robert Morgan by Assistant Attorney General Bernard A. Harrell for the State.

Musselwhite & Musselwhite by W. E. Musselwhite and J. H. Barrington, Jr., for defendant appellant.

CAMPBELL, J.

The defendant took some sixteen exceptions during the course of the trial and assigned each one in his assignments of error. Many of these exceptions, however, were expressly abandoned in the brief.

[1] The first exception is to the sustaining of an objection by the State to a question asked the witness Betty Butler on cross-examination. The record does not show what the answer to the question would have been, and therefore, we cannot tell whether the defendant was prejudiced.

This exception is without merit.

[2] The second exception assigned by the defendant as error was to the effect that the court, during a discussion between defense counsel and the Solicitor on behalf of the State with regard to the identity of a picture stated:

"Witness has previously identified this car as photo of Ike Phillips' car."

The record does not disclose that this comment by the trial judge was in any way prejudicial to the defendant. The record further reveals that the defendant made no objection to this comment and took no exception. At any rate, the comment by the court was in no way prejudicial to the defendant and there is no merit in this exception.

[3] The third exception brought forward by the defendant is the following:

"Q. Mr. Oliver, is the automobile shown in this picture the same automobile you have seen Ike Phillips driving?

A. One just like it, if it is not it.

OBJECTION & MOTION TO STRIKE BY THE DEFENDANT.

. . .

OBJECTION SUSTAINED."

The defendant now assigns as error the failure of the court specifically to instruct the jury in connection with the motion to strike.

After the objection had been sustained by the court, defense counsel did not request the court to instruct the jury not to consider the answer. Under the facts here presented, it was incumbent upon defense counsel to make the specific request to the court. There is no merit in this exception anyway because the question and answer were not prejudicial to the defendant so as to justify a new trial.

[4] The fourth group of exceptions made by the defendant is to the effect that the trial judge failed to comply with G.S. 1-180, in that when the motion for nonsuit of the charge of felonious assault was sustained and the case submitted to the jury only on the charges of an assault with a deadly weapon, the misdemeanor charge, and on the charge of kidnapping, it was incumbent on the trial judge to go further and explain to the jury that the felonious assault charge had been dismissed. In the brief for the defendant it is stated:

"It is true that the court later correctly charged the jury as to the elements necessary to make out a case of assault with a deadly weapon . . . but at no point was the jury instructed as to the difference between the crimes of felonious assault and assault with a deadly weapon, nor that the felonious assault charge had been dismissed."

This is certainly a novel argument, but in law, there is no merit in it. The trial judge told the jury about the dismissal of other elements of the assault bill of indictment and that only the assault with a deadly weapon remained. It was not incumbent upon the trial judge to charge with regard to the law on something that was no longer before the jury. The statute only requires the court "to state only such evidence as is necessary to explain and apply the law to the facts in the case". *State v. Tyson,* 242 N.C. 574, 89 S.E. 2d 138. The court did this.

There is no merit in this exception.

[5] The fifth group of exceptions is that the trial judge expressed an opinion when charging the jury. These exceptions are directed to the following two excerpts from the charge:

1. "I know by now, having sat here all the week, you must know what I mean when I say to you, in such a case defendant, who does so, is the beneficiary of a presumption of law and that presumption is one of innocence. Nonetheless, in spite of the fact that you may now be familiar with the importance of this case, causes me to instruct you about it again and specifically."

2. "I take it that you are bound to know and especially in a case as serious and as important as this, that it is not a question of sympathy for anybody and not a question of prejudice against anybody, and you must not permit any consideration of that kind to enter your minds or influence your thinking or judgment."

The first quotation above occurred in the beginning of the charge and followed this sentence:

> "Now, to these charges, members of the jury, the defendant has come into court and through his counsel, has entered a plea of not guilty."

Immediately following the first quotation above to which exception has been taken, the trial judge went on to explain to the jury what is meant by "presumption of innocence". When taken in context, there is no expression of opinion by the trial judge of a prejudicial nature to the defendant.

The second excerpt from the charge to which exception has been taken as expressing an opinion, followed immediately after an instruction to the jury as follows:

"Members of the jury, in passing on the testimony of any wit-

ness for either side, you ought to take into consideration the intelligence which is manifested by these witnesses, while on the witness stand; the fairness or lack of fairness they demonstrated, if they do; the reasonableness or unreasonableness of their testimony, if any; their interest in the result of the action, or bias or prejudice, if any; their means of knowing the facts of which they have testified; and you should give in the final analysis to each witness such weight as to you he seems to be entitled. You may believe all of what any witness says, or disbelieve all that a witness has said; you may believe a part of what he says and disbelieve a part; or you may disbelieve altogether."

When taken in context, the portion of the charge to which exception is taken does not express any opinion of the trial judge prejudicial to the defendant.

There is no merit in this exception.

[6] The sixth group of exceptions assigned as error by the defendant is that the trial court in the charge to the jury failed adequately to set forth and explain to the jury the defense of alibi relied upon by the defendant. The portion of the charge excepted to is as follows:

"Now, members of the jury, probably all of your lives you have heard use of the word, 'alibi.' The word, alibi, is a perfectly legitimate, proper and correct English word, which has a legal meaning. The word, alibi, means elsewhere. It is not, properly speaking, a defense within any accurate meaning of the word, defense, but it is a mere fact that may be used to call and question the identity of the person who is charged or the entire basis of the prosecution. The burden of proof, in proving an alibi, does not rest upon the defendant. The burden of proof never rests upon the defendant for any purpose in a criminal trial. And the burden of proof does not rest upon him to show his innocence or his whereabouts or disprove anything necessary to establish the crime with which he is charged.

A defendant's presence at or participation in the crime or crimes charges, [*sic*] are affirmative material facts and the State must show beyond a reasonable doubt those facts to sustain a conviction. For the defendant to say he was not there is not an affirmative proposition. It is a denial of the existence of a material fact in the case and, therefore, the defendant's evidence of an alibi is to be considered by you like any other evidence, wherein the defendant tries to refute or disprove the evidence

of the State, although the burden for doing that is not upon him, and if upon consideration of all of the evidence in the case, including the defendant's evidence in respect to an alibi, there arises in your minds a reasonable doubt as to his guilt, he should be acquitted."

The court fairly summarized the evidence offered by the defendant and fully and adequately set forth the contentions of the defendant all tending to establish that he was not present either in Fairmont or on Highway 41 between Fairmont and Fair Bluff at the time the assault and kidnapping occurred. The various witnesses offered by the defendant accounted for all of his time and his presence elsewhere during the period of the assault and the kidnapping.

The above charge with regard to alibi was adequate and complete under the facts of this case and nothing prejudicial to the defendant is shown. *State v. Lovedahl,* 2 N.C. App. 513, 163 S.E. 2d 413, (certiorari denied, 274 N.C. 518.)

The record in this case discloses that the defendant has been afforded a fair and an impartial trial free of error of law and that is all to which he is entitled. The jury found the facts to be contrary to those contended by the defendant.

No error.

BROCK and MORRIS, JJ., concur.

STATE HIGHWAY COMMISSION v. LULIA E. HAMILTON; DONALD E. HAMILTON AND WIFE, BARBARA R. HAMILTON; ANDRA H. POND AND HUSBAND, EUGENE POND

No. 6914SC346

(Filed 23 July 1969)

1. Evidence § 48— expert testimony — remarks of trial court to jury

Remarks of trial court to the jury relating to the nature and purpose of expert testimony, which remarks were made prior to testimony of an expert in the field of real estate appraisal, *are held* without error.

2. Evidence § 49; Eminent Domain § 6— expert evidence of value — hearsay

In highway condemnation proceeding, trial court did not err in refusing to permit real estate expert to testify as to what third party had told him concerning the sale price of a particular piece of real estate.

3. Eminent Domain § 5— determination of compensation — evidence — change in zoning ordinance

In highway condemnation proceeding, trial court properly allowed the introduction of evidence which tended to show the reasonable probability of a change in a zoning ordinance from residential to industrial use, and properly denied the introduction of evidence which showed changes in the ordinance subsequent to the date of taking.

4. Trial § 10; Appeal and Error § 51— remarks of trial court — counsel

Trial court's remarks, which followed an exchange between counsel and which contained the phrase "will-o'-the-wisp," *held* not prejudicial to appellants, especially where the remarks were inaudible to the court reporter and, presumably, to the jury.

5. Eminent Domain § 6— evidence of value — necessity for voir dire

In highway condemnation proceeding, failure of trial court to conduct *voir dire* examination of expert witnesses and thereafter make specific rulings pertaining to comparable values of other pieces of real estate was not error.

APPEAL by defendants from *Ragsdale, S.J.*, 6 January 1969 Civil Session, DURHAM County Superior Court.

This was a condemnation proceeding wherein Lulia E. Hamilton, Donald E. Hamilton and wife, Barbara R. Hamilton, Andra H. Pond and husband, Eugene Pond, (defendants) sought to recover damages for the taking by the State Highway Commission (plaintiff) of a portion of a tract of land owned by them in the City of Durham, Durham County. The portion in question was taken for highway purposes. The entire tract of land owned by the defendants was not taken.

The following issue was submitted to the jury:

"What sum, if any, are the defendants entitled to recover of the plaintiff, State Highway Commission, as just compensation for the taking of a portion of defendants' land for highway purposes?

ANSWER: Yes. $24,000."

The trial judge thereupon entered a judgment that the defendants recover $24,132.75, which is the total of the jury verdict plus interest. The defendants excepted and appealed to this Court. The facts and the questions presented for review are set out in the opinion.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, Trial Attorney J. Bruce Morton and Assistant Attorney General Andrew McDaniel for plaintiff appellee.

Blackwell M. Brogden for defendant appellants.

CAMPBELL, J.

The parties stipulated that the date of taking was 29 April 1968. Seven rental houses were located on the tract of land, four of which were taken by the plaintiff and three of which were left intact. The tract was bounded on the west by Plum Street, on the east by Bernice Street and on the south by Bowen Street. The former was an eighteen-foot wide gravel street, while the latter two were fifteen-foot wide gravel streets. The W. L. Robinson Tobacco Company was located on Plum Street across from the tract. On 29 April 1968 the property in question was zoned R-3 which was a residential classification.

The witnesses for the defendants testified that the highest and best use for the property was industrial, not residential. They introduced testimony to the effect that, at the time of taking, a change in the zoning ordinance was being considered and that the change would make the property available for industrial use rather than being restricted to residential use.

[1] The defendants' first assignment of error relates to "the handling of testimony of expert witnesses" in the trial. They offered the testimony of David H. Scanlon, a witness with many years of experience in the real estate business and in appraising property. After bringing out his qualifications, the defendants tendered him as an expert in the field of real estate appraisal. The trial judge then stated:

> "Without objection you are found by the Court to be an expert witness in the field of real estate appraisal. Members of the jury, let me explain what all of this means if I can. Ordinarily witnesses are not permitted to give their opinion about matters. Witnesses generally testify to facts, and the jury customarily finds facts, and the witness is not ordinarily allowed to give his opinion because it is said that invades the province of a jury, but in certain cases, particularly in cases where value is involved, certain persons upon the presentation of proper credentials may be found by the court to be persons who are qualified to express an opinion about it. The expression of the opinion is for the purpose of permitting the jury to have that opinion, and

that opinion is for the jury's consideration. The jury is not bound by the opinion, and you are not to be bound by anything which may be expressed or which may not be expressed in this case, but I wanted to explain to you just what went on in front of you. All right, you may proceed."

The defendants excepted and assigned this remark by the trial judge as an error in the handling of expert testimony. There is no merit in this exception.

[2] Another example of what the defendants are complaining of as error in "the handling of testimony of expert witnesses" is illustrated by the testimony of Howard Gamble, a witness for the defendants. He testified as to his experience in the real estate business over a period of nearly thirty years including experience in appraisal work. On cross-examination he expressed his opinion that a particular sale of real estate did not represent the fair market value. He then attempted to state that he had discussed the sale with another party and to relate what that party had told him. At this point an objection was entered as to what the other party had said and the trial court sustained the objection. The following then occurred:

"THE COURT: Sustained as to what someone else told you. You have heard of the old hearsay business. You can't say what anybody else has told you.

MR. BROGDEN: I think he might can. He is qualified as an expert, and an expert can testify. One of the exceptions to the hearsay rule — opinion evidence like character evidence — it is what others think — it is one of the exceptions — an opinion by experts is one of the exceptions to the hearsay rule.

THE COURT: He can give his opinion.

MR. MORTON: He has given his opinion.

THE COURT: But he can't tell what somebody else told him. That is hearsay.

MR. BROGDEN: Opinions are based on what he gained as an expert. . . ."

The error assigned pertains to the action of the trial judge in sustaining the objection to the witness testifying as to what another person had told him. There is no merit in this exception.

". . . It is probably still the law that statements *by a third person* may not be considered by the expert as a basis for his opinion, and that the opinion of one expert based upon that of

another is incompetent." Stansbury, N.C. Evidence 2d, § 136, p. 328.

We have reviewed the other exceptions included within this assignment of error and pertaining to "the handling of testimony of expert witnesses" by the trial judge, and we can find no merit in these exceptions. Since nothing would be gained by discussing these numerous exceptions one by one, we will refrain from doing so. Suffice it to say that the evidence of the expert real estate witnesses was handled in keeping with the views expressed in *Highway Commission v. Conrad,* 263 N.C. 394, 139 S.E. 2d 553.

This assignment of error is without merit.

[3] The defendants' second assignment of error is that the trial judge erred in excluding testimony to the effect that there was a reasonable probability of the property in question being rezoned from residential to industrial use. The defendants attempted to show that, subsequent to the date of taking, the governing authorities of the City of Durham had approved a change in the zoning law and had rezoned this property from residential to industrial use. The trial judge sustained objections to the introduction of evidence as to the actual changes which had occurred in the zoning ordinances subsequent to 29 April 1968. The defendants assigned this as error. The record shows, however, that the trial judge permitted the defendants to introduce evidence pertaining to all steps which had been taken by the governing authorities and the Planning and Zoning Commission pertaining to a change in the zoning of this property which had taken place prior to the actual date of taking. The only thing that the trial judge prohibited was testimony of changes which had occurred subsequent to this date of taking.

In instructing the jury, the trial judge discussed the contemplated zoning changes as follows:

> "Now, members of the jury, something has been said in this case about zoning ordinance. Our Supreme Court has said in a famous case that if the land taken is not presently available for a particular use by reason of a zoning ordinance, or other restriction imposed by law, but the evidence tends to show a reasonable probability, and that is another phrase of art, you have got to understand that, but if the evidence tends to show a reasonable probability of a change in the near future in the zoning ordinance, or other restrictions, then the effect of that probability upon the minds of purchasers generally may be taken into consideration in fixing the market value; however,

if the possible change in a zoning ordinance restricting use of the property condemned is purely speculative, such possibility is not to be considered in ascertaining market value in an eminent domain proceeding. The reasonable probability of a rezoning of the condemned property to permit the highest and best use may be considered in determining market value; but if you find it to be merely a possibility, or one of a speculative nature, you cannot consider it.

So, as I have said, members of the jury, the test is what is the fair market value of the property in the market, or what was the fair market value of the property in the market. The uses and capabilities must be so reasonably probable as to have an effect on the market value and purely imaginative or speculative value should not be considered by you."

We have reviewed the evidence pertaining to the change in the zoning ordinance, and we think the trial judge properly handled such evidence. The defendants were entitled to introduce and were permitted to introduce evidence which tended to show that there was a reasonable probability of a change in the zoning ordinance from residential to industrial use. The trial judge was correct in refusing to permit the defendants to introduce evidence as to what changes occurred subsequent to the date of taking. The question involved was the fair market value of the property on 29 April 1968. Therefore, evidence as to what had occurred subsequent to that date was not relevant or pertinent in fixing value as of such date of taking.

The reasonable probability of a zoning change was handled by the trial judge in conformity with the applicable principles of law contained in *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219.

This assignment of error is without merit.

[4] The defendants' third assignment of error pertains to "injudicious remarks about counsel for the defendants" made by the trial judge. It is directed to the following incident:

"MR. PAUL W. BROOKS, after being duly sworn, testified as follows:

(Mr. Brogden and Mr. Morton exchanged remarks which were audible but not intelligible to the Court Reporter.)

THE COURT: Mr. Brogden, do you think you can contain yourself?

MR. BROGDEN: Yes sir.

THE COURT: All right, sir, try hard to — will o the wisp — (hardly audible to Reporter). You may proceed, sir.

DIRECT EXAMINATION."

The defendants assert that this verbal exchange indicated that the trial judge was making remarks which reflected upon the defendants' attorney and which thereby tended to prejudice the jury against them. From the record we have sincere misgivings as to whether the jury even heard the exchange either between counsel or between the court and counsel. The record indicates that even the court reporter had difficulty in hearing the words which were uttered. Even if the jury heard the words, we do not see where anything prejudicial to the defendants occurred. The expression "will-o'-the-wisp" does not appear to have been directed by the court to Mr. Brogden, the defendants' attorney. The phrase "will-o'-the-wisp" is defined in Webster's Third New International Dictionary (1968) as "IGNIS FATUUS" and as "a delusive goal" (such as "followed the *will-o'-the-wisp* of universal disarmament — G. F. Eliot"). "Ignis fatuus" is defined as being "a light that sometimes appears in the night usu. over marshy ground and that is often attributable to the combustion of marsh gas — called also *jack-o'-lantern*" and is defined as "a deceptive or false goal: a misleading ideal".

At most the expression "will-o'-the-wisp" would not be applicable to a person, and if it should be so construed, it would certainly indicate something ephemeral. Anyone who has ever seen Mr. Brogden in person with his physical portions would readily know that he could in no way be referred to as ephemeral. We are of the opinion that this episode constituted "much ado about nothing" and was in no way prejudicial to the defendants.

This assignment of error is without merit.

[5] The defendants' fourth assignment of error is that the trial judge did not conduct a *voir dire* examination of the expert witnesses and thereafter make a specific ruling pertaining to comparable values of other pieces of real estate. The defendants assert that it was the obligation of the trial judge to conduct such a *voir dire* examination and thereafter to make a specific ruling. There is, however, no fixed requirement in this regard. In *Barnes v. Highway Commission, supra,* the Supreme Court stated:

"It is within the sound discretion of the trial judge to determine whether there is a sufficient similarity to render the evidence of the sale admissible. It is the better practice for the

judge to hear evidence in the absence of the jury as a basis for determining admissibility. . . ."

In the instant case there was no error in the admission and exclusion by the trial judge of evidence pertaining to sales of property which the expert witnesses referred to as forming the basis of their respective opinions as to value.

This assignment of error is without merit.

The defendants' last assignment of error is that the trial judge erred in his charge to the jury. We have reviewed these various assignments of error and we find no merit in any of them. When the charge is construed as a whole, we find that it correctly and impartially presented the case to the jury.

This assignment of error is without merit.

The trial presented a clear dispute as to the relative value of the entire property in its status before any portion thereof was taken for highway purposes as compared to the value of that portion which was left after the taking. The case was fairly and impartially tried in compliance with well-established principles of law, and we find

No error.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. GENE WAYNE GARRETT
AND
STATE OF NORTH CAROLINA v. CHARLES LEONARD BRANK
No. 6926SC316

(Filed 23 July 1969)

1. Criminal Law § 98— conduct of trial — witness taken into custody

The fact that the trial court ordered a State's witness to be taken into custody and charged with perjury does not constitute an expression of opinion to the prejudice of defendants in violation of G.S. 1-180 when the trial court's action took place out of the presence of the jury.

2. Criminal Law § 130— mistrial — juror reading newspaper headline

Defendants were not entitled to a mistrial on the ground that a newspaper article published on the second day of the trial contained an improper and prejudicial statement by the assistant solicitor, where trial

court's findings were to the effect that only one of the jurors had seen the article, that he had merely glanced at the headline, and that his verdict would in no way be affected by what he read.

3. Criminal Law § 97— recall of witness — arrest for perjury

Trial court did not abuse its discretion in allowing the State to recall its witness to give further testimony after the witness had been arrested on a bench warrant charging him with perjury, even though witness' testimony was more favorable to the State on recall than when he had initially testified.

4. Robbery § 4— armed robbery — nonsuit

Evidence of defendants' guilt of armed robbery was sufficient to withstand motions for nonsuit.

5. Criminal Law § 113— instructions — recapitulation of the evidence

Recapitulation of all the evidence is not demanded, and the requirements of the statute in this respect are met by presentation of the principal features of the evidence relied on respectively by the prosecution and defense.

6. Criminal Law § 113— instructions — compliance with G.S. 1-180

Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contentions of the parties, it complies with G.S. 1-180, and a party desiring further elaboration on a particular point, or of his contentions, or a charge on a subordinate feature of the case, must aptly tender request for special instructions.

7. Criminal Law § 113— instructions — recapitulation of testimony

Trial court did not err in restricting its recapitulation of the evidence offered by a State's witness to the testimony given by the witness on the second day of the trial after the witness had been arrested and charged with perjury for testimony given on the first day.

APPEAL by defendants from *Thornburg, S.J.*, at the 3 February 1969 Schedule "D" Criminal Session of MECKLENBURG Superior Court.

By three indictments proper in form, defendants were jointly charged with (1) armed robbery of William McMillan, (2) armed robbery of A. C. Warren, and (3) armed robbery of James Lewis. The indictments alleged that the offenses occurred on 24 July 1968 and that the value of the property taken from McMillan was $1675, from Warren $225, and from Lewis $285. There were additional indictments against the defendants but they were dismissed for lack of evidence. The cases were tried together and the jury found both defendants guilty in all three cases. From judgments imposing prison sentence of not less than 25 years nor more than 30 years on each defendant, they appealed.

Attorney General Robert Morgan and Staff Attorney Sidney S. Eagles, Jr., for the State.

James H. Morton for defendant appellant Garrett and Arthur Goodman, Jr., for defendant appellant Brank.

BRITT, J.

[1] The first assignment of error brought forward and discussed in defendants' brief relates to an order by the trial judge, entered on the first day of the trial, that a State's witness, Jimmy Rogers, be taken into custody and a bench warrant issued charging him with perjury. Defendants contend that the action of the judge constituted an opinion by the judge that the witness was guilty of perjury, to the prejudice of defendants in violation of G.S. 1-180.

The record reveals that after the witness Rogers had testified and left the witness stand the following occurred:

"COURT: Mr. Liles, may I see your file? Sheriff, take the Jury to the Jury Room. Members of the Jury, if you will step out for a few minutes, please, we will send for you a little later. Sheriff, after you take the Jury to the Jury Room, come back to the Courtroom.

JURY RETURNED TO JURY ROOM.

COURT: Sheriff, take this witness into custody and I want a bench warrant issued against this witness for signature this afternoon for perjury.

JURY RETURNED TO COURTROOM."

In support of their contention, defendants cite *State v. Barnes*, 4 N.C. App. 446, 167 S.E. 2d 76, where, after discussing several Supreme Court decisions on the question, Parker, J., on behalf of this Court, said:

"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."

Although we adhere to and reaffirm the quoted statement, we are unable to perceive how the circumstances in the instant case led "the jury to the conclusion that the judge was of the opinion that the witness was guilty of perjury" when the only action taken by the judge in the presence of the jury was to ask the assistant so-

licitor for his file, all other action being in the absence of the jury. The assignment of error is overruled.

[2] Defendants next assign as error the failure of the trial judge to grant their motions for a mistrial based on a newspaper article published during the trial containing "an improper and prejudicial statement by the Attorney for the State."

Trial of this case began on Monday, 10 February 1969, and lasted two or three days. On the morning of Tuesday, 11 February 1969, the Charlotte Observer contained an article, not on the front page, entitled "Witness Held As Poker-Theft Trial Kicks Off." The fourth paragraph of the article quoted Assistant Solicitor Liles as saying that Rogers' testimony Monday was "substantially different" from an unsigned statement Rogers gave to investigating police.

The record indicates that before the court recessed for the day on Monday, 10 February 1969, the trial judge instructed the jurors, among other things, not to read any newspaper during the course of the trial. On Tuesday when defense counsel, in the absence of the jury, moved for a mistrial based on the newspaper article, the trial judge then recalled the jury and inquired if any juror had read any article or portion of an article appearing in the Charlotte Observer pertaining to the case being tried. One juror stated that he "just looked at the headline of the article and passed it over." The judge then questioned the juror as to whether, after he looked at the headline, he formed or expressed any opinion about the case. The juror stated that he had not. The judge then asked the juror if reading the headline would in any way affect his "ultimately reaching a verdict in the case based solely on the evidence as it came from the witness stand and the arguments and contentions of counsel and the instructions given you by the court." The juror replied that "[i]t would not affect me in any way." No other juror indicated that he had seen the headline or article. In the absence of the jury, the judge then made appropriate findings and concluded that the juror was not prejudiced by reading the headline, that the remaining jurors had not read any portion of the article, and that the jury panel as constituted was competent to proceed with the trial of the case.

There was no showing that any juror read the statement attributed to the assistant solicitor, hence there was no showing of prejudice as to it. The record fully supports the findings and conclusions of the trial judge that the jury was competent to proceed with the trial, and the assignment of error relating thereto is without merit and is overruled.

[3] In their third assignment of error, defendants contend that the court erred in allowing the State to recall its witness, Jimmy Rogers, to testify further in the case after said witness had been arrested on a bench warrant issued by the court charging him with perjury. The transcript of testimony discloses that when Rogers first testified he provided some evidence that was helpful to the State but was evasive about the date on which he, Marlowe DeYoung and David Roland saw the defendants at a night spot near Greenville, South Carolina, and followed them to Charlotte. The witness was also evasive as to when he last saw the defendants after they arrived in Charlotte. When he was recalled as a witness for the State, Rogers definitely established the night of 23 July 1968 and early morning of 24 July 1968 as the dates that he had talked with defendants in or near Greenville, S. C., and followed them to Charlotte. He also testified when recalled that defendants and the witness stopped at a service station on the edge of Charlotte and defendants asked for and received directions to the Charlotte Moose Lodge; that he, Rogers, and his group followed defendants to the parking lot at the Moose Lodge and that Rogers then became scared, left Charlotte and went back to Greenville; that defendant Brank stated that he and Garrett might rob the Moose Lodge.

Conceding that Rogers' testimony was more favorable to the State when he was recalled as a witness than when he initially testified, we do not think the judge committed error in permitting him to be recalled. In *State v. Noblett,* 47 N.C. 418, cited in the attorney general's brief, we find the following: "So in *State v. Weaver,* 35 N.C., 491, it was stated that whether a witness who has once been examined shall be re-examined is a question of discretion with the presiding judge, and that from his decision no appeal would lie to this Court." We hold that permitting the witness to be recalled in the instant case was within the discretion of the trial judge and no abuse of that discretion has been shown. The assignment of error is overruled.

[4] Defendants assign as error the failure of the court to grant their motions for nonsuit. When considered in the light most favorable to the State, the evidence showed: Defendants lived in or near Greenville, South Carolina. Around eleven or twelve on the night of 23 July 1968, they were seen together at the Oasis, a night spot near Greenville, S. C. At the suggestion of defendant Brank, defendants left Greenville on I-85 to go to Charlotte to play poker. Jimmy Rogers, Marlowe DeYoung and David Roland, acquaintances of defendants and with whom they had talked at the Oasis, followed de-

fendants to Charlotte in another car. Defendants and the others stopped at a service station near the edge of Charlotte and asked for and obtained directions to the Moose Lodge on East Eighth Street in Charlotte. Proceeding to the Moose Lodge parking lot, defendants were followed by Rogers, DeYoung and Roland. At the parking lot, Brank stated that they might rob the Moose Lodge and tried to get Rogers to go in. Rogers got scared and he, DeYoung and Roland left and returned to their homes. William McMillan was the assistant manager of the Moose Lodge and was on duty at the time, it then being 2:30 a.m. or later. A. C. Warren and several others were at the Moose Lodge playing poker. Defendants gained entrance to the Moose Lodge and appeared in the doorway of the card room with each of them carrying a shotgun. With his gun pointed at them, Garrett ordered all of the card players to place their hands on the table and then ordered them to stand up and remove their pants. Brank collected the pants and placed them in pillow cases or laundry bags. James Lewis came to the lodge while defendants were there and with the use of their shotguns defendants robbed him of his billfold containing approximately $270. At Garrett's order, McMillan surrendered the money in the lodge cash register, approximately $40, and also gave defendants $770 of his own money. After staying in the lodge about fifteen minutes and relieving all persons there of their money and pants, defendants departed, carrying money, pants, etc., with them. McMillan and Lewis positively identified Garrett as one of the two men who perpetrated the robbery with the use of a shotgun, and Warren identified Brank as the other one. We hold that the evidence was sufficient to survive the motions for nonsuit, and the assignment of error relating thereto is overruled.

[5-7] In their final assignment of error, defendants contend that the court erred in restricting its recapitulation of the evidence offered by the witness Rogers to the testimony given by him on the second day of the trial after the witness had been arrested and charged with perjury for testimony previously given. We have carefully reviewed the judge's charge and hold that it was free from prejudicial error. It is well established in this jurisdiction that recapitulation of all the evidence is not demanded, and the requirements of the statute in this respect are met by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. *State v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58. Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contention of the parties, it complies with G.S. 1-180, and a party desiring further elaboration on a particular point, or of his contentions, or a charge

on a subordinate feature of the case, must aptly tender request for special instructions. *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14. Neither of defendants requested additional or special instructions in this case. The assignment of error is overruled.

The 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.

JAMES C. STONE v. WALTER D. MITCHELL AND SHERMAN H. WALKER, TRADING AS TRIANGLE DAIRIES, AND JAMES LUTHER MANN

No. 6915SC305

(Filed 23 July 1969)

1. Automobiles § 23— duty of vehicle operator to maintain adequate brakes — G.S. 20-124

G.S. 20-124 does not constitute the operator of a motor vehicle an insurer of the adequacy of the brakes of the vehicle, but the statute requires that the operator act with care and diligence to see that his brakes meet the standards prescribed by statute, without making the operator liable for injuries caused by some latent brake defect unknown to him and not reasonably discoverable upon proper inspection.

2. Automobiles §§ 68, 90— negligence in failing to maintain adequate brakes — peremptory instruction — jury question

In this action for personal injuries resulting from an intersection accident which occurred when both the foot and hand brakes on defendant's milk truck failed, the trial court erred in giving the jury peremptory instructions to the effect that defendant was negligent in operating the truck without adequate brakes as required by G.S. 20-124 where defendant's evidence tends to show that all the brakes on the milk truck were periodically adjusted and repaired, that the last such adjustment occurred approximately two months before the accident, that the foot brake had worked properly since that time and during more than 100 milk deliveries on the day of the accident, and there is no evidence that the emergency brake had been used or attempted to be used since the last adjustment, the question of whether defendant was negligent in failing to maintain proper brakes being for the jury.

APPEAL by defendants from *Clark, J.,* 27 January 1969 Civil Session, Superior Court of ORANGE.

Action to recover for personal injuries sustained by plaintiff when the automobile he was driving was in a collision with a milk truck owned by Triangle Dairies and driven by James Luther Mann.

The collision occurred at about 11 or 11:30 a.m. on 31 December 1966 just north of the then town limits of Chapel Hill. Neither vehicle had any occupant other than the driver. Plaintiff was traveling in a northerly direction on Highway 86, which is commonly known as Airport Road. Just north of the then town limits of Chapel Hill, Airport Road is intersected on the west side by Umstead Drive, forming a "T" intersection. Umstead Drive is on a down grade as it runs east and intersects with Airport Road, and directly across from the intersection on the east side of Airport Road, there is a 10 to 12 foot drop-off.

Plaintiff testified that he remembered nothing from the time he turned onto Airport Road until he awoke in the x-ray room at the hospital.

Mr. Hines, the State Highway Patrolman, testified that he investigated the collision; that the point of impact was in the right lane of traffic on Airport Road; that there were 30 feet of skid marks leading from the plaintiff's car to the point of impact; that defendant Mann told him that he was driving the milk truck, and as he approached the intersection of Umstead Drive with Airport Road he began to apply his brakes but the truck did not slow down and traveled on into Airport Road where it collided with a Pontiac automobile; that he had had trouble with his brakes one other time earlier that month, had reported it, and they had been fixed; that he, the witness, checked the brakes on the truck and the brake pedal lacked about half an inch going to the floor; that he did not check the emergency brake on the truck.

Defendant Mann testified in substance as follows: He was operating a GMC milk truck owned by Triangle Dairies traveling east on Umstead Drive. As he approached the intersection he was traveling at a speed of approximately 20 to 25 miles per hour. "I was coming down Umstead Road going into Airport Road and I hit my brakes and I didn't have any, I tried gearing it down and I got it into third gear and I tried to put it in second gear and it didn't slow it down none, and I'm pretty sure I pulled my emergency brakes and that didn't do no good and so I was going in, I was going to try to make the turn, because there's a big cliff on the other side, and I run out in the road and run into Mr. Stone." He had started on his milk route that morning about 6 o'clock, was just about finished with his deliveries, and had had no trouble with the brakes during

the morning. He had made about 100 stops. He had had trouble with the brakes about a month and a half prior to this, had reported that the brakes were not working properly, and the trouble was fixed. There was a store named Marlowe's Store on Airport Road across from a trailer court, but he had not been in that store on this day and had only been there on one occasion since he had been employed by Triangle Dairies and that was a while before this when he stopped and got a sandwich and a drink. He didn't remember that he had ever used the emergency brakes on the truck but he was "pretty sure they didn't work" because he was "just about positive I pulled them when I put on brakes and it didn't stop."

On cross-examination he testified in substance as follows: That it was his best recollection that as he was coming down Umstead Drive he pulled the emergency brake and it didn't slow the truck down. He believed that he had tried the emergency brake at least two or three times since he had been driving the truck and it had not worked. He had never reported that to his company because he "never did use them that much." There was a stop sign facing him on Umstead Drive but he did not stop and did not blow his horn. He saw the plaintiff's car just before he hit it. The left front of his truck struck the left front of plaintiff's car.

On redirect examination he testified that after the collision the Highway Patrolman got in the truck and "checked the brakes and it didn't have any."

Defendant Walter D. Mitchell testified that he is a partner in and manager of Triangle Dairies; that Miller Truck & Sales takes care of the maintenance and service of the company's trucks and is located just across the street from the company; that the drivers are instructed to take their trucks there without having to ask anybody and the service manager will take care of whatever is wrong with it; that a separate file of repairs and service bills is maintained on each truck; that his file disclosed the following bills with respect to brake work on the truck driven by Mann: 4-25-66, "pull front wheel, check lining, reline front brakes and adjust all brakes"; 6-3-66, "adjust all brakes"; 8-1-66 "adjust brakes"; 8-66 (not dated), "adjust brakes"; 8-31-66, "adjust brakes, repair hand brake"; 9-20-66, "adjust brakes, replace rear shoes, replace rear drum"; 11-3-66, "check brake adjustment and fluid, adjust all brakes and bleed".

The court peremptorily instructed the jury on the first issue as to the negligence of defendants. The jury answered the issue in

favor of the plaintiff and awarded damages in the amount of $30,000. Defendants appealed.

Bryant, Lipton, Bryant & Battle by F. Gordon Battle for plaintiff appellee.

Newsom, Graham, Strayhorn & Hedrick by Ralph N. Strayhorn and E. C. Bryson, Jr., for defendant appellants.

MORRIS, J.

Defendants assign as error the following portion of the court's charge:

> "Members of the jury, the Court feels that under all the evidence in this case, only one inference may be drawn from this evidence and from the facts admitted, including of course, the testimony of the defendant Mann, the agent of the defendants Mitchell and Walker; it is the law of this State that an operator of a motor vehicle must stop where a stop sign is erected by competent authority as provided by the statute, and yield the right of way to vehicles on a dominant or through highway, and failure to do so is evidence of negligence. The evidence in this case tends to show without question that the GMC delivery truck operated by the defendant Mann did not stop in obedience to the stop sign on Umstead Drive, but that he continued on through into the intersection and struck the vehicle operated by the plaintiff. However, the evidence further tends to show that he had a brake failure of his foot brakes and further tends to show from his testimony that he didn't have any hand or emergency brake. Now, we have a statute, G.S. 20-124, which requires that a motor vehicle have two separate means of applying the brakes and that these must be so constructed that failure of any one of the operating mechanism shall not leave the motor vehicle without brakes; so members of the jury, the Court feels, as I've said, that there is only one inference to be drawn from the evidence in this particular case; that in view of all of the testimony and particularly the testimony of the defendant Mann, agent of the defendants Mitchell and Walker, that the defendant Mann was negligent on the occasion in question and his negligence of course is imputed to the other defendants, the operators of the Triangle Dairies. I do instruct you that if you believe the evidence in this case and find by the greater weight thereof the facts to be as the evidence tends to show, bearing in mind that the burden is upon the plaintiff, then

I instruct you that it would be your duty to find that the defendants in this case were negligent; and if you further find by the greater weight of the evidence that such negligence of the defendants was a proximate cause of the collision between the vehicles and the injuries to the plaintiff, then it would be your duty to answer this first issue yes; if you fail to so find, it would be your duty to answer this first issue no."

Defendants contend that the evidence in this case is not such that the only inference to be drawn therefrom is that defendants were guilty of negligence, but on the contrary that diverse inferences may be drawn therefrom — some favorable to plaintiff and others favorable to defendants, making it a jury question.

Although the failure to maintain proper brakes would warrant a finding of negligence, we are of the opinion that whether defendants' evidence was sufficient to overcome the showing made by plaintiff is a question for the jury.

[1] In *Stephens v. Oil Co.*, 259 N.C. 456, 131 S.E. 2d 39, a case strikingly similar as to facts, defendant driver was going downhill driving an oil tanker. It appeared that the collision occurred on Saturday and the brakes had been overhauled and relined the preceding Thursday. They had worked properly early Saturday morning. Defendant driver, approaching a line of cars, applied his brakes "and didn't have any". He pulled to his left thinking the extra width of the highway in the western lane would enable him to avoid a collision, but he collided with the back fender of plaintiff's car. He had attempted to check his speed by throwing the transmission in low gear, but was unable to do so. The Supreme Court said the court properly overruled defendant's motion for nonsuit for that plaintiff's evidence was sufficient to permit a jury to find defendants violated three statutes, including G.S. 20-124, and if the negligence resulting from failure to comply with any of these statutes proximately causes injury, liability results, the question of proximate cause being for the jury. Defendants there, as here, assigned as error portions of the charge relating to the violation of the safety statutes and to the failure of the court to instruct the jury with respect to their defense — unavoidable accident. Rodman, J., speaking for the Court, said:

"Plaintiff has shown the violation of a statute, G.S. 20-124, mandatory in its language. Notwithstanding this mandatory language, the statute must be given a reasonable interpretation to promote its intended purpose. The Legislature did not intend to make operators of motor vehicles insurers of the ade-

quacy of their brakes. The operator must act with care and diligence to see that his brakes meet the standard prescribed by statute; but if because of some latent defect, unknown to the operator and not reasonably discoverable upon proper inspection, he is not able to control the movement of his car, he is not negligent, and for that reason not liable for injuries directly resulting from such loss of control. The injuries result from an unavoidable accident. *Smith v. Pate,* 246 N.C. 63, 97 S.E. 2d 457; *Pike v. Seymour,* 222 N.C. 42, 21 S.E. 2d 884.

The true rule is, we think, clearly and accurately stated in *Wilson v. Shumate,* 296 S.W. 2d 72. There plaintiff was driving defendant's automobile at his request. She was injured because of the failure of the brakes on the car. The Court said: 'Plaintiff's testimony, heretofore noted, that the brake pedal went clear to the floor as she "again and again" used it in an attempt to stop the automobile, that it had failed to slow or stop but ran into the embankment, was sufficient evidence from which a jury reasonably could find that defendant's automobile was not equipped with two sets of brakes in good working order during the time plaintiff was driving and that the defective foot brake contributed to cause the collision. Defendant's failure to observe the duty or standard of care prescribed by the statute constituted negligence. In recognition, however, of the principle that the statutes must be reasonably construed and applied, defendant could offer proof of legal excuse or avoidance of his failure to have observed the duty created by the statute, i.e., proof that an occurrence wholly without his fault made compliance with the statute impossible at the moment complained of and which proper care on his part would not have avoided. Upon adducing the substantial evidence tending to so prove, it was then a jury question as to whether the defendant was negligent for failure to have provided a foot brake in good working order.' *Lochmoeller v. Kiel,* 137 S.W. 2d 625; *Merry v. Knudsen Creamery Co.,* 211 P. 2d 905; *Purser v. Thompson,* 219 S.W. 2d 211; *Eddy v. McAninch,* 347 P 2d 499. Similar conclusions have been announced by the courts with respect to other safety statutes. *Leek v. Dillard,* 304 S.W. 2d 60; *Scott v. Mackey,* 324 P. 2d 703; *Clark v. Hawkins,* 321 P 2d 648; *Bedget v. Lewin,* 118 S.E. 2d 650; *Frager v. Tomlinson,* 57 N.W. 2d 618."

[2] Here defendants have shown periodic brake adjustment and repair, the last such adjustment to all brakes occurring on 3 No-

vember. The evidence was that the foot brakes had worked properly since that time and that for the more than 100 deliveries made by the driver that morning no difficulty had been experienced. There is no evidence that the emergency brake had been used or attempted to be used since 3 November. The evidence was that the driver was "pretty sure" he pulled the emergency brake when the foot brake failed and after he had attempted to gear the truck down. The evidence is that neither the patrolman nor anyone else checked the emergency brake after the accident.

We think the defendants' evidence, if accepted by the jury, was sufficient to negative the allegation that the truck was being operated without adequate brakes.

Defendants' contention as to error committed in the admission of evidence is not discussed since, for error in the charge, there must be a new trial and the particular error, if any, is not likely to occur upon another trial.

New trial.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. JOHN FRANKLIN BEST
No. 698SC191

(Filed 23 July 1969)

1. Telephone Companies § 5— prosecution for obscene and threatening calls — sufficiency of warrant

In prosecution on warrant charging defendant with making obscene telephone calls to a named female and threatening to kill her if she exposed him, G.S. 14-196, allegation that the offenses occurred "on or about the 9 day of August 1967 and on divers other occasions" does not render warrant defective on ground of vagueness; nor is warrant defective in failing to state what words were used to constitute the alleged offense.

2. Indictment and Warrant § 9— sufficiency of averments

An indictment or warrant is sufficient if it charges the offense in a plain, intelligible and explicit manner, and contains averments sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense.

3. Indictment and Warrant § 9— failure to allege specific date

Where time is not of the essence of the offense charged, an indictment

may not be quashed for failure to allege the specific date on which the crime was committed.

4. Indictment and Warrant § 9— allegation of time and place

When the exact time and place are not essential elements of the offense itself, defendant must move for a bill of particulars if he desires more information in respect thereto.

5. Constitutional Law § 32— right to counsel — serious misdemeanor

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.

6. Telephone Companies § 5— prosecution for obscene calls — right to counsel

A warrant charging violation of the statute prohibiting obscene and threatening telephone calls, G.S. 14-196, charges a serious offense entitling defendant to the assistance of legal counsel.

7. Criminal Law §§ 67, 84— identity of accused by voice — effect of illegal arrest

The fact that defendant might have been under illegal arrest at the time the prosecutrix identified defendant's voice as the voice of the person who had been making obscene telephone calls to her does not *ipso facto* render the identification inadmissible.

8. Criminal Law § 67; Constitutional Law § 32— identification of defendant by voice — right to counsel

Where accused was asked routine questions by a deputy sheriff in order to afford the victim of obscene and threatening telephone calls, who was concealed in another room, an opportunity to identify his voice, such proceeding became a critical stage requiring the presence of counsel unless that right had been voluntarily, knowingly and intelligently waived.

9. Constitutional Law § 37— waiver of rights

Waiver of constitutional rights may be made orally and without advice of counsel.

10. Criminal Law § 67— identification of defendant by voice — voir dire — waiver of counsel — necessity for findings of fact

When defense counsel moved to suppress evidence pertaining to in-custody identification of defendant's voice by victim of obscene and threatening telephone calls, trial court properly excused the jury and conducted a *voir dire*, but defendant is entitled to a new trial where court made no determination as to whether defendant voluntarily, knowingly and intelligently waived counsel at the time of the identification.

APPEAL by defendant from *Parker, J.*, at the 11 November 1968 Session of WAYNE Superior Court.

Defendant was tried on a warrant issued by a justice of the peace charging that "on or about the 9 day of August 1968 and on divers

other occasions, John Franklin Best did unlawfully and wilfully make obscene and vulgar telephone calls to Mrs. Norwood Vinson, Rt. 4, Goldsboro, N. C. and did threaten to kill the said Mrs. Norwood Vinson if she exposed him in violation of Section 14-196 of the General Statutes of N. C. against the form of the statute in such cases made and provided, and contrary to law and against the peace and dignity of the State."

On 24 September 1968, defendant was found guilty in the Wayne County Court and was given an eight-months active prison term. He appealed to the Superior Court of Wayne County for trial by jury.

The State's evidence consisted primarily of the testimony of Mrs. Norwood Vinson, George Kornegay and Deputy Sheriff Sasser. In her testimony, Mrs. Vinson related that she began receiving anonymous telephone calls containing vulgar and obscene proposals in February 1968; that in spite of her hanging up on practically every occasion and asking the person not to call her any more, she continued to receive the calls at intervals until August 1968. At that time, she reported the incidents to the police who arranged with the telephone company for the installation of a mechanism to determine the origin of the calls to Mrs. Vinson's residence. She testified that the caller not only made vulgar and obscene proposals to her but threatened to kill her if she exposed him.

George Kornegay testified that he was employed by Southern Bell Telephone and Telegraph Company in August 1968. At the request of police, he caused a cross-bar communication system to be installed in order to determine the origin of the telephone calls. On 14 August 1968, he determined that a call received by Mrs. Vinson on that date originated from a telephone listed in the name of Sarah B. Pridgen at Central Heights in the City of Goldsboro. On 17 August 1968, just before 11:00 a.m., he received a call from Mrs. Vinson saying she had just received another call from the person who had been harassing her and that he traced the call to the Pridgen telephone and determined that it was placed at 10:46 a.m. Other evidence disclosed that Sarah B. Pridgen was defendant's mother and that defendant lived with her.

Pertinent testimony of Deputy Sheriff Sasser is hereinafter set forth in the opinion.

Defendant offered no evidence. The jury returned a verdict of guilty, and from judgment imposing a two-year active prison sentence, defendant appealed.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Trial Attorney I. B. Hudson, Jr., for the State.

Herbert B. Hulse and George F. Taylor for defendant appellant.

BRITT, J.

[1] Defendant assigns as error the form of the warrant under which he was charged and tried. He contends that the warrant fails to state an offense within the meaning of the statute because it "alleges purely conclusions of law and does not state what words were used to constitute the alleged offense." He also contends that the allegation "on 9 August 1967 and diverse (sic) other occasions" is too vague an allegation to support a conviction.

[2-4] An indictment or warrant is sufficient if it charges the offense in a plain, intelligible, and explicit manner and contains averments sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. 4 Strong, N.C. Index 2d, Indictment and Warrant, § 9, p. 348. Where time is not of the essence of the offense charged, an indictment may not be quashed for failure to allege the specific date on which the crime was committed. When the exact time and place are not essential elements of the offense itself, defendant must move for a bill of particulars if he desires more definite information in respect thereto. 4 Strong, N.C. Index 2d, Indictment and Warrant, § 9, p. 350. Defendant made no motion for a bill of particulars. The assignments of error relating to the sufficiency of the warrant are without merit and are overruled.

Defendant assigns as error the refusal of the court to allow his motion to suppress evidence because of unlawful arrest and illegal identification; also the allowance of testimony relating to the identification of his voice by the prosecutrix while he was held or detained in the sheriff's office.

On voir dire, Chief Deputy Sheriff Sasser testified that immediately after 11:00 a.m. on 17 August 1968, after he was advised by Mrs. Vinson that she had received another telephone call from the person who had been calling her and the telephone company had determined that the call had originated at the home of Sarah B. Pridgen, defendant's mother, Mr. Sasser together with two other deputies sheriff went to the Pridgen home, arriving there within three or four minutes after leaving the sheriff's office. Upon arrival they found an elderly man sitting in a chair in the yard; he was later identified as defendant's grandfather. In the Pridgen residence,

they found the defendant, dressed only in pants and T-shirt; the only other occupant of the house or premises was a seven-month-old child. At Mr. Sasser's request, the defendant accompanied him and the other two officers to the sheriff's office in the courthouse. With respect to defendant's constitutional rights, Mr. Sasser's testimony was as follows:

> "I advised him that he had the right to remain silent; I read the *Miranda* — He had the right to remain silent and not make any statement; anything that he said could and would be used against him in court should he be indicted; that he had the right to talk to a lawyer for advice before we asked him any questions and to have him or anyone else with him during questioning; he had the same right to advice and presence of a lawyer even if he could not afford to employ one, and if he was indigent a lawyer would be appointed to represent him before any questioning if he desired. I asked him if he understood these rights and he said that he did. I told him that if he decided to answer questions now without a lawyer present he would still have a right to stop answering them at any time and would have the right to stop answering questions at any time until he talked to a lawyer. In response to my question he said he did understand each of these rights and having these rights in mind I asked him did he wish to talk to us or make any statement. At that time he didn't make any statement."

While taking the defendant to the sheriff's office, Mr. Sasser arranged by radio for Mrs. Vinson to go there. Upon arrival, defendant was kept in one room and when Mrs. Vinson arrived she was directed to an adjoining room; a partition wall that did not reach the ceiling separated the two rooms, enabling Mrs. Vinson to hear what was said by persons in the other room. The police proceeded to ask defendant several routine questions which he answered. Mrs. Vinson then declared that she recognized defendant's voice as the voice of the person who had been making the obscene calls to her.

Mrs. Vinson did not see the defendant at the sheriff's office but saw him a few minutes later at the magistrate's office where a warrant was issued and defendant was given a preliminary hearing. It was there that she recognized the defendant as one who had worked in the yard of her home for some two or three years and she expressed considerable surprise that the accused was the same person who had worked for her.

Defendant contends that the voice identification by Mrs. Vinson in the sheriff's office was illegal and that the evidence of identi-

fication of defendant based thereon should have been excluded. The trial judge conducted a voir dire in the absence of the jury and at the conclusion of the evidence on voir dire ruled as follows: "There was no illegal arrest. Motion as to listening to only one voice. Denied."

[5, 6] 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. A warrant charging a violation of G.S. 14-196 charges a serious offense, entitling defendant to the assistance of legal counsel. *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245. In *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353, opinion by Lake, J., it was held that the right to have counsel appointed and to consult with him prior to participation in a police lineup is not to be deemed waived merely because of a failure of the defendant to request such appointment or consultation.

[7] In *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53, the Supreme Court held that a confession obtained from a person in custody as a result of an illegal arrest is not *ipso facto* inadmissible, voluntariness remaining the test of admissibility. We think the same rule would apply in this case and that it is not necessary for us to determine if defendant was "under arrest" at the time Mrs. Vinson heard him talk in the sheriff's office. It is necessary, however, that we inquire if defendant's constitutional rights were violated at the time of the voice identification.

[8] In *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581, in an opinion written by Huskins, J., it is said:

> "* * * [R]equiring the accused to walk, to wear certain type clothing, to talk and repeat words allegedly uttered by the assailant at the time of the crime, nothing else appearing, are pretrial procedures which defendant may be compelled to perform without violating his constitutional rights under the Fifth, Sixth and Fourteenth Amendments. *Even so, when performed by the accused for purposes of identification by the prosecutrix they then become part of a 'critical' stage requiring the presence of counsel unless that right has been voluntarily, knowingly, and intelligently waived. Gilbert v. California, supra* [388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1951]. It thus becomes necessary to examine the facts and circumstances under which defendant allegedly waived his right to assistance of

counsel at the confrontation with Mrs. Byrd for identification purposes and during in-custody interrogation by Officers Upchurch and King." (Emphasis added.)

[9, 10] Waiver of constitutional rights may be made orally and without advice of counsel. *State v. Wright, supra.* In the trial of the instant case, when defendant's counsel moved to suppress the evidence pertaining to Mrs. Vinson's identification of defendant's voice in the sheriff's office, the trial judge properly excused the jury and conducted a voir dire. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. However, the trial judge made no determination as to whether defendant voluntarily, knowingly, and intelligently waived counsel at the time he was asked questions in the sheriff's office and his answers were overheard by Mrs. Vinson. For failure of the court to make this determination, defendant is entitled to a new trial.

Inasmuch as the defendant is awarded a new trial for the reasons above stated, we do not deem it necessary to pass upon the other questions brought forward and argued in defendant's brief, as they may not arise upon a retrial.

New trial.

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

STATE OF NORTH CAROLINA v. WILLIE SWANN

No. 6914SC313

(Filed 23 July 1969)

1. Criminal Law § 75— confessions — 1969 retrial of trial begun prior to Miranda

Where defendant charged with murder confessed to a law officer on 23 May 1964, a jury trial was held in October 1964 to determine defendant's competency to stand trial for the murder and defendant was found to be insane, and defendant was thereafter committed to a State hospital, where he remained until October 1966, trial of defendant in 1969 for the murder is a "retrial" of a "trial" which began in 1964, prior to the effective date of *Miranda v. Arizona,* 384 U.S. 436, and the *Miranda* decision does not govern the admission of defendant's 1964 confession in the 1969 trial.

2. Criminal Law § 75— confessions — admissibility — 1969 retrial of trial begun prior to Miranda

In a 1969 "retrial" of a "trial" which began prior to the effective date

of the *Miranda* decision, the trial court did not err in the admission of a confession made in 1964, notwithstanding the full *Miranda* warnings were not given to defendant prior to in-custody interrogation which produced the confession, where the court found, upon competent evidence, that the confession was voluntarily made after defendant was advised of his constitutional rights as they then existed.

APPEAL by defendant from *Burgwyn, E.J.*, 27 January 1969 Session for the trial of criminal cases in the Superior Court of DURHAM County.

Defendant was tried upon an indictment, in proper form, charging him with the felony of murder. Upon the call of the case for trial, the solicitor announced that he would not seek a verdict of guilty of murder in the first degree, but would seek a verdict of guilty of murder in the second degree. Upon a plea of not guilty, trial was by jury who returned a verdict of guilty of murder in the second degree. From judgment of imprisonment of not less than 25 years nor more than 28 years the defendant appealed to the Court of Appeals.

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

Jerry L. Jarvis for defendant.

BRITT, J.

The record on this appeal is not clear as to all the defendant contends transpired in his previous trials for the murder of Bee James prior to the bill of indictment returned at July 1968 Session of Superior Court of Durham County. Some of it is by stipulation which appears only in the transcript. In the defendant's brief there appears what defendant presents as a chronological record of the history of this case, but since this does not appear in the record on appeal, it is not set forth in detail herein. At one time this case was heard by the North Carolina Supreme Court and is reported at 272 N.C. 215, 158 S.E. 2d 80. The records in the Supreme Court reveal that a warrant charging this defendant with the murder of Bee James on 20 May 1964 was issued on 25 May 1964, and a bill of indictment charging the defendant with the murder of Bee James was returned at the June 1964 Session of Superior Court of Durham County. The record does not reveal why another warrant was issued on 14 June 1968 charging the defendant with the murder of Bee James on 20 May 1964, or why another bill of indictment was obtained at the July Session 1968, although defendant states in his

brief that under the provisions of the North Carolina Post Conviction Hearing Act the defendant, on 14 June 1968, was awarded a new trial by reason of constitutional infirmities in the selection of the grand jury which had returned the bill of indictment against him in June 1964.

The evidence tends to show that Bee James, age 70, was killed in his rural home-store on 20 May 1964, and his body and the building were partially burned, apparently by the perpetrator in an effort to conceal the crime. Investigating officers of the Durham County Sheriff's Office established the fact that a station wagon owned by the defendant, age 26, had been observed at the scene shortly before the crime was committed. The defendant was arrested on 22 May 1964. The arresting officers, two deputies sheriff of Durham County, informed the defendant shortly after his arrest, in the Durham County jail, of his right to remain silent and that anything he said probably would be used against him in court. He was not advised that he was entitled to a lawyer and that if he could not afford a lawyer, the court would appoint one for him. On this occasion the defendant told the officers that he knew the deceased and had been to his house on the day he was killed, but declined to tell them anything else.

The following morning the defendant was taken from his cell by the same officers and again informed of his rights in the same manner as on the previous day. During this questioning the defendant asked to see Detective McCrea and Detective Cox, two officers with the Durham City Police Department, and they were summoned. The defendant stated to these two detectives and later to Deputy Sheriff T. C. Leary, in substance, that he had committed the crime.

At the trial in January 1969, after hearing witnesses in the absence of the jury, the trial judge, among other things, made the following findings:

> "On the question of confession that arose, the alleged confession in the opinion of this Court was properly obtained. Also the Court finds upon the question of voir dire of the confession itself that the statements made to Sheriff T. C. Leary by the defendant as testified to by Sheriff Leary were freely, voluntarily, knowingly, and intelligently made, without any threat, inducement, reward, or hope of reward to the Defendant, and after he had been advised of his constitutional rights as they then existed with reference to any statement he might make being used against him. The alleged confession will be admitted."

Thereafter the State's witness, T. C. Leary, was permitted to testify as to what the defendant told him.

Defendant makes only one assignment of error which is to "(t)he action of the Court, in admitting into evidence at the trial in February, 1969, the defendant-appellant's alleged confession to Deputy Sheriff T. C. Leary on May 22, 1964, after finding that the warnings given Swann with reference to his constitutional rights fell short of the requirements established and set forth in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 868 S. Ct. 1602, decided June 13, 1966."

In the case of *State v. Lewis,* 1 N.C. App. 296, 161 S.E. 2d 497 (1968), it is said:

> "The investigation of this brutal assault and the interrogation of defendant began in January 1955 — more than 12 years previous to this retrial. The evidence is clear that in 1955 defendant was warned of his constitutional rights in accordance with the requirements then prevailing. The warnings now required by *Miranda* were not included. Defendant concedes that if this case had been tried prior to *Miranda,* the confession involved here would have been admissible. In *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772, (hereinafter referred to as *Johnson*) it was held that *Miranda* is prospective only in its application. In *Johnson,* the Court said that the *Miranda* 'guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966.' Defendant earnestly contends that the *Miranda* guidelines must be applied. We do not agree. In *State v. Branch,* 1 N.C. App. 279, 161 S.E. 2d 492, opinion filed by Court of Appeals this day, Brock, J., discusses the question exhaustively. We concur in the conclusion that the intent of the Court in *Johnson* and the rationale of the opinion is that the terms 'cases commenced after' and 'trials begun after' encompass the interrogation."

See also *State v. Johnson,* 3 N.C. App. 420, 165 S.E. 2d 27 (1969).

In the case of *State v. Lewis,* 274 N.C. 438, 164 S.E. 2d 177 (1968), the Supreme Court said:

> "In our view, *Miranda* should not and does not apply to confessions obtained prior to that decision, when offered at trials or retrials beginning thereafter, where law enforcement officers relied upon and complied with constitutional standards applicable at the time the confessions were made. We perceive a trend towards this conclusion in decisions of the Supreme Court of the United States discussed herein."

Defendant was arrested on Friday, 22 May 1964, and made the inculpatory statement on Saturday, 23 May 1964. This was over two years prior to the date of the *Miranda* decision. The defendant was tried by a jury at the 15 October 1964 Session of Superior Court of Durham County to determine his competency to stand trial on the bill of indictment returned against him. The jury found that the defendant was "insane and without sufficient mental capacity to undertake his defense or to receive sentence in this case."

Defendant, on account of his mental condition, was confined as a patient in Cherry Hospital, a state institution, from 19 June 1964 until October 1966.

We think it is clear that the trial of this defendant for the murder of Bee James commenced in 1964 inasmuch as during the year 1964 he was committed to Cherry Hospital for observation, and thereafter during 1964 the jury was impaneled to determine his ability to plead to the bill of indictment and to stand trial for the crime. It is not necessary for decision in this case to determine, and we therefore do not determine, the exact date in 1964 that his trial commenced.

The trial court found, upon competent evidence, that the statement made by the defendant to Deputy Sheriff Leary was "freely, voluntarily, knowingly, and intelligently made, without any threat, inducement, reward or hope of reward to the Defendant, and after he had been advised of his constitutional rights as they then existed with reference to any statement he might make being used against him."

In *Jenkins v. Delaware,* 395 U.S. 213, 23 L. Ed. 2d 253 (1969), Chief Justice Warren said:

> "In *Johnson v. New Jersey,* 384 U.S. 719 (1966), we held that *Miranda v. Arizona,* 384 U.S. 436 (1966), 'applies only to cases in which the trial began after the date of our [*Miranda*] decision. . . .' 384 U.S., at 721. In this case, we must decide whether *Miranda's* standards for determining the admissibility of in-custody statements apply to post-*Miranda* retrials of cases originally tried prior to that decision. We hold that they do not. * * *
>
> In *Johnson,* after considering the need to avoid unreasonably disrupting the administration of our criminal laws, we selected the commencement of trial as determinative. . . . On the other hand, we could have adopted the approach we took in *Stovall* and *Desist* and made the point of initial reliance, the

moment the defendant is interrogated, the operative event. See W. Schaefer, *supra,* at 646. But in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial. Implicit in this choice was the assumption that, with few exceptions, the commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial that no undue burden would be imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda.*"

In a footnote appearing in *Jenkins v. Delaware, supra,* "retrial" is defined thus:

"The word 'retrial' is used in this opinion to refer only to a subsequent trial of a defendant whose original trial for the same conduct commenced prior to June 13, 1966, the day on which *Miranda* was announced."

The crucial question in this case is when does a trial commence. In *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597 (1962), the Supreme Court said in interpreting the words "at anytime before trial" which appear in G.S. 8-81 relating to depositions:

"When a trial commences is a difficult question, and the answer may vary according to the statute being construed and according to the circumstances in a particular case. 'In general, it has been held that the trial begins when the jury are called into the box for examination as to their qualifications — when the work of impaneling the jury begins — and that the calling of a jury is a part of the trial.' 53 Am. Jur., Trial, Section 4. Certainly the purpose of G.S. 8-81 would not be served by a holding that the trial did not begin until after the jury was empaneled. Once the case is reached on the calendar and the jury called into the box, 'the hurry of a trial' has begun and the time for deliberation and scrutiny of a deposition has passed."

[1] It is not necessary for decision in this case to determine whether the ruling in *Jenkins v. Delaware, supra,* limits the principles of law enunciated in *State v. Branch, supra; State v. Lewis, supra;* or *State v. Johnson, supra,* because we are of the opinion and so hold that under the circumstances this is a "retrial" of a "trial" of the defendant for the murder of Bee James which commenced prior to June 13, 1966, and that therefore *Miranda* does not apply.

[2] Applying the principle of law enunciated in *State v. Lewis, supra,* and in *Jenkins v. Delaware, supra,* we are of the opinion and so hold that the trial judge did not commit error in admitting the in-custody confession of the defendant made to Deputy Sheriff Leary on 23 May 1964.

No error.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. LAWRENCE RAY MARKHAM,
CASES No. 68CR278, -279

No. 6915SC343

(Filed 23 July 1969)

1. Criminal Law §§ 42, 55— evidence of blood and human flesh — nonexpert testimony

Trial court properly allowed nonexpert witnesses, one of them a highway patrolman, to testify that they observed particles of flesh and blood on the right fender of defendant's automobile.

2. Automobiles § 131— hit-and-run driving — identity of defendant — sufficiency of evidence

Issue of defendant's guilt of "hit-and-run" driving was properly submitted to the jury where the State's evidence tended to show that a pedestrian on a rural paved road was fatally struck at 2:20 p.m. by a black 1959 Chevrolet which failed to stop, that the defendant was seen at approximately 2:30 p.m. traveling at a speed of 75 miles per hour in a black Chevrolet and that a piece of dark cloth was hanging from the right fender of the automobile, that a piece of material was found missing from the coat worn by deceased, that defendant was seen by several other witnesses on the rural road just prior to and immediately after the accident, and that the highway patrolman investigating the death observed a dent in the right front fender of defendant's car and particles of flesh and blood imbedded therein.

3. Automobiles § 113— manslaughter — evidence of intoxication — nonsuit

Evidence that an automobile operated by defendant fatally struck a pedestrian on a rural paved road at approximately 2:30 p.m. and speeded off without stopping, that prior to the accident defendant ran a stop sign approximately seven-tenths of a mile from the accident scene, and that at approximately one and one-half hours following the accident defendant appeared to be intoxicated and that defendant himself stated that he had not had a drink since 2:00 p.m., *held* insufficient to be submitted to the

jury on the issue of defendant's guilt of involuntary manslaughter, there being no evidence of how the car was being operated at the time of accident nor of intentional violation of a safety statute.

APPEAL by defendant from *Clark, J.,* 17 February 1969 Criminal Session, Superior Court of CHATHAM.

The defendant was charged with driving under the influence, manslaughter, and hit-and-run. Upon a plea of not guilty to each of these charges, trial was held. Defendant was found guilty of the charges of manslaughter and hit-and-run. To the charge of driving under the influence a judgment as of nonsuit was entered.

On 1 September 1968 at approximately 2:20 p.m., Kemp Page, who was 75 years of age, was walking north on the west shoulder of State Road #1008, also known as "Farrington Road". Paul Farrington, Jr. was standing in front of his house and observed Kemp Page as he was walking along the road. As Paul Farrington, Jr. was getting into his car, he heard a "thug" sound and immediately turned and saw Kemp Page's hat falling beside a black 1959 Chevrolet. The car did not stop or slow down but increased its speed. Paul Farrington, Jr. started toward the highway and his wife called to him and stated that she had called an ambulance. He then turned and ran to his car and began to chase the 1959 Chevrolet. He was unsuccessful in his efforts and returned to his home. Upon arriving at his home he observed Kemp Page lying in a ditch on the west side of State Road #1008.

Trooper T. T. Jeffries, with the State Highway Patrol, arrived at the scene of the accident at approximately 2:35 p.m. and found that Kemp Page was dead. Kemp Page's body was situated eight feet from the edge of the pavement behind a mail box.

The accident occurred approximately seven-tenths of a mile south of the Lystra Church Road which dead ends into State Road #1008 from the west; and approximately six-tenths of a mile north of Martha Chapel Road which is a short road, approximately two and one-half miles long, connecting State Road #1008 and N.C. 751. N.C. 751 is east of State Road #1008 and runs parallel thereto.

While at the scene of the accident Jeffries had a conversation with Paul Farrington, Jr. and Eddie Burnette, and, as a result of this conversation, he began looking for a black 1959 Chevrolet. He went to the defendant's residence, apparently because of information received from Eddie Burnette, and discovered that the defendant was not at home. At approximately 4:00 p.m. Jeffries found the defendant in the yard of Paul Farrington, Sr., who lives approx-

imately 100 yards from where the accident occurred. At this time Jeffries observed that the defendant appeared to be under the influence of alcohol. Jeffries also examined a 1959 black Chevrolet which was at the residence of Paul Farrington, Sr. and which belonged to the defendant and observed that the right front fender was damaged just above the headlights. He also observed two other State Troopers remove particles of flesh from the fender of the car; and he observed that fine particles of clothing fiber were embedded in the paint in the immediate area of the damage to the defendant's vehicle. Defendant was informed of his constitutional rights and placed under arrest.

From concurrent sentences of imprisonment for a period of 5 to 7 years and 4 to 5 years on the charges of involuntary manslaughter and hit-and-run, respectively, the defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Staff Attorney James E. Magner for the State.

Robert L. Gunn for defendant appellant.

MORRIS, J.

[1] Defendant argues that the trial judge committed error in allowing the State's witnesses Jeffries and Russell to testify that they observed particles of flesh and blood on the right fender of the defendant's automobile. He has cited no authority for this argument. We think this argument is without merit. One need not be an expert to recognize particles of flesh and blood. The witnesses did not state that this matter came from the body of Kemp Page. Defendant argues that this testimony was a conclusion and, therefore, not admissible. Perhaps it was possible for the witnesses to describe the matter they found on the defendant's automobile without using the words flesh and blood, however, it would not have been practicable to do so. The witnesses were testifying as to physical matters within their own knowledge.

> "Even when it might be *possible* to describe the facts in detail, it may still be *impracticable* to do so because of the limitations of customary speech, or the relative unimportance of the subject testified about, or the difficulty of analyzing the thought processes by which the witness reaches his conclusion, or because the inference drawn is such a natural and well-understood one that it would be a waste of time for him to elaborate the facts, or perhaps for some other reason.

> It is neither possible nor desirable to lay down a hard and fast rule to cover the infinite variety of situations that may arise, but the admissibility of opinion evidence under the circumstances suggested above is thoroughly established. The idea is variously expressed by saying that 'instantaneous conclusions of the mind,' or 'natural and instinctive inferences,' or the 'evidence of common observers testifying to the results of their observation' are admissible, or by characterizing the witness's statement as a 'shorthand statement of the fact' or as 'the statement of a physical fact rather than the expression of a theoretical opinion.' " Stansbury, N.C. Evidence 2d, § 125.

This assignment of error is overruled.

Defendant has excepted to the failure of the trial judge to grant his motions for judgment as of nonsuit to the charges of involuntary manslaughter and hit-and-run; and to the signing of the judgment for each of these charges. These exceptions are brought forward in his assignments of error.

Case #68CR279 — Hit-and-Run

G.S. 20-166 provides that "The driver of any vehicle involved in an accident or collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident or collision, and any person violating this provision shall upon conviction be punished as provided in § 20-182."

[2] The evidence, taken in the light most favorable to the State, tends to show that the defendant was seen by Connie Kerns between 2:10 p.m. and 2:30 p.m. on the day of this accident driving a black Chevrolet and turning onto State Road #1008 and heading in a southerly direction. Connie Kerns stated that she observed the defendant turn from Lystra Church Road onto State Road #1008; that he did not stop at the stop sign; and that he pulled out into the wrong lane of the road and pulled back into his lane. He was traveling south. Lystra Church Road is approximately seven-tenths of a mile north of where the accident occurred.

Paul Farrington, Jr. testified that at approximately 2:20 p.m. he observed Kemp Page walking on the west side of State Road #1008 in a northerly direction; that he had turned to get into his car when he heard a "thug" sound; that after hearing this sound he turned and saw Kemp Page's hat fall beside a black 1959 Chevrolet; and that this car did not stop, but it gained speed as it left the scene of the accident.

Eddie Burnette testified that he was at his mother's home, which is located approximately three-fourths of a mile from State Road #1008, on the Martha Chapel Road, on the day of this accident; that at approximately 2:30 p.m. he saw the defendant pass his mother's home traveling toward the east driving a black Chevrolet at a speed of 75 miles per hour; and that a piece of dark cloth was hanging from the right fender of his automobile. Trooper Jeffries testified that a piece of material was missing from the deceased's coat. Burnette testified that he observed the car for approximately one-half mile.

Clay Scott testified that on the day of this accident at approximately 2:30 he was traveling east on the Martha Chapel Road and about to turn onto N.C. 751 when he observed a car come up behind him; that he pulled to the right to make his turn and the car behind him made a left turn traveling 25 to 30 miles per hour without stopping at the intersection; and that as the car came up beside him he recognized the person driving the car as being the defendant and that he was driving a 1959 or 1960 dark Chevrolet. Scott testified that he had known the defendant 30 to 35 years.

Trooper Robert Russell, with the State Highway Patrol, testified that he observed the defendant and his car in the yard of Paul Farrington, Sr. following the accident; that the defendant smelled of alcohol and that he staggered when he walked. Russell stated that the right front of the defendant's car was dented in and that there were particles of flesh and blood in this area.

We think this evidence taken in the light most favorable to the State as we are bound to do, 2 Strong N.C. Index 2d, § 106, was sufficient for submission to the jury. The motion for judgment as of nonsuit as to Case #68CR279 was properly denied.

Case #68CR278 — Involuntary Manslaughter

In *State v. Massey,* 271 N.C. 555, 157 S.E. 2d 150, it is said:

"'The common-law definition of involuntary manslaughter includes unintentional homicide resulting from the performance of an unlawful act, from the performance of a lawful act done in a culpably negligent manner, and from the negligent failure to perform a legal duty.' *State v. Stansell,* 203 N.C. 69, 71, 164 S.E. 580, 581. In *State v. Cope,* 204 N.C. 28, 167 S.E. 456, Stacy C.J., laid down the criteria for determining criminal responsibility in automobile-accident cases. Criminal negligence is something more than actionable negligence in the law of torts; it is such recklessness, 'proximately resulting in injury or death, as

imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.' *Id.* at 30, 167 S.E. at 458. Under this definition '[a]n intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. . . . But an unintentional violation of a prohibitory statute or ordinance, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not such negligence as imports criminal responsibility.' "

[3] Governed by these principles, we do not think the evidence was sufficient to submit to the jury the issue of involuntary manslaughter. Taken in the light most favorable to the State, the evidence shows that the defendant ran a stop sign approximately seven-tenths of a mile from where the accident occurred. There was no evidence of speed at this point. Paul Farrington, Jr. testified that he saw a black Chevrolet just after Kemp Page was struck and that the car increased its speed instead of stopping; however, there is no evidence of how the car was being operated at the time of the accident, nor is there any evidence of an intentional violation of a safety statute. There is evidence that approximately an hour and 30 minutes following the accident the defendant appeared to be intoxicated, and there is evidence that the defendant stated that he had not had a drink since 2:00 p.m. Assuming, *arguendo,* that this inculpatory statement made by the defendant takes this case out of the rule set forth in *State v. Reddish,* 269 N.C. 246, 152 S.E. 2d 89, we do not think the evidence establishes that the intoxication of the defendant was the proximate cause of the death of Kemp Page. *State v. Tingen,* 247 N.C. 384, 100 S.E. 2d 874. This assignment of error is sustained.

The conviction for hit-and-run is affirmed. The conviction for involuntary manslaughter is reversed.

CAMPBELL and BROCK, JJ., concur.

WILLIAM A. BUNDY v. CABARRUS COUNTY BOARD OF EDUCATION

No. 6919IC162

(Filed 23 July 1969)

1. State § 8— school bus accident — sufficiency of findings by Industrial Commission

In this action for damages resulting from a collision between plaintiff's automobile and defendant's school bus, the Industrial Commission did not err in failing to make additional findings of fact requested by defendant, although the evidence would support such findings and such findings would support the conclusion that plaintiff was contributorily negligent, where the evidence is conflicting and the facts found by the Commission are pertinent to the issues and are ample to determine the dispute and support the award to plaintiff.

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

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.

3. Damages § 15; State § 9— school bus accident — medical expenses — sufficiency of evidence

In this action for damages resulting from a collision between plaintiff's automobile and defendant's school bus, Industrial Commission award of $5,000 as compensation for pain and suffering, loss of wages, medical expenses and damages to plaintiff's automobile is not rendered invalid by fact that plaintiff's evidence fails to show the exact amount of medical expenses arising from the accident in that it includes a doctor's bill covering treatment for a pre-existing back injury as well as treatment for a neck injury received in the accident, where the evidence shows specific dates of treatment by the doctor for plaintiff's neck injury, such evidence establishing some data from which the medical expenses relating to the injury caused by the accident could be established by the Commission.

APPEAL by defendant from the Full Industrial Commission from order entered on 2 January 1969.

This is an action by plaintiff brought under the provisions of G.S. 143-291, to recover for personal injuries and property damage arising out of a collision which occurred on 17 November 1966 involving plaintiff and a school bus driven by Terry Sanders.

Decision and order by Forrest H. Shuford, II, was filed on 15 August 1968. In this order the school bus driver employed by the defendant was found to be negligent, the plaintiff was found to be free from contributory negligence and allowed a recovery in the amount of $5,000 for pain and suffering, loss of wages, medical expenses, and damages to his automobile. On 11 October 1968, defendant made application for this order to be reviewed by the Full Com-

mission, and on 9 December 1968 defendant made motions to correct the decision, and order, and for additional findings of fact. The latter motion was amended on 12 December 1968. Decision and order of the Full Commission filed on 2 January 1969 denied the defendant's motions and affirmed the findings of fact and conclusions of Commissioner Shuford and adopted them as its own. The findings of fact and conclusions were as follows:

"FINDINGS OF FACT

1. On 17 November 1966, at approximately 3:15 P.M., plaintiff drove his 1962 Chevrolet station wagon at a speed of approximately 40 miles per hour in a southerly direction on U.S. Highway Number 29 in Cabarrus County. Such highway had two lanes for southbound traffic and two lanes for northbound traffic. The north and southbound lanes were separated by a median strip.

2. While so driving upon the highway, plaintiff drove from the right southbound lane to the left southbound lane, he intending to make a left turn further down the highway. In the left southbound lane, plaintiff drove to the rear of a truck which was loaded with cotton. While so following the truck, plaintiff approached the intersection of Highway 29 and U.S. Highway 29-A, which intersected from the plaintiff's right or west side at an angle. Highway 29 was a dominant highway and Highway 29-A was a serving (sic) highway, there being Stop signs at the entrance of Highway 29-A into Highway 29.

3. A school bus being driven by Terry Sanders, an employee of defendant, who was paid from the State Nine Months' School Fund and who was acting within the scope and course of his employment, stopped at the entrance of Highway 29-A into Highway 29 as plaintiff approached such intersection. Traffic was extremely heavy at such intersection, making it almost impossible for the school bus to enter the intersection and turn north on Highway 29 as the driver intended to do. Despite such heavy traffic the school bus was driven past the Stop signs into Highway 29 and towards an opening in the median strips which separated the north and southbound lanes of traffic on Highway 29. The school bus stopped between the median strips with the rear of the school bus sticking out on Highway 29. The rear of the school bus almost completely blocked the left southbound lane of Highway 29.

4. As the school bus entered Highway 29 the truck in front of

plaintiff was driven to the right and into the right southbound lane thus exposing to plaintiff's view for the first time the school bus which was at such time being brought to a stop in such a position as to block the left southbound lane.

5. Upon being confronted with such situation, plaintiff attempted to bring his motor vehicle to a stop, he being unable to turn from the left southbound lane because of the heavy traffic. He was unable to bring his station wagon to a complete stop before the front of his motor vehicle struck the left rear of the school bus. Such collision occurred in plaintiff's lane of traffic upon the highway.

6. The school bus driver by entering the dominant road when such could not be done in safety and by causing or allowing the school bus to block one of the lanes of traffic on the highway failed to do that which and did other than a reasonably prudent person would have done under the same or similar circumstances. This constituted negligence upon his part and such negligence was the proximate cause of the accident giving rise hereto and the damages sustained by plaintiff.

7. 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 his part.

8. Following the accident, plaintiff was carried to a hospital where he was seen by a physician who later referred him to Dr. Lewis Curlee, orthopedic surgeon. Plaintiff was suffering from a neck injury and on 27 November 1966 he was hospitalized by Dr. Curlee. Plaintiff was released from the hospital on 12 December 1966 with a cervical collar which had been prescribed by the doctor. Plaintiff recovered sufficiently to return to work on 2 January 1967.

9. Plaintiff continued to have trouble with his neck and was out of work for another week or two in March and for two additional weeks in May, 1967, when he was again hospitalized by Dr. Curlee. Plaintiff also had an arthritic condition of the back which was a condition of long standing and was unrelated to the accident giving rise to this claim.

10. As a result of the accident giving rise hereto, plaintiff incurred pain and suffering, loss of wages from his $60.00 per week job with Cannon Mills, medical expenses, and damage to his station wagon. By reason of such things, he was damaged in the total amount of $5,000.00."

"CONCLUSIONS OF LAW

1. There was negligence upon the part of the above-named employee of defendant while acting within the scope and course of his employment, such employee being paid from the State Nine Months' School Fund. The negligence of such employee was the proximate cause of the accident giving rise hereto and the damages sustained by plaintiff.

2. There was no contributory negligence upon the part of plaintiff.

3. As a result of the negligence of the employee of defendant, plaintiff was damaged in the total amount of $5,000.00 and he is entitled to recover such amount from defendant. G.S. 143-291, et seq."

Defendant excepted to this order of the Full Commission and appealed to this Court.

Irvin and Irvin by E. Johnston Irvin for plaintiff appellee.

Attorney General Robert Morgan by Staff Attorney Richard N. League for defendant appellant.

MORRIS, J.

In its motion for additional findings of fact, the defendant requested the Full Commission to find that plaintiff followed a truck loaded with cotton at a distance of 3½ car lengths until immediately before the collision occurred; that plaintiff was familiar with this intersection and knew it was heavily congested at this time of day, and that plaintiff failed to reduce his speed even though he knew it was impossible for cars on 29-A (the servient highway) to cross the intersection in a continuous movement; and that the weather at the time of this accident was fair and the road was dry. In his amendment to the motion for additional findings of fact defendant requested the Commission to find that the plaintiff was traveling at a speed of 40 miles per hour until he sighted the school bus. Defendant argues that the Full Commission was compelled to find these facts, and that these facts constitute contributory negligence by the plaintiff as a matter of law.

[1, 2] It is clear that the Commission could have found these facts to be the facts of this case and, based upon these facts, the Commission could have found that the plaintiff was contributorily negligent. However, the Commission was not bound to make this determination. "The facts found (by the Commission) are pertinent

to the issues and are ample to determine the dispute and support the award." *Parsons v. Board of Education,* 4 N.C. App. 36, 165 S.E. 2d 776. The Industrial Commission is not required to make findings co-extensive with the credible evidence. *Parsons v. Board of Education, supra.* "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." *Guest v. Iron & Metal Co.,* 241 N.C. 448, 85 S.E. 2d 596. Moreover, the evidence concerning the occurrences surrounding this accident is not without conflict. At the time of the accident, the plaintiff was traveling on a dominant highway at a speed of 40 miles per hour. The speed limit of the highway upon which he was traveling is not set out in the record. Plaintiff testified:

> "He (the school bus driver) come out of the side road there, coming off of 29-A and pulled right straight out in front of me and I looked at my speedometer and I was at Trucker's Center and I was doing 40 miles an hour and just as the truck pulled across he pulled — was coming across the lane in front of me, and I slammed on brakes and locked all four wheels . . ."

Further, plaintiff stated he first saw the school bus just as the truck loaded with cotton passed the intersection, and that when he first saw the bus the front end of it had come across the road. We think this evidence amply supports the finding of fact No. 7 and conclusion of law No. 2 pertaining to the plaintiff's contributory negligence. This testimony also supports the findings and conclusions pertaining to the negligence of the school bus driver.

[3] Finding of fact No. 10 states that the plaintiff incurred pain and suffering, loss of wages, medical expenses, and damages to his automobile. And, by reason of these things he was damaged in the amount of $5,000. Defendant argues that this finding is invalid because from the evidence the amount of the medical expenses arising from this accident was not made clear. Plaintiff produced a bill from a Dr. Curlee, along with other medical bills, in the amount of $952, which plaintiff stated was for treatment of injuries to his neck resulting from this accident. However, Dr. Curlee, on cross-examination, stated that at the time he was treating the plaintiff for this neck injury, he was also treating him for a back injury unrelated to this accident, and that the bill for $952 included fees for both services. Dr. Curlee stated that it would be difficult to separate these charges, apparently, because both services were administered during the same visits.

In *Lieb v. Mayer,* 244 N.C. 613, 94 S.E. 2d 658, the rule was

stated: "Where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed." In this last cited case a partial new trial was ordered because of the insufficiency of the evidence pertaining to damages to the plaintiff's vehicle. The evidence only showed that the plaintiff's car had been "mashed in" around the left rear door and fender. In the Court's own words there was no evidence "as to the value of the plaintiff's car before the collision or as to its condition at that time. Had it ever been in a collision before this time? How many miles had it been driven? What was its value after the wreck? What was the cost of repairs?" We think the present case is distinguishable from the *Lieb* case. While we do not have evidence of the exact amount of Dr. Curlee's services for the treatment of the plaintiff's neck, we do have the amount of the total bill owed by plaintiff to Dr. Curlee for treatment from the date of the accident until Dr. Curlee released plaintiff on 16 December 1967. The evidence also shows that Dr. Curlee treated the plaintiff for injuries to his neck on a daily basis following the accident until 27 November 1966, at which time the plaintiff was hospitalized, for this neck injury, until 12 December 1966. Plaintiff was again hospitalized by Dr. Curlee for treatment of his neck on 12 May 1967 for a period of 16 days. Plaintiff was hospitalized by Dr. Curlee from 3 August 1967 to 1 September 1967, and from 28 November 1967 until 16 December 1967 for treatment of his back and neck.

We think these facts establish some data from which the medical expenses relating to the injury caused by this accident could be established by the Full Commission. Therefore, while we agree with the rule set forth in the *Lieb* case, we do not think this case is governed by the holding of that case because of factual distinctions. The order and award of the Industrial Commission is

Affirmed.

CAMPBELL and BROCK, JJ., concur.

GLOSSON MOTOR LINES, INC. v. SOUTHERN RAILWAY COMPANY
No. 6922SC249

(Filed 23 July 1969)

1. Negligence § 12— last clear chance doctrine

The doctrine of last clear chance is applicable when both plaintiff and defendant have been negligent and defendant has time to avoid the in-

jury after the combined negligence of both has resulted in the hazard being created.

2. Railroads § 5— crossing accident — last clear chance — sufficiency of evidence

In plaintiff's action for damages arising out of the collision between plaintiff's tractor-trailer and a freight train owned by defendant railroad, issue of last clear chance was properly submitted to the jury where plaintiff's evidence tended to show that, after the plaintiff's driver had negligently pulled onto the railroad tracks behind traffic facing a stop sign, there was an appreciable time before the collision during which defendant's engineer could have discovered the driver's peril and acted to slow down or stop the train, but that the engineer did not apply the brakes until after the collision occurred, and that the driver of the automobile in front of plaintiff's driver pulled away from the stop sign a second or two before the collision occurred.

APPEAL by defendant from *Thornburg, S.J.*, 2 December 1968 Special Civil Session of Superior Court of DAVIDSON County.

This is a civil action instituted by the plaintiff to recover for damages sustained as a result of the collision of a tractor-trailer owned by the plaintiff and a freight train owned by the defendant. The collision occurred on 21 June 1967 at what is called "Connell's Crossing" in Thomasville. This crossing is where the railroad crosses Trinity Street (it was also called Connell Street by some of the witnesses).

The evidence for the plaintiff tended to show that its tractor-trailer (truck) on 21 June 1967 was being driven by Gary Berrier who was employed as a "local driver." Berrier was accompanied by Larry Potts, a summer employee of the plaintiff. The truck was on its "regular run" from Lexington to Thomasville and return. At Connell's Crossing, Trinity Street runs generally east and west, and the three separate tracks of the defendant run generally north and south. After turning into Trinity Street behind a lady driving a Ford automobile (Ford), the truck was traveling in a generally western direction. The Ford stopped at the tracks and then proceeded across the tracks and stopped at the stop sign on Trinity Street at the point where it intersects Main Street, which at that point runs parallel with the railroad tracks. This intersection is estimated to be from 10 to 40 feet west of the westernmost rail of the defendant's tracks. Berrier drove the truck up to the tracks and stopped. After looking both north and south, he determined that the tracks were clear and he proceeded across and stopped behind the Ford. At the intersection Berrier could see for about a mile to the south and about 1500 to 2000 feet to the north. The restricted

vision to the north was caused by a curve in the defendant's tracks. Berrier stopped about two feet behind the Ford which left the rear portion of the trailer across defendant's southbound track. There was traffic behind the truck but none of it was on the tracks. After the truck had been in this position from 20 seconds to two or three minutes, the defendant's freight train came around the curve to the north. It was traveling in a southern direction at a speed estimated from 35 to 65 miles per hour and did not slow down until it struck the truck. Berrier and Potts first saw the train when it was approximately 1400 feet away, and the engineer began to blow the whistle when the train was 1000 to 1400 feet away. Berrier blew his horn and yelled at the woman in the Ford. She did not move and Berrier then moved his truck within one foot of the rear of the Ford and locked the brakes, but the rear of the trailer was still across the southbound track. There was no traffic in the eastbound lane of Trinity Street between the railroad crossing and Main Street. The engineer did not slow the train or apply brakes from the time it rounded the curve until after the collision and thereafter it continued on down the tracks for approximately 2100 feet. The Ford pulled out into Main Street a split second before the collision.

The evidence for the defendant tended to show that the 120-car freight train was being operated in a southerly direction on the southbound track at a speed of 55 miles per hour prior to entering the city limits of Thomasville. At the second crossing north of where the accident occurred the engine was "placed in dynamic braking" which had the effect of decreasing the speed of the train. Defendant's engineer testified that "(d)ynamic braking is where you do not use the air brakes." When the train came around the curve 1200 feet to the north of Connell's Crossing, it was traveling at 35 to 40 miles per hour and was further slowing down as a result of the "dynamic braking." At the time the engineer first observed the truck of the defendant its front wheels were on the northbound track and the remaining portion of the truck was on Trinity Street to the east of the crossing. Upon coming around the curve the engineer began blowing the whistle in short blasts. The truck pulled across the tracks and stopped with the rear portion of the trailer on the southbound tracks. It then appeared to pull up and stop again, and in all, it pulled up and stopped a total of three times. At the time the truck pulled across the tracks, the train was approximately 800 feet away. The engineer continued to sound the whistle in short blasts. When the train was 100 feet from the crossing, the engineer applied emergency brakes but the train could not stop and struck the trailer at a point near the rear wheels of the trailer unit. The defendant

also offered evidence which tended to show that the Ford automobile had pulled out into Main Street prior to the collision and that the Ford was approximately 257 feet away at the time of the collision. It was also shown that Trinity Street flares out at the intersection of Main Street and there was a grassy area along side Trinity Street. The parties stipulated as follows:

> "IT IS HEREBY STIPULATED AND AGREED between the parties that in the event the jury should answer the issues of negligence in favor of the plaintiff, that the plaintiff shall recover from the defendant without the necessity of showing damage to its tractor-trailer unit or furniture the sum of $2,-800.00. It is further stipulated and agreed that in the event the jury should answer the issues of negligence in favor of the defendant, the defendant, Southern Railway Company, shall recover from the plaintiff for damage to its engine and automatic signaling device without the necessity of introducing evidence as to such damage or as to the amount thereof the sum of $2,-800.00."

The following three issues were submitted to the jury and each was answered in the affirmative:

> "1. Was the plaintiff's property damaged as a result of the defendant's negligence?
>
> 2. Did the plaintiff by its own negligence contribute to its own damage and the damage to the property of the defendant?
>
> 3. Notwithstanding plaintiff's contributory negligence, if any, could defendant, through the exercise of due care, have avoided damage to the plaintiff?"

From the entry of judgment awarding plaintiff $2,800.00, the defendant appeals to the Court of Appeals, assigning error.

Robert L. Grubb for plaintiff appellee.

Joyner, Moore & Howison by W. T. Joyner, and Walser, Brinkley, Walser & McGirt by Gaither S. Walser for defendant appellant.

MALLARD, C.J.

[1] Defendant objected to the submission of the third issue relating to last clear chance. The doctrine of last clear chance is applicable when both the plaintiff and the defendant have been negligent and the defendant has time to avoid the injury after the combined

negligence of both has resulted in the hazard being created. In the case of *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337 (1945) it is said:

> "The doctrine of last clear chance, otherwise known as the doctrine of discovered peril, is accepted law in this State. It is this: The contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so. * * *
>
> To sustain the plea it must be made to appear that (1) plaintiff by his own negligence placed himself in a dangerous situation; (2) the defendant saw, or by the exercise of reasonable care should have discovered, the perilous position of plaintiff, (3) in time to avoid injuring him; and (4) notwithstanding such notice of imminent peril negligently failed or refused to use every reasonable means at his command to avoid the impending injury, (5) as a result of which plaintiff was in fact injured."

In the case of *Irby v. R. R.*, 246 N.C. 384, 98 S.E. 2d 349 (1957), the Supreme Court said:

> "The discovery of the danger, or duty to discover it, as basis for a charge of negligence on the part of defendant after the peril arose, involves something more than a mere discovery of, or duty to discover, the presence of the injured person, it includes a duty, in the exercise of ordinary care under the circumstances, to appreciate the danger in time to take the steps necessary to avert the accident."

[2] Applying the above principles of law to the evidence in this case, we are of the opinion and so hold that the court did not commit error in submitting the issue of last clear chance. There was evidence of negligence on the part of the defendant, and contributory negligence on the part of the plaintiff. There was also evidence that the defendant's engineer could have but failed to slow down or stop the train after he saw or should have seen that the plaintiff's truck was in a position from which it could not in the exercise of reasonable care be moved or extricated because of the Ford in front of it stopped at the stop sign at the entrance to Main Street.

The evidence in this case most favorable to plaintiff tended to show that if the truck driver had had just a few more seconds after the driver in front of him moved that he could have moved his vehicle off the tracks. The evidence most favorable to plaintiff tended to show that the brakes on the train were not applied and the train did not slow down until after the collision. The jury could have found from the evidence, as it did, that there was an appreciable time between the negligence of the plaintiff's driver in pulling plaintiff's truck onto the railroad track behind traffic facing the stop sign and the time it was struck, during which the defendant's engineer in the exercise of ordinary care, could or should have seen it, discovered its peril, acted with due care by slowing down or stopping and thus avoided the effect of plaintiff's negligence. There is no evidence that plaintiff was in a position to move the truck out of the way of the train after his negligent act of pulling up behind the Ford and stopping. We think that whether the engineer, in the exercise of due care, saw or should have seen the Ford stopped by the traffic on Main Street, and the truck stopped immediately behind the Ford in time to appreciate the danger the truck was in and to take the necessary steps to slow down or stop the train and thus had the last clear chance to avoid the collision was a proper question for the jury.

Defendant contends that the trial court committed error in charging the jury on the doctrine of last clear chance and on the first issue involving the negligence of the defendant. These contentions are without merit. We think the charge, when read as a whole, is basically correct and free from prejudicial error.

No error.

BRITT and PARKER, JJ., concur.

JOHN EDWARD WOOD v. MOZELLE WOOD NELSON AND W. C. NELSON

No. 6919SC207

(Filed 23 July 1969)

1. Cancellation and Rescission of Instruments § 10; Fraud § 12— action to set aside deed — promissory misrepresentation — sufficiency of evidence

In this action to set aside a deed on the ground of fraud, plaintiff's evidence *is held* sufficient to be submitted to the jury where it tends to

show that plaintiff executed the deed to defendant, his daughter, upon defendant's agreement that plaintiff should retain the deed unrecorded for his lifetime so that he would have a place to live and the income from the property during his lifetime, that defendant daughter was to place the deed with plaintiff's other valuable papers kept by her until plaintiff could place the deed in his lock box, but that defendant had the deed recorded and moved onto the property, and that since the death of his first wife, plaintiff had placed special trust and confidence in defendant daughter.

2. Fraud § 3— promissory misrepresentation

A promissory misrepresentation may constitute the basis of fraud when it is made to mislead the promisee, and the promisor, at the time of making the promise, has no intent to comply therewith, since in such instance the state of mind of the promisor is a subsisting fact.

3. Trial § 38— failure to give tendered instructions

The trial court did not err in refusing to give instructions tendered by defendant where the tendered instructions were handwritten but not signed as required by G.S. 1-181(3), and the court in substance gave the requested instructions which were supported by the evidence.

4. Cancellation and Rescission of Instruments § 11; Trial § 33— action to set aside deed — instructions — failure to apply law to evidence

In this action to set aside a deed on the ground of a fraudulent promissory representation by defendant, the trial court erred in failing to declare and explain the law arising on the evidence as required by G.S. 1-180 where the court gave a general abstract statement of the law relating to promissory representation but failed to explain to the jury what facts it would have to find in order to establish a promissory representation.

APPEAL by defendant Mozelle Wood Nelson from *Seay, J.*, 2 December 1968 Session, Superior Court of RANDOLPH.

This is an action to have a deed set aside on the ground of fraud or, in the alternative, to have the deed declared null and void by reason of nondelivery or conditional delivery. Defendant Mozelle Wood Nelson is the only child of plaintiff. Defendant W. C. Nelson is her husband. At the close of plaintiff's evidence, plaintiff took a voluntary nonsuit as to W. C. Nelson.

Two issues were submitted to the jury: (1) Was the plaintiff induced to execute a deed to the defendant Mozelle Wood Nelson for the property described in the complaint by the false and fraudulent representation of Mozelle Wood Nelson? and (2) Did the plaintiff deliver the deed to the defendant Mozelle Wood Nelson with the intent that the title to said property should immediately pass to her?

The jury answered the first issue "Yes" and, therefore, did not answer the second issue.

From the entry of judgment in favor of plaintiff, defendant appealed.

Miller, Beck and O'Briant by Adam W. Beck for plaintiff appellee.

Morgan, Byerly, Post and Keziah by Edward M. Post for defendant appellant.

MORRIS, J.

Plaintiff alleges, in substance, that on or about 12 April 1965, at the instance of his daughter, he executed a deed to her of property described in the complaint; that prior to the execution of the deed she agreed and promised that the deed would not be recorded until after plaintiff's death; that the deed would be retained by plaintiff and kept in his lock box until his death so that he would have the right to dispose of the property at any time he chose during his lifetime; that it was specifically understood and agreed that title would not pass to the daughter until after plaintiff's death; that the daughter arranged with a law firm in High Point for the deed to be prepared, and plaintiff went to the law office and executed the deed; that the daughter was to carry the deed back to her home and then give it to plaintiff to place in his lock box; that instead of giving the deed to the plaintiff, the daughter, on 16 April 1965, had the deed recorded and requested the Register of Deeds to attach a notice to the deed as recorded requesting the local papers not to publish the recordation of the deed; that at the time of the execution of the deed and as inducement therefor the defendant expressly declared, promised, and represented that the deed would not be recorded during plaintiff's lifetime; that during all times since the death of his wife plaintiff had reposed special trust and confidence in his daughter, his only child, and relied upon her; that the promises made by her not to record the deed were false and fraudulent and known by defendant to be false and fraudulent at the time they were made; that plaintiff entrusted the deed to his daughter for the purpose of placing it with his valuable papers located at her home until such time as he had the opportunity to pick it up for deposit in his lock box at High Point; that such entrustment was not intended by the plaintiff as a delivery of the deed to her and the registration thereof was without his knowledge or consent and contrary to his express instructions.

The defendant denied all allegations of fraud and fraudulent representations, denied any special confidence and trust reposed in defendant Mozelle Nelson by plaintiff, denied that the deed was not to be recorded, and averred that the deed was prepared at the request of plaintiff and was recorded at his instructions; that the plaintiff asserted that he wanted to make a gift to his daughter of the property but did not want the transfer known to his prospective second wife.

[1] Defendant contends that there was not sufficient evidence of fraud for the submission of the first issue to the jury. Plaintiff's evidence tended to show that defendant daughter had heard that plaintiff intended to remarry and she told plaintiff she wanted a deed for the farm to keep it in the family; that plaintiff agreed to execute a deed upon defendant daughter's agreement that he would retain the deed unrecorded for his lifetime so that he would have a place to live and the income from the property during his lifetime; that there was an agreement that the fact that a deed had been executed would not be disclosed to anyone even defendant daughter's husband; that the defendant daughter had the deed prepared, came by plaintiff's farm and told him and he went with her to a law firm in High Point and signed the deed; that when he had signed it defendant daughter put it in her pocketbook and was to place it with plaintiff's other valuable papers kept by her at her home until such time as plaintiff could get it and put it in his lock box; that she then carried him home; that later that month, plaintiff got married and went to Florida; that in June 1965 he returned to Randolph County and discovered that the deed had been recorded; that his grandson and his wife were living in the house and defendant daughter and her husband had also moved in; that plaintiff demanded that defendant daughter reconvey the property to him but she refused to do so; that he subsequently did gain possession of the house; that he sold some timber from the land and his daughter objected and demanded the proceeds of sale; that after he signed the deed, his daughter told him that he would have to file a gift tax return; that no tax would be due but she had had such a return prepared and all he had to do was sign it; that he went to the lawyer's office and signed the return just a day or two after he signed the deed, because his daughter told him it was necessary.

Defendant's evidence tended to show that the plaintiff suggested giving defendant daughter the property because he planned to remarry; that he told her to have a deed prepared and that when she advised him this had been done, he took her to the lawyer's office and signed the deed and handed it to her and told her to have it re-

corded when she got time; that when the gift tax return was prepared he again took her to High Point and signed the tax return and again told her to have the deed recorded; that she did so on 16 April 1965 but told the Register of Deeds not to publish it because her father didn't want anyone to know about it; that before plaintiff went to Florida, she and her husband began remodeling the house and when he came back and wanted the house they moved out; that she had not requested the money from the sale of the timber, but that it was placed in escrow pending the outcome of this suit.

The evidence was uncontradicted that since the death of plaintiff's first wife, his daughter and he had been very close. He had had his checking and savings accounts put in their joint names and she was free to withdraw funds therefrom and did at one time withdraw $1500 from his checking account; that she had kept for him all of his valuable papers, including automobile and truck insurance policies, titles, etc. This relationship existed until his remarriage.

[1, 2] We think the court correctly overruled defendant's motions for nonsuit. "When a representation contains all the elements of fraud except that it is not a representation of an existing fact but is promissory in nature, the 'state of mind' of the promissor is material. If he made the promissory representations merely to mislead the promisee with no intent to comply with the promise, and the other elements of fraud are made to appear, such representations will support an action in fraud notwithstanding the promissory nature of the representation, for the 'state of mind' of the promissor is a subsisting fact. What his condition of mind was at the time and his intent in respect to the fulfillment of the promise presents a question for the jury. (citations omitted.)" *Roberson v. Swain*, 235 N.C. 50, 55, 69 S.E. 2d 15. This assignment of error is overruled.

[3] Defendant also assigns as error the refusal of the court to give tendered instructions which consisted of defendant's contentions. The instructions tendered were, according to the record, handwritten but not signed as required by G.S. 1-181(3). In any event, it appears that the court in substance gave the requested contentions which were supported by the evidence. This assignment of error is overruled.

[4] By assignments of error Nos. 10, 11, 12, 14 and 15 defendant complains that the judge failed to apply the law to the evidence. G.S. 1-180 provides that the trial tribunal, in giving a charge to the jury, "shall declare and explain the law arising on the evidence

given in the case." Defendant contends that the court did not adequately perform the function devolving upon it under this portion of the statute. We agree. In *Lewis v. Watson,* 229 N.C. 20, 23, 47 S.E. 2d 484, Justice Ervin said:

> "The chief purpose of a charge is to aid the jury clearly to comprehend the case, and to arrive at a correct verdict. For this reason, this Court has consistently ruled that this statute imposes upon the trial judge the positive duty of instructing the jury as to the law upon all of the substantial features of the case. *Smith v. Kappas,* 219 N.C. 850, 15 S.E. (2d), 375; *Ryals v. Contracting Co.,* 219 N.C., 479, 14 S.E. (2d), 531; *Williams v. Coach Co.,* 197 N.C., 12, 147 S.E., 435; *Wilson v. Wilson,* 190 N.C., 819, 130 S.E., 834. If the mandatory requirements of the statute are not observed, 'there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented.' *Smith v. Kappas, supra.* A litigant does not waive his statutory right to have the judge charge the jury as to the law upon all of the substantial features of the case by failing to present requests for special instructions. *Smith v. Kappas, supra; Spencer v. Brown,* 214 N.C., 114, 198 S.E., 630. Moreover, the mandate of the statute is not met by a 'statement of the general principles of law, without application to the specific facts involved in the issue.' *Ryals v. Contracting Co., supra; Mack v. Marshall Field & Co.,* 218 N.C., 697, 12 S.E. (2d), 235; *Nichols v. Fibre Co.,* 190 N.C., 1, 128 S.E., 471. The judge must declare and explain the law 'as it relates to the various aspects of the testimony offered.' *Smith v. Kappas, supra.* By this it is meant that the statute requires the judge 'to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.' 53 Am. Jur., Trial, section 509."

When the challenged instructions are examined in the light of these principles it is apparent that the court failed to declare and explain the law arising upon the evidence in this case. After recapitulating the evidence, the court discussed fraud, gave a general abstract statement of the law relating to promissory representation but failed to make any application to the evidence. The trial judge failed to explain to the jury what facts it would have to find in order to establish a promissory representation. These assignments of error are sustained.

Defendant has abandoned a number of her assignments of error

and in the remaining ones not abandoned we find no prejudicial error.

Because of prejudicial error in the court's charge to the jury, there must be a

New trial.

CAMPBELL and BROCK, JJ., concur.

JETTIE BRADY GALLIGAN v. TOWN OF CHAPEL HILL AND HAROLD P. SMITH

No. 6915SC304

(Filed 23 July 1969)

1. Municipal Corporations § 12— waiver of governmental immunity — liability insurance — affirmative action to retain immunity

The General Assembly did not intend that a municipality could exempt itself from liability in accordance with the provisions of Chapter 1015, Session Laws of 1951, by passing a one time blanket resolution.

2. Municipal Corporations § 12— tort liability — waiver of governmental immunity — liability insurance

A municipality is deemed to have waived its governmental immunity by purchase of liability insurance in the absence of affirmative action on the part of the municipal governing body. G.S. 160-191.1, G.S. 160-191.4.

3. Municipal Corporations § 12— tort liability — waiver of governmental immunity — purchase of liability insurance — prior resolution against waiver

Purchase by a municipality of liability insurance on a police car waived its governmental immunity for the negligent operation of such vehicle to the extent of the liability insurance thereon, where the governing body of the municipality thereafter took no affirmative action to retain its governmental immunity, notwithstanding the municipal governing body had passed a resolution against waiver of its governmental immunity some 14 years prior to the purchase of liability insurance.

APPEAL by plaintiff from *Clark, J.*, 20 January 1969 Session of Superior Court held in ORANGE County.

The plaintiff instituted this action to recover for injuries received in an accident when the car in which she was riding as a passenger collided with a police car owned by the Town of Chapel Hill. The collision occurred on 18 July 1965 on a bridge on U. S.

Highway 15-501 at a point where Highway 15-501 crosses over N. C. Highway 54 near the Town of Chapel Hill. At the time of the collision the police car was being operated by Harold P. Smith in the performance of his official duties.

This action was instituted in Randolph County where the plaintiff resides. Subsequently, upon motion of the defendants, the action was removed to Orange County pursuant to G.S. 1-83 and G.S. 1-77. The action was specially set for trial at the request of plaintiff at the 20 January 1969 Session of Superior Court of Orange County. On coming on for trial, the trial court, out of the presence of the jury, heard evidence on the plea of governmental immunity asserted by the Town of Chapel Hill. The plea of governmental immunity was based upon a resolution (ordinance) passed by the Chapel Hill Board of Aldermen on 25 June 1951. This resolution purports to avoid any liability of the Town of Chapel Hill as a consequence of the passage of Chapter 1015 of the Session Laws of 1951. (Chapter 1015, which was effective July 1, 1951, is now codified as G.S. 160-191.1 to G.S. 160-191.5.) The Town of Chapel Hill has taken no further action since the passage of this resolution, other than it has continued to purchase liability insurance, and was covered by liability insurance at the time the wreck occurred. After the hearing on the plea of the Town of Chapel Hill respecting its governmental immunity, the trial court entered the following order:

> "THIS CAUSE COMING ON FOR TRIAL before the undersigned Judge Presiding at the January 20, 1969, Civil Session of Superior Court of Orange County, and it appearing to the Court upon the call of the case for trial that the defendant Town of Chapel Hill had pleaded as an affirmative defense that the defendant Town of Chapel Hill was immune from liability for torts committed when engaged in performing a governmental function and that the plaintiff had filed a reply to the further defense of the Town of Chapel Hill and had pleaded that the Town of Chapel Hill was not entitled to any immunity from liability for torts committed when engaged in performing a governmental function because the defendant Town of Chapel Hill had waived its immunity from liability for torts, and the Court being of the opinion that the plea of governmental immunity of the defendant Town of Chapel Hill should be heard and determined prior to a trial of the case on its merits, whereupon without objection by any party, the Court proceeded to hear the evidence offered by the parties; that after the plaintiff had offered her evidence and rested, the defendant Town of Chapel

Hill offered its evidence and rested, at which time the plaintiff offered further evidence in rebuttal.

Based upon all of the competent evidence offered at the hearing, the Court makes the following findings of fact: The plaintiff alleged and the defendant Town of Chapel Hill admitted that at the time of the collision giving rise to the plaintiff's alleged cause of action, the defendant Harold P. Smith was a police officer of the Town of Chapel Hill and that he was acting within the course and scope of his employment at the time of the collision and that in the exercise of its powers as a municipal corporation, it maintained a police force, that Harold P. Smith was a policeman and that at the time of the collision, he was in the performance of his duties as a policeman. The plaintiff did not contend that the Town of Chapel Hill was not engaged in a governmental function of a municipality at the time of the collision giving rise to the plaintiff's alleged cause of action. On June 25, 1951, the governing body of the Town of Chapel Hill unanimously adopted and enacted a resolution or ordinance to the effect that the governmental immunity from liability for torts by the Town of Chapel Hill was not waived, the ordinance specifically stating that under no circumstances or in any respect as suggested by Chapter 1015, Session Laws of 1951 (GS 160-191, *et seq*) or in any other manner did the defendant Town of Chapel Hill waive its governmental immunity for damages to property or injury to persons as a result of its activities. The resolution and ordinance has not since been repealed, rescinded or amended. The defendant Town of Chapel Hill had purchased a policy of motor vehicle liability insurance and said policy was in full force and effect at the time the plaintiff's alleged cause of action arose, but by purchasing said motor vehicle liability policy, the defendant Town of Chapel Hill did not waive its governmental immunity from liability for torts under the provisions of GS 160-191.1 for that it took affirmative action in passing said resolution and ordinance of June 25, 1951.

Based upon the foregoing findings of fact, the Court concludes that the defendant Town of Chapel Hill is immune from liability for torts committed by its agents and employees when engaged in the performance of a governmental function and that the action against the defendant Town of Chapel Hill should be dismissed.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND

DECREED that the defendant Town of Chapel Hill, a municipality, is immune from liability for torts committed by its agents and employees while engaged in the performance of a governmental function and this action against the defendant Town of Chapel Hill shall be and the same is hereby dismissed."

The plaintiff then took a voluntary nonsuit as to defendant Smith.

From the order dismissing the action against the Town of Chapel Hill, the plaintiff appeals to the Court of Appeals, assigning error.

Ottway Burton for plaintiff appellant.

Perry C. Henson and Daniel W. Donahue for defendant appellee.

MALLARD, C.J.

G.S. 160-191.1, which is the codification of Chapter 1015 of the Session Laws of 1951, reads in pertinent part as follows:

"The governing body of any incorporated city or town, by securing liability insurance as hereinafter provided, is hereby authorized and empowered, but not required, to waive its governmental immunity from liability for any damage by reason of death, or injury to person or property, proximately caused by the negligent operation of any motor vehicle by an officer, agent or employee of such city or town when acting within the scope of his authority or within the course of his employment. Such immunity is waived only to the extent of the amount of the insurance so obtained. Such immunity shall be deemed to have been waived in the absence of affirmative action by such governing body."

The resolution of 25 June 1951 of the Board of Aldermen of the Town of Chapel Hill reads as follows:

"Upon motion of Alderman Cornwell and seconded by Alderman Burch, the above Resolution was introduced for passage and the same was duly passed, the following number voting in the affirmative: Fowler, Fitch, Burch, Davis, Cornwell, and Putnam, and the following number voting in the negative: None. Mr. Lanier brought up the question of a Resolution for not waiving governmental immunity for damages. After discussing this matter, Mr. Burch moved that the following recommended Resolution be adopted. WHEREAS, Chapter 1015 of the Session Laws of 1951 provides a method whereby municipalities may waive their governmental immunity; and

WHEREAS, one provision of said law seems to require positive action on the part of this Governing Body with respect to whether or not it desires to waive such governmental immunity; and, WHEREAS, it is the opinion of this Governing Body that the waiving of such immunity is not to the best interest of this municipality: NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF ALDERMEN OF THE TOWN OF CHAPEL HILL, N. C., does not under any circumstances or in any respect as suggested by Chapter 1015 of the Session Laws of 1951 or in any other manner waive its governmental immunity for damages to property or injury to persons as a result of its activities. Mr. Burch's motion was seconded by Mr. Fitch and passed unanimously."

[1] From the time that it passed the resolution in 1951 until the date of the collision in question the Town of Chapel Hill took no further action with respect to its non-waiver of governmental immunity. The total time since it passed the original resolution was over 14 years. We do not think that the General Assembly intended that a municipality could exempt itself from liability in accordance with the provisions of Chapter 1015 of the Session Laws of 1951 by simply passing a one time blanket resolution. We have not found any case directly on point with the facts of the present case. However, in the case of *White v. Mote,* 270 N.C. 544, 155 S.E. 2d 75 (1967), we find the following language:

"Where a municipal corporation procures liability insurance on a vehicle used by it in the performance of a governmental function, it may, but is not required to, waive its governmental immunity for the negligent operation of such vehicle to the extent of the amount of liability insurance. . . ."

[2] In the absence of affirmative action on the part of the governing body of the Town of Chapel Hill, its governmental immunity would be deemed to have been waived by the purchase of liability insurance. G.S. 160-191.1 and G.S. 160-191.4. In the present case, the liability insurance policy (Hartford Accident and Indemnity Company, Policy No. 22 C 352288) was issued on and was effective after 11 July 1965 to 11 July 1966. (This policy shows that there was a previous policy which was numbered 22 C 351282).

The question presented for decision is: Did the Town of Chapel Hill waive its defense of governmental immunity from liability for the tort alleged in this action to the extent of the liability insurance policy which it purchased effective 11 July 1965?

G.S. 160-191.4 provides: "An incorporated city or town may in-

cur liability pursuant to this article only with respect to a claim arising after such city or town has procured liability insurance pursuant to this article and during the time when such insurance is in force."

[3] On 25 June 1951, before the effective date of the foregoing statutes, the governing authorities of the Town of Chapel Hill took affirmative action to retain its governmental immunity, but, thereafter, as of 11 July 1965, the governing body of the Town of Chapel Hill again took the affirmative action of purchasing and procuring liability insurance as authorized by G.S. 160-191.1, and did not subsequently act to retain its governmental immunity.

Defendant, Town of Chapel Hill, admitted at the trial that "on July 18, 1965, this liability insurance policy, which would cover the police car being operated by Mr. Smith at the time of this accident, was in full force and effect."

We are of the opinion, and so hold, when the Town of Chapel Hill purchased and procured the policy of insurance No. 22 C 352288 on 11 July 1965 from the Hartford Accident and Indemnity Company, that to the extent of such insurance, the said Town had waived its governmental immunity pursuant to G.S. 160-191.1 by failing to subsequently take affirmative action to retain it.

We have considered the other question raised by the appellant in regard to the change of venue and find it to be without merit.

For the reasons stated, the judgment of the Superior Court dismissing this action as to the Town of Chapel Hill is

Reversed.

BRITT and PARKER, JJ., concur.

MRS. HELEN ALLEN BROWN v. BOREN CLAY PRODUCTS COMPANY

No. 6926SC358

(Filed 23 July 1969)

1. Trial § 50— motion to set verdict aside — experiments by juror

In plaintiff's action to recover damages sustained in an automobile-truck collision which occurred forty minutes after sunset, trial court did not abuse its discretion in refusing to set the verdict aside because one

of the jurors during a night recess conducted experiments with regard to viewing vehicles on the highway thirty minutes after sunset.

2. Automobiles § 13— use of lights at night

G.S. 20-129(a) requiring vehicles to be equipped with lighted front and rear lamps at night is a safety statute enacted for the protection of persons and property, and a violation thereof is negligence *per se*.

3. Automobiles § 90— instructions — application of law to evidence — lighted headlamps

Where plaintiff's evidence was to the effect that the collision between her automobile and defendant's truck occurred some forty minutes after sunset and that at the time of the collision defendant's truck did not have lighted headlamps, it was incumbent upon the trial judge to instruct the jury with regard to G.S. 20-129(a) requiring lighted front lamps at night and to apply the law to the facts, and his failure to do so entitles plaintiff to a new trial.

4. Trial § 33; Appeal and Error § 50— instructions — prejudicial error — unexplained use of "strike that"

Where trial judge failed to explain to the jury what he meant by his use of the words "strike that" immediately following the sentence containing statement of plaintiff's contentions, the jury could not know whether trial judge meant to strike the entire sentence or a part thereof, and plaintiff's exception to the charge is sustained.

APPEAL by plaintiff from *Falls, J.*, 24 February 1969 (Schedule B) Regular Civil Session, MECKLENBURG County Superior Court.

Plaintiff instituted this action for personal injuries and property damage resulting from a collision between her 1961 Ford automobile and a 1965 Ford truck owned by the defendant and operated on the occasion in question by its duly authorized employee and agent.

On 16 December 1966 some forty minutes after sunset at a time when it was dusky dark, but not black dark, the plaintiff was driving in a westerly direction on the Albemarle Road known as North Carolina Highway No. 27. Plaintiff was looking for a place where she could turn around, as she had gone by the place where she was to meet her husband. Plaintiff reached a point where there was an unpaved road which intersected the Albemarle Road from the south. This unpaved road terminated there and thus formed a "T" intersection. Plaintiff alleged and offered evidence tending to show that on reaching this point, she stopped her vehicle giving proper signals indicating that she intended making a left turn. She remained in a stopped position with her headlights burning until other traffic proceeding in an easterly direction could pass. After waiting for some three or four vehicles to pass, each of which had headlights burning, she then determined that she could complete her turn in safety and

proceeded to do so. Before she could complete her turn and while the rear of her vehicle was still on the hard surface, her vehicle was struck near the right rear by the defendant's truck. Plaintiff claimed that she had been unable to observe the defendant's truck because of its color and because it did not have any lights burning. As a result of the collision, the plaintiff seeks damages, both for personal injuries sustained and property damage to her vehicle. The defendant, on the other hand, alleged and offered evidence tending to prove that its truck was proceeding in an easterly direction with its headlights burning; that the plaintiff was meeting the defendant's truck when suddenly and without warning and at a time when such maneuver could not be made in safety, the plaintiff turned left across the lane of traffic in which the truck was proceeding, thereby producing the collision between the plaintiff's vehicle and the truck and causing damage to the truck for which damage the defendant filed a counterclaim.

Issues were submitted to the jury and answered as follows:

"1. Was the plaintiff injured and her property damaged through the negligence of the defendant, as alleged in the complaint?

Answer: No

2. Did the plaintiff, by her own negligence, contribute to said injuries and damage, as alleged in the answer?

Answer:

3. What amount, if any, is the plaintiff entitled to recover of the defendant?

For Personal Injuries:

For Property Damage:

4. Was the defendant's property damaged through the negligence of the plaintiff, as alleged in the answer?

Answer: Yes

5. What amount, if any, is the defendant entitled to recover of the plaintiff?

Answer: $150.00"

From judgment entered in accordance with the issues and verdict that the plaintiff have and recover nothing and that the defendant have and recover of the plaintiff the sum of $150.00 on the counterclaim, the plaintiff appealed to this court.

Craighill, Rendleman & Clarkson by J. B. Craighill for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by John G. Golding and Michael K. Gordon for defendant appellee.

CAMPBELL, J.

The plaintiff makes numerous assignments of error, but we will refrain from discussing many of them as we find it necessary to award a new trial, and the same questions are unlikely to arise again.

[1] The plaintiff assigns as error the refusal of the court to set the verdict aside because one of the jurors during a night recess conducted some experiments with regard to viewing vehicles on the highway some thirty minutes after sunset. The record discloses that the trial judge went into this with care and concluded that any impropriety in this regard had not affected the verdict. This was a discretionary matter with the trial judge, and we do not think the record discloses any abuse of the discretion of the trial judge.

There is no merit in this assignment of error.

Both the pleadings and the evidence brought into sharp focus not only the desirability, but the necessity of having headlights burning on the respective vehicles at the time of collision. The plaintiff claimed that she did have the headlights burning on her vehicle and that the defendant did not have lights burning on the truck and that as a result thereof, she was unable to see the truck and hence placed herself in a position where the collision occurred. The defendant on the other hand contended that at all times the lights on the truck were burning. It was stipulated and agreed that the collision occurred on the open highway where the maximum speed limit was 55 miles per hour for passenger vehicles and 45 miles per hour for trucks; and that the sun had set at 5:13 p.m. The plaintiff claimed the collision occurred some forty minutes after sunset and thus the statutory requirement with regard to headlights was applicable.

[2] G.S. 20-129(a) provided:

> "When Vehicles Must Be Equipped. — Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, shall be equipped with lighted front and rear lamps as in this section respectively required for different classes of vehicles, and subject to exemption with reference to lights on

parked vehicles as declared in § 20-134." (As it read in 1966 at the time of the accident here involved and prior to the 1967 amendment.)

This is a safety statute enacted for the protection of persons and property. A violation of this statute is negligence *per se*. *Thomas v. Thurston Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377; *Oxendine v. Lowry,* 260 N.C. 709, 133 S.E. 2d 687.

[3] It was incumbent upon the trial judge to instruct the jury with regard to the requirements of the statute as being the law applicable to the case and then to apply the law as thus given to the facts in question. *Correll v. Gaskins,* 263 N.C. 212, 139 S.E. 2d 202.

The trial judge should have instructed the jury, even in the absence of request therefor, in substance, as follows: If the jury should find from the evidence and by its greater weight that the collision in question occurred more than a half hour after sunset and that at that time the defendant's truck did not have front lamps lighted as required by the statute, then such conduct on the part of the defendant would constitute negligence as a matter of law, and if the jury find by the greater weight of the evidence that such negligence was a proximate cause of the collision and the injuries and property damage sustained by the plaintiff, then the first issue should be answered, "Yes". In the instant case, the trial judge gave no instructions with regard to this statute requiring lighted front lamps and did not apply the law as contained in the statute to the facts. Because of this failure, the plaintiff is entitled to a new trial. *Correll v. Gaskins, supra.*

Another statute and factual situation was drawn into sharp focus by both the pleadings and the evidence of the plaintiff and the defendant in this case.

The plaintiff contended and alleged and offered evidence tending to show that she reached the intersection sometime prior to the defendant's truck; that she was giving a proper signal for a left turn an appreciable length of time before the defendant's truck reached the intersection, and in fact, long enough for some three or four cars to pass before she commenced turning. She claimed that she had the right-of-way pursuant to G.S. 20-155 as it provided in 1966, and prior to the 1967 amendment. This statute then read:

"(b) The driver of a vehicle approaching but not having entered an intersection and/or junction, shall yield the right-of-way to a vehicle already within such intersection and/or junction whether the vehicle in the junction is proceeding straight

ahead or turning in either direction: Provided, that this subsection shall not be interpreted as giving the right-of-way to a vehicle already in an intersection and/or junction when said vehicle is turning either to the right or left unless the driver of said vehicle has given a plainly visible signal of intention to turn as required in § 20-154."

[4] The trial court in charging in this phase of the matter stated:

". . . If you should find, Members of the Jury, that the Plaintiff in this case entered this intersection or junction and was already in the act of turning into this junction road; that when the truck driver approached the junction, it would have been the duty of the defendant to delay his entrance into the intersection until the Plaintiff had passed through, that is to yield to the Plaintiff the right-of-way, even though the — STRIKE THAT."

If the words "STRIKE THAT" mean to strike the entire sentence, then the Court failed to instruct properly the jury with regard to the plaintiff's contentions. It is difficult, if not impossible, to say exactly what the judge intended by the words "STRIKE THAT". There was no explanation given to the jury, and the result was certain to cause confusion in the minds of the jury.

As Ervin, J. wrote in *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484:

"The chief purpose of a charge is to aid the jury clearly to comprehend the case, and to arrive at a correct verdict. For this reason, this Court has consistently ruled that this statute imposes upon the trial judge the positive duty of instructing the jury as to the law upon all of the substantial features of the case. . . . If the mandatory requirements of the statute are not observed, 'there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented.' . . . A litigant does not waive his statutory right to have the judge charge the jury as to the law upon all of the substantial features of the case by failing to present requests for special instructions. . . . Moreover, the mandate of the statute is not met by a 'statement of the general principles of law, without application to the specific facts involved in the issue.' . . . The judge must declare and explain the law 'as it relates to the various aspects of the testimony offered.' . . . By this it is meant that the statute requires the judge 'to explain the law of the case, to point out the essentials to be

proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.' . . .

When the instructions given to the jury in the court below are scrutinized in the light of these principles, it is indisputably clear that the trial judge failed to declare and explain the law arising upon the evidence given in this case, and that the exceptions of the plaintiff to the charge must be sustained. . . ."

For the reasons given in this opinion, the plaintiff is entitled to a new trial. It is so ordered.

New trial.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. LEROY MELVIN REID

No. 6926SC261

(Filed 23 July 1969)

1. Robbery § 4— armed robbery — sufficiency of evidence — issue of common-law robbery

In armed robbery prosecution, there is no merit in defendant's argument that he was guilty of only common-law robbery in that at the moment the robbery actually occurred he and his accomplice did not use or threaten to use dangerous weapons in a manner "whereby the life of a person is endangered or threatened," G.S. 14-87, where there was ample evidence that defendant held a gun and his accomplice a knife at the time they assaulted their victim and dragged him into an adjacent lot prior to robbing him.

2. Kidnapping § 1— removal of victim — length of distance

In prosecution for kidnapping, evidence that the defendant dragged the victim for a distance of only 75 feet into a lot adjoining the victim's yard does not warrant nonsuit.

3. Kidnapping § 1— "kidnap" defined

"Kidnap" means the unlawful taking and carrying away of a person by force and against his will, and it is the fact and not the distance of forcible removal of the victim that constitutes kidnapping. G.S. 14-39.

4. Kidnapping § 1— instructions

In kidnapping prosecution, an instruction which would permit the jury to find defendant guilty of the offense upon a finding that he had unlawfully detained the victim without any finding that the body of the victim

had been forcibly removed and carried away for any distance whatsoever is erroneous.

5. Criminal Law § 168— instructions — prejudicial error

Where the court charges correctly in one part of the charge and incorrectly in another part, there must be a new trial, since the jury may have acted upon the incorrect part, and this is particularly true when the incorrect part of the charge is the application of the law to the facts.

APPEAL by defendant from *Falls, J.*, 2 December 1968 Schedule "A" Session of MECKLENBURG Superior Court.

Defendant was charged in two bills of indictment with the felonies of armed robbery and kidnapping. He pleaded not guilty to both. Evidence for the State was in substance as follows: Robert Neal has his residence and office in the City of Charlotte, N. C. Adjacent to his house is a garage with walkway running along the side and to the rear, where the entrance to his office is located. At the back of his lot is a hedgerow, four to five feet high, which separates his property from an adjoining vacant lot. At approximately 9:00 a.m. on 3 September 1968 Mr. Neal left his office and as he rounded the corner of the garage he encountered the defendant and another man, by the name of Sims. Prior to that time he had never seen the defendant but had seen Sims on 31 August 1968 at a boardinghouse operated by his wife. The defendant had a gun in his hand and Sims had a knife in his. The defendant had a nylon stocking mask hanging around his neck. Neal ran but tripped and fell. The defendant and Sims seized Neal and dragged him through the hedge at the rear of his property approximately 75 feet into the vacant lot. There the defendant and Sims laid their weapons on the ground while each held one of Neal's arms. As they were binding Neal's wrists with adhesive tape, the defendant picked up the knife from the ground, cut Neal's watchband, took his watch, which had cost $200.00, and removed a Masonic ring, which had cost $75.00, from Neal's hand. The defendant asked Neal where the key to Neal's house was, and Neal told defendant that he did not have it on him but that it was in his office. The defendant and Sims placed adhesive tape over Neal's mouth and eyes and then took him back to the hedgerow which separated his property from the vacant lot. At the hedgerow they laid Neal on the ground and Neal heard the defendant and Sims discuss plans as to how to get to Neal's wife when she should return home and how to gain admission to the house. They remained at the hedgerow for a few minutes and then Neal heard either defendant or Sims yell "Police," whereupon both defendant

and Sims ran away, and Neal's bonds were removed by a Charlotte Police officer.

Other witnesses, including police officers, testified and identified defendant as the person who was pursued from the scene by the police. Defendant was apprehended a short time later by a Charlotte Police officer who found defendant in a honeysuckle thicket a few blocks away and placed him under arrest.

The jury found defendant guilty of the offense charged in each indictment, and from prison sentences to run concurrently imposed thereon, defendant appealed.

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

J. LeVonne Chambers and James E. Lanning for defendant appellant.

PARKER, J.

[1] Appellant assigns as error the overruling of his motion of nonsuit on the charge of armed robbery. G.S. 14-87 is as follows:

> "Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."

While admitting the State's evidence shows he held a gun and his accomplice a knife at the time they seized their victim and dragged him into the adjoining lot, appellant argues that the evidence also shows that at the moment the robbery actually occurred he did not use or threaten to use these dangerous weapons in a manner "whereby the life of a person is endangered or threatened," and therefore he could only be found guilty of common-law robbery. In support of this argument he points to the testimony of the prosecuting witness who testified as follows:

> "Q. No one ever threatened your life to get it, did they?
>
> "A. They threatened my life but not to get the watch and ring."

Appellant's argument ignores the fact that all of the evidence shows that the transactions all occurred as one continuous course of events; that there was ample evidence that defendant and his accomplice held in their hands dangerous weapons when they assaulted their victim; that at the moment the actual robbery occurred it was no longer necessary for them to use or threaten to use their weapons, since they had already physically subdued their victim and were in process of binding his arms. Under these circumstances, there was plenary evidence to submit the charge of armed robbery to the jury.

We have also carefully examined the court's charge on armed robbery and find therein no error. There was no error in the trial, verdict, or judgment sentencing the defendant for the offense of armed robbery.

[2] Appellant assigns as error the overruling of his motion for nonsuit on the charge of kidnapping. In this connection appellant contends that the common-law offense of kidnapping, as heretofore defined by the North Carolina Supreme Court, requires that the victim be carried away over a substantial distance, and that the evidence here shows the victim was dragged only some 75 feet into an adjoining lot. There is no merit in this contention.

[3] In North Carolina there is no statutory definition of the crime of kidnapping. The authoritative definition which has been given by the North Carolina Supreme Court is contained in the case of *State v. Lowry*, 263 N.C. 536, 541, 139 S.E. 2d 870, 874, and is as follows:

> "The word 'kidnap,' in its application to the evidence in the case at bar, and as used in G.S. 14-39, means the unlawful taking and carrying away of a person by force and against his will (the common-law definition). *State v. Gough*, 257 N.C. 348, 126 S.E. 2d 118; *State v. Dorsett*, 245 N.C. 47, 95 S.E. 2d 90; *State v. Witherington*, 226 N.C. 211, 37 S.E. 2d 497; *State v. Harrison, supra* (145 N.C. 408, 59 S.E. 867). *It is the fact, not the distance of forcible removal of the victim that constitutes kidnapping.*" (Emphasis added.)

The evidence here was amply sufficient to warrant submitting to the jury defendant's guilt of the crime of kidnapping.

[4, 5] The judge correctly charged the jury as to the definition of the crime of kidnapping, following almost verbatim the definition approved in *State v. Lowry, supra.* However, after the jury had retired to consider its verdict and had been in the jury room for approximately one hour, it returned and asked for additional instruc-

tions as to the definition of kidnapping. Thereupon the court charged the jury as follows:

> "Well, with respect to the charge of kidnapping, if you find from the evidence in this case and beyond a reasonable doubt, the burden being upon the State of North Carolina to so satisfy you, that on the 3rd day of September, 1968, the defendant, Leroy Melvin Reid, unlawfully took and carried away from his premises, that is, Neal's premises, the person of Robert Neal, by unlawful physical force, against his will, or did unlawfully seize and unlawfully detain him off of his premises for a period of thirty to forty-five minutes and further find beyond a reasonable doubt that such taking or carrying away or unlawfully detaining the person of Robert Neal was against his will and was unlawful or done without lawful authority and by physical force, then it would be your duty to convict the defendant Reid of the crime of kidnapping as charged in the bill of indictment."

This instruction was in error, in that it would permit the jury to find the defendant guilty of the crime of kidnapping upon a finding that he had unlawfully detained the prosecuting witness without any finding that the body of the victim had been forcibly removed and carried away for any distance whatsoever. Some states have by statute so defined the crime of kidnapping. "Some modern statutes define kidnapping so as to absorb the crime of false imprisonment and tend to obliterate the distinction between the two offenses; others adopt the basic concept that there must be a carrying away of a person from the place where he was seized to some other place." 1 Am. Jur. 2d, Abduction and Kidnapping, § 1, p. 160. North Carolina by judicial definition of the crime still follows the concept that some carrying away or transporting of the person of the victim is an essential element of the crime of kidnapping. Even though a part of the instructions given was a correct statement of the law, our Supreme Court has uniformly held that "where the court charges correctly in one part of the charge, and incorrectly in another part, it will cause a new trial, since the jury may have acted upon the incorrect part, and this is particularly true when the incorrect part of the charge is the application of the law to the facts." *State v. Gurley,* 253 N.C. 55, 58, 116 S.E. 2d 143, 145.

In the trial and judgment sentencing defendant for the crime of armed robbery, we find

No error.

In the case in which defendant was charged with the crime of

kidnapping, because of prejudicial error in the charge, defendant is entitled to a

New trial.

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

STATE OF NORTH CAROLINA v. WALTER BASS

No. 6914SC328

(Filed 23 July 1969)

1. Constitutional Law § 31— right of cross-examination — examination of witness from counsel table

In this common-law robbery prosecution, defendant was not denied his constitutional right effectively to cross-examine the prosecuting witness by court's reminder to defense counsel that interrogation of witnesses should be conducted from the counsel table, where the court indicated that it would review its ruling should the necessity be later shown for defense counsel to leave the counsel table for purpose of a physical demonstration, and no such necessity was ever shown.

2. Criminal Law § 89— cross-examination as to prior convictions

Defendant has the right to cross-examine a State's witness with respect to the witness' previous criminal convictions for the purpose of impeaching the testimony of the witness.

3. Criminal Law § 169— exclusion of question as to prior conviction — harmless and prejudicial error

No prejudicial error is shown in the trial court's sustention of an objection to a competent question begun by defense counsel as to whether on a certain date a State's witness had been "charged and convicted," the trial court apparently thinking defense counsel was continuing previously disallowed interrogation concerning prior criminal charges as distinguished from prior convictions, where the trial court permitted defense counsel immediately thereafter to continue questioning the witness and to obtain his admission of a conviction for leaving the scene of an accident, and the record does not disclose what the answer of the witness would have been.

4. Criminal Law § 167— burden of showing prejudicial error

Defendant appellant has the burden not only to show error but to show that such error was prejudicial.

5. Criminal Law § 113— recapitulation of the evidence — direct testimony

In this common-law robbery prosecution, statement by the court in

recapitulating the evidence that the prosecuting witness testified that he had identified defendant from pictures shown him by a detective *is held* supported by the witness' direct testimony.

6. Criminal Law § 168— misstatement of evidence in charge — harmless and prejudicial error

In this prosecution for common-law robbery, no prejudicial error is shown in the trial court's inaccurate statement in the charge that the robbery victim testified that the lights at the crime scene were a little brighter than the courtroom lights, when, in fact, the witness so testified as to the lights in a bus station, where the witness testified in detail as to lighting conditions at the crime scene, the court instructed the jury that they were to be guided by their own recollection of the testimony, and this misstatement of the evidence was not called to the court's attention at the trial.

7. Criminal Law § 166— abandonment of assignments of error

Assignment of error not brought forward in the brief is deemed abandoned. Court of Appeals Rule No. 28.

APPEAL by defendant from *Bowman, J.*, 10 March 1969 Criminal Session of DURHAM Superior Court.

By bill of indictment, proper in form, defendant was charged with the offense of common-law robbery of one James Lewis Parrish, alleged to have been committed on 18 January 1969. He pleaded not guilty. At the trial the victim of the robbery, appearing as a witness for the State, testified in substance as follows: That about 12:30 a.m. in the early morning of 18 January 1969 he went to the bus station in the City of Durham for the purpose of getting supper; after eating, he left the bus station and walked approximately two blocks on his way home when the defendant ran up behind him, grabbed him around the neck, and knocked him down; he could see the defendant, who came in front of him when defendant shoved him down; there was a street light at the corner; three other boys then ran up and two of the boys held him while the other two searched him and took from him his watch, his pocketbook and money, and other personal belongings; he had seen the four boys previously around the bus station and had seen the defendant in the bus station that night when he ate supper. The second witness for the State was a pawnbroker who testified that on the morning of 18 January 1969 the defendant, whom he had known for approximately one year, had come into his pawnshop and pawned a watch with him. The watch was put in evidence and identified as the watch belonging to the victim and which had been taken from him during the course of the robbery.

The defendant took the stand and testified to an alibi and that he had purchased the watch on the morning of 18 Jaunary for $4.00 from a man he met in a poolroom and later had pawned it for $6.00.

The jury found defendant guilty as charged, and from judgment imposing prison sentence thereon, defendant appeals, assigning errors.

Attorney General Robert Morgan and Staff Attorney L. Phillip Covington, for the State.

William R. Winders for defendant appellant.

PARKER, J.

[1] Appellant's first assignment of error, based on his exceptions #1 and 2, is that the court denied his constitutional right effectively to cross-examine the principal witness for the State, first, as to the method by which the robbery had been accomplished and, second, as to the witness's past criminal record. Exception #1 is based upon the following episode, which occurred while counsel for defendant was cross-examining the victim of the robbery:

> Counsel for defendant: "Mr. Parrish, you say this boy here came up behind you?"
>
> The Court: "All interrogation of witnesses is conducted from the counsel table."
>
> Counsel for defendant: "I was going to get him to show me how this man grabbed him, if Your Honor please. I would like to use something to show how it happened, and I think it is important as to how it happened."
>
> The Court: "When you come to that point, we will see."

The court committed no error in reminding defense counsel of the rule of decorum generally enforced in the courts of this State that interrogation of witnesses be conducted from the counsel table. Further, the court clearly indicated that it would review its ruling should the necessity be later shown for defense counsel to leave the counsel table for purpose of a physical demonstration. Examination of the record reveals that such necessity was never shown, as defense counsel proceeded to accomplish his purpose of demonstrating how the attack had been made by questions asked from the counsel table, and this was done without further interruption by the court or objection by the solicitor. The defendant was given full opportunity to cross-examine the State's witness as to the method by which the robbery had been accomplished.

[2-4] Appellant's exception #2 is directed to a remark made by the court while defendant's counsel was cross-examining the State's principal witness as to the witness's own prior criminal record. In this connection, the State's witness had been asked by defendant's counsel if he had been *charged* with assault and battery on two separate occasions. The answer in both cases was in the negative. The solicitor objected to the form of the question, which objection was sustained after the witness had already answered. Defense counsel then asked:

> "On December 29, 1966, Mr. Parrish, were you charged with and convicted of —"
>
> The Court: "Sustained. You know better than to ask that question."

For the purpose of impeaching the testimony of the State's witness, defendant had the right to cross-examine with respect to the witness's previous criminal convictions and the question asked was a proper one. *Ingle v. Transfer Corp.*, 271 N.C. 276, 156 S.E. 2d 265. Apparently the trial judge thought that defendant's counsel was continuing to interrogate concerning previous criminal charges which had been made against the witness, as distinguished from his previous convictions for criminal offenses. That this was the case appears from the fact that the court did permit defense counsel immediately thereafter to continue, without interruption, to question the witness and to obtain his admission to having been convicted and sentenced for the criminal offense of leaving the scene of an accident. It is not clear from the record whether this conviction was the one referred to in counsel's question, above quoted, as having occurred on 29 December 1966. If it was, then defendant's counsel did successfully cross-examine the witness with respect to that conviction, despite the interruption by the court, and defendant has suffered no prejudice. If it was not, then the record does not disclose what the witness's answer would have been; consequently, it is impossible for us to know whether the ruling was prejudicial. We cannot assume the witness's answer would have been in the affirmative. The burden was on the defendant not only to show error but to show that such error was prejudicial. *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342. No prejudicial error has been shown in defendant's first assignment of error.

[5] Appellant's second assignment of error, based on his exceptions #4 and 5, is addressed to that portion of the court's charge to the jury in which the court recapitulated the testimony of the prosecuting witness. Exception #4 is directed to that portion of the

charge in which the court stated: "At this point he (referring to the prosecuting witness) stated that he identified defendant from some pictures Mr. Cameron, the detective, showed him." Examination of the transcript reveals the following questions on cross-examination by defendant's counsel and the following answers given by the State's witness:

"Q. Have you been shown any pictures by Mr. Cameron?
"A. Yes sir.
"Q. Have you identified anybody?
"A. No.
"Q. You have not?
"A. I identified him (pointing to the defendant).
"Q. You identified him where?
"A. I said I could identify him.
"Q. Where did you identify him?
"A. Pictures Mr. Cameron showed me."

From the foregoing series of questions and answers, it is clearly apparent that the witness did testify positively that he had identified the defendant from pictures shown him by the detective, and it was not error for the court to so charge the jury while recapitulating that testimony.

[6] Exception #5 is to the portion of the judge's charge in which it is stated, while still recapitulating the testimony of the same witness:

> "On redirect examination the witness testified that the lights at the scene from the street light were a little brighter than the courtroom lights."

This statement of the witness's testimony was not accurate, since the witness had testified that the lights in the bus station, not the lights at the scene of the crime, were a little brighter than the courtroom lights. The witness had testified in some detail, both on direct and cross-examination, as to the lighting conditions at the scene of the crime. In particular, he had testified that the scene was lighted by an ordinary street light which was at the corner approximately 50 feet from the place he was robbed. The court did positively instruct the jury that they were to be governed solely and entirely by their own recollection of the testimony and were to disregard the recollection of any other person, including that of the judge. While the judge's charge did contain an inaccurate statement of the testimony

in the respect noted, we do not believe the error material or that the jury was misled thereby. Furthermore, it does not appear that this misstatement of the evidence was called to the attention of the court before the jury retired or at any time during the trial. Our Supreme Court has repeatedly held that this must be done in order to give the court an opportunity to correct the inadvertence. After verdict, the objection comes too late. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Cornelius,* 265 N.C. 452, 144 S.E. 2d 203; *State v. McNair,* 226 N.C. 462, 38 S.E. 2d 514.

[7] Appellant's final assignment of error is not brought forward in his brief and is deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals. In the entire trial we find no error sufficiently prejudicial to warrant awarding a new trial.

No error.

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

TRUMAN LOCKLEAR v. CLAUDE HENRY SNOW AND RED SPRINGS MOTORS, INC.

No. 6916SC201

(Filed 23 July 1969)

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

In determining the sufficiency of the evidence on plaintiff's motion for nonsuit as to defendant's counterclaim, the trial court is required to consider the evidence in the light most favorable to the defendant.

2. Negligence § 34— contributory negligence — counterclaim — sufficiency of evidence

In this action for damages resulting from a collision between plaintiff's automobile and defendant's wrecker, the trial court properly allowed plaintiff's motion for nonsuit of defendant's counterclaim and properly refused to submit the issue of contributory negligence to the jury, where all of defendant's evidence related to events which occurred after the collision and there is no evidence to support defendant's allegations of negligence by plaintiff.

3. Appeal and Error § 10; Trial § 49— motion for new trial for newly discovered evidence

A motion for a new trial on the basis of newly discovered evidence may be made in the Court of Appeals when such evidence is discovered

after the adjournment of the trial court and pending an appeal, but such motions are not looked upon with favor and are granted only in the Court's discretion.

4. Trial § 49— new trial for newly discovered evidence — prerequisites

An applicant seeking a new trial on the ground of newly discovered evidence must rebut the presumption that the verdict is correct and must show by affidavit that he used due diligence and the means employed to do so, or that there has been no laches in procuring the testimony which he contends is now available but which was not available at the time of the trial.

5. Trial § 49— motion for new trial for newly discovered evidence — failure to show due diligence

In this action for damages resulting from a collision between plaintiff's automobile and defendant's wrecker, defendant's motion for a new trial on the ground of newly discovered evidence is denied by the Court of Appeals where the affidavits in support of the motion fail to show affirmatively that due diligence was used and proper means employed to procure the evidence at the trial.

APPEAL by defendant from *Bailey, J.*, November 1968 Session of the Superior Court of SCOTLAND County.

This is a civil action instituted by the plaintiff to recover for alleged personal injuries and property damage resulting from the collision of plaintiff's automobile and a wrecker truck (wrecker) owned by the corporate defendant and operated by the individual defendant. Since the institution of this action, the individual defendant has died from causes unrelated to this cause of action. The collision between the plaintiff's automobile and the wrecker occurred at approximately 12:10 P.M. on 17 October 1967 on North Carolina Highway 71 about five miles from Red Springs, North Carolina.

The evidence for the plaintiff tended to show that he was operating his car in a southerly direction on Highway 71 which was a paved road 18 feet wide; he had been following the wrecker for some distance; he pulled into the left lane to pass the wrecker and sounded his horn as he did so; as he pulled alongside the wrecker, the wrecker attempted to turn left and collided with the right side of plaintiff's automobile when plaintiff's automobile was about three feet from the center line; as a result of the collision, the plaintiff's car left the highway and struck a tree thereby causing injury to his person and property; that prior to turning left, the driver of the wrecker gave no signal of his intention to turn left, and after the collision the defendant Snow turned the left blinker light on after he had gone to a house near there and returned.

The evidence for the defendant tended to show that the left

blinker light on the wrecker was in operation a few minutes after the accident and before Mr. Snow returned to the wrecker from the house; that neither the car nor the wrecker were moved for several minutes after the wreck until a highway patrolman arrived; and that one of the plaintiff's witnesses was a woman of bad reputation.

At the close of all the evidence, the trial court granted a nonsuit as to defendant's counterclaim. The issue of defendant's negligence was submitted to the jury who returned a verdict in favor of the plaintiff in the amount of $4,631.50. Subsequent to the trial but before the judgment was signed, the defendant made a motion for a new trial on the basis of newly discovered evidence. This motion was denied.

From the judgment of the Superior Court, the defendant appeals to the Court of Appeals, assigning as error the granting of the nonsuit as to its counterclaim, the failure to submit to the jury the issue of contributory negligence on the part of plaintiff, the denial of its motion for a new trial, and the action of the trial court in signing and entering the judgment.

Johnson, Hedgpeth, Biggs & Campbell by John W. Campbell for defendant appellant.

Mason, Williamson and Etheridge by Andrew G. Williamson for plaintiff appellee.

MALLARD, C.J.

The defendant asserts that there are three questions presented on this appeal:

"1. Did the court err in allowing Plaintiff's motion for judgment of nonsuit on the counterclaim of the Defendant, granted at the close of all the evidence?

2. Did the Court err in refusing to submit the issue of contributory negligence of the Plaintiff, as requested by Defendant?

3. Did the Court err in signing and entering the judgment?"

[1, 2] We consider the initial two questions presented. In considering the sufficiency of the evidence on plaintiff's motion of nonsuit as to defendant's counterclaim, the trial court was required to consider the evidence in the light most favorable to the defendant. *Wilkins v. Turlington*, 266 N.C. 328, 145 S.E. 2d 892 (1966); *Gillikin v. Mason*, 256 N.C. 533, 124 S.E. 2d 541 (1962). All of the evi-

dence offered by the defendant related to events occurring after the collision actually took place. Nowhere in the evidence favorable to the defendant is there to be found testimony that the left blinker light on the wrecker was actually in operation at the time the collision occurred; that the plaintiff failed to sound his horn before passing; that the plaintiff failed to maintain a proper lookout; that the plaintiff was operating his vehicle at a speed greater than was reasonable and prudent under the then existing circumstances; that the plaintiff failed to keep his car under control; that the plaintiff failed to keep at least a two-foot interval between his car and the wrecker when attempting to pass; or that plaintiff failed to reduce his speed in order to avoid the collision. Although the defendant has alleged all of the foregoing acts of negligence by the plaintiff, there is a total absence of proof as to any one of them. Allegations alone are not sufficient; there must be some proof of the allegations alleged in defendant's answer. *Moore v. Hales,* 266 N.C. 482, 146 S.E. 2d 385 (1966). Viewing the evidence in the light most favorable to the defendant, we hold that it was not sufficient to be submitted to the jury as to the counterclaim of defendant or to require the submission of the issue of contributory negligence.

The cases cited by the defendant are factually distinguishable in that they are concerned with accidents arising from a collision with a vehicle ahead, and therefore are not in point with the case under consideration.

The third question presented on this appeal is to the entry and signing of the judgment. This is a formal exception, is without merit and needs no discussion.

The defendant's motion for a new trial was made before the signing of the judgment but after the adjournment of the session of the trial court at which the case was tried. The trial court denied the motion for the reason that it was "without jurisdiction to entertain said motion for that the term at which trial was had has expired, but without prejudice to the defendant Red Springs Motors, Inc. to make this motion in the Appellate Division." Defendant does not contend in its brief that the trial court was in error in denying the motion for a new trial on the grounds of newly discovered testimony.

[3] In this court defendant has renewed its motion for a new trial on the basis of newly discovered evidence. Such motions may be made in the Court of Appeals when such evidence is discovered after the adjournment of the trial court and pending an appeal. Such motions are not looked upon with favor in the appellate division

and are granted only in the discretion of the appellate court. *Herndon v. R. R.*, 121 N.C. 498, 28 S.E. 144 (1897); McIntosh, N.C. Practice and Procedure § 1800(7).

In *State v. Casey*, 201 N.C. 620, 161 S.E. 81 (1931), Chief Justice Stacy speaking for the court said:

> "Both the trial and appellate courts have exercised the right to grant new trials for newly discovered evidence in civil cases, and the rules governing such applications, in cases appearing on the civil side of the docket, are well established by a number of decisions. But on account of the abuse to which such applications are susceptible, the courts have found it necessary to admit them cautiously, under somewhat stringent rules, to prevent the endless mischief which a different course would undoubtedly produce."

[4] There are seven of these rules which are specifically set out in *State v. Casey, supra,* and *Johnson v. R. R.*, 163 N.C. 431, 453, 79 S.E. 690 (1913), and many other cases. See also 7 Strong, N.C. Index 2d, Trial § 49. The rules require the applicant seeking a new trial on the grounds of newly discovered evidence to rebut the presumption that the verdict is correct. The applicant is also required to show by affidavit that he used due diligence and the means employed to do so, or that there has been no laches in procuring the testimony which he contends is now available but which was not available at the time of the trial. *Johnson v. R. R., supra.*

In the case of *Alexander v. Cedar Works,* 177 N.C. 536, 98 S.E. 780 (1919), we find the following language:

> "But we put our decision chiefly upon the ground that a want of laches has not been sufficiently shown. Laches is negligence, consisting in the omission of something which a party might do, and might reasonably be expected to do, towards the vindication or enforcement of his rights. . . . It may be that petitioners were actually free from laches, but if so, it should have appeared affirmatively, the burden of showing diligence being upon them."

[5] J. D. Odom, in his affidavit filed in support of the defendant's motion for a new trial, states that he knew Claude Snow, the driver of the wrecker for Red Springs Motors, Inc., before this occasion, and that he talked to him there at the scene of the collision on 17 October 1967. Mr. Odom stated that he operated an advertising business in Lumberton, and on Friday, 8 November 1968, which was over a year after the incident, was making a *routine* business call

on the owner and operator of Red Springs Motors, Inc., and was informed about the trial that had taken place that week. It is not clear from the affidavit or this record why the identity of this man who made "routine" calls on the corporate defendant, who knew Mr. Snow, the driver of the wrecker, and who had talked to Mr. Snow at the scene of the collision, was not called as a witness at the trial of this case.

After careful consideration of the affidavits submitted in support of the motion for a new trial on the basis of newly discovered evidence, we are of the opinion that there is a failure to affirmatively show that due diligence was used and proper means employed to procure the testimony of J. D. Odom at the trial. The motion for a new trial on the grounds of newly discovered evidence is denied.

For the reasons set out in the trial in the Superior Court, we find

No error.

BRITT and PARKER, JJ., concur.

LUCILLE F. MUSGRAVE AND GAIL M. LANNING, ADMINISTRATRIX OF CLYDE WILSON MUSGRAVE v. MUTUAL SAVINGS AND LOAN ASSOCIATION

No. 6922SC317

(Filed 23 July 1969)

1. Judgments § 6— modification of judgment during term at which rendered

A judgment is *in fieri* during the term at which it is rendered and the judge, *non constant* notice of appeal, may modify, amend or set it aside at any time during the term.

2. Judgments § 6; Trial § 30— setting aside ruling allowing nonsuit — authority of court

Trial court had authority, in its discretion, to set aside its ruling allowing defendant's motion for judgment as of nonsuit after the jury had been dismissed and the court had commenced the trial of another case.

3. Appeal and Error § 54— judicial discretion

The exercise of judicial discretion by a judge is not an arbitrary power and is not one to be used to gratify the passion, whim, vindictiveness or idiosyncracies of the individual judge.

4. Appeal and Error §§ 54, 59; Trial §§ 9, 50— mistrial declared after jury dismissed

In this action for damages allegedly caused by defendant's negligent failure to procure a policy of life insurance for plaintiff, the trial court did not abuse its discretion in ordering a mistrial after the court had allowed defendant's motion for nonsuit and dismissed the jury, and two of the jurors had been empaneled to try another case.

APPEAL by defendant from *McConnell, J.*, 17 February 1969 Civil Session of Superior Court of DAVIDSON County.

In the amended complaint the following is alleged as a first cause of action: On 5 May 1966 plaintiff, Lucille F. Musgrave (Mrs. Musgrave), and her husband, Clyde Wilson Musgrave (Mr. Musgrave), borrowed $5000.00 from defendant. Defendant, acting through its agents, agreed to procure a policy of insurance on the life of Mr. Musgrave, which, upon the death of Mr. Musgrave would pay the unpaid balance of the note securing the loan. Premiums for the payment thereof were to be paid along with the regular monthly payments on the note. Defendant negligently failed to procure the insurance policy, and negligently failed to notify Mr. and Mrs. Musgrave that such insurance had not been obtained. On 7 July 1966 Mr. Musgrave died and Gail M. Lanning qualified as the administratrix of his estate. As a result of the failure to secure the policy of insurance the defendant is indebted to the plaintiff in the sum of $4,913.79.

As a second cause of action the plaintiffs allege in the amended complaint that by failing to procure the policy of insurance as hereinabove set out the defendant breached its contract with Mr. and Mrs. Musgrave.

Defendant answering denies the material allegations of the complaint, and by way of further answer asserts that plaintiffs have alleged a cause of action in tort and on contract arising out of the same facts and circumstances; and that they are not entitled to proceed in the trial of this case on both theories, but should be required to make an election.

The action came on for trial which began either on 17 February 1969 or 18 February 1969 (the record is not clear which date it began) and continued until 19 February 1969, when "(a)t the close of all the evidence, defendant's motion for judgment as of nonsuit was sustained." The judge dismissed the jury that had been empaneled to try this case, called another case and began the trial thereof. Two of the jurors on the panel to try this case were selected, sworn and empaneled on 19 February 1969 to serve on the case the judge called

for trial immediately after announcing that defendant's motion for nonsuit in this case had been allowed. On 20 February 1969 while the same session of court was being held the trial judge *ex mero motu* declined to sign the judgment sustaining the defendant's motion for nonsuit and then signed and caused to be entered the following judgment:

> "THIS CAUSE coming on to be heard before the undersigned Judge Presiding at the February 1969 Civil Session of the Superior Court of Davidson County, and having been called for trial on Tuesday, February 18, 1969, and the plaintiffs and the defendant having both offered evidence; and at the close of the defendant's evidence, a motion was made for judgment of nonsuit. This motion was allowed by the Court, and subsequent thereto further consideration having been given to the motion, and the Court now being of the opinion that the motion should have been denied, but the jury having heard the statement of the Court that the motion for nonsuit was allowed; and it appearing to the Court that it would not be proper to continue the trial.
>
> Now, therefore, it is ORDERED that the judgment of the Court sustaining the motion for nonsuit be and the same is hereby stricken out and a juror is withdrawn and a mistrial is declared. The foregoing action striking out the previous judgment and declaring a mistrial is taken by the Court in the exercise of its discretion during the session at which said judgment was entered, and a new trial of this action is ordered."

The defendant excepted and appealed to the Court of Appeals.

Walser, Brinkley, Walser & McGirt by Walter Brinkley for plaintiff appellees.

Wilson and Beeker by Ned A. Beeker for defendant appellant.

MALLARD, C.J.

The original record did not contain the pleadings on which the case was tried. Upon motion being made and allowed the pleadings were supplied by an addendum to the record. The evidence in the case was not included in the record on appeal and there was no transcript of the evidence filed. The question was not raised as to whether the judgment appealed from was an interlocutory order from which no appeal lies.

The defendant excepted to the signing of the judgment entered

herein, and makes this exception the basis of its first assignment of error. This presents the proposition of whether the trial judge had the right, at the same session of court, to change his ruling on the motion for judgment as of nonsuit after he had dismissed the jury engaged in the trial of the case and started the trial of another case.

In the case of *Shaver v. Shaver,* 248 N.C. 113, 102 S.E. 2d 791 (1958), the court said:

> "The presiding Judge of the Superior Court may, within established limitations, open or vacate a judgment on his own motion. During a term of court, all judgments and orders are deemed to be *in fieri.* Therefore, during the term any judgment or order, except one entered by consent, ordinarily may be opened, modified or vacated by the court on its own motion."

[1, 2] "A judgment is *in fieri* during the term at which it is rendered and the judge, *non constat* notice of appeal, may modify, amend, or set it aside at any time during the term." *Hoke v. Greyhound Corp.,* 227 N.C. 374, 42 S.E. 2d 407 (1947). See also *State v. Godwin,* 210 N.C. 447, 187 S.E. 560 (1936); *GMC Trucks v. Smith,* 249 N.C. 764, 107 S.E. 2d 746 (1959); *Insurance Co. v. Walton,* 256 N.C. 345, 123 S.E. 2d 780 (1962); *Chriscoe v. Chriscoe,* 268 N.C. 554, 151 S.E. 2d 33 (1966); *Hagins v. Redevelopment Comm.,* 275 N.C. 90, 165 S.E. 2d 490 (1969). We are of the opinion, and so hold, that Judge McConnell had the right and authority in this case, in his discretion, to set aside the ruling allowing the motion for judgment as of nonsuit after he had dismissed the jury engaged in the trial thereof and had commenced the trial of another case.

Defendant took exception to the refusal of the trial judge to sign the judgment tendered by it dismissing this action as of nonsuit, and makes this exception the basis of its second assignment of error. In view of what is said above this assignment of error is overruled.

Defendant's third assignment of error is based on a combination of its exceptions numbered one and two, and in which defendant asserts and contends that the trial judge "erred and abused his discretion in signing the judgment dated February 20, 1969." The judge specifically stated that striking out the previous judgment of nonsuit and declaring a mistrial was done in the exercise of his discretion. In *2 McIntosh, N.C. Practice* 2d, § 1548, it is said:

> "The causes for which a mistrial may be ordered are varied and within the discretion of the court. It may be necessary on account of the sickness or other disability of the judge, juror, parties or counsel; or it may be necessary to prevent injustice,

as where a party is taken by surprise after the trial has begun, or it is discovered that a juror is disqualified or there has been an improper remark or expression of opinion by the court, or abuse of privilege by counsel, or some misconduct on the part of the jurors or others, or when the jury fails to agree upon a verdict after reasonable time for deliberation."

In *Chapman v. Dorsey,* 230 Minn. 279, 41 N.W. 2d 438, it is said:

"Judicial discretion is the sound choosing by the court, subject to the guidance of the law, between doing or not doing a thing, the doing of which cannot be demanded as an absolute right of the party who asks that it be done. A right which is positive is an unqualified right — one which is not dependent upon, and which in fact does not admit of any exercise of, discretion."

[3] The exercise of judicial discretion by a judge is not an arbitrary power, and is not one to be used to gratify the passion, partiality, whim, vindictiveness, or idiosyncracies of the individual judge. In the case of *Hensley v. Furniture Co.,* 164 N.C. 148, 80 S.E. 154 (1913), in discussing the nature of judicial discretion Justice Walker said:

"Judicial discretion, said Coke, is never exercised to give effect to the mere will of the judge, but to the will of the law. The judge's proper function, when using it, is to discern according to law what is just in the premises. *'Discernere per legem quid sit justum.' Osborn v. Bank,* 9 Wheat., 738. When applied to a court of justice, said *Lord Mansfield,* discretion means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular. 4 Burrows, 2539. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment, in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited. We do not interfere unless the discretion is abused."

[4] Also in *2 McIntosh, N.C. Practice* 2d § 1548, referring to withdrawing a juror and ordering a mistrial it is said: "The withdrawal is merely a fiction carried over from the criminal practice, and amounts to nothing more than the ordering of a mistrial." In this case the fact that the judge had commenced the trial of another

case, and the fact that at least two of the jurors empaneled in this case had been selected, sworn and empaneled on the case that had been commenced, did not prevent the judge from exercising his discretion and ordering a mistrial in this case. No abuse of discretion, or arbitrary use of discretion has been made to appear on this record.

Affirmed.

BRITT and PARKER, JJ., concur.

ROBERT L. SHEW v. ROYCE CHEMICAL COMPANY

No. 6918SC289

(Filed 23 July 1969)

Process § 13— service on foreign corporation — whether employee is managing agent

Foreign corporation's resident employee is not a "managing agent" within the purview of G.S. 1-97(b) so as to render the foreign corporation amenable to service of process by service on its local agent as provided by the statute, where the evidence is that the employee calls upon the corporation's customers in this State once a month to sell its products but that the employee does not take orders or collect money, that it is only occasionally that he handles a complaint, and that the employee's only exercise of discretion is in selecting the customers upon whom he calls.

APPEAL by defendant from *Gwyn, J.*, 9 September 1968 Civil Session, Superior Court of GUILFORD (Greensboro Division).

Plaintiff brings this action to recover for injuries allegedly caused by the negligence of the defendant's employees in New Jersey. Plaintiff is a resident of North Carolina. Defendant is a corporation organized under the laws of New Jersey and has its principal place of business in New Jersey.

Summons and order granting application for extension of time to file complaint were delivered to the Secretary of State for service on the defendant on 3 October 1966. On this same date these documents were mailed to the defendant by registered mail. Complaint was filed by the plaintiff on 20 October 1966. On 21 November 1966 the defendant moved that this summons be quashed, basically, on

the grounds that the defendant had not had a registered agent appointed in this State; that the defendant had not transacted business in this State; and that the cause of action stated did not arise in this State. Therefore, service on the defendant, through the Secretary of State, by the provisions of G.S. 55-143, 55-144, or 55-145, was improper. Following this motion to quash made by the defendant and within 90 days of the issuance of the original summons, the plaintiff had issued an alias and pluries summons and directed that such summons be served on defendant by serving Irving J. Royce, 2008 Belvedere Avenue, Charlotte, North Carolina, the local agent of the defendant. This summons was served on 7 January 1967.

On 9 March 1967 the defendant moved that this action be dismissed, alleging that the service made upon it by serving Irving J. Royce was improper and without effect because Irving J. Royce was not a person upon whom service could be made so as to constitute service upon defendant. The motions made by the defendant on 21 November 1966 and 9 March 1967 were considered in the Superior Court on affidavits and depositions. On 31 January 1969, Gwyn, J., entered an order declaring invalid the service made upon defendant by serving the Secretary of State, and upholding the service made on defendant by serving Irving J. Royce. From this order defendant appealed.

Jordan, Wright, Nichols, Caffrey & Hill by Karl N. Hill, Jr., for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter by Stephen P. Millikin and Larry B. Sitton for defendant appellant.

MORRIS, J.

The question presented by this appeal is whether the North Carolina Court properly has *in personam* jurisdiction over the defendant.

Royce Chemical Company manufactures and sells sodium hydrosulfite which is used in the textile business, and zinc oxide which is used primarily in the manufacture of rubber tires. Royce Chemical Company, at the time the service of process was served on Irving J. Royce, had one employee stationed in North Carolina. This was Irving J. Royce. Defendant does not maintain an office in this State, nor does it have a telephone in this State. Defendant keeps a certain amount of hydrosulfite stored in North Carolina in public warehouses located at Charlotte and High Point. The hydrosulfite stored at Charlotte has a gross sales value of $5,000 to $25,000, and that

stored at High Point has a gross sales value of $5,000 to $10,000. The chemicals stored at Charlotte and High Point are used to serve certain North Carolina customers, and customers in South Carolina and Georgia who pick up the chemicals in their own truck. Occasionally a North Carolina customer will pick up chemicals from these storage supplies in his own truck. Approximately 50 percent of the sales based on orders originating in North Carolina are picked up at the New Jersey plant in the customer's vehicle; 30-35 percent of the North Carolina orders are shipped by common carriers from the New Jersey plant; and 15-20 percent of the North Carolina orders are shipped on vehicles leased by the defendant. No money is collected in North Carolina for the sales and the defendant does not have a bank account in North Carolina. The gross sales of defendant are $6,000,000 to $8,000,000 per year, and the sales made by defendant in North Carolina are approximately $100,000 per month, or 20 percent of defendant's total business.

Irving J. Royce, defendant's only employee in North Carolina at the time this action was begun, has resided in North Carolina since 1933. He operates out of his home; does not have an office in his home; nor does he have a telephone in the defendant's name. His job is to call on customers and sell them his company's product, however, he does not take orders. He will call upon each customer approximately once a month. The orders are sent into the New Jersey office by the customer and, generally, on the customer's order form. Irving J. Royce does not collect money. He does pick the customers upon whom he calls, and on rare occasions he will phone in an order for a customer if it is a rush order. This might happen once or twice a year. The orders are accepted or rejected by the home office, although Irving J. Royce testified that to his knowledge he had never had an order refused.

Louis Meyer is also employed at the present time by the defendant in North Carolina. His duties are essentially the same as those of Irving J. Royce. He was not employed by the defendant in this State at the time this action was commenced.

North Carolina G.S. 1-97(b) provides for service upon a foreign corporation as follows:

> "If the action is against a foreign corporation, to the president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer or the manager of any office or plant maintained in this State by the corporation or to any managing agent transacting business for the corporation in the State or

to a director when he is in this State on business of the corporation."

The affidavit and depositions reveal that Irving J. Royce is not an officer of the defendant corporation, does not manage a plant here, nor is he a director of the defendant corporation. Therefore, as we interpret this statute, the defendant could be served with process by serving Irving J. Royce only if Irving J. Royce is (1) a managing agent (2) transacting business for the defendant. "Before a foreign corporation can be subjected to the jurisdiction of our State court, two requirements must be met: (1) The corporation must be doing business in this State; and (2) it must be present in the person of an authorized officer or agent who carries on the business." *Heath v. Manufacturing Co.*, 242 N.C. 215, 87 S.E. 2d 300. (Decided just prior to the enactment of the above statute.)

In *Heath v. Manufacturing Co., supra,* Higgins, J., stated that "[t]he officer or agent through whom the business is done must be one who exercises some degree of control over the corporate functions of the company. He must be empowered to exercise some discretion with respect to the business for which the company was organized and in which it is engaged. . . . The term 'agent' means more than subordinate employee without authority or discretion. To be an agent one must have some charge or measure of control over his principal's business. . . . A salesman or broker who takes orders and submits them to the home office of the foreign corporation for acceptance is not a managing or local agent, and the foreign corporation by reason thereof is not doing business in this State." (citations omitted.) In this last cited case the trial court had found that the person served "was employed by the defendant as a sales and factory representative" and that through him the defendant was doing business in this State. The Supreme Court held that these findings were insufficient to support the conclusion that the person served was a managing agent.

Decisions of the United States Supreme Court have expanded concepts of a state court's jurisdiction over foreign corporations, *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154; *Perkins v. Benquet Cons. Mining Co.,* 342 U.S. 437, 96 L. Ed. 485, 72 S. Ct. 413, and this trend has been followed by the North Carolina Supreme Court. *Dumas v. R. R.,* 253 N.C. 501, 117 S.E. 2d 426. In *Dumas* our Supreme Court held that service upon the defendant Railroad through its agent who maintained an office in this State for the defendant was proper. However, the Court's discussion in *Dumas* was related to whether the defendant Railroad

was "doing business" in this State, and, apparently, the Court saw no need to discuss the problem of whether the agent served was a managing agent.

We need not decide the question of whether the defendant was doing business in this State, because under the principles enunciated in *Heath v. Manufacturing Co., supra,* we do not think it can be said that Irving J. Royce was a "managing agent" and, therefore, service on defendant through him is invalid because not in compliance with G.S. 1-97. The evidence shows that he did not collect money, he did not take orders, he could not approve orders, and it was only occasionally that he would handle a complaint. These complaints generally involved late shipments, and when they arose he would call the traffic manager and inform him of the problem. He would not contact the shipper. The only discretion exercised by Irving J. Royce was that of selecting the customers upon whom he would call, but he called upon all customers who purchased the defendant's products. We hold that Irving J. Royce did not have sufficient control over the defendant's business in this State to be considered a "managing agent". The decision of the trial court is

Reversed.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIE THOMAS

No. 699SC344

(Filed 23 July 1969)

1. Homicide § 19— evidence competent on question of self-defense — deceased's reputation for peace and quiet

In support of his plea of self-defense, defendant in a homicide prosecution offered evidence of specific threats of violence towards defendant by deceased, and of specific acts and threats of violence by deceased towards defendant's daughter, the wife of deceased. *Held:* It was error to allow the State in rebuttal to offer testimony by deceased's employer that deceased never exhibited violent or vicious behavior during the employment and to offer evidence of the peaceful conduct of deceased on an occasion when threatened by the son of defendant, and of which defendant had no knowledge.

2. Homicide § 19— evidence on self-defense — deceased as a violent man

On the question of the reasonableness of defendant's apprehension of

death or bodily harm upon his plea that he acted in self-defense, defendant was entitled to offer evidence that deceased was a violent and dangerous man, if such reputation was known to defendant, and to offer evidence of threats against defendant by deceased which were communicated to defendant.

3. Homicide § 19— evidence on self-defense — deceased's reputation for peace and quiet

Where the defendant in a homicide prosecution makes an attack on the character of the deceased and thereby puts it in issue, the State in rebuttal may support its case by introducing evidence that deceased bore the reputation of being a man of peace and quiet, but such evidence must be in rebuttal and limited to the general reputation of deceased for peace and quiet.

APPEAL by defendant from *Carr, J.,* 16 December 1968 Session, VANCE Superior Court.

Defendant was charged in a bill of indictment with the capital felony of murder of his son-in-law, Walter Burwell. When the case was called for trial the solicitor for the State announced that he would not try the defendant on the first degree charge, but would ask for a conviction of second degree murder or manslaughter. Defendant entered a plea of not guilty.

Evidence for the State was limited to that of L. B. Faulkner, Vance County Sheriff, who talked to the defendant and visited the scene. The sheriff recalled that the night of 12 July 1968 was a very dark night and that a sprinkle of rain was starting to fall at about the time of the homicide which he estimated to be about 9:30 p.m. It was stipulated that about that time Walter Burwell, son-in-law of the defendant, died from a rifle bullet wound that penetrated the left-front shoulder of Burwell at an angle horizontal to the ground, with the body standing erect, and the bullet ranged downward into the heart. The defendant admitted that he fired the .22 rifle, an old gun he had had for some time.

On the night in question, a message was received from Clementine Burwell, daughter of the deceased, by William Odell Thomas (William), son of the defendant, at the defendant's home near Franklin County line. Clementine asked her uncle and grandfather to come to her house because her daddy was beating on her mother again and almost choking her to death. William, who had been sick, and the defendant jumped into the car and rode some eight miles to the home of Burwell, which was about one mile north of Henderson on Highway 39. Defendant took his rifle with him and loaded it with one shell while on the way to town. After going up a steep

bank in front of the house, defendant stepped on the porch and was met by Clementine who told him her daddy had almost choked her mother to death. Meanwhile, William had gone around back of the house and met Walter about 50 feet from the house walking toward it. When William asked, "Walter, what in the world is going on?" Walter replied, "None of your damned business," and then continued on toward the house. William kept walking on toward Walter Burwell's mother's house (which was behind Burwell's own home) looking for his sister, Beatrice.

By this time, defendant had come around back of the house and was standing near a screened-in porch attached to the rear of the house. Walter came toward him and defendant asked, "Walter, what on earth is wrong here tonight?" Walter replied, "None of your g. d. business," according to defendant, and then he immediately struck defendant in the forehead and knocked him back against the screen at the corner of the house. Defendant said "When he hit me, I fell and caught with my left hand up in the screen wire, and when I straightened up, I shot. I don't know which way I shot or nothing. I just fired the rifle . . . because I was afraid of him."

The sheriff's version of what was told him by defendant on direct examination by the solicitor was that Burwell struck him with his hand or his fist, he wasn't sure, and as soon as he straightened up, he took his rifle and shot him. The sheriff's notes did not reveal any profanity used against defendant by deceased.

After deceased was shot, William and defendant drove straight to George Bullock's cab stand which was on the edge of Henderson near Highway 39 North and asked Bullock to call the rescue squad to help Walter and take him to the hospital. Defendant said he thought he would do more harm than good by moving Walter or trying to help him. Defendant did not call the police station.

On this night Walter Burwell had assaulted his wife and threatened her life and she had had to run from the house with her children to escape her husband. She had gone to the police station to take out a warrant when her father arrived at her home.

After the defendant told Bullock to send the rescue squad for Walter, he told him that he was going to his home to see whether his daughter Beatrice had gotten to his house. Some difficulty was had with the car in which defendant was riding and he asked his son, Joe, to call Mr. Bullock and see if Walter had been carried to the hospital. Joe made the call and reported Walter was dead. Defendant then went back to George Bullock's where he met Sheriff Faulkner and Deputy Sheriff Mims in a few minutes.

At the time of his death, deceased was 40 years of age, 5'11" tall, and weighed 175 to 180 pounds.

At time of shooting, defendant was 71 years of age and suffered from high blood pressure and arthritis.

From a verdict of guilty of voluntary manslaughter, and judgment of imprisonment for a period of not less than eight nor more than twelve years, defendant appealed.

Robert Morgan, Attorney General, by Harrison Lewis, Deputy Attorney General, and Claude W. Harris, Trial Attorney, for the State.

Sterling G. Gilliam, and James C. Cooper, Jr., for the defendant.

BROCK, J.

[1] In support of his contention that he acted in self-defense, defendant offered evidence of specific threats of violence towards defendant by deceased, and of specific acts and threats of violence by deceased towards defendant's daughter (wife of deceased).

In rebuttal the State offered the testimony of Sparkwood Burwell, employer of deceased, and of Leonard Perry, Jr., a brother-in-law of deceased. By the testimony of these witnesses the State sought to show that deceased was a peaceful and nonviolent man.

After the witness Sparkwood Burwell had stated that he did not know anything about deceased's reputation in the community, he was allowed, over defendant's objection, to answer questions as follows:

"Q. Did you ever know him to show any temper or —

"A. I said presently he was, during the time he was my employee. He was working for me at the time this happened and he has never shown me no one second of violence or being a vicious man, don't he couldn't have worked for me.

"Q. Have you ever seen him display any violence towards his family?

"A. No Sir."

It not having been established that the witness had ever observed the deceased except while on the job, it seems obvious that the witness was not qualified to answer the questions, had they otherwise been proper inquiries. It would seem manifest that even a

vicious and violent man would not likely display such propensities to or in the presence of his employer.

Also, over defendant's objection, the witness Leonard Perry, Jr. was allowed to testify concerning the peaceful conduct of deceased on an occasion in 1961 when threatened by the son of defendant, and of which defendant had no knowledge.

Defendant's exceptions and assignments of error to the allowance of these questions and answers are well taken.

[2] On the question of the reasonableness of defendant's apprehension of death or bodily harm upon his plea that he acted in self-defense, defendant was entitled to offer evidence that deceased was a violent and dangerous man, if such reputation was known to defendant. *State v. Morgan,* 245 N.C. 215, 95 S.E. 2d 507; *State v. Blackwell,* 162 N.C. 672, 78 S.E. 316; Stansbury, N.C. Evidence 2d, § 106. Also, for the same purpose, defendant was entitled to offer evidence of threats against defendant by deceased which were communicated to defendant. *State v. Rice,* 222 N.C. 634, 24 S.E. 2d 483; Stansbury, N.C. Evidence 2d, § 162a.

[3] Where the defendant in a prosecution for homicide makes an attack on the character of the deceased and thereby puts it in issue, the State may, in rebuttal, support its case by introducing evidence that deceased bore the reputation of being a man of peace and quiet. Such evidence by the State must be in rebuttal and limited to the general reputation of the deceased for peace and quiet. *State v. Champion,* 222 N.C. 160, 22 S.E. 2d 232; *Nance v. Fike,* 244 N.C. 368, 93 S.E. 2d 443; Stansbury, N.C. Evidence 2d, § 106; Annot., 34 A.L.R. 2d 451 (1954).

The State was allowed impermissible latitude in this case.

New trial.

CAMPBELL and MORRIS, JJ., concur.

WILLIAM BROOKS THAYER, ADMINISTRATOR OF FRANCES MOORE THAYER, DECEASED v. CHRYSLER LEASING CORPORATION, FRANK EDWARD MILLER, JR. AND ECHLIN MANUFACTURING CO.

No. 6910SC274

(Filed 23 July 1969)

1. Death § 7— wrongful death action — damages — evidence of future job

In an action for the wrongful death of plaintiff's decedent, a housewife, evidence of conversations between the decedent and her husband relating to her return to work after their son began school was speculative and remote on the issue of damages, and the evidence was properly excluded.

2. Death § 7— wrongful death — future earning capacity

In determining future earning capacity, prior earnings are admissible in evidence if there is a reasonable relation between past and probable future earnings.

3. Death § 7— wrongful death — future earnings — evidence

Where there was no evidence that the decedent, a housewife, intended to return to work at her former position at a state university, evidence as to the present salary range of the position is properly excluded on the issue of future earning capacity.

4. Automobiles § 102— liability of employer — respondeat superior — vacationing employee

Employer is not liable under doctrine of *respondeat superior* for the death of plaintiff's decedent in an automobile accident with its vacationing employee merely because the employee had the right to the off-duty use of the employer's leased automobile.

5. Damages § 16; Death § 7— wrongful death — instructions — purchasing power of dollar

In wrongful death action, it was not necessary or proper for the trial judge to instruct the jury that the purchasing power of the dollar has diminished in the last few years.

APPEAL by plaintiff from *Hobgood, J.*, First November 1968 Civil Session of Superior Court of WAKE County.

There were three other related cases consolidated with this case for trial by agreement, all arising out of the same automobile collision. In one case, the jury awarded William Brooks Thayer $30,790.00 for his personal injuries. In another, William Brooks Thayer was awarded $2,493.40 for medical expenses incurred, and loss of services sustained due to his son's injuries. In the other, the son, William David Thayer, was awarded $35,000.00.

This action was instituted by the plaintiff to recover for the wrongful death of Frances M. Thayer. The plaintiff also seeks to

recover for Mrs. Thayer's medical and hospital expenses and for her pain and suffering prior to her death.

Mrs. Thayer died as a result of injuries received in an automobile collision which occurred about 4 o'clock P.M. on 5 July 1965 on N.C. Highway 49 about six miles west of Asheboro in Randolph County. She was a passenger in a car driven by her husband when it was struck by an automobile owned by Chrysler Leasing Corporation (Chrysler) and being driven by Frank Edward Miller, Jr. (Miller), an employee of Echlin Manufacturing Co. (Echlin). The automobile was leased by Chrysler to Echlin, and was assigned by Echlin to Miller for his use on both company and personal business. In the event that Miller should use the automobile on personal business, he was to repay Echlin at the rate of 3¢ per mile in addition to gas and oil. At the time of the collision, Miller was on vacation but was driving the company car. There is no evidence that Miller ever reimbursed Echlin for his personal use of the company car. The collision occurred when Miller drove to his left to pass a car pulling a boat that was in front of him. The Thayer automobile was traveling east, the Miller car was traveling west and they collided headon when the Miller car had gotten about mid way past the boat trailer. At the time of the collision, Miller was carrying Echlin literature in the automobile. Mrs. Thayer was taken to a hospital in Asheboro where she died some hours after the wreck.

At the close of the evidence the trial court allowed defendant's motion of nonsuit as to Echlin. The following issues were submitted to the jury in this case:

"1. Was Frances Moore Thayer killed by the negligence of the defendant Frank E. Miller, Jr., as alleged in the complaint?

2. At the time of the collision, was the defendant, Frank E. Miller, Jr., employed by the defendant Chrysler Leasing Corporation, and was he acting within the scope of his employment?

3. What amount, if any, is the plaintiff administrator entitled to recover of the defendants, or any of them, for the pain and suffering endured by Frances Moore Thayer before her death?

4. What amount, if any, is the plaintiff administrator entitled to recover of the defendants, or any of them, for the wrongful death of Frances Moore Thayer?"

The jury answered the first issue, yes; the second issue, no; the

third issue in the amount of $1,116.50; and the fourth issue in the amount of $7,500.00.

From the judgment that the plaintiff have and recover of the defendant Frank E. Miller, Jr., the sum of $8,616.50 together with the costs of the action, the plaintiff appeals to the Court of Appeals, assigning error.

Purrington, Joslin, Culbertson & Sedberry by Charles H. Sedberry for plaintiff appellant.

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

MALLARD, C.J.

The plaintiff asserts that the following questions are presented on this appeal:

"1. Did the trial court err in refusing to allow into evidence the discussions and decision that had been reached by the plaintiff and his wife concerning her return to work after their son started to school?

2. Did the trial court err in refusing to allow into evidence the amount, as of the time of trial, to which the State of North Carolina had increased the salary, solely by reason of general wage increases without regard to merit, of a person who held the same position at North Carolina State University that Mrs. Thayer held on December 31, 1962?

3. Did the trial court err by allowing the motion of Echlin Manufacturing Company for judgment as of nonsuit?

4. Did the trial court err in refusing to hold that Echlin Manufacturing Company would be liable to the plaintiff if the jury should find from the evidence that the automobile being operated by defendant Miller was provided and maintained for him and entrusted to him on a full time basis by Echlin Manufacturing Company with authority to operate it for the business of Echlin and for the personal use, pleasure and convenience of defendant Miller?

5. Did the trial court err in failing to instruct the jury that they should consider changes in cost of living or in purchasing power of money in determining the amount of damages plaintiff is entitled to recover?"

Considering the first two questions presented, we find the following in *Bank v. Stack,* 179 N.C. 514, 103 S.E. 6 (1920):

> "The relevancy of evidence is frequently difficult to determine, . . . All the authorities are agreed that if the evidence is merely conjectural or is remote, . . . it should be rejected, . . ."

[1-3] In the case before us, the evidence which the plaintiff sought to introduce relative to Mrs. Thayer's return to work at some future date and of increases in salary was too remote to be of any probative value in assessing the damages suffered by the plaintiff. Mrs. Thayer was a housewife at the time of the collision and the evidence in this case of conversations between her and her husband, and his conclusions with respect thereto, relating to her return to work after their son began school was merely speculative and conjectural as to whether she would in fact return to work. Exclusion of this evidence was not error. *Fox v. Army Store,* 216 N.C. 468, 5 S.E. 2d 436 (1939). The plaintiff was allowed to introduce evidence of the amount of salary Mrs. Thayer was earning at the time she resigned to have her baby, but was not allowed to introduce into evidence what her salary probably would have been had she remained employed. "In determining future earning capacity, prior earnings are admissible in evidence if there is a reasonable relation between past and probable future earnings." *Smith v. Corsat,* 260 N.C. 92, 131 S.E. 2d 894 (1963). In the present case, there is no evidence that Mrs. Thayer in fact intended to return to work at her old position. It was not error for the trial judge to exclude evidence as to the present salary range of Mrs. Thayer's old position at North Carolina State University. See also note in 18 N.C.L.R. 239 as to admissibility of prior earnings in determining future earning capacity.

On the motion of nonsuit as to Echlin, the trial judge was required to take plaintiff's evidence in its most favorable light. When so viewed, all the evidence affirmatively discloses that Miller was on vacation at the time of the collision and was not acting within the course and scope of his employment with Echlin.

[4] The fourth question raised by the appellant presents the contention that the family purpose doctrine should be extended to include the situation presented by the present case. We do not think that the doctrine of respondeat superior (out of which the family purpose doctrine grows) should be extended to a point where an employer is liable, nothing else appearing, merely because an employee has the right to use an automobile leased by it when the em-

ployee is off duty. The automobile involved here was owned by Chrysler Leasing Corporation.

[5] In considering the fifth and final question presented by the appellant, suffice to say, we are of the opinion and so hold that it was not necessary or proper for the trial judge to instruct the jury that the purchasing power of the dollar has diminished in the last few years. We have carefully reviewed all the assignments of error and find no prejudicial error.

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

Affirmed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. CLARENCE E. GIBBS

No. 6914SC332

(Filed 23 July 1969)

1. Constitutional Law § 29— right to unbiased jury — acquaintance with member of deceased's family

In this homicide prosecution, defendant's right to a fair and unbiased jury was not violated by refusal of the trial court to allow defense counsel to ask further questions of a juror who, having answered negatively a *voir dire* question as to whether he knew any member of deceased's family and been passed by the State and defendant, stated that it occurred to him that deceased's mother had nursed his mother-in-law while she was a hospital patient, but that his decision in the case would not be affected thereby.

2. Homicide § 19— self-defense — evidence of specific acts of violence by deceased

In this homicide prosecution wherein defendant contended he shot deceased in self-defense, the trial court did not commit reversible error in the exclusion of testimony as to specific instances of violence by deceased, where there is no evidence that defendant had knowledge that any violence toward the witness was at the hands of deceased, and defendant failed to question the witness further as to any specific acts of violence although invited by the trial court to propound questions to the witness so the court could rule thereon and the answers thereto could be gotten into the record.

3. Homicide § 21— first degree murder — sufficiency of evidence

Evidence of the State tending to show that defendant intentionally shot

deceased seven times *is held* sufficient to be submitted to the jury as to defendant's guilt of first degree murder.

4. Homicide § 28— instructions on self-defense

In this homicide prosecution, the trial court adequately instructed the jury on self-defense and committed no prejudicial error in the charge.

APPEAL by defendant from *Brewer, J.*, 24 February 1969 Criminal Session, Superior Court of DURHAM.

Defendant was charged, in a valid bill of indictment, with the murder of Gaylon Norwood Stewart. The offense occurred on 26 January 1969. A true bill was returned by the grand jury on 27 January 1969, and counsel was appointed for defendant, pursuant to a stipulation of indigency, on 28 January 1969. Defendant was found guilty of second-degree murder. In apt time, through counsel, he gave notice of appeal.

Attorney General Robert Morgan by Staff Attorney T. Buie Costen for the State.

C. Wallace Vickers for defendant appellant.

MORRIS, J.

[1] During the selection of the jury, the seventh juror, who had been passed by both defendant and the State, requested permission to make a statement to the court with respect to a question asked him on *voir dire* examination the previous day. It appears from the record that the juror had been asked whether he knew the deceased or any member of his family and had answered the question "No". He stated that during the night it had occurred to him that the mother of the deceased had at one time nursed his mother-in-law while she was a patient in the hospital. He further stated, on questioning by the court, that that fact would not affect his decision in any way but he simply wanted to clear the record. The court refused to allow counsel for defendant to ask any further questions of the juror. The record is silent as to what the questions would have been. Defendant contends that the refusal of the court to allow further questioning of this juror by defendant constitutes reversible error and cites *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481, where the Court said, "Each party to a trial is entitled to a fair and unbiased jury." We fail to see where this unquestionably correct principle of law has been violated in this case. It is provided by G.S. 9-14 that "[t]he presiding judge shall decide all questions as to the competency of jurors." "[H]is rulings thereon are final and not subject to re-

view on appeal unless accompanied by some imputed error of law". *State v. Suddreth,* 230 N.C. 239, 52 S.E. 2d 924. This assignment of error presents no reviewable question of law and is, therefore, overruled.

[2] Defendant also contends that the trial judge committed reversible error in refusing to allow evidence of specific instances of violence on the part of deceased. Defendant contends that he shot deceased in self-defense. Counsel for defendant in questioning a witness for defendant asked "Did you know Mr. Stewart to be a violent person?" The court sustained the State's objection. The witness, nevertheless, answered "Yes", and the State moved to strike. Whereupon, defendant requested that he be heard in the absence of the jury. The court ruled that the witness could testify as to deceased's reputation for violence in the community and not specific instances of violence. Defendant then, in the absence of the jury, proceeded to question the witness as to deceased's violent nature. In response, the witness testified "Yes, sir, when he was drinking, he was very violent, because on occasions, he had come to my house and he has beat me, and I went to Duke Hospital, and Mr. Gibbs has seen me with the whole side of my head black from where he had — I mean just out of the blue sky, for no reason at all, and then I learned he was married and I wouldn't date him any more, and I told him that." At the conclusion of the *voir dire,* the court again ruled the witness could testify as to the reputation of the deceased for being a violent and dangerous man but was not to mention any specific episode of which she might have knowledge. Counsel for defendant asked for an exception. "THE COURT: You may ask your question, and I will rule on it out of the presence of the jury." The jury returned and counsel for defendant asked only one question: "Mrs. Perry, does Gaylon Stewart have the reputation of being a violent and dangerous person? Answer: Yes, sir."

There is no evidence, either in the presence of the jury or out of the presence of the jury, that the defendant had knowledge that any violence toward the witness was at the hands of deceased. *Nance v. Fike,* 244 N.C. 368, 93 S.E. 2d 443; Stansbury, N.C. Evidence 2d, § 106. Additionally, although invited by the trial court to propound questions to the witness so the court could rule thereon and the answers thereto could be gotten into the record, the defendant failed to question the witness further as to any specific instances of violence. This assignment of error is overruled.

[3] Defendant further contends that there was not sufficient evidence for the jury to consider either first-degree or second-degree

murder. The evidence, taken in the light most favorable to the State, tends to show: At about 11 o'clock on the night of the homicide deceased and one Riley went to a house wherein defendant operated a barroom. Defendant was behind the bar. Deceased ordered two drinks, one for him and one for Riley, which were fixed by defendant. While standing at the bar drinking and talking with other customers, deceased took defendant's hat from his head. Defendant retrieved it. Deceased moved behind the bar. He was told by defendant "Don't mess with my hat" and defendant also said "Please get out from behind the bar" and "if you don't, I'll have to shoot you". Deceased continued to reach for defendant's hat whereupon defendant pulled a chrome plated pistol from his hip pocket. The witness Riley asked defendant not to shoot, to give him time and he would get deceased from behind the bar. He reached for deceased's arm, heard a shot and turned and ran out the room. When he heard nothing further he turned and went back into the room. Defendant was by the cash register with his back to the witness as witness reentered the door. Deceased was by the refrigerator. Defendant turned and had a black colored pistol in his hand. Witness hollered "For God's sake, please don't. If you'll just let me, I'll get him out of the house." Whereupon defendant said "I'm going to show him he can't mess with my hat." He then shot one time at deceased. Witness turned and ran back in the hall. He heard a series of shots, went back in the room, and deceased was staggering by the refrigerator to the end of the bar where he fell with his head in the hallway. Witness further testified that before the first shot was fired, when defendant had a pistol in his hand, deceased was facing defendant with his hands up in the air and, after the first shot, said to defendant "Please don't, it's not necessary." After the shooting witness asked defendant to call an ambulance. He replied "If you want to call an ambulance, you call it." Deceased was a man of 46 years of age, of average physique, muscular, weighing between 205 and 210 pounds, who had had a heart attack about five years previously. There was evidence tending to show that defendant is about six feet four inches tall, weighs approximately 260 pounds, and on occasion has suffered from arthritis to the extent that he had to use crutches. There were seven gunshot wounds in deceased's body — four on the front of his body and three on his right side. The most severe of the wounds and the one which was the primary cause of death entered his right side piercing his heart and lung. One of the wounds was in his right elbow. The evidence was uncontradicted that deceased had no weapon.

We think the evidence is amply sufficient to take the case to the

jury on first-degree murder. Any inconsistencies and contradictions therein were for the jury.

[4] Defendant's remaining assignment of error is to the charge. Defendant contends that the court failed to instruct the jury that defendant may justify the use of a deadly weapon when assaulted by a person of greater strength, although such person be unarmed, and that defendant in his own home is under no duty to retreat but was justified in using such force as the violence of the attack warranted. Viewing the charge as a whole in the light of the evidence in this case, we are of the opinion that the court adequately charged the jury on self-defense and committed no prejudicial error.

Affirmed.

CAMPBELL and BROCK, JJ., concur.

IN THE MATTER OF: WILLIAM EUGENE HAAS, JR.

No. 6927DC364

(Filed 23 July 1969)

Constitutional Law § 32; Courts § 15; Infants § 10— juvenile court delinquency proceeding — waiver of right to counsel — necessity for findings of fact

In this juvenile court delinquency proceeding, the court erred in failing to comply with the provisions of G.S. 110-29.1 where the court made no findings of fact to support its conclusion that the alleged delinquent knowingly and intelligently waived his right to counsel, there being no finding that the juvenile and his father were financially able to retain counsel, or if indigent, that they were advised that the State would afford counsel for them, and that with all information available to them, the juvenile and those responsible for him waived an attorney and elected to proceed without legal representation.

APPEAL by defendant from *Bulwinkle, J.*, April 1969 Juvenile Session, CLEVELAND County District Court.

Three juvenile petitions were filed in this cause asserting that William Eugene Haas, Jr., (Haas) was less than sixteen years of age; was residing within the territorial jurisdiction of the Cleveland County District Court, namely, in the City of Gastonia; and was residing with his parents, Nellie Haas (mother), and William E. Haas, Sr., (father). In the first petition it was asserted that Haas

was a delinquent because he drank intoxicating liquors and became intoxicated on 7 March 1969. In the second petition it was asserted that he was a delinquent because he carried a concealed weapon on 7 March 1969. In the third petition it was asserted that he was a delinquent because, on 7 March 1969, he committed an assault upon Bill Parker with a metal chain, thereby causing serious bodily injuries to him. Each petition requested the district court to hear and determine the case and, if need be found, to give Haas such oversight and control as would promote his welfare and the best interest of the State.

Pursuant to the three petitions, each of which was issued by a police officer of the Town of Kings Mountain on 27 March 1969, a summons was issued to the mother and father requiring their appearance in the juvenile division of the district court on 1 April 1969 to show cause why Haas should not be dealt with according to the provisions of the North Carolina Juvenile Law. This summons was served on the mother on 29 March 1969.

On 1 April 1969, the father appeared in court before Judge Mull and advised the court that his attorney, Mr. Forbes, could not be present since he was in Charlotte, North Carolina. Judge Mull thereupon advised him "to be in court either with Mr. Forbes or with another attorney on 4-8-69."

On 1 April 1969, another juvenile summons was issued to the mother and father requiring that they appear in the district court on 8 April 1969 and show cause why Haas should not be dealt with according to the provisions of the North Carolina Juvenile Law. This summons was served on the father on 3 April 1969.

On 8 April 1969, the father appeared in the district court before Judge Bulwinkle and "stated that he had been unable to get in touch with Robert H. Forbes, attorney, and had decided to come to court without an attorney and chose to proceed without an attorney." Judge Bulwinkle then found "as a fact that William E. Haas, Jr., and his father, William E. Haas, knowingly, intelligently, and wilfully waived the right to be represented by counsel and ordered the hearing to proceed."

In accordance with the provisions of the North Carolina Juvenile Law, Judge Bulwinkle made a summary of the testimony at the hearing conducted on 8 April 1969. This summary reveals that Officer William Roper of the Kings Mountain Police Department went to a 7-Eleven Store in Kings Mountain about 9:15 p.m. on 7 March 1969 and "found William G. Parker lying on the floor with three

stab wounds on his chest and a cut on his left hand." A little later the same evening, an automobile occupied by seven boys was stopped. One of the occupants was Haas, who had a dog chain in his pocket. "The chain was about two feet in length and consisted of metal links with a snap fastener at one end and a leather loop at the other." Haas was intoxicated.

Parker testified that, while he was at the 7-Eleven Store, he was attacked by about five boys; he was stabbed in the chest several times; and he was cut on the left hand. Sometime after the first stabbing, Haas struck him "with a chain once behind the left ear and once on the back." Parker "testified further that he did not know any of his assailants, but that the attacks ceased when he told where his (Parker's) brother worked and what kind of car he drove."

The mother testified that Haas became sixteen years of age on 13 March 1969 and that since 7 March 1969 he "had behaved himself, had worked regularly and had stayed at home at night."

Miss Jeanne Morgan, a member of the Family Court Counseling Staff of the District Court, testified that Haas "had formerly been found by the Gaston County Domestic Relations and Juvenile Court to be delinquent in that he was a truant"; he had been placed on probation; the probation had been revoked and he had been committed to the Juvenile Evaluation Center at Swannanoa, North Carolina. Haas had appealed from the order of commitment and the appeal was then pending.

Following the hearing, Judge Bulwinkle entered an order under date of 8 April 1969. It was stated that the hearing had been held after notice to all persons with a direct interest in the case and that "[t]he nature of the proceedings was explained to the child and to the adults present, and a full opportunity to be heard and to cross examine opposing witnesses was afforded all interested parties." Judge Bulwinkle then found as a fact that Haas was a delinquent in that, on 7 March 1969, he drank intoxicating beverages and became intoxicated, he carried a concealed weapon, and he assaulted William G. Parker with a deadly weapon causing serious bodily injuries to him. It was then ordered that Haas "be committed to the Juvenile Evaluation Center at Swannanoa, North Carolina."

From the entry of this judgment, Haas noted an appeal and posted a recognizance bond in the amount of $500.00. The bond was signed by the father and another surety, Ray S. Smith.

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

Hollowell, Stott & Hollowell by Grady B. Stott for defendant appellant.

CAMPBELL, J.

The first assignment of error is that, in conducting the hearing on 8 April 1969, the trial judge erred in failing to afford Haas representation by counsel. G.S. 110-29.1 of the North Carolina Juvenile Court Act provides:

> *"Appointment of counsel for indigent children in delinquency proceedings; compensation of counsel.* — Any judge authorized to conduct hearings in juvenile court matters, shall, prior to conducting a hearing pursuant to G.S. 110-29, in which a finding of delinquency and commitment to an institution is possible, inform the child and his parent or parents that the child is entitled to representation by counsel, and that if they are financially unable to retain counsel, the court will appoint counsel to represent the child. Determination of indigency shall be made under the standards established in G.S. 15-5.1 for indigency in adult cases. The fee for appointed counsel shall be fixed by the judge who conducts the hearing, and shall be paid under the same procedures and from the same fund as fees for counsel appointed in adult indigent cases. To assure a reasonable degree of uniformity in fees for appointed counsel in juvenile cases, the Administrative Officer of the Courts is authorized to promulgate, subject to the approval of the Supreme Court, rules for the guidance of juvenile court judges in fixing fees under this section."

The record in the instant case does not show compliance with the provisions of this statute. Although the record reveals that Haas and his father "knowingly, intelligently, and wilfully waived the right to be represented by counsel", there are no findings of fact to support this conclusion. There was no finding that Haas and his father were financially able to retain counsel and the necessary facts to support this set out, or that, if they were unable to do so because of indigency, they were advised that the State would afford counsel for them, and that with all information available, the juvenile and those responsible for him waived an attorney and elected to proceed without an attorney. In order for a trial judge to conclude that an alleged delinquent "knowingly and intelligently" waived the right

to be represented by counsel, the necessary facts to support such a conclusion must appear of record.

For failure to comply with G.S. 110-29.1, this cause must be remanded to the district court. We will refrain from discussing the other assignments of error brought forward as a new hearing must be conducted.

New trial.

BROCK and MORRIS, JJ., concur.

AUSTIN A. KYLES AND WIFE, BLANCHE O. KYLES, AND OSCAR O. KYLES AND WIFE, BONNIE J. KYLES v. SOUTHERN HOLDING CORPORATION; HOME SECURITY CORPORATION; J. H. GATES AND WIFE, AGNES GATES, AND MARTIN L. CROMARTIE, JR., SUBSTITUTE TRUSTEE FOR BRAXTON SCHELL, TRUSTEE

No. 6914SC206

(Filed 23 July 1969)

1. Mortgages and Deeds of Trust § 17— payment of debt secured by deed of trust

Payment of the debt secured by a mortgage or deed of trust extinguishes the power of sale and terminates the title of the mortgagee or trustee, and a foreclosure sale conducted thereafter is invalid and ineffectual to convey title to the purchaser.

2. Mortgages and Deeds of Trust § 40— action to set aside foreclosure — payment of debt — nonsuit

In an action to set aside a deed of trust foreclosure and certain deeds executed pursuant thereto, plaintiff's evidence is sufficient to justify the inference that the debt secured by the deed of trust was paid prior to commencement of the foreclosure proceedings, and trial court erred in entering judgment of involuntary nonsuit.

APPEAL by plaintiffs from *Ragsdale, S.J.*, at the January 1969 Civil Session of DURHAM Superior Court.

This is an action to set aside a deed of trust foreclosure and certain deeds executed pursuant thereto. The plaintiffs filed their complaint 3 July 1968 and set out the following facts, admitted by the defendants: On 20 December 1956, plaintiffs Oscar Kyles (Oscar) and wife purchased the property in question from C. C. Edwards and wife and W. W. Edwards and wife. On 22 March 1960, Oscar

and wife executed a deed of trust on the property to Braxton Schell, trustee for Wise Homes, Inc. This was recorded 12 April 1960 and secured an indebtedness of $3,103.20. On 29 August 1962, Wise Homes, Inc., executed an assignment of the note and deed of trust to James Talcott, Inc. This assignment was recorded 31 October 1962. James Talcott, Inc., executed a written assignment of the note and deed of trust to Southern Holding Corporation (Southern) dated 30 September 1966, recorded 22 November 1966, and on said latter date Martin Cromartie, Jr., (Cromartie) was appointed substitute trustee. The property was advertised for sale by Cromartie in a Durham newspaper on 28 November, 5 December, 12 December, and 19 December 1966 and was sold 22 December 1966 for $400.00 to Southern. The trustee's deed to Southern was recorded 13 January 1967. On 20 November 1967, Southern purported to convey the property to Home Security Corporation (Home Security) by quitclaim deed recorded 31 May 1968.

The plaintiffs also alleged, not admitted by the defendants, that Oscar and wife deeded the property to Austin A. Kyles (Austin) and wife for a valuable consideration on 25 May 1965. This deed was recorded 24 March 1967. They alleged payment of the indebtedness in full prior to the date of the foreclosure, that they had no actual notice of the foreclosure, and that the foreclosure proceeding was irregular and void.

The record shows no answer by Southern. Home Security and Cromartie answered denying payment of the obligation or any irregularity in the foreclosure proceedings.

At the trial, plaintiffs introduced evidence in substantial support of their allegations. Defendants' motion for nonsuit as to Home Security was granted at the close of plaintiffs' evidence, and a mistrial was declared as to the remaining defendants. Plaintiffs appealed.

Brooks & Brooks by Eugene C. Brooks, III, for plaintiff appellants.

Newsom, Graham, Strayhorn & Hedrick by E. C. Bryson, Jr., for defendant-appellee Home Security Corporation.

BRITT, J.

When liberally construed in favor of plaintiffs as required by G.S. 1-151 and cases decided thereunder, the complaint alleges that plaintiffs Austin and wife are the owners of the subject property and the deed of trust foreclosure proceedings conducted by Cromartie,

substitute trustee, were void for the reason that the indebtedness secured by the deed of trust had been fully paid prior to the commencement of said proceedings. The complaint was also sufficient to ask (1) that the foreclosure sale be declared void, (2) that the deed from the substitute trustee to Southern be cancelled of record, and (3) that the quitclaim deed from Southern to Home Security be cancelled of record.

[1] In *Barbee v. Edwards,* 238 N.C. 215, 77 S.E. 2d 646, in an opinion by Johnson, J., it is said:

> "The general rule is that where a mortgage or deed of trust is given to secure a specific debt, payment of the debt extinguishes the power of sale and terminates the title of the mortgagee or trustee, and all outstanding interests in the land revert immediately to the mortgagor by operation of law. *Crook v. Warren,* 212 N.C. 93, 192 S.E. 684; *Saleeby v. Brown,* 190 N.C. 138, 129 S.E. 424; *Stevens v. Turlington,* 186 N.C. 191, 119 S.E. 210; *Walker v. Mebane,* 90 N.C. 259; 59 C.J.S., Mortgages, Sec. 550, p. 887, *Id.* Sec. 453, pp. 708 and 709; 36 Am. Jur., Mortgages, Sec. 413, p. 894.
>
> And ordinarily a sale conducted under the power after full payment of the debt is invalid and ineffectual to convey title to the purchaser. *Crook v. Warren, supra; Fleming v. Barden,* 126 N.C. 450, p. 457, 36 S.E. 17; 59 C.J.S., Mortgages, 594, p. 1024; 37 Am. Jur., Mortgages, Sec. 803; Annotations: 19 Am. St. Rep. 274; 92 *Id.* 597, 598. See also *Layden v. Layden,* 228 N.C. 5, 44 S.E. 2d 340; *Oliver v. Piner,* 224 N.C. 215, 29 S.E. 2d 690.
>
> In the case at hand the plaintiff testified: 'I paid to Mr. Lindsey all the money that I agreed to pay on the property.' This testimony is sufficient, when considered with the rest of the evidence in the case, to justify, though not necessarily to impel, the inference that the debt secured by the deed of trust was fully paid before, rather than after, the trustee's deed was made to Lindsey in 1945. This by virtue of the presumption, shown by human experience, that in the ordinary course of affairs a rational person does not 'lock the stable door after the steed is stolen.' And if the debt was so paid, it necessarily follows that the trustee's deed made to Lindsey in 1945, more than seventeen years after the alleged foreclosure sale, is void. And on the record as presented the deed to Lindsey controls the validity of the subsequent deed made by Hiatt to the defendant under the doctrine of title by estoppel. Therefore, if the trustee's deed fails, so does the defendant's. And it is to remove these

two deeds and put to rest the defendant's claim made thereunder, as an alleged cloud on the plaintiff's title, that this action is brought.

It necessarily follows that the plaintiff made out a *prima facie* case entitling him to go to the jury. See *Combs v. Porter,* 231 N.C. 585, 58 S.E. 2d 100, and cases cited."

[2] In the case before us, the plaintiffs' evidence when viewed most favorable to them tended to show: The deed of trust secured an indebtedness of $3,103.20, payable in monthly installments of $43.10, beginning 1 June 1960, with interest from maturity. (This would be seventy-two payments of $43.10 each, with final payment being due in May or June of 1966.) Oscar made the payments until he "turned the property over" to Austin, at which time the balance due was approximately $750.00. Austin assumed responsibility for making the payments "sometime" before Oscar gave him a deed; the deed was dated 25 May 1965. Austin's wife, Blanche, paid Southern $86.20 on 21 December 1964, $86.20 on 17 February 1965, and $43.10 on 20 April 1965; on 8 October 1965, Austin paid Southern $300.00. These payments were verified by cancelled checks. Thereafter, Austin determined from the payment book that he owed a balance of $260.00 and he sent a check for that amount to Southern. This cancelled check was destroyed by a fire which Austin had in his office. Southern was the record holder of the deed of trust at the time of the foreclosure proceedings, which proceedings were instituted at Southern's request.

As was said in *Barbee v. Edwards, supra,* the summarized testimony, when considered with the other evidence in this case, was sufficient to justify, though not necessarily to impel, the inference that the debt secured by the deed of trust was paid before the foreclosure proceedings were commenced in November 1966. If the debt was so paid, the trustee's deed to Southern was void and the deed from Southern to Home Security was void.

Plaintiffs presented a case for the jury, and the court erred in entering judgment of involuntary nonsuit and dismissing the action as to Home Security.

Reversed.

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

STATE OF NORTH CAROLINA v. TONY ERVIN JOHNSON

No. 697SC44

(Filed 23 July 1969)

1. Criminal Law § 166— the brief — abandonment of assignments of error

Assignment of error for which no argument is set forth nor authority cited in defendant's brief is deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

2. Constitutional Law § 36; Criminal Law § 138; Infants § 10— sentencing of juvenile — felonies — cruel and excessive punishment

Sentence of imprisonment of one to three years in a youthful offender's camp, which was imposed upon juvenile's plea of guilty to three bills of indictment each charging felonious breaking and entering and felonious larceny, was within statutory limits and cannot be considered excessive, cruel or unreasonable.

3. Appeal and Error § 46; Criminal Law § 158— presumption — regularity of judicial acts

Unless the contrary is made to appear, it will be presumed that judicial acts and duties have been duly and regularly performed.

4. Appeal and Error § 46; Criminal Law § 158— the record — presumption arising from matters omitted

Where the record is silent upon a particular point, the action of the trial judge will be presumed correct.

5. Courts § 16; Criminal Law § 23— defect in juvenile court proceeding — guilty plea — waiver

By his failure to raise the question and by his plea of guilty in the superior court at a time when he was represented by counsel, defendant waived any defect in the juvenile court proceedings which resulted in his being brought to trial in the superior court pursuant to G.S. 110-29(6).

6. Constitutional Law § 37— waiver of constitutional rights — procedural matters

Defendant may waive a constitutional right relating to a mere matter of practice or procedure.

APPEAL by defendant from *Crissman, J.*, 19 August 1968 Regular Criminal Session of NASH Superior Court.

On a sworn petition filed by a resident of Nash County, the judge of the juvenile court of the city of Rocky Mount entered an order dated 11 July 1968 finding defendant to be a child more than fourteen and less than sixteen years of age, that there was probable cause that defendant had committed the felonies of breaking and entering certain designated premises, and that defendant at the time

of the alleged offenses was an escapee from the Eastern Carolina Boys School. The order further found that defendant was a delinquent and incorrigible, and on these findings the judge of the juvenile court concluded that the case should be brought to the attention of the judge of superior court as provided in G.S. 110-29(6), and accordingly ordered defendant bound over to the superior court for trial. At the August 1968 Session of Nash Superior Court the grand jury returned three true bills of indictment, each charging defendant with the crimes of felonious breaking and entering and felonious larceny. Defendant was brought to trial on these indictments in the superior court, where he was represented by counsel and pleaded guilty. The court consolidated all cases for purposes of judgment and sentenced defendant to a term of not less than one nor more than three years, assigning defendant to a youthful offender's camp under G.S. 148-49.1. Defendant appealed, and upon showing of indigency the court appointed counsel, other than the counsel who had represented defendant at the trial, to represent defendant in connection with this appeal.

Attorney General Robert Morgan and Assistant Attorney General George A. Goodwyn for the State.

John E. Davenport for defendant appellant.

PARKER, J.

[1, 2] The sole assignment of error in the record is that the court erred in pronouncing an excessive, cruel and unreasonable punishment and that the record proper does not support the judgment. Appellant's brief sets forth no argument and cites no authority in support of the contention that the punishment imposed was excessive. Therefore, that portion of the assignment of error is deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals; *State v. Jetton,* 1 N.C. App. 567, 162 S.E. 2d 102. In any event it is clear that the sentence imposed was within statutory limits and cannot be considered excessive, cruel or unreasonable. *State v. Parrish,* 273 N.C. 477, 160 S.E. 2d 153; *State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854; *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216.

In his brief appellant argues that the record proper does not support the judgment in that he was denied constitutional due process at the hearing in the juvenile court which resulted in the order of that court waiving its jurisdiction and binding defendant over for trial in the superior court. Specifically, he contends that (1) the record proper does not show service of a copy of the peti-

tion on which the juvenile court's order was entered upon defendant or upon his parents, and (2) the juvenile court did not advise defendant of his right to be represented by counsel and to be supplied counsel if he were found indigent. Defendant argues that the decision of the Supreme Court of the United States in *Kent v. United States,* 383 U.S. 541, 16 L. ed. 2d 84, 86 S. Ct. 1045, as read in the light of the later decision in the case of *In re Gault,* 387 U.S. 1, 18 L. ed. 2d 527, 87 S. Ct. 1428, imposed constitutional standards of due process upon state juvenile court proceedings held for the purpose of determining whether the juvenile court should waive its jurisdiction so that the juvenile might be tried as an adult in the criminal courts. At the outset, it may be noted that the authorities are not altogether in agreement as to whether *Kent,* even when read in the light of *Gault,* had the effect of imposing constitutional standards of due process upon such state juvenile court proceedings, as contrasted with proceedings in state juvenile courts which may lead directly to confinement of the juvenile. For decisions that constitutional standards are applicable to waiver proceedings in state juvenile courts see *State v. Steinhauer,* 216 So. 2d 214 (Fla. 1968); *In re Harris,* 64 Cal. Rptr. 319, 434 P. 2d 615; *Smith v. Commonwealth,* 412 S.W. 2d 256 (Ky. 1967), cert. denied, 389 U.S. 873. For decisions *contra* see *Cradle v. Peyton,* 208 Va. 243, 156 S.E. 2d 874, cert. denied, 392 U.S. 945; *Stanley v. Peyton,* 292 F. Supp. 209. For discussion of the entire problem see Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited,* 43 Ind. L.J. 583.

[3, 4] We do not deem it either necessary or proper, however, in the present case to decide the question which defendant seeks to raise by the argument presented in his brief, since the question is not presented by the record before us. In the first place, the record before us does not indicate that no notice of the juvenile court hearing was given defendant and his parents nor does it indicate that they were not in fact present at that hearing; it is merely silent on the subject. Nor does the record disclose that at the hearing defendant was not advised of his right to be represented by counsel or to have counsel appointed for him if he could not afford one; again, the record is merely silent on the subject. The record does affirmatively show that defendant was represented by counsel (whether privately employed or court-appointed not being shown) at the time of his trial in superior court. "Unless the contrary is made to appear, it will be presumed that judicial acts and duties have been duly and regularly performed. Where the record is silent upon a particular point, the action of the trial judge will be presumed correct." 1 Strong, N.C. Index 2d, Appeal and Error, § 46, p. 191.

[5, 6] More importantly, the record before us does affirmatively show that when defendant was brought to trial in superior court, at which time the record shows he was represented by counsel, he pleaded guilty. At that time he failed to raise any question as to the validity of the juvenile court proceedings which had resulted in his being bound over for trial in the superior court pursuant to G.S. 110-29(6). By his failure to raise the question in superior court and by his plea of guilty, defendant waived any defect, if indeed any existed, in the proceedings in the juvenile court which resulted in his being brought to trial in the superior court. *Eyman v. Superior Court for County of Pinal,* 9 Ariz. App. 6, 448 P. 2d 878; *Neller v. State,* 79 N.M. 528, 445 P. 2d 949. As stated by Parker, J., (now C.J.) in *State v. Doughtie,* 238 N.C. 228, 231, 77 S.E. 2d 642, 644: "Any defect in the process by which a defendant is brought into court may be waived by him by appearing before the court having jurisdiction of the case. *S. v. Turner, supra* (170 N.C. 701, 86 S.E. 1019); *S. v. Cale, supra* (150 N.C. 805, 63 S.E. 958). The defendant may waive a constitutional right relating to a mere matter of practice or procedure. *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513."

In the judgment appealed from, we find

No error.

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

MAURICE DEAN FREEZE, BY HIS NEXT FRIEND, JOHN D. FREEZE, JR.

v. BETTY J. CONGLETON

No. 6919SC320

(Filed 23 July 1969)

1. Negligence § 59— licensees — social guests

A social guest in a home is a licensee and not an invitee.

2. Negligence § 59— action by minor licensee — sufficiency of evidence

In this action for injuries received by the five-year old plaintiff when he walked through a glass door while a social guest in defendant's home, plaintiff's evidence *is held* sufficient to be submitted to the jury where it tends to show that the door had been open for several hours, that plaintiff had come through the door some four or five times, that defendant closed the door immediately after plaintiff passed through the open door

the last time without warning plaintiff or marking the clear glass of the door so it would be visible, that defendant gave plaintiff no warning as he approached the door, and that defendant knew that several persons had previously run into the glass door.

APPEAL by plaintiff from *Lupton, J.*, at the 24 March 1969 Session of CABARRUS Superior Court.

In his complaint plaintiff alleged that he was injured by walking through a glass door at the home of the defendant, his aunt. He alleged that the door had been open for several hours and that the defendant closed the door, neither warning the plaintiff nor making the door visible by sign or marking when, by previous occurrences, she knew of the inability of a child such as the plaintiff to see the door and avoid walking into it.

Defendant answered denying the material allegations of the complaint and specifically denying negligence in any form.

Plaintiff introduced evidence in support of his allegations, but at the close of plaintiff's evidence, the defendant's motion for nonsuit was allowed and the action dismissed. Plaintiff appealed.

Hartsell, Hartsell & Mills by K. Michael Koontz for plaintiff appellant.

Williams, Willeford & Boger by John Hugh Williams for defendant appellee.

BRITT, J.

The sole question presented is whether the evidence offered by plaintiff is sufficient, when taken in the light most favorable to him, to support a finding of negligence on the part of defendant which proximately caused injury to plaintiff. 6 Strong, N.C. Index 2d, Negligence, § 30, p. 64.

[1] Plaintiff concedes the general rule that a social guest in a home is a licensee and not an invitee. *Murrell v. Handley*, 245 N.C. 559, 96 S.E. 2d 717, and citations therein. However, plaintiff contends that where the guest is a child he should not be treated as a bare licensee.

The traditional treatment of child social guests has been correctly summarized as follows:

"To a large extent, the fact that a social guest injured or killed on the premises of his host is a child 15 years or younger has not prevented the application of the rule governing the liability

> of a host to social guests in general, that a social guest is a licensee to whom the host owes only the duty not to injure, by active or affirmative negligence, a guest whose presence is known, not to set a trap or pitfall for the guest, to warn against or remove defects which the host knows are likely to cause harm to the guest, and which he has reason to believe that the guest is not likely to discover for himself, and generally not to cause injury by gross negligence, recklessness, or wanton and wilful misconduct. Rather, it is in the application of the standards of duty that consideration is given to the immaturity of the child, since actions on the part of the host which would not be considered a breach of duty toward an adult licensee in view of the latter's awareness and understanding of danger, may be considered wilful and wanton acts of negligence when applied to an infant." Annot., 20 A.L.R. 3d 1127, 1131.

The annotation goes on to deal with cases from several jurisdictions which have departed from the standard of care quoted above as well as modifying the application of the standard. Of particular interest because of the similar facts is *Kemline v. Simonds,* 231 Cal. App. 2d 165, 41 Cal. Rptr. 653, where the court found that the evidence could support a judgment for the plaintiff. That court applied, to a child social guest, the standard for liability to a trespassing child, as set out in Restatement of Torts 2d, § 339.

In North Carolina it has been said that "[t]he owner of land owes to a licensee only the duty to refrain from injuring him wilfully or through wanton negligence, *and from increasing the hazard while the licensee is on the premises, by active and affirmative negligence* * * *." (Emphasis added) 6 Strong, N.C. Index 2d, § 59, p. 129.

In *Moore v. Moore,* 268 N.C. 110, 150 S.E. 2d 75, a case involving injury to a child social guest, it is said:

> "To permit recovery for an injury, the jury must find the defendant was guilty of one or more of the negligent acts alleged and that the injurious result was reasonably foreseeable. *Jenkins v. Electric Co.,* 254 N.C. 553, 119 S.E. 2d 767. Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them. *Mattingly v. R. R.,* 253 N.C. 746, 117 S.E. 2d 844. The breach of duty may be by negligent act or a negligent failure to act. *Williams v. Kirkman,* 246 N.C. 510, 98 S.E. 2d 922."

[2] The evidence presented by plaintiff, and reasonable inferences therefrom, were sufficient to show the following: The accident occurred on Sunday, 8 October 1967, plaintiff being five years old at that time. Plaintiff, his parents and his brother were visiting with his aunt's family in Raleigh and had spent Saturday night there. Sunday was a mild, sunny day. The home had a combination den, dining room and kitchen (family room) approximately 12 feet by 15 to 20 feet. The door leading from this room to the outside was some six feet wide, consisting of two clear, clean glass panels, each enclosed in a thin metal frame, extending from the floor to the ceiling; one panel was stationary while the other one was mounted on small rollers and a track, and the door was opened by pushing the sliding panel back of the stationary panel. Outside the door was a screened-in porch with a door leading from one end of it to the back yard. This glass door was opened around 12 noon and remained open until a little after 2:30 p.m. During that time plaintiff had come from the yard, through the open door and into the house some four or five times. The last time he came in he went through the family room and into the bathroom; at that time the adults were watching television in the family room and defendant was sitting in a chair with her back very close to the stationary panel of the door. Immediately after plaintiff passed through the open door on his way to the bathroom, defendant reached back and closed the door which was approximately one foot from her. Seconds later, plaintiff returned from the bathroom on his way back to the yard, walked into the clear glass door, broke it, and fell face down on the porch, with painful and serious lacerations on his face and head. Defendant gave plaintiff no warning as he approached the door which she had just closed but immediately after the incident declared that she, as well as several children, had previously run into the glass door and that she had been meaning to mark it.

Although we adhere to the general rule that a social guest in a home is a licensee and not an invitee, we hold that the evidence presented in this case was sufficient to support a jury finding of negligence on the part of defendant, either "by negligent act or a negligent failure to act," proximately causing plaintiff's injuries. *Moore v. Moore, supra.*

The judgment of the superior court is

Reversed.

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

STATE OF NORTH CAROLINA v. LONNIE MARSHALL, JR.

No. 6915SC361

(Filed 23 July 1969)

1. **Assault and Battery § 14— felonious assault — intent to kill — serious injury — sufficiency of evidence**

In this prosecution for felonious assault, the evidence is sufficient to show "intent to kill" and "serious injury" for submission of the case to the jury where it tends to show that defendant grabbed the prosecuting witness from behind and shot him in the neck with a pistol, and that the prosecuting witness lost consciousness and spent some five hours in the hospital during which an operation was performed on his neck to remove the bullet. G.S. 14-32.

2. **Assault and Battery § 5— felonious assault — serious injury**

In a prosecution for felonious assault, whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question the jury must answer under proper instruction.

3. **Assault and Battery § 5— felonious assault — intent to kill**

In a prosecution for felonious assault, the intent to kill may be inferred or presumed from the act itself.

4. **Assault and Battery § 15— felonious assault — serious injury — instructions**

In this prosecution for felonious assault, the trial court did not err in instructing the jury that inflicting serious injury "means physical or bodily injury and this I feel needs no further definition," a fair construction of the charge, when taken as a whole, being that the injury must consist of physical or bodily injury and that the injury must be serious, leaving the question of whether the particular injury was serious for the jury to determine.

APPEAL by defendant from *Clark, J.*, 24 February 1969 Session, ORANGE Superior Court.

Defendant was tried upon two separate bills of indictment which were consolidated for purposes of trial. In Case No. 69-CRS-44 defendant was charged with committing a felonious assault on one Richard Weaver. In case No. 69-CRS-46 defendant was charged with felonious assault on George Caldwell. Defendant entered a plea of not guilty in each case.

The evidence for the State tended to show that Richard Weaver and some of his friends went to the home of Paul Sanford in Chapel Hill about six or seven p.m. on 21 November 1968 to visit Sanford's wife, who had just returned from the hospital; that after they had been at Sanford's home for an hour or so playing cards, the defendant came in; that defendant walked into the kitchen and started

talking with Richard Weaver about the Black Muslims and that Weaver told defendant that he was not interested in that subject; that defendant then said something about coming on outside; that Weaver went out first and just as he stepped out onto the sidewalk the defendant grabbed him and shot him in the neck with a .22 caliber pistol; that Weaver fell or lay down with the assistance of defendant and said something about being shot; that then the defendant said "I ought to shoot you again" or "I ought to kill you" or words to that effect; that George Caldwell followed the defendant and Weaver out and saw defendant grab Weaver from behind and then shoot him and say that he was going to kill him; that then the defendant turned and shot Caldwell in the foot and Caldwell backed up; that Henry Laney came up to try to help Weaver up and take him to the hospital and defendant slapped him with the pistol and then shot him also.

The State's evidence further tended to show that defendant and others present at the scene had been drinking prior to the shooting; that Weaver passed out after being shot in the neck, and that he regained consciousness in North Carolina Memorial Hospital; that he stayed there for some five hours during which time he had an operation on his neck to remove the bullet.

Upon motion to nonsuit the felony charges made by defendant, the Court allowed a nonsuit as to the felony aspect of the assault on Caldwell. Defendant did not offer any evidence in his own behalf. From verdicts of guilty as to the felonious assault on Weaver and guilty as to a misdemeanor assault on Caldwell, and a sentence of six to ten years in the felony conviction with prayer for judgment continued for five years in the misdemeanor conviction, defendant appealed to this Court.

Robert Morgan, Attorney General, by Harry W. McGalliard, Deputy Attorney General, for the State.

James R. Farlow for defendant appellant.

BROCK, J.

[1-3] Defendant first argues that the trial court erred in denying defendant's motion to nonsuit the felony charge in Case No. 69-CRS-44 (Weaver indictment) and in submitting the felony charge to the jury on the evidence before it. Defendant contends that the evidence clearly shows *lack of a serious injury* and *lack of intent to kill,* both of which are essential elements of the crime of felonious assault. G.S. 14-32. He says that the testimony of Richard Weaver

shows a situation of "no animosity" and that the shot fired did not inflict serious injury because "a wound in the neck dressed and released within a few hours, with no compounding complications is nothing more than a flesh wound." We cannot agree with these contentions. Taken in the light most favorable to the State, we think there is plenary evidence of an assault with a deadly weapon *with intent to kill, inflicting serious injury* not resulting in death. A pistol wound in the neck, close to the spinal cord, resulting in unconsciousness, with the bullet lodging in the neck is sufficient evidence of serious injury, within the meaning of the statute, to submit the question of serious injury to the jury. Whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question the jury must answer under proper instruction. *State v. Jones,* 258 N.C. 89, 128 S.E. 2d 1. As to the sufficiency of evidence of intent to kill, the intent to kill may be inferred or presumed from the act itself. 1 Strong, N.C. Index 2d, Assault and Battery, § 5, p. 298. Here we think the requisite intent can be inferred from the nature of the assault on Weaver, the manner in which it was made and the conduct of the parties under the circumstances. *State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915. This assignment of error is overruled.

[4] Defendant next argues that the Court erred in its instruction to the jury on the meaning of "serious injury" by stating as follows: "Fourth, inflicting serious injury. As to this, members of the jury, this means physical or bodily injury and this I feel needs no further definition." Defendant complains that the jury could understand the Court's statement to mean that any physical or bodily injury was serious injury. We find no prejudicial error in the above instruction. A fair and reasonable construction of the judge's charge, when taken as a whole, is that the injury must consist of physical or bodily injury in the first place and, in the second place, the injury must be serious, leaving the question of whether the particular injury was serious for the jury to determine. It is evident that the Court was mindful of our Supreme Court's definition of serious injury in *State v. Jones,* in which the Court said: "The term 'inflicts serious injury' means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. *Further definition seems neither wise nor desirable.* Whether such serious injury has been inflicted must be determined according to the particular facts of each case." (Emphasis added.) *State v. Jones, supra,* p. 91. This assignment of error is overruled.

We have carefully considered the remainder of defendant's as-

signments of error which are to the charge of the court and to the denial of various defense motions and we find no prejudicial error.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

AMARR COMPANY v. J. M. DIXON, INC. AND PEERLESS INSURANCE COMPANY

No. 6915SC200

(Filed 23 July 1969)

1. Principal and Surety § 9— bonds for public construction — purpose of G.S. 44-14

The purpose of G.S. 44-14 is to provide protection for laborers and materialmen furnishing labor or material for the construction of public works commensurate with that afforded them while engaged in private construction.

2. Principal and Surety § 9— bonds for public construction — laborer's or materialman's claim

Provision in a contractor's bond for construction of a municipal building which requires notice of a laborer's or materialman's claim within 90 days of the last furnishing of labor or material *is held* invalid as violative of G.S. 44-14 in failing to give protection commensurate with that afforded laborers or materialmen in private construction, since such laborers or materialmen have six months after completion of the labor or the final furnishing of material within which to file notice of lien. G.S. 44-39.

APPEAL by defendants from *Hall, J.*, at the November 1968 Session of ALAMANCE Superior Court.

Material allegations of the complaint are summarized as follows: J. M. Dixon, Inc. (Dixon) was the prime contractor for the construction of a municipal building for the City of Graham, N. C. Dixon and Peerless Insurance Company (Peerless) executed a payment bond to the City of Graham in order to comply with the terms of G.S. 44-14. Triangle Steel Company (Triangle) became a subcontractor, obligated to furnish certain labor and materials. Between 1 March 1967 and 1 June 1967, plaintiff furnished certain doors, materials and supplies of the value of $2500.00 to Triangle for use in the municipal building. Not being paid by Triangle, plaintiff gave proper notice to Dixon and Peerless, and their failure to pay constituted a violation of G.S. 44-14.

The defendants demurred, the demurrer was overruled and certiorari was denied by this Court on 13 September 1968. Thereafter, the defendants answered, admitting the contract between Dixon and the City of Graham, the bond executed by Dixon and Peerless, and the subcontract with Triangle. They admitted that Amarr furnished material and supplies and labor as shown in the invoices exhibited by plaintiff. The defendants also admitted receipt of the claim notice on 27 September 1967.

As a further defense, defendants alleged that plaintiff failed to allege compliance with the terms of the bond. As a second defense, defendants alleged that the last delivery date of 25 April 1967 and the first notice on 27 September 1967, as alleged by the plaintiff, clearly showed a failure to comply with the provisions of the bond.

The parties stipulated the facts and the matter was heard by Hall, J., sitting without a jury on 18 November 1968. Judge Hall found that the term of the bond requiring notice to the defendants of the claim within 90 days of the last furnishing of material was unreasonable, arbitrary and invalid as contrary to the intent of G.S. 44-14. From judgment for the plaintiff, the defendants appealed.

Booe, Mitchell, Goodson & Shugart by William S. Mitchell for plaintiff appellee.

Adams, Kleemeier, Hagan, Hannah & Fouts by Walter L. Hannah for defendant appellants.

BRITT, J.

The question presented is whether a condition in a bond, made pursuant to the requirements of G.S. 44-14, that "[n]o suit or action shall be commenced hereunder by any claimant: a) Unless claimant, other than one having a direct contract with the Principal, shall have given written notice to any two of the following: The Principal, the Owner, or the Surety above named, within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made * * *" is invalid as contrary to the requirements of G.S. 44-14.

The statute (G.S. 44-14) provides in material part as follows:

> "* * * Any laborer doing work on said building and materialman furnishing material therefor and used therein, under a contract or agreement between said laborer or materialman and the principal contractor or subcontractor *has the right to sue on*

said bond * * *. Every bond given by any contractor to any county, city, town or other municipal corporation for the building, repairing or altering of any building, public road or street, as required by this section *shall be conclusively presumed to have been given in accordance therewith,* whether such bond be so drawn as to conform to the statute or not, and *this statute shall be conclusively presumed to have been written into every such bond so given.* * * *" (Emphasis added.)

[1] The purpose of this statute has been clearly declared. "The statute, G.S. 44-14, was designed and intended to provide protection for laborers and materialmen furnishing labor or material for the construction of public works commensurate with that afforded them while engaged in private construction. It prescribed the minimum protection that must be furnished but does not undertake to stipulate the maximum. * * *" *Owsley v. Henderson,* 228 N.C. 224, 45 S.E. 2d 263. Also *Steel Corp. v. Brinkley,* 255 N.C. 162, 120 S.E. 2d 529. "Commensurate" is defined as "equal in measure or extent." Webster's Third New International Dictionary (1968).

[2] A clause seeking to limit the protection afforded the laborer or materialman to less than that afforded the same persons when engaged in private construction violates the meaning and intent of the statute. In so doing, it does not meet the prescribed minimum. We are required by the statute to treat the bond as including the statute. The bond, therefore, must give, as a minimum, that protection commensurate with the protection afforded workers in private construction. It is well known that in private industry a laborer or a materialman has six months after the completion of the labor or the final furnishing of materials within which to file his notice of lien. G.S. 44-39. The ninety-day requirement here is not commensurate protection.

We do not deem it necessary to determine whether G.S. 44-14 would allow notification beyond the six-months period above mentioned.

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

Affirmed.

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

ELI JOSEPH MONSOUR, T/A RICK'S LOUNGE AND T/A THE WAGON WHEEL v. NORTH CAROLINA STATE BOARD OF ALCOHOLIC CONTROL

No. 6910SC255

(Filed 23 July 1969)

Intoxicating Liquor § 2— suspension of retail beer license — sufficiency of evidence

In this proceeding for the revocation or suspension of respondent's retail beer license, the evidence is sufficient to sustain findings by the ABC Board that respondent failed to give the licensed premises proper supervision and permitted an intoxicated waitress to work in the licensed establishment, which findings support the Board's suspension of respondent's beer license.

APPEAL by petitioner from *McKinnon, J.*, at the January 1969 Regular Civil Session of WAKE Superior Court.

This proceeding was instituted by respondent by the filing of a citation for petitioner to appear before a hearing officer of the State Board of Alcoholic Control to show cause why his retail beer permits should not be revoked or suspended. The charges against the petitioner were:

"1. Permitting and allowing an employee to be in an intoxicated condition while working in the establishment of the petitioner on or about March 23, 1968, at 10:10 P.M. in violation of Board of Alcoholic Control Regulation Number 30(7).

2. Failing to give his retail licensed premises proper supervision on or about March 23, 1968, at 10:10 P.M., GS 18-78."

A hearing was held in Raleigh by a hearing officer of the respondent. Evidence was introduced in support of the charges and evidence favorable to the petitioner was also introduced. The hearing officer concluded that the charges were true and recommended that respondent Board suspend the malt beverage permits held by the petitioner for sixty days, effective 24 June 1968.

Thereafter, on 10 June 1968, respondent Board reviewed the findings of fact based on the evidence taken at the hearing by the hearing officer, adopted the findings of fact as its own, and ordered that the retail beer permits of the petitioner be suspended for a period of thirty days, effective 24 June 1968.

Petitioner appealed to the Superior Court of Wake County. Pursuant to a hearing, Judge McKinnon entered judgment affirming the decision of respondent Board as it pertained to the establishment where the incident complained of occurred but reversed the decision

of respondent Board as it pertained to another business establishment operated by petitioner. From that portion of the judgment affirming respondent's order, petitioner appealed.

Brown, Fox & Deaver by Bobby G. Deaver for petitioner appellant.

Attorney General Robert Morgan and Staff Attorney Mrs. Christine Y. Denson for respondent appellee.

BRITT, J.

Petitioner contends that the court erred in affirming the finding of fact that Cassie Young was "working" for petitioner in Rick's Lounge (petitioner's establishment) while intoxicated on 23 March 1968 at 10:10 p.m., because the finding that she was working at that time is not supported by material and substantial evidence. He also contends that the court erred in affirming the finding of fact that petitioner failed to give his retail licensed premises the proper supervision on or about 23 March 1968 at 10:10 p.m., in violation of G.S. 18-78, for the reason that this finding is not supported by material and substantial evidence.

In *Freeman v. Board of Alcoholic Control,* 264 N.C. 320, 141 S.E. 2d 499, in an opinion by Higgins, J., we find the following:

> "The duty to weigh the evidence and find the facts is lodged in the agency that hears the witnesses and observes their demeanor as they testify — in this case the Board of Alcoholic Control. Its findings are conclusive if supported by material and substantial evidence. *Campbell v. ABC Board,* 263 N.C. 224, 139 S.E. 2d 197; *Thomas v. ABC Board,* 258 N.C. 513, 128 S.E. 2d 884. 'Courts will not undertake to control the exercise of discretion and judgment on the part of members of a commission in performing the functions of a State agency.' *Williamston v. R. R.,* 236 N.C. 271, 72 S.E. 2d 609. 'When discretionary authority is vested in such commission, the court has no power to substitute its discretion for that of the commission; and in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene.' *Pharr v. Garibaldi,* 252 N.C. 803, 115 S.E. 2d 18. 'Hence it is that the findings of the board, when made in good faith and supported by evidence, are final.' *In re Hastings* [sic], 252 N.C. 327, 113 S.E. 2d 433."

The summarization of evidence by the hearing officer reveals,

among other things, the following: At about 9:45 p.m. on 23 March 1968, Fayetteville Police Officers DeVane and Knight visited Rick's Lounge, one of petitioner's places of business. In the establishment they observed Cassie Young waiting on tables and specifically observed her going to the bar, securing three opened bottles of beer and delivering them to some young men seated at a table. Cassie Young acted differently from her usual conduct and appeared slightly unsteady and there were indications that she had been drinking. Petitioner was absent from the premises at the time. The officers left the establishment and returned some 25 minutes later and again observed Cassie Young. She was standing near the table of the parties to whom she had previously delivered the three bottles of beer; she was loud and boisterous. Upon seeing the officers, she walked over to them and made the statement that she was drunk. Petitioner was not present at that time. The officers arrested her and took her outside the establishment onto the sidewalk, at which time petitioner appeared and remarked that she was drunk, that she knew better than to drink when she was working, and that she was on duty. Cassie Young was indicted for and pleaded guilty to public drunkenness on the occasion in question and paid a fine and the court costs.

Although petitioner presented testimony showing that he was only temporarily absent from his place of business for the purpose of eating dinner at the time of the incidents complained of, that Cassie Young was off duty at the time and that she was not drunk, it was the province of the hearing officer to weigh the credibility of the testimony and to find the facts from the evidence presented.

We fully agree with the conclusion of Judge McKinnon that the findings of fact and decision of the respondent are supported by competent, material and substantial evidence, and the judgment affirming respondent Board's suspension order as to Rick's Lounge is

Affirmed.

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

ERWIN McKINNIS AND WIFE, EMMA McKINNIS v. WELL DRILLERS, INCORPORATED

No. 6921DC302

(Filed 23 July 1969)

Vendor and Purchaser § 2— expiration of contract to purchase realty — right of purchaser to recover excess payments

In an action to recover alleged excess payments upon a contract executed in 1962 to purchase real estate at a price of $8,275, the contract providing that after plaintiffs made weekly payments of $20 for a two-year period the defendant would execute and deliver to plaintiffs a deed to the property in return for their note and deed of trust for the balance of the purchase price, plaintiffs' evidence that they continued to make payments after the expiration of two years and that defendant continued to accept the payments without delivering the deed, although indicating an intention by the parties to consummate a purchase and sale of the property after expiration of the contract, *is held* insufficient to show an extension of the contract in the absence of evidence of the terms of the extension; consequently, defendant's execution and delivery of the deed to plaintiffs in 1967 in consideration of plaintiffs' payment of $4,390 constituted a new and fully executed contract, thereby precluding recovery by plaintiffs.

APPEAL by defendant from *Billings, J.*, 27 January 1969 Session, FORSYTH District Court.

Plaintiffs bring this action to recover, upon the theory of unjust enrichment of defendant, alleged excess payments upon a contract to purchase real estate from defendant.

Plaintiffs' evidence tends to show that plaintiffs executed an offer to purchase and defendant executed an acceptance of the offer on 26 May 1962. The offer provided for the purchase of the real estate described therein for a total of $8,275.00 payable in weekly payments of $20.00 for a period of two years. It provided that, after the payments for the two-year period, defendant would execute and deliver to plaintiffs a deed to the property in return for their note and deed of trust for the balance of the purchase price. There was further provision in the offer and acceptance respecting the application of the weekly payments to rent in the event of default in payment according to the terms.

Plaintiffs' evidence tends to show that they moved into the house in June 1962 and thereafter made the weekly payments for the balance of the year. Their evidence tends to show that they made the weekly payments throughout the calendar year 1963. Their evidence tends to show that they made payments of $60.00 per month in 1964, plus some unidentified additional payments. Their evidence tends to show there was some vague conversation with defendant in

1964 concerning what balance was due, but there was no evidence as to amounts claimed by either plaintiffs or defendant.

Plaintiffs' evidence tends to show that during 1965 they paid defendant a lump sum of $1,500.00, and that they disagreed with defendant as to the balance due; but there was no evidence of the amount claimed to be due by either plaintiffs or defendant.

Plaintiffs' evidence tends to show that during the years 1965 and 1966 they paid the sum of $60.00 monthly. There is no evidence of monthly payments during the year 1967. Plaintiffs' evidence tends to show that in September 1967 they received from defendant a deed to the property and paid to defendant a sum in excess of $6,000.00 as the balance due; however, the complaint and answer establish that this final payment was $4,390.00, not $6,000.00.

Defendant offered no evidence.

From the finding and conclusion that plaintiffs paid defendant $695.00 in excess of the amount provided for in the 1962 contract, and that defendant had been thereby unjustly enriched in the sum of $695.00, defendant appealed.

Green, Teeter & Parrish, by Carol L. Teeter, for plaintiffs-appellees.

David P. Mast, Jr., for defendant-appellant.

Brock, J.

We note with interest that according to plaintiffs' complaint, they paid a total of $10,250.00 for the property; according to plaintiffs' uncontradicted evidence, they paid in excess of $11,300.00 for the property; and according to the judge's findings of fact, they paid a total of $8,970.00 for the property. We are unable to reconcile these differences. However, it does not seem necessary to do so in order to dispose of this appeal.

It appears from plaintiffs' evidence that there was a dispute between plaintiffs and defendant as to the balance due on the purchase price at the time the deed was executed in 1967. Plaintiffs rely wholly upon the purchase price being established at $8,275.00 as set out in the 1962 offer and acceptance. However, the 1962 offer and acceptance by its terms was to be performed on or before the expiration of two years from its effective date, which would have been in April or May of 1964. The record is absolutely silent as to an agreement to extend the 1962 contract, or as to the terms of any extension. Assuming *arguendo,* but specifically not deciding, that a

contract required by the statute of frauds to be in writing may be extended by implication from the conduct of the parties, it would appear from their conduct that plaintiffs and defendant intended to consummate a purchase and sale of the property after the expiration of the 1962 contract. However, the record does not reveal any terms of extension, implied or otherwise. Therefore, upon this record, we hold that plaintiff has failed to show an extension of the 1962 contract.

At the time of the execution of the deed to plaintiffs in 1967, plaintiffs accepted defendant's computation of the balance due, under whatever agreement it was calculated, and paid to defendant the balance as computed, and accepted the deed. This constituted a new and fully executed contract. Plaintiffs do not contend there was fraud, undue influence, or a mutual mistake; they contend only that they made a mistake. Indeed they do not seek rescission of the contract; they only seek to recover a sum of money that they paid by reason of what they allege to be a mistake on their part.

As stated above, this record does not support a finding that the 1962 contract was extended; therefore the only evidence upon which a calculation of correct purchase price can be made was the conduct of the parties in the execution of the deed in consideration of the payment of a balance due in the sum of $4,390.00.

We do not discuss the propriety of the nature of the action undertaken to be prosecuted by plaintiffs. Suffice it to say, that upon this record plaintiffs have failed to establish a cause of action for relief against defendant.

Defendant's motion for nonsuit should have been allowed.

Reversed.

CAMPBELL and MORRIS, JJ., concur.

IN RE: SELMA SHELTON (69-J-32)
JOHN GREEN CUNNINGHAM (69-J-33)
No. 692DC300

(Filed 23 July 1969)

Constitutional Law § 29; Courts § 15; Infants § 10— constitutionality of Juvenile Courts Act — jury trial in juvenile proceeding

The North Carolina Juvenile Statute, G.S. Ch. 110, Art. 2, is constitu-

tional, and a jury trial is not constitutionally required in a juvenile court proceeding.

APPEAL by respondents from *Ward, District Judge,* January 1969 Juvenile Session, District Court of HYDE County, Division of the General Court of Justice.

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

Chambers, Stein, Ferguson and Lanning by James E. Ferguson, II, for respondents.

MALLARD, C.J.

These matters were heard separately on 21 January 1969. Evidence was taken separately. There has been no order entered consolidating these proceedings for a hearing. See Rule 14 of the Rules of Practice in the Court of Appeals. Under Rule 48 it would be entirely proper to dismiss the appeal, however, we decide the proceedings on their merits.

In a juvenile petition, #69-J-32, the respondent Selma Shelton, of Rt. 1, Swan Quarter, was alleged to be under 16 years of age and in need of the care, protection or discipline of the State. In the petition, it is alleged, in substance, that such need was demonstrated and evidenced by the conduct of the respondent on 14 November 1968 in unlawfully, wilfully, and intentionally blocking, obstructing, and impeding the flow of traffic on the State Highway and street passing through and traversing the community of Swan Quarter, in violation of G.S. 20-174.1. The evidence tended to show that at the time thereof this respondent was one of a group of twenty-three females and eleven males engaged in such conduct.

In another juvenile petition, #69-J-33, the respondent John Green Cunningham, of Rt. 1, Engelhard, was alleged to be under 16 years of age and in need of the care, protection or discipline of the State. In the petition, it is alleged, in substance, that such need was demonstrated and evidenced by the conduct of the respondent on 12 November 1968 in unlawfully, wilfully and intentionally blocking, obstructing, and impeding the flow of traffic on the State Highway and street passing through and traversing the community of Swan Quarter, in violation of G.S. 20-174.1. The evidence tended to show that at the time thereof this respondent was one of a group of twenty-six persons engaged in such conduct.

After the hearings, a separate, but almost identical order of cus-

tody was entered declaring each to be a delinquent in need of more suitable guardianship. In each of the orders of custody, it is provided that the respondent:

> "(I)s 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, consistent with the laws of this State; this commitment is suspended and said child placed upon probation for twelve 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 his residence by 11:00 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."

The respondents contend that the North Carolina Juvenile Statute as contained in Article II of Chapter 110 of the General Statutes is unconstitutional.

Respondents also contend that their constitutional rights were violated because they were not afforded jury trials.

These questions in identical language were raised and decided contrary to respondent's contentions in the case of *In Re Burrus*, 4 N.C. App. 523, 167 S.E. 2d 454 (1969).

In *Burrus* the factual situation was almost the same as here. The evidence in both tended to show that groups of children were permitted or allowed by their parents or persons *in loco parentic* to gather together in gangs and roam up and down the streets and highways intentionally and willfully blocking and impeding the flow of

traffic to the harassment of all the people at that time lawfully using those particular streets and highways in Hyde County.

For the reasons enunciated in *Burrus,* we are of the opinion and so hold that the North Carolina Juvenile Statute as contained in Article II of Chapter 110 of the General Statutes is not unconstitutional, and that the constitutional rights of the respondents were not violated because they were not afforded a jury trial.

Affirmed.

BRITT and PARKER, JJ., concur.

GEORGE W. COX, JR., AND WIFE, MORTY H. COX v. WILSON PHILLIPS

No. 693SC278

(Filed 23 July 1969)

1. Evidence § 32— ambiguity in written contract — parol evidence rule

In this action for breach of a home construction contract, the parol evidence rule is not violated by the admission of testimony by defendant to the effect that the written agreement did not include bricking up the end of the carport, where the terms of the contract relative to the carport were ambiguous and defendant was testifying only to the terms of the agreement signed by him.

2. Contracts § 18— modification of written contract — consideration

In this action for breach of a home construction contract, testimony by defendant with respect to modifications in the contract was not inadmissible as unsupported by consideration.

APPEAL by plaintiffs from *Cowper, J.,* at the February 1969 Session of CRAVEN Superior Court.

Plaintiffs filed their complaint 3 July 1968 alleging that they and the defendant entered into a contract on 30 May 1967 under which the defendant was to construct a home for the plaintiffs on land belonging to the plaintiffs; that plaintiffs have remained ready to perform, but defendant has failed and refused to perform the contract.

Defendant demurred 20 August 1968 and the demurrer was overruled 2 October 1968. However, in order to make the complaint more certain, plaintiffs amended on 8 October 1968, alleging that defendant failed to perform the contract in that he failed to complete the

walkway, brickwork, carpentry in the carport, and failed to paint the gutters, treat for termites, fit the doors, provide certain light fixtures and carpet, reimburse for interest on construction loan beyond the original completion date, and numerous other specifics.

The defendant answered 12 November 1968 admitting receipt of $12,500.00 from the plaintiffs but denying the other material allegations of the complaint. As a further defense and by way of counterclaim, the defendant alleged: The parties entered into a contract for defendant to build, for $15,000.00, a house of standard design known as "The Atlantic." The terms of payment were specified in the agreement. After making the agreement, the parties agreed on numerous modifications of the plans, with no agreed price for each modification; the reasonable value of the modifications was $3917.00. The house was not completed by 15 October 1967 as planned because of delays in obtaining the special materials ordered by plaintiffs as well as normal construction delays. For said extras plus the balance on the original contract, plaintiffs owed defendant $6317.00. Defendant stands ready to complete the remaining work of approximately $500 value.

At the trial, both parties testified substantially as alleged in their pleadings. The court submitted two issues to the jury, these being the amount, if any, which the defendant was indebted to the plaintiffs and the amount, if any, which the plaintiffs were indebted to the defendant. The jury answered the issues in favor of defendant, and from judgment for the defendant in the amount of $4760.00, plaintiffs appealed.

Robert G. Bowers for plaintiff appellants.

Beaman & Kellum by Norman B. Kellum, Jr., for defendant appellee.

BRITT, J.

[1] Plaintiffs contend that the court committed error in permitting the defendant to testify that neither the oral conversations nor the subsequent written contract, as signed by the defendant, had included a brick wall on the outside of the extended carport.

Plaintiffs' former home on the same lot had burned and the parties contemplated building a new house very similar to the one that had burned. The burned house had a single-car open carport. The typed contract incorporated a handwritten list of specifications of materials, alterations and the like. Item No. 15 stated: "Add 13'

on width of carport." On the same line of the lined paper, in slightly different writing and crowded to the edge of the paper, was the following: "w/brick wall." As the import of the defendant's testimony was that the signed agreement had not included bricking up the end of the carport, the contract terms were ambiguous. Defendant was seeking to testify only to the terms of the agreement signed by him. He did not seek to vary the agreement; the parol evidence rule is not involved. Stansbury, N.C. Evidence 2d, § 260, p. 625, § 229, p. 581. See also *Bowden v. Bowden,* 264 N.C. 296, 141 S.E. 2d 621. The assignment of error is overruled.

[2] Plaintiffs contend that the court erred in allowing the defendant to testify "with respect to modifications in the contract which were unsupported by consideration" and cite *Whitehurst v. FCX Fruit and Vegetable Service,* 224 N.C. 628, 32 S.E. 2d 34, in support of this contention. We do not find any exception or assignment of error in the record or transcript dealing with that question. Moreover, the *Whitehurst* case supports the admissibility of the evidence. We think the broad view of the question of consideration suggested in *Helicopter Corp. v. Realty Co.,* 263 N.C. 139, 139 S.E. 2d 362, is pertinent to this case.

We have carefully considered each of the assignments of error discussed in plaintiffs' brief and finding them without merit, they are overruled.

No error.

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

STATE OF NORTH CAROLINA v. TOMMY (TOMMIE) ANDERSON

No. 6929SC353

(Filed 23 July 1969)

1. Criminal Law § 9— aiders and abettors — principals

Where two or more persons aid and abet each other in the commission of the crime, all being present and participating in its commission, then all are principals and equally guilty.

2. Criminal Law §§ 9, 168; Robbery § 5— instructions — principal in first degree or second degree — harmless error

Where the State's evidence in this armed robbery prosecution tended to show that both defendant and his co-defendant actively participated in

the robbery, defendant was not prejudiced by error in the court's instructions casting defendant in the role of principal in the first degree and the co-defendant as principal in the second degree, both being equally guilty.

3. Criminal Law § 117— instructions — credibility of witnesses

The trial court did not err in failing to instruct the jury on the credibility of witnesses absent a request for such an instruction.

4. Criminal Law § 117— instructions — character evidence

Character evidence is a subordinate feature of the case, and failure of the court to give an instruction as to the effect of such evidence is not error absent a request for such instruction.

ON *certiorari* by defendant from *Anglin, J.*, May 1967 Session, HENDERSON Superior Court.

Defendant Tommy Anderson and co-defendant Nathaniel Stubbs were jointly charged in a bill of indictment proper in form with the felony of armed robbery. The defendants entered pleas of not guilty.

The State offered the testimony of F. T. Fleming and Stella Maude Fleming, husband and wife, which tended to show that they operated a small grocery business in Hendersonville, North Carolina; that on the night of 14 August 1966, they were outside their store locking up when the defendant and Stubbs attacked them; that the defendant had a pistol; that they were both beaten with the pistol; and that Stella Fleming's pocketbook with some thirty thousand dollars ($30,000.00) in United States currency was taken from them by the defendant and Stubbs. The State offered other testimony which further tended to show that the general reputation and character of Mr. and Mrs. Fleming in the community in which they lived was good. Mr. and Mrs. Fleming identified the defendant and Stubbs in court as the two men who robbed them.

There was no evidence offered by either defendant. Upon a jury verdict of guilty as charged and an active sentence of not less than fifteen nor more than twenty years, and upon an order allowing his petition for writ of *certiorari*, defendant Tommy Anderson appealed to this Court.

Robert Morgan, Attorney General, by Dale Shepherd, Staff Attorney, for the State.

Prince, Youngblood, Massagee & Groce, by Edwin R. Groce, for defendant appellant.

BROCK, J.

[1, 2] Defendant argues that the trial court erred in the charge to the jury by casting the defendant in the role of principal in the first degree of the crime of armed robbery, and by casting co-defendant Stubbs as a principal in the second degree, and further charging the jury that it could find Stubbs guilty of armed robbery only after it had found defendant guilty of armed robbery. We do not agree with this argument. It is thoroughly established law in North Carolina that where two or more persons aid and abet each other in the commission of a crime, all being present and actively participating in its commission, then all are principals and equally guilty. *State v. McNair,* 272 N.C. 130, 157 S.E. 2d 660; *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25; *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670. The evidence disclosed that both defendants actively participated in the attack on and the robbery of Mr. and Mrs. Fleming; that defendant Stubbs grabbed Mrs. Fleming and was grabbing for the pocketbook, and that defendant Anderson had a pistol which he used to strike Mrs. Fleming in the face, forcing her to let go of the pocketbook. Upon such evidence the trial court may be guilty of technical error in not casting defendant Stubbs as a principal in the first degree. Even so, we are unable to perceive any prejudicial error toward defendant Anderson by the court's failure to properly cast defendant Stubbs as principal in the first degree. Furthermore, "[t]here is no practical difference between principals in the first and second degrees, since all are equally guilty." 2 Strong, N.C. Index 2d, Criminal Law, § 9, p. 492. This assignment of error is overruled.

[3] Defendant assigns as error the failure of the court to charge the jury that they could, but were not compelled to do so, believe the testimony of witnesses. It is well established that no duty rests upon the trial court to charge the jury on the credibility of witnesses, absent a request for such instruction. This assignment of error is overruled upon authority of *State v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909, and *State v. Anderson,* 208 N.C. 771, 182 S.E. 643.

[4] Defendant next complains that the court erred in failing to charge the jury that testimony given as to the good character of the prosecuting witnesses could not be considered as substantive evidence of guilt or innocence, but only as to their credibility as witnesses. Our Supreme Court has held that character is a subordinate feature of the case, and a special request must be made of the court if the court is to be held for error in failing to charge the jury as to the effect of character evidence. *State v. Burell,* 252 N.C. 115,

113 S.E. 2d 16. Since defendant did not request special instruction, this assignment of error is also overruled.

In the trial we find

No error.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT EARL ABBOTT

No. 6912SC243

(Filed 23 July 1969)

1. Constitutional Law § 32; Criminal Law § 21— right to counsel — preliminary hearing

A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction nor is it a critical stage of the proceeding, and a defendant may waive the hearing and consent to be bound over to the superior court to await grand jury action without forfeiting any defense or right available to him; therefore, the fact that defendant was not represented by counsel at the preliminary hearing deprived him of no essential right.

2. Criminal Law § 138— punishment — accomplice receiving probationary sentence

The fact that defendant's accomplice received a probationary type sentence while defendant received an active prison sentence is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge.

ON petition for *certiorari* to review judgment of *Brewer, J.*, 4 March 1968 Criminal Session of CUMBERLAND Superior Court.

Defendant was charged in fourteen bills of indictment with forgery and uttering of forged instruments in violation of the General Statutes of North Carolina. He pleaded not guilty and the jury returned a verdict of guilty as charged on each count in each of the fourteen bills of indictment. The court entered judgment imposing prison sentences as follows: On the first count of the first indictment, not less than five nor more than ten years; on the second count of the first indictment, not less than five nor more than ten years; on the first count of the second indictment, not less than five nor more than ten years; on the second count of the second indictment, five

years, all of the above sentences to run consecutively; the remaining indictments were all consolidated for purpose of judgment and defendant was sentenced to ten years thereon, such sentence to run concurrently with the sentences imposed on the verdicts of guilty to the first two indictments. Defendant appealed.

Attorney General Robert Morgan and Special Attorney Leslie A. Fleisher for the State.

Sol G. Cherry for defendant appellant.

PARKER, J.

Defendant, an indigent, was represented at his trial by court-appointed counsel. Following the trial, for good cause shown the court permitted the trial counsel to withdraw from the case and appointed other counsel to represent defendant in connection with this appeal. However, because of delay in notifying the newly appointed counsel of his appointment, the statement of case on appeal was not prepared and served and the record on appeal was not docketed in this Court in apt time. In order to permit defendant's appeal to be fully considered, this Court granted *certiorari.*

[1] Appellant's first assignment of error is that he was denied right to be represented by counsel at the preliminary hearing and for that reason improvidently waived the hearing. There is no merit in this assignment of error. A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction nor is it a critical stage of the proceeding, and a defendant may waive the hearing and consent to be bound over to the superior court to await grand jury action without forfeiting any defense or right available to him. Therefore, the fact defendant was not represented by counsel at the preliminary hearing deprived him of no essential right. *State v. Gasque,* 271 N.C. 323, 156 S.E. 2d 740.

[2] Appellant's second assignment of error is that the sentences imposed by the court were excessive in view of the fact that an accomplice received a probationary type sentence. There is also no merit in this assignment of error. "There is no requirement of law that defendants charged with similar offenses be given the same punishment. The punishment imposed in a particular case, if within statutory limits, is within the sound discretion of the presiding judge." *State v. Garris,* 265 N.C. 711, 144 S.E. 2d 901; 3 Strong, N.C. Index 2d, Criminal Law, § 138. In the present case the punish-

ment imposed was clearly within statutory limits. We have examined the entire record and in the trial and judgment, we find

No error.

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

STATE OF NORTH CAROLINA v. JIMMY HOWARD LEDBETTER

No. 6927SC314

(Filed 23 July 1969)

1. Larceny § 5— presumption arising from possession of recently stolen property

Possession of stolen property shortly after the property was stolen raises a presumption of the possessor's guilt of larceny of such property.

2. Criminal Law § 104— nonsuit — consideration of evidence

On motion for nonsuit, all of the evidence must be taken in the light most favorable to the State.

3. Larceny § 7— larceny of automobile — nonsuit

Evidence of defendant's guilt of the larceny of an automobile was sufficient to be submitted to the jury.

APPEAL by defendant from *Grist, J.*, 28 January 1969 Session of the Superior Court of CLEVELAND County.

Defendant was charged in a bill of indictment with the felony of larceny of an automobile of the value of twelve hundred dollars.

Defendant's plea was not guilty. Verdict of the jury was guilty as charged. From a judgment of imprisonment for not less than eight nor more than ten years, the defendant appealed to the Court of Appeals.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Trial Attorney Robert G. Webb for the State.

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

MALLARD, C.J.

The State's evidence is summarized as follows: Troy Ernest Drum (Drum), who lives on Route 7, Shelby, was the owner of a Plymouth automobile, worth twelve hundred dollars, which he drove to work

on the night of 22 October 1968. He worked on the third shift at the Dover Yarn Mill, Buffalo. When he got off the next morning at 6 o'clock, his automobile was gone. He reported this to the police. He had not given anyone permission to take or drive his automobile. At about 11:00 A.M. on the morning of 23 October 1968, the police officers of Kings Mountain arrested the defendant who was alone and driving Drum's automobile on the streets of the City of Kings Mountain. Drum's license plates had been removed and two South Carolina license plates were on the car. The South Carolina license plate appearing on the front was not the same number as the one on the rear. Drum's automobile was returned to him on 23 October 1968 about noon but he never did recover his license plates.

Defendant's evidence is summarized as follows: His home is in Bessemer City. He was arrested by the police officers on 23 October for not having an operator's license. The Plymouth automobile he was driving had been borrowed by him from a Miss Tina Owens, a girl he had met at Gastonia in a "package store" located at the corner of Franklin Avenue and Bessemer City Road. Beer and wine is also sold at this "package store." He had just got acquainted with her on that morning between 9:30 and 10 o'clock. He borrowed the car to go to borrow some money from his brother-in-law. On the way to find his brother-in-law he was stopped and arrested by the officers. He did not steal the car. Since his arrest he has tried to contact Tina Owens but has been unable to find her. She had driven the car from Gastonia to the Bessemer City-Kings Mountain Trailer Court. She got out there and he drove the car to the place he was arrested.

On cross-examination he testified as follows:

> "I have been tried and convicted of assault with a deadly weapon with intent to kill and simple assault, larceny, and trespassing. I have never been convicted of breaking and entering and larceny but was convicted once of larceny. The time I spent in prison was for assault with a deadly weapon, felonious assault. I got out on Monday before the Wednesday I was picked up in this automobile."

The defendant assigns as error the failure of the court to allow his motion for judgment of nonsuit at the close of all the evidence.

[1] "Possession of stolen property shortly after the property was stolen raises a presumption of the possessor's guilt of larceny of such property." 5 *Strong, N.C. Index 2d,* Larceny § 5. See also *State v. Chambers,* 239 N.C. 114, 79 S.E. 2d 262 (1953); *State v. Frazier and*

State v. Givens, 268 N.C. 249, 150 S.E. 2d 431 (1966); and *State v. Hayes,* 273 N.C. 712, 161 S.E. 2d 185 (1968).

[2,3] On a motion for nonsuit all the evidence must be taken in the light most favorable to the State. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). When thus viewed the evidence of the State was sufficient to carry the case to the jury, and the motion of the defendant for judgment of nonsuit was properly denied.

No error.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. ROGER FRANKLIN FELTS

No. 6921SC309

(Filed 23 July 1969)

Automobiles § 129— driving under influence of intoxicants — instructions

In this prosecution for operating a motor vehicle upon the public highways while under the influence of intoxicating liquors, the trial court erred in giving the jury instructions which are subject to the interpretation that a person would be guilty of a violation of G.S. 20-138 if he had partaken of an intoxicant to an "appreciable extent," rather than "to such an extent that there is an appreciable impairment of either bodily or mental faculties."

APPEAL by defendant from *Armstrong, J.,* 3 February 1969 Criminal Session, FORSYTH County Superior Court.

The defendant was charged under a warrant with, on 2 April 1968, unlawfully and willfully operating a motor vehicle upon the public highways of North Carolina while under the influence of intoxicating liquors.

The defendant entered a plea of not guilty, and from a conviction and judgment in the Municipal Court of the City of Winston-Salem appealed to the Superior Court of Forsyth County where he had a trial *de novo.* The defendant again entered a plea of not guilty. The jury found him guilty, and from a judgment entered in the Superior Court the defendant appealed to this court.

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

White, Crumpler and Pfefferkorn by Fred G. Crumpler, Jr., and William G. Pfefferkorn for defendant appellant.

CAMPBELL, J.

The defendant made numerous assignments of error, but since there must be a new trial, we will refrain from a discussion of the evidence and the numerous assignments of error as they are unlikely to arise on a new trial.

In the charge to the jury, the learned trial judge gave the following instruction:

> "Well, I instruct you, first, that this statute provides that one may not operate a motor vehicle while under the influence of some intoxicant. It is not necessary for one to be drunk and operate a motor vehicle on a public highway to violate this statute, although one would be guilty if he were drunk and operated a motor vehicle on a public highway, but it says, if you paid attention to the statute, only under the influence. So, then, I instruct you that one is under the influence of an intoxicant when he has consumed some quantity of an intoxicating beverage, whether it be a small amount or a large amount, one drink or several drinks, or one bottle of beer or one can of beer, or more than one, so as to cause him to lose the normal control of his bodily faculties or his mental faculties, or both of those faculties, to such an extent that there is an appreciable impairment of either one of those faculties, that is, bodily or mental faculties.
>
> (So, there isn't anything complicated about what is meant by being under the influence of an intoxicant as defined by our Courts. There is only one term, or two words, in that definition which might need to be explained to you, and that is the words, or the term, appreciable extent. That simply means has a person had enough intoxicants so that if some person observes him — has the opportunity to see him, talk with him and observe him — has he had enough intoxicants so that it may be recognized that he has had something intoxicating to drink, and that he has had enough so that that person may estimate and come into court and, under oath, testify about it is what is meant by appreciable extent; that is, sufficient to be recognized and estimated. So, then, to summarize, I guess I should say that if one operates a motor vehicle on a public highway or public street

while he is under the influence of some intoxicating beverage, as I have defined under the influence to be, then he violates this statute.)"

The first paragraph quoted above is a correct statement of the law involved in a case of this kind which has been approved in numerous decisions of the Supreme Court of North Carolina. *State v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688.

The second paragraph quoted above from the charge of the court is what the defendant assigns as error. It will be noted that in the second paragraph, the court emphasized the words "appreciable extent" rather than the words "appreciable impairment". This second paragraph lends itself to the interpretation that a person would be guilty of a violation of the statute involved if such person had partaken of an intoxicant to an "appreciable extent", rather than "to such an extent that there is an appreciable impairment of either bodily or mental faculties." The second paragraph quoted above from the charge of the court is not the law.

" 'It is well settled that where there are conflicting instructions with respect to a material matter, a new trial must be granted, as the jury are not supposed to know which of the two states the law correctly, and we cannot say they did not follow the erroneous instruction. . . .' " *State v. Bryant,* 245 N.C. 645, 97 S.E. 2d 264.

Defendant, for the prejudicial error in the charge, is entitled to a New trial.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM E. PATTON, JR.

No. 6915SC283

(Filed 23 July 1969)

1. Criminal Law § 161— what constitutes assignment of error

A proper assignment of error is the statement of the error complained of when there is a grouping together of all exceptions taken during the trial of a case relating to one principle of law.

2. Criminal Law § 114— instructions — use of "the witness said," etc.

When the charge to the jury is considered as a whole, trial judge's use

of the words "the witness testified," "the witness said," "he stated," and similar phrases, was not prejudicial error.

3. Criminal Law § 92— consolidation of crimes

Trial court properly consolidated for trial the three charges against defendant of safecracking, felonious breaking and entering and felonious larceny, where State's evidence tended to show that defendant and two accomplices broke and entered a place of business through a back window, removed a safe containing over seven hundred dollars to a garage, opened the safe with an iron bar and an acetylene torch, and divided the money among the three of them. G.S. 15-152.

APPEAL by defendant from *Bowman, S.J.*, January 1969 Session of Superior Court of ALAMANCE County.

Defendant was tried upon two bills of indictment, proper in form, charging the defendant in one bill with the violation of G.S. 14-89.1 entitled "Safecracking and safe robbery," and in the other bill with the felony of breaking and entering and the felony of larceny.

Upon a plea of not guilty, trial was by jury and the verdict was guilty.

From the imposition of prison sentences, the defendant appealed to the Court of Appeals.

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

John D. Xanthos for defendant.

MALLARD, C.J.

[1, 2] In the record before us defendant has 120 purported assignments of error based on 120 exceptions taken. A proper assignment of error is the statement of the error complained of when there is a grouping together of all exceptions taken during the trial of a case relating to one principle of law. In this case the defendant has ten exceptions and ten different assignments of error to the use by the judge in charging the jury of the two words "he testified." There are six exceptions and six assignments of error to the use by the judge in charging the jury of the three words "the witness testified," and six more exceptions and assignments of error to the use by the judge in charging the jury of the two words "he stated." The defendant in his brief states that forty-nine of the assignments of error pertain to expressions used by the court throughout the charge such as "he testified," "he stated," "the witness said" and similar phrases. It is thus seen that there was no grouping together under one assign-

ment of error of all the exceptions taken relating to this one principle of law. There were altogether 116 exceptions and 116 purported assignments of error stated with respect to the charge. We have carefully read the charge and are of the opinion that, taken as a whole, no prejudicial error is made to appear therein.

[3] Defendant also contends that the court committed error in granting the motion of the State to consolidate the safecracking case with the breaking and entering and larceny case. The evidence tended to show that the place of business operated by Carl Thomas Needham under the name of Needham's Produce Market, at 2223 Maple Avenue, Burlington, was broken into and entered on the evening of November 9, 1968, or early morning of November 10, 1968, by the defendant acting in concert with Everette O. Heritage and Jim Griggs. Heritage and Griggs testified as witnesses for the State. The defendant offered no witnesses. After the entry was made through a back window that had been broken out by the defendant, a safe containing over seven hundred dollars in money was stolen therefrom and taken to a garage. The defendant helped to open the safe with an iron bar and an acetylene torch. The money from the safe was divided between the three of them. The three charges included in the two bills of indictment were so connected as to make the three offenses one continuous criminal episode. The court did not commit error in ordering the cases consolidated. G.S. 15-152. *State v. Arsad,* 269 N.C. 184, 152 S.E. 2d 99 (1967).

Defendant's second contention is that the court committed error in failing to allow defendant's motion for judgment as of nonsuit at the close of the evidence. This contention is without merit and requires no discussion.

We have considered all of the assignments of error brought forward and discussed by defendant in his brief and find that no prejudicial error has been made to appear.

No error.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. GROVER CLEVELAND NORMAN AND BILLY DEAN NORMAN

No. 6929SC275

(Filed 23 July 1969)

Criminal Law § 159— failure to file stenographic transcript agreed to by solicitor

Appeal is dismissed for failure to file with the record on appeal a stenographic transcript of the evidence of the trial tribunal which had been agreed to by the solicitor. Court of Appeals Rules 19(d)(2) and 48.

APPEAL by defendants from *McLean, J.*, at the January 1969 Session of McDOWELL Superior Court.

By indictment proper in form, defendants, father and son, were charged with felonious breaking and entering and larceny. They pleaded not guilty but the jury found them guilty as charged. From judgments imposing substantial prison sentences as to Grover Cleveland Norman, the father, and lesser sentences as to Billy Dean Norman, the son, to be served at a youthful offender's center, both defendants appealed.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

Thomas White by Alton T. Cummings for defendant appellants.

BRITT, J.

On 9 June 1969, the attorney general filed in this Court a motion to dismiss defendants' appeal pursuant to Rules 19(d)(2) and 48 of our Rules of Practice for the reason that defendants failed to file the complete stenographic transcript of the evidence in the trial tribunal with their record on appeal.

Our clerk's records disclose that the record on appeal was filed in his office on 10 April 1969 and that defendants elected to state the evidence under Rule 19(d)(2), but the transcript of testimony was not filed until 10 June 1969. The judgments were entered on 10 January 1969, and the trial judge allowed defendants 30 days to prepare and serve case on appeal and allowed the State 20 days after such service to prepare countercase. The record contains a statement by defendants' counsel that he "tendered" the case on appeal on 9 April 1969. The solicitor of the Eighteenth Solicitorial District filed a certificate in this Court on 11 June 1969 stating that the case on appeal was served on him on 10 April 1969 (the same

day it was filed in this Court) and that no statement of the evidence or charge of the court was filed with him by the defendants. The transcript of testimony bears no certificate except that of the court reporter.

Although our Rule 19(d)(2) has been repealed by the Supreme Court, effective 1 July 1969, appeals heard during the 1969 Spring Session are not affected by the repeal. The pertinent portion of the rule provides as follows: "As an alternative to the above method (*as a part of the record on appeal* but not to be reproduced), the appellant shall cause the complete stenographic transcript of the evidence in the trial tribunal, *as agreed to by the opposite party or as settled by the trial tribunal* as the case may be, to be filed with the Clerk of this Court * * *" (Emphasis added.) For failure of defendants to comply with the rule, the motion to dismiss their appeal is allowed. *Inman v. Harper*, 2 N.C. App. 103, 162 S.E. 2d 629; *Shephard v. Highway Comm.*, 2 N.C. App. 223, 162 S.E. 2d 520.

Nevertheless, we have carefully reviewed the record before us, with particular reference to the assignment of error brought forward and discussed in defendants' brief, and find that defendants received a fair trial, free from prejudicial error.

Appeal dismissed.

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

STATE OF NORTH CAROLINA v. JAMES THOMAS SMITH

No. 6910SC194

(Filed 23 July 1969)

Criminal Law §§ 34, 170— defendant's guilt of other crimes — evidence — prejudicial error

Trial court did not err in failing to instruct the jury not to consider non-responsive answer of State's witness that he saw defendant being tried in city court, defendant's character not being in issue at the time, where trial judge immediately sustained defendant's objection after the solicitor had admonished the witness, and where defendant made no motion to strike nor did he request an instruction to the jury.

APPEAL by defendant from *McKinnon, J.*, at the Regular 2 December 1968 Criminal Session of WAKE Superior Court.

Defendant was tried on a bill of indictment containing two counts, one charging him with the crime of forgery and the other charging him with the crime of uttering a forged instrument. He pleaded not guilty, and was found guilty by the jury on the charge of uttering a forged instrument. The court directed a verdict of not guilty on the count of forgery. From judgment imposing prison sentence upon the verdict of guilty to the charge of uttering a forged instrument, defendant appeals.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Staff Attorney Thomas B. Wood for the State.

Stanley L. Seligson for defendant appellant.

PARKER, J.

The sole assignment of error brought forward in defendant's brief relates to the following incident which occurred during the course of the trial: While evidence for the State was being presented, the assistant solicitor asked a question of one of the State's witnesses. The witness made a non-responsive answer in stating: "And at that time, I saw him (referring to the defendant) in the courtroom being tried in the City courtroom." The defendant objected. Immediately thereafter the assistant solicitor admonished the witness, "Don't tell that," whereupon the court sustained the objection. The sole assignment of error is that the court erred in failing to go forward to instruct the jury not to consider this evidence as to character, for the reason that the defendant, not having himself testified, the character of defendant was not before the jury at that time. There is no merit in this assignment of error.

> "It is well settled in this jurisdiction that defendant's objection should have been accompanied by a motion to strike the objectionable statement from the record if he deemed it incompetent and prejudicial. If he desired to do so, he should have requested an instruction to the effect that the jury should not consider it as evidence." *State v. Gooding,* 196 N.C. 710, 146 S.E. 806.

In the present case, defendant made no motion to strike nor did he request an instruction to the jury.

The situation presented by this case is similar to that which was presented in the case of *State v. Battle,* 269 N.C. 292, 152 S.E. 2d 191, in which the court, even before objection could be made by defendant, admonished the State's witness not to testify concerning his

having seen defendant in the presence of the probation officer. In that case, the Supreme Court of North Carolina in a *per curiam* decision said:

> "Conceding the reference to parole or probation officer was improper, nevertheless the court's direct and positive correction without waiting for objection or motion to strike could have been understood by the jury only as disapproval of the officer's gratuitous remark and that the officer was off limits in making it." *State v. Battle, supra.*

In the present case it was the assistant solicitor, rather than the trial judge, who admonished the witness not to go into the forbidden matters. When the trial judge immediately thereafter sustained defendant's objection he, in effect, affirmed the warning which had been given by the assistant solicitor and this action on his part could only have been understood by the jury as disapproval of the witness's gratuitous remark in this case fully as much as if the trial judge had himself admonished the witness.

No prejudicial error has been made to appear, and in the trial and judgment, we find

No error.

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

STATE HIGHWAY COMMISSION v. W. N. LANE AND WIFE, MADGE M. LANE

No. 6929SC252

(Filed 23 July 1969)

Eminent Domain § 6; Witnesses § 8— highway condemnation action — cross-examination of landowner as to price paid for land

In this highway condemnation proceeding, cross-examination of the landowner as to what he paid for the property was competent to test the witness' memory where he had testified that he had known the property all his life and testified as to the condition of the soil on the property.

APPEAL by defendants from *McLean, J.*, 13 January 1969 Civil Session of Superior Court of RUTHERFORD County.

Defendants were the owners of a 15.9-acre tract of land near Forest City, North Carolina. Part of the land was located within

the city limits of Forest City, and part was outside the city limits. In August 1967, the plaintiff took 6.44 acres of the defendants' tract making a deposit with the Clerk of the Rutherford Superior Court in the amount of $4,320.00 as its estimate of just compensation for the taking. On 18 September 1968 the parties entered into a consent order which settled all issues except that of damages. At the trial the defendants introduced evidence which tended to show damages in amounts varying from $11,633.00 to $12,030.00. The plaintiff introduced evidence tending to show damages in amounts varying from $1,700.00 to $2,924.00. The issue of damages was submitted to the jury who answered the issue in the amount of $3,750.00. From the judgment entered in accordance with the verdict, the defendants appeal to the Court of Appeals assigning as error the trial court's admission into evidence of the price which defendants paid for the original tract.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Trial Attorney I. B. Hudson, Jr., for plaintiff appellee.

J. Nat Hamrick for defendant appellants.

MALLARD, C.J.

Defendants' only assignment of error is to the cross-examination of W. N. Lane when the following occurred:

"Q. What did you pay for the property when you bought it in January, 1961?

MR. HAMRICK: Objection.

COURT: Overruled. Exception.

A. I gave $2,500.00 for it and sold my house to buy it.

MR. HAMRICK: Motion to strike

THE COURT: Motion to strike denied. Exception."

The defendants' objection to the question propounded by the plaintiff was a general objection.

"A general objection, if overruled, is no good, unless, on the face of the evidence, there is no purpose whatever for which it could have been admissible. * * *

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.*

In *Wigmore on Evidence,* 3rd Ed., § 995, we find the following:

"Subject to the general principle (ante, § 944) that the trial Court's discretion controls, the testing of a witness' capacity of recollection *by cross-examination* upon other circumstances, even unconnected with the case in hand, is a recognized and common method of measuring the weight of his testimony."

In the present case, the witness W. N. Lane had testified that he had known the property all his life and that it used to be beautiful pasture. W. N. Lane, without fixing in dollars and cents the value of the property before or after the taking, had also testified on direct examination as to the condition of the soil, and what would be required to correct a moisture problem on the land in question. Moreover, in his charge to the jury, Judge McLean specifically instructed them that the testimony elicited on cross-examination as to what Mr. Lane had paid for the land was not substantive evidence. We are of the opinion and so hold that it was not prejudicial error under the facts and circumstances of this case to test the witness' memory on cross-examination as to what he had paid for the property. *Davis v. Ludlum,* 255 N.C. 663, 122 S.E. 2d 500 (1961); see also *Stansbury, N.C. Evidence* 2d, § 42.

In the trial we find

No error.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. RAYMOND DEWITT HOWARD, JR.

No. 6910SC350

(Filed 23 July 1969)

1. Constitutional Law § 32— right to counsel — preliminary hearing

Failure to provide defendant with counsel at a preliminary hearing does not violate any constitutional right.

2. Criminal Law § 172— error cured by verdict — conviction of lesser offense

Where defendant is found guilty of a lesser degree of the crime charged, error relating to the graver offense will not be held prejudicial in the absence of a showing that the verdict of guilty of the lesser offense was affected thereby.

STATE *v.* HOWARD

APPEAL by defendant from *Hobgood, J.*, at the 18 November 1968 Session of WAKE Superior Court. (Certiorari allowed 28 March 1969.)

By indictment proper in form, defendant was charged with the armed robbery of one H. K. Wall on 15 October 1968. Defendant was represented at trial, as he is here, by court-appointed attorney. He pleaded not guilty, the jury found him guilty of common law robbery, and from judgment imposing prison sentence of not less than seven years nor more than ten years, he appealed to this Court.

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

Malcolm B. Grandy for defendant appellant.

BRITT, J.

[1] Defendant's first assignment of error is that his constitutional right to counsel was violated. Inasmuch as the record on appeal, presumably prepared by defendant's attorney, does not disclose when counsel was appointed and defendant's brief does not specify as to when or in what respect defendant's right to counsel was violated, we can only speculate as to his contention. The record indicates that a warrant for defendant's arrest was issued on 15 October 1968, that on the same day he waived a preliminary hearing before a justice of the peace, and that bond for his appearance in superior court was set. We assume that defendant contends he was entitled to counsel at his preliminary hearing; if this is his contention, the question has been settled by our Supreme Court in the case of *Gasque v. State*, 271 N.C. 323, 156 S.E. 2d 740, where it was held that failure to provide a defendant with counsel at a preliminary hearing does not violate any constitutional right. See also *State v. Bentley*, 1 N.C. App. 365, 161 S.E. 2d 650. The assignment of error is overruled.

In the other three assignments of error brought forward in his brief, defendant contends (1) that the evidence was not sufficient to go to the jury on the question of armed robbery, (2) that the court erred in overruling his motion of nonsuit as to the charge of armed robbery, and (3) the court erred in charging the jury on armed robbery.

[2] We deem it unnecessary to relate the evidence here; suffice to say, we have carefully reviewed the evidence and the charge and hold that the evidence was sufficient to warrant the submission of the case to the jury on armed robbery and the charge is free from

prejudicial error. Furthermore, it will be noted that the jury returned a verdict of the lesser offense of common law robbery. It is well established in this jurisdiction that where a defendant is found guilty of a lesser degree of the crime charged, error relating to the graver offense will not be held prejudicial in the absence of a showing that the verdict of guilty of the lesser offense was affected thereby. 3 Strong, N.C. Index 2d, Criminal Law, § 172, p. 144. *State v. Casper*, 256 N.C. 99, 122 S.E. 2d 805; *State v. DeMai*, 227 N.C. 657, 44 S.E. 2d 218. Defendant has not shown that the verdict of guilty of common law robbery was affected by the submission of his case on armed robbery. The assignments of error are overruled.

The defendant received a fair trial, free from prejudicial error, and the sentence imposed was within the limits prescribed by statute.

No error.

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

STATE OF NORTH CAROLINA v. GEORGE BATISTE, JR.

No. 698SC292

(Filed 23 July 1969)

Constitutional Law § 32— right to counsel — misdemeanor amounting to serious offense

In prosecution in the superior court for secreting personal property to hinder enforcement of a lien in violation of G.S. 14-115, 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 *Parker, J.*, at the 20 December 1968 Session of WAYNE Superior Court.

In a warrant issued by a justice of the peace, defendant was charged with removing, exchanging or secreting personal property on which a lien existed, with intent to prevent or hinder the enforcement of the lien, in violation of G.S. 14-115. He was tried and found guilty in county court and appealed to superior court where he was not represented by counsel, pleaded not guilty, was found guilty by

a jury and sentenced to "two years in jail assigned to work the roads." Defendant appealed.

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

Earl Whitted, Jr., Esq., for defendant appellant.

BRITT, J.

Defendant assigns as error the failure of the superior court to provide him with legal counsel.

G.S. 14-115 under which defendant was charged provides as follows: "Any person removing, exchanging or secreting any personal property on which a lien exists, with intent to prevent or hinder the enforcement of the lien, shall be guilty of a misdemeanor." Inasmuch as the statute does not prescribe specific punishment for its violation, by virtue of G.S. 14-3 a person convicted of violating G.S. 14-115 would be subject to a fine, to imprisonment for a term not exceeding two years, or both, in the discretion of the court.

In *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245, filed 21 January 1969, our Supreme Court, in an opinion by Huskins, J., held 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; and these findings and determinations should appear of record. See decision of this Court in *State v. Maness*, 4 N.C. App. 658.

We conclude that the instant case is controlled by *Morris*, and for the reasons stated therein and in *State v. Maness, supra*, it is ordered that defendant be awarded a

New trial.

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

STATE OF NORTH CAROLINA v. ROBERT RAY RANN

No. 6926SC284

(Filed 23 July 1969)

Burglary and Unlawful Breakings § 8; Larceny § 10— punishment

Sentences of imprisonment imposed upon defendant's pleas of guilty to two indictments each charging him with felonious breaking and entering and felonious larceny *are held* within the statutory limits for such offenses.

APPEAL by defendant from *Falls, J.*, 3 February 1969 Schedule "B" Session of Criminal Court of the Superior Court of MECKLENBURG County.

The record filed herein, with an addition thereto filed by the Clerk of Superior Court of Mecklenburg County as directed by order of this court, reveals that the defendant was tried in two cases upon two bills of indictment, proper in form, charging him in each with the felony of breaking and entering and the felony of larceny.

In case #69-CR-5237, the defendant pleaded guilty to the felony of breaking or entering and the felony of larceny. On the breaking and entering charge, judgment was that the defendant be imprisoned for the term of not less than eight nor more than ten years in the State Prison; on the larceny charge, judgment was that he be imprisoned for the term of not less than three nor more than five years. The judgment provides that the sentence on the larceny charge is to commence at the expiration of the sentence pronounced on the charge of breaking and entering.

In case #69-CR-5238, the defendant pleaded guilty to the felony of breaking or entering and the felony of larceny. One sentence of six years imprisonment was imposed in the judgment on both charges. The judgment provides that this sentence is to begin at the expiration of the sentence pronounced in case #69-CR-5237 on the count charging larceny of property.

Defendant appealed to the Court of Appeals.

Attorney General Robert Morgan and Deputy Attorney General Harry W. McGalliard for the State.

Henry E. Fisher for the defendant.

MALLARD, C.J.

Defendant's counsel in this court also represented the defendant in the Superior Court, and frankly states in his brief that he is

unable to find error in the trial.

The sentences imposed were within the limits of the law for such offenses.

We find no prejudicial error in the record.

Affirmed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. GEORGE DIXON

No. 6914SC345

(Filed 23 July 1969)

1. Constitutional Law § 36; Escape § 1— punishment for felonious escape — cruel and unusual punishment

Sentence of 12 months for felonious escape is within the maximum provided by G.S. 148-45 and cannot be considered cruel and unusual in a constitutional sense.

2. Constitutional Law § 20; Escape § 1— equal protection — felonious escape

There is no merit in defendant's contention that he was deprived of equal protection of the laws by his conviction for felonious escape in that on the date of the escape he committed no acts of violence or made any overt threats to lawful authorities of the state prison system to categorize his acts as a felony.

APPEAL from *Brewer, J.*, 24 February 1969 Criminal Session, Superior Court of DURHAM.

Defendant was charged with felonious escape. He signed a waiver of appointment of counsel and entered a written plea of guilty. The court entered judgment imposing a prison sentence of 12 months to commence at the termination of any and all sentences which defendant is now serving. Defendant excepted and appealed, and the court, upon a finding of indigency, appointed counsel to perfect the appeal, ordering Durham County to pay the costs thereof.

Attorney General Robert Morgan by Staff Attorney Dale Shepherd for the State.

Blackwell M. Brogden for defendant appellant.

MORRIS, J.

[1] Defendant's only contention is that the judgment of the court of imprisonment for 12 months for felonious escape constitutes cruel and unusual punishment, in violation of Article I, Section 14, of the Constitution of North Carolina and the Eighth Amendment to the Constitution of the United States.

In *State v. Stewart,* 4 N.C. App. 249, 166 S.E. 2d 458, Campbell, J., quoted the Supreme Court in *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330:

> "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."

The statute, G.S. 148-45, provides for punishment of "imprisonment for not less than six months nor more than two years." Further, unless specifically otherwise ordered by the trial judge, the sentence is to begin at the termination of any and all sentences defendant may be serving. Obviously, the judgment is well within the maximum and cannot constitute cruel and unusual punishment.

[2] Defendant further argues in his brief "[t]hat on the day in question, July 24, 1967, the defendant committed no acts of violence or made any overt threats to the lawful authorities of the State Prison system to categorize his acts as a felony, this requiring a stiffer sentence, and has no reasonable relation to the classification of the crime, which in turn deprives the defendant of equal protection of the laws as set out in Article I, Section 7, Constitution of North Carolina, and the Fourteenth Amendment of the Constitution of the United States." The general principles of law cited by defendant have no application to the question raised by him. While the argument is novel, we find it to be without merit.

Affirmed.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. M. C. COLLINS

No. 6928SC276

(Filed 23 July 1969)

Criminal Law § 104— nonsuit — consideration of evidence

Contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant granting of the motion for nonsuit.

APPEAL by defendant from *McLean, J.*, November 1968 Session of BUNCOMBE Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the crime of common-law robbery. He pleaded not guilty. The jury returned a verdict of guilty and from judgment imposing prison sentence of three years, defendant appealed.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Trial Attorney Eugene A. Smith, for the State.

Robert L. Harrell for defendant appellant.

PARKER, J.

Appellant assigns as error the refusal of the trial judge to grant his motions for nonsuit made at the close of the State's evidence and renewed at the close of all evidence. G.S. 15-173. Review of the record reveals that there was substantial evidence tending to prove each essential element of the offense charged. Contradictions and discrepancies in the State's evidence were for the jury to resolve and do not warrant granting of the motion for nonsuit. *State v. Carter*, 265 N.C. 626, 144 S.E. 2d 826; *State v. Simpson*, 244 N.C. 325, 93 S.E. 2d 425. Defendant's court-appointed counsel, in his brief, states that this is a case in which an indigent defendant has exercised his absolute right to appeal and placed upon court-appointed counsel the duty of finding error in his trial. Appellant's brief further states that his counsel, after careful research, has found that the court has committed no prejudicial error in denying the motion for nonsuit. The remaining assignments of error have been expressly abandoned in the appellant's brief.

After reviewing the entire record, we find

No error.

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

STATE OF NORTH CAROLINA v. THEODORE PRESTON VERBAL

No. 6919SC321

(Filed 23 July 1969)

Criminal Law § 155.5— failure to docket record on appeal on time

Where defendant was given the maximum time within which to docket his record on appeal, and the record on appeal was not docketed until almost three months beyond the maximum time allowed by Rule 5, the Court of Appeals dismissed the appeal *ex mero motu.* Court of Appeals Rule No. 5.

APPEAL by defendant from *Exum, J.,* 9 September 1968 Regular Criminal Session of Superior Court of ROWAN.

Defendant was charged under a valid bill of indictment with illegal possession of amphetamine drugs for the purpose of sale. Defendant was represented by privately retained counsel and entered a plea of not guilty. At the close of the State's evidence, he withdrew his plea of not guilty and tendered a plea of nolo contendere which was accepted by the State. Judgment was entered on 17 September 1968 imposing a prison term on defendant. On 26 September 1968, defendant, in open court, gave notice of appeal. The court was notified that defendant was being represented on appeal by different privately retained counsel and additional time was allowed for serving case on appeal. Time for docketing the record on appeal was extended to 17 February 1969. The record on appeal was not docketed, however until 5 May 1969.

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

Pearson, Malone, Johnson & DeJarmon by W. G. Pearson, II, and C. C. Malone, Jr., for defendant appellant.

MORRIS, J.

The record discloses that defendant was given by the trial tribunal the maximum time within which to docket his record on appeal. The record on appeal was not docketed until 5 May 1969, almost three months beyond the maximum time allowed by our rules. Rule 5, Rules of Practice in the Court of Appeals of North Carolina.

For failure to docket the record on appeal within the time ordered by the court, which was the maximum time allowed by our rules, the appeal is dismissed *ex mero motu.*

Dismissed.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. BILLY CORNWELL

No. 6930SC327

(Filed 23 July 1969)

APPEAL by defendant from *Martin, J.*, March-April Session 1969, CHEROKEE County Superior Court.

The defendant was charged, under a bill of indictment proper in form, with, on 4 February 1968, feloniously breaking into a building owned and occupied by Frank Craig, and in a second count with larceny of five cartons of cigarettes of the value of $10.00 from said building.

The record which we received had a multiple choice plea, and it did not indicate which one of the choices the defendant had elected. Likewise, the adjudication bearing date of 31 March 1969, had multiple choices shown thereon and no designation as to which one of the multiple choices shown on the form was the proper entry by the court.

In view of this record, we entered an order under date of 7 July 1969 that the corrected record be certified to this court to be attached to and made a part of the case on appeal. By certificate from the Clerk of Superior Court of Cherokee County dated 15 July 1969, we now have a correct transcript of plea which indicates that the defendant freely, understandingly and voluntarily entered a plea of guilty to the lesser offense of nonfelonious breaking and entering and larceny. The trial judge examined the defendant in open court as to his plea, and after said examination, the trial court adjudicated that the plea of guilty by the defendant was freely, understandingly and voluntarily made and was made without undue influence, compulsion or duress and without promise of leniency. Thereupon, the plea of guilty was ordered entered in the record.

The trial court imposed a sentence of two years in the common jail of Cherokee County to be assigned to work under the supervision of the North Carolina Department of Correction. There was a recommendation that the defendant be allowed to serve this sentence pursuant to the provisions of the work release program.

From the imposition of this judgment, the defendant took an appeal to this court.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis for the State.

Herman V. Edwards for defendant appellant.

CAMPBELL, J.

The attorney for the defendant candidly states in his brief:

"Counsel for the appellant-defendant has carefully examined the record and can find no prejudicial error disclosed therein, and appeals only upon the insistence of the appellant-defendant."

We have examined the record as corrected and now certified to this court, and no error appears therein.

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. EDWARD McMANUS

No. 6926SC319

(Filed 23 July 1969)

APPEAL by defendant from *Falls, J.*, 10 March 1969 Schedule "B" Session of MECKLENBURG Superior Court.

Defendant was tried on his plea of not guilty to a bill of indictment, proper in form, charging him with having committed the offense of common-law robbery on 19 November 1968. He was found guilty as charged, and from judgment imposing prison sentence of ten years, defendant appealed.

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

T. O. Stennett for defendant appellant.

PARKER, J.

The record on appeal contains no assignment of error. The defendant, an indigent, was represented at his trial and on this appeal by court-appointed counsel. Counsel for appellant in his brief has stated that he has searched the record proper and is unable to find anything therein which merits this Court's consideration. We have also carefully examined the record and can find no prejudicial error therein. There was ample evidence to support the verdict of

the jury. Defendant was positively identified by an eyewitness to the robbery. The sentence imposed was within statutory limits. Upon careful review of the entire record we find

No error.

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

DEWEY C. SWANEY v. GEORGE NEWTON CONSTRUCTION COMPANY, EMPLOYER; UNITED STATES CASUALTY COMPANY, CARRIER

No. 6810IC331

(Filed 13 August 1969)

1. Master and Servant §§ 87, 89— G.S. 97-10.1 and G.S. 97-10.2 — effective date

G.S. 97-10.1 and G.S. 97-10.2 do not apply to an injury which occurred prior to 20 June 1959, the effective date of those statutes. Ch. 1324, Session Laws of 1959.

2. Master and Servant §§ 77, 89— discontinuance of lifetime workmen's compensation benefits — recovery from third party tort-feasor

Where plaintiff employee, who is entitled to workmen's compensation benefits for life under G.S. 97-29 and G.S. 97-41, and his employer's compensation insurance carrier divided the amount recovered from the third party tort-feasor in accordance with a written agreement approved by the Industrial Commission, [former] G.S. 97-10 does not authorize the Industrial Commission to allow the insurance carrier to discontinue making compensation payments to the injured employee until the accrued benefits exceed the amount recovered from the third-party tort-feasor, and the Industrial Commission erred in allowing such discontinuance of compensation payments.

3. Master and Servant § 77— workmen's compensation award — change of condition

G.S. 97-47, which grants the Industrial Commission power to review an award on the grounds of a change in condition, is not applicable where there is no evidence of any change in the physical capacity to earn or in the earnings of the injured employee.

4. Master and Servant § 77— workmen's compensation award — change of condition

Change of condition, as used in G.S. 97-47, refers to a substantial change, after a final award of compensation, of the injured employee's physical capacity to earn and in some cases, of his earnings.

BROCK, J., concurring in result.

SWANEY *v.* CONSTRUCTION CO.

APPEAL by plaintiff employee from North Carolina Industrial Commission, Opinion and Award of 17 and 30 May, and 7 June 1968.

On 4 April 1957 plaintiff employee was severely injured as a result of an accident which arose out of and in the course of his employment. Among other injuries, his spinal cord was severed, making him a paraplegic and totally and permanently disabled. The United States Casualty Company (carrier), the workmen's compensation insurance carrier for his employer, commenced making the weekly compensation and medical payments to plaintiff as required by the North Carolina Workmen's Compensation Act and continued making these payments until May 1967, when it stopped making further payments.

On 9 June 1967 the carrier filed a motion before the North Carolina Industrial Commission for an order allowing it and the employer to suspend making any further payments of workmen's compensation benefits to or on behalf of the plaintiff until such time as such additional benefits thereafter becoming due to the plaintiff should total $69,136.98, which sum represented that portion of the recovery which had been effected from a third party tort-feasor which had been paid to plaintiff and his attorneys. A hearing was held on this motion before the Chairman of the Industrial Commission on 4 October 1967, and on 11 December 1967 the Chairman filed an order making findings of fact which may be summarized as follows: As a result of his injuries which arose out of and in the course of his employment, plaintiff has been rated permanently and totally disabled and is entitled to compensation for life. The defendant employer and its insurance carried accepted liability and entered into an agreement to pay plaintiff compensation. Thereafter plaintiff brought an action against the third party tort-feasor whose negligence had caused plaintiff's injuries, as a result of which plaintiff was awarded damages in the amount of $125,000.00, plus interest, making a total recovery in the amount of $138,237.79. The parties entered into a written agreement for division of this recovery which plaintiff had effected against the third party tort-feasor under which it was agreed that the total recovery should be equally divided between the plaintiff and the defendant insurance carrier, the fee of the plaintiff's attorneys for their services in the third party tort-feasor action to be paid out of the total recovery in proportion to the amount which each party was receiving. This agreement was submitted to the North Carolina Industrial Commission for its approval and was approved by order signed by its Chairman on 12 March 1964. The carrier continued to pay plaintiff

compensation and medical expenses until a total of $69,136.98 was reached, making a total of $138,273.79 paid the plaintiff in compensation and out of the amount received by him from the recovery against the third party tort-feasor.

On these findings of fact the Chairman of the Industrial Commission concluded as a matter of law that "(u)nder the provisions of G.S. 97-10, G.S. 97-10.1, and G.S. 97-10.2, the defendant employer is not obligated to pay compensation and medical expenses for the plaintiff until such time as they exceed the amount recovered from the third party tort-feasor." The Chairman "approved" defendant's "claim" to stop compensation "until such time as the accrued compensation and medical shall exceed the amount received from the third party tort-feasor."

In apt time plaintiff excepted to this order and appealed to the full Commission pursuant to G.S. 97-85. The matter was heard before the full Commission on 3 May 1968, and on 17 May 1968 the Commission entered an order overruling plaintiff employee's exceptions and adopting as its own the findings of fact and conclusions of law contained in the order of its Chairman and affirming such order. This order of the full Commission also contained a recital to the effect that each party had paid out one-third of the amount which each had received from the third party recovery to pay plaintiff's attorney's fees incurred in effecting that recovery, and since defendant insurance carrier "is now receiving credit for more than its disbursement of the third party recovery, defendants are liable for a greater proportion of the attorney fee." The Commission ordered the defendant carrier to "reimburse the plaintiff one-third of the compensation and medical expenses incurred since the defendant's insurance carrier stopped paying the compensation and medical expenses, and to continue to pay such one-third of the compensation and medical expenses until such time as the amount of the third party recovery has been exhausted."

Thereafter, on 30 May 1968 and again on 7 June 1968, without any further hearing, the Commission issued orders amending its 17 May 1968 order, the final order directing the defendant carrier to continue to pay to plaintiff "one-third of the compensation and medical expenses until such time as the sum of $23,045.66 or one-third of the plaintiff's share of the third party recovery has been exhausted."

From the order, opinion and award of the Industrial Commission filed 17 May 1968 as amended by its orders filed 30 May 1968 and 7 June 1968, plaintiff appealed.

Clark & Huffman, by Richard Clark, and McLendon, Brimm, Brooks, Pierce & Daniels, by Hubert Humphrey, for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay, by C. Woodrow Teague and G. S. Patterson, Jr., for defendant appellees.

PARKER, J.

By appropriate assignments of error appellant challenges the order of the Industrial Commission which authorized reduction in the amount of the workmen's compensation benefits payable to him and the conclusions of law upon which that order was based. In the opinion and award made by the Chairman of the Industrial Commission, which were adopted with modification by the full Commission, the Chairman had concluded as a matter of law that "(u)nder the provisions of G.S. 97-10, G.S. 97-10.1 and G.S. 97-10.2, the defendant employer is not obligated to pay compensation and medical expense for the plaintiff until such time as they exceed the amount recovered from the third party tort-feasor." Based on this conclusion of law, which was adopted as its own by the full Commission, the Commission entered its order which, as finally amended, in effect authorized the defendant carrier to reduce to one-third the amount of weekly compensation and medical benefits which it would otherwise be obligated to pay to the plaintiff, the reduction in such payments to remain in effect "until such time as the sum of $23,045.66 or one-third of the amount of the plaintiff's share of the third party recovery has been exhausted." While the exact meaning of the quoted portion of the Commission's order is not altogether clear, presumably the Commission intended that the reduction in the amount of the payments should remain in effect until the total of the reduced payments should equal the amount of the attorney's fees which had been paid by the plaintiff out of that portion of the third party recovery (one-half) which had been distributed to the plaintiff by agreement between the parties approved in 1964 by the Commission. It is, however, unnecessary for us to determine the exact meaning of the Commission's order, since in our view the Industrial Commission was without power, under the circumstances of this case, to authorize any reduction in the amount of the compensation and benefit payments to which plaintiff was entitled under the North Carolina Workmen's Compensation Act.

For most industrial injuries compensable under the North Carolina Workmen's Compensation Act, the Act provides limitations in the period of time during which payments are to be made and in

the total amount of such payments. However, G.S. 97-29 contains the following:

> "In cases in which total and permanent disability results from paralysis resulting from an injury to the brain or spinal cord or from loss of mental capacity resulting from an injury to the brain, compensation, including reasonable and necessary nursing services, medicine, sick travel, medical, hospital, and other treatment or care *shall be paid during the life of the injured employee* without regard to the (maximum limitations of time and amount.)" (Emphasis added.)

G.S. 97-41 contains the following:

> "In cases where permanent total disability results from paralysis or loss of mental capacity caused by an injury to the brain or spinal cord, compensation *shall be payable for the life of the injured employee* as provided by G.S. 97-29." (Emphasis added.)

The defendant employer and its insurance carrier have never questioned that plaintiff's accident arose out of and in the course of his employment, that the injuries he received thereby rendered him totally and permanently disabled, and that this permanent disability resulted from paralysis caused by an injury to his spinal cord. No question is raised, therefore, but that plaintiff's condition brings him squarely within the language of G.S. 97-29 and G.S. 97-41 and that he is entitled to be paid the compensation and to receive the benefits provided by the Workmen's Compensation Act throughout his life and without regard to any limitation in the total amount.

[1] The opinion and award of the Chairman of the Industrial Commission, which was adopted by the full Commission, expressly found that "plaintiff has been rated totally and permanently disabled and is entitled to compensation for life." Nevertheless he concluded as a matter of law that "(u)nder the provisions of G.S. 97-10, G.S. 97-10.1, and G.S. 97-10.2, the defendant employer is not obligated to pay compensation and medical expenses for the plaintiff until such time as they exceed the amount recovered from the third party tort-feasor." At the outset we observe that the provisions of G.S. 97-10.1 and G.S. 97-10.2 are not applicable to plaintiff's injuries. These two sections were enacted by Chap. 1324 of the 1959 Session Laws. That Act deleted G.S. 97-10 as it then existed and substituted in lieu thereof G.S. 97-10.1 and G.S. 97-10.2. Section 2 of that Act expressly provided that it shall not apply to any injury occurring before the ratification thereof. The Act was ratified on

20 June 1959. Plaintiff's injuries occurred on 4 April 1957. Therefore, G.S. 97-10.1 and G.S. 97-10.2 are not applicable in this case.

[2] Nor does G.S. 97-10 as it existed prior to the 1959 Act support the Commission's conclusion of law. G.S. 97-10 provided:

> "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this article, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death: Provided, however, that *in any case where such employee,* his personal representative, or other person *may have a right to recover damages for such injury,* loss of service, or death *from any person other than the employer, compensation shall be paid in accordance with the provisions of this chapter.*" (Emphasis added.)

The statute then went on to provide that after the Industrial Commission had issued an award or the employer or his carrier had admitted liability in writing, the employer or his carrier should have the exclusive first right to commence an action for damages on account of the employee's injuries; if the employer failed to commence action within six months of the injury, the employee might do so; and in either event any amount recovered was to be applied first to the payment of court costs and attorneys' fees, and "the remainder or so much thereof as is necessary shall be paid to the employer to reimburse him for any amount paid and/or to be paid by him under the award of the industrial commission; if there then remain any excess, the amount thereof shall be paid to the injured employee . . ." The insurance carrier which assumed the liability of the employer was subrogated to the rights and duties of the employer.

It is clear that G.S. 97-10 as it existed at the time of plaintiff's injuries furnishes no support for the Commission's action in ordering reduction in the amount of the compensation payable to plaintiff. That section provided exactly to the contrary. By express language the statute directed that in any case where the employee might have a right to recover damages for his injuries from any person other than his employer, *"compensation shall be paid in accordance with the provisions of this chapter."*

Appellees contend in their brief that it was and is a "basic premise" of our North Carolina Workmen's Compensation Act,

both before and after the 1959 amendment, "that the employer and/or carrier is always entitled to full and complete reimbursement (with the exception of attorneys' fees) from a third-party recovery for any and all amounts required to be paid under the Workmen's Compensation Act." But even such an assumed "basic premise" does not support the conclusion that the employer or carrier has any right to effect such reimbursement by reducing or refusing to make the payments of compensation and benefits which the Act requires to be paid to the injured employee. That there is no such right is made clear by the above quoted express language of the very statutory section to which appellees' point as establishing their assumed "basic premise."

[3, 4] G.S. 97-47, which grants the Industrial Commission power to review an award on the grounds of a change in condition, is not here applicable. No evidence was introduced and there has been no finding that there has been any change in condition. Change of condition, as those words are used in the statute, refers to a substantial change, after a final award of compensation, of the injured employee's physical capacity to earn and in some cases, of his earnings. *Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E. 2d 27; *Smith v. Swift & Co.*, 212 N.C. 608, 194 S.E. 106. Defendant insurance carrier does not even suggest that there has been any change in the physical capacity to earn or in the earnings of the injured employee. All of the evidence is that he remains totally and permanently disabled.

[2] In 1963 the plaintiff employee, after protracted litigation undertaken on his own initiative (see *Swaney v. Steel Co.*, 259 N.C. 531, 131 S.E. 2d 601) finally succeeded in effecting a substantial recovery from the third party tort-feasor whose negligence had caused his injuries. In November 1963 the judgment against the third party, with interest, was paid into the office of the clerk of superior court. The amount of this recovery was considerably larger than the total of the payments which the defendant insurance carrier had at that time been required to pay to the injured employee in workmen's compensation and medical benefits. The parties negotiated with each other in an effort to reach agreement as to the distribution of this recovery. They did reach agreement, which they reduced to writing and submitted to the Industrial Commission for approval. The agreement was approved by the Commission on 12 March 1964. The agreement provided that the recovery be divided equally between the injured employee and the insurance carrier, each to pay his proportionate part of the attorneys' fees. Pursuant to this agreement the recovery was divided and distributed in 1964. The net

amount distributed to defendant carrier was substantially greater than the total of the payments which it had then made to the injured employee. We are not presently concerned with the question whether this agreement conformed to the provisions of G.S. 97-10. The fact is that the agreement was made by parties fully competent to make a legally binding contract, was reduced to writing, was signed by the parties, approved by the Industrial Commission, and fully performed. There is no suggestion of fraud, misrepresentation, or duress on the part of anyone. Presumably the officials of defendant insurance carrier thought the agreement was in the best interest of their company at the time it was made. By virtue of the agreement defendant carrier did obtain the use of a substantial sum of money for a number of years. The fact that the injured employee may now have survived for a longer period and become entitled to larger workmen's compensation and medical benefit payments than the defendant carrier may have anticipated at the time the agreement was made, does not entitle it to discontinue or reduce the amount of those payments.

The 1964 agreement did contain the following provision:

> "Whereas, the parties have agreed that this Agreement shall be submitted to the N.C. Industrial Commission for its approval as to the recovery from the third party tort-feasor and that either party may at any time in the future apply to the N.C. Industrial Commission for a hearing to determine its respective rights and liabilities under the N.C. Workmen's Compensation Law, all parties further agreeing that this Agreement does not constitute a waiver of any of the rights heretofore possessed by any of the parties hereto."

However, this provision created no new rights in either party; it merely made clear that by the agreement neither party waived any right theretofore possessed. Before the agreement was signed the defendant carrier was obligated to pay workmen's compensation benefits to the injured employee for life, and the employee possessed a right to these payments. He did not waive that right by signing the agreement.

The order of the Industrial Commission is reversed and this case is remanded to the Industrial Commission for entry of an order denying the defendant carrier's motion to be allowed to discontinue payment of workmen's compensation benefits to plaintiff employee and directing defendant carrier to pay the full amount of all such benefits as may have heretofore accrued or as shall hereafter become due during the life of plaintiff employee. Pursuant to G.S. 97-88 the

cost to plaintiff employee of this proceeding, including therein a reasonable attorney's fee to be determined by the Commission, shall be paid by defendant carrier as a part of the bill of cost.

Reversed and remanded.

BRITT, J., concurs.

BROCK, J., concurring in the result:

In my view the agreement as approved by the Industrial Commission on 12 March 1964 constituted a waiver by defendant carrier of further claim to reimbursement.

STATE OF NORTH CAROLINA v. WAYNE DARNELL BUMPER

No. 6915SC342

(Filed 13 August 1969)

1. Criminal Law § 89— variance between direct and corroborative testimony — police lineup identification

The fact that sheriff's testimony on direct examination that victim of assault had identified defendant in a lineup as the man holding card number "seven" was at variance with victim's own testimony on cross-examination that in a former trial he testified his assailant was holding card number "six" *is held* not to render the sheriff's testimony inadmissible, it being clear from all the evidence that both the sheriff and the victim knew it was defendant who had been identified in the lineup.

2. Criminal Law § 89— variance between direct and corroborative testimony

Slight variation in the corroborating testimony affects only the credibility of the evidence and not its admissibility.

3. Criminal Law § 88— extent of cross-examination — impeachment

When defendant's cross-examination of prosecuting witness for impeachment purposes clearly established the fact that the witness had stated in a former trial that he believed defendant had held card number "six" in a police identification lineup, defendant was given full benefit of cross-examination on this point, and action of trial judge in precluding further examination thereon was not error.

4. Witnesses § 8; Criminal Law § 89— impeachment — scope of cross-examination

The extent to which cross-examination for the purpose of impeachment

will be permitted rests largely in the discretion of the trial court, and objections to questions which amount to no more than argument with the witness are properly sustained.

5. Criminal Law § 66— identity of defendant by photograph — admissibility

There are no grounds for asserting that photographic identification of defendant, a Negro male, was impermissibly suggestive, where witnesses who made the identification were in hospitals in separate towns at the time of identification, and each selected the photograph of defendant from a group of twelve photographs of Negro males.

6. Criminal Law §§ 43, 66— photograph of defendant — admissibility

Where defendant sought to impeach testimony of witness relating to his identification of defendant by photograph, it was proper to allow the photograph in evidence to illustrate the witness' testimony that defendant's name did not appear thereon.

7. Criminal Law §§ 43, 66— photograph of defendant — name of police department — admissibility

The fact that jury was shown photograph of defendant in which the words "Police Department, Burlington, N. C., 9495, 7-10-66," were displayed beneath defendant's likeness is no ground for objection, since the State was entitled to introduce the photograph to illustrate its witness' challenged testimony that defendant's name did not appear thereon.

8. Indictment and Warrant § 11— variance between pleading and proof — identity of victim

Where the bills of indictment charged defendant with the assault and armed robbery of one Monty Jones, and the evidence is that the victim's legal name is Manson Marvin Jones, Jr., and his nickname is Monty, there is no fatal variance between pleading and proof, it being clear that the legal name and the nickname refer to one and the same person.

APPEAL by defendant from *Bowman, J.,* 20 January 1969 Session, ALAMANCE Superior Court.

The defendant, Wayne Darnell Bumper, was charged in a bill of indictment (68 Cr S 74) with a felonious assault upon Monty Jones on 31 July 1966. In another bill of indictment (68 Cr S 75) he was charged with a felonious assault upon Loretta Nelson. In another bill of indictment (68 Cr S 77) he was charged with the felony of armed robbery from Loretta Nelson and Monty Jones. The two felonious assault charges and the armed robbery charge were consolidated for trial.

The State offered evidence which tended to show that Loretta Nelson and Monty Jones had been dating for some time, and further that subsequent to the offenses alleged in the bills of indictment and prior to the time of this trial, they were married to each other and

that Loretta Nelson is now Loretta Nelson Jones. The evidence for the State further tended to show the following. Loretta Nelson and Monty Jones went for a ride in her automobile and parked on a secluded road, which led from the Mount Vernon Church Road in Alamance County, near the Burlington City Lake. This road is approximately three-quarters of a mile from where defendant lived. After they had been parked for a short time, Wayne Darnell Bumper came up to the car and tapped on the window. Loretta Nelson rolled the window down about two inches and Bumper put a rifle in the window and told her to get out. After she got out of the car, Bumper asked them for money. Bumper pointed the rifle toward her and Monty Jones gave him $3.00, and Loretta Nelson gave him about $8.00 from her pocketbook. Bumper then told Monty Jones to get in the car and lie down on the back seat, and told Loretta Nelson, "Now strip." She took her clothes off and while Bumper held the rifle aimed at the back window of the car, he caused Loretta Nelson to lie across the back of the car where he raped her. Bumper hit Loretta on the head with the rifle, causing her head to bleed, and after he had had intercourse with her and she had put her clothes back on, Bumper made the couple walk down the road. He then ordered them to go back and get in the car, and with Loretta Nelson driving, Bumper, sitting beside her and Monty Jones on the back seat, Bumper held the gun on Monty Jones to make Loretta Nelson drive where he said. They went for some distance and Bumper told Loretta to turn off on a road and stop the car. He made them get out and lie down on the ground. When Loretta and Monty asked defendant to let them go, he said, "I am going to have to kill you." After that, defendant had Loretta Nelson to tie Monty Jones to a tree by tying his hands around the tree behind him and then defendant gagged and blindfolded Monty Jones. Defendant then tied Loretta Nelson to another tree and gagged and blindfolded her. He took her clothes off and raped her again. After that, defendant walked to where Monty Jones was tied and asked him where his heart was, and shot him. Defendant then shot Loretta Nelson. After Loretta Nelson heard her car drive away, she was able to free herself and untie Monty Jones. They walked across a field until they came to a dirt road, and finally to a Mr. McPherson's house, who called the police and an ambulance for them. The ambulance took Loretta Nelson and Monty Jones to the Alamance County Hospital, but Monty Jones was immediately transferred to the North Carolina Memorial Hospital at Chapel Hill.

On 1 August 1966 Sheriff John H. Stockard, the High Sheriff of Alamance County, and Mr. J. N. Minter, a special agent of the

State Bureau of Investigation, visited Loretta Nelson at the Alamance County Hospital and visited Monty Jones at the hospital in Chapel Hill, at which time each described to the officers the events substantially as set out above. On 2 August 1966 Sheriff Stockard and Agent Minter again visited the hospitals. On the second visit they carried a group of about twelve pictures of Negro males, which they showed to Loretta Nelson to see if she could identify anyone shown in the pictures. She selected a photograph of the defendant, Wayne Darnell Bumper, as being a photograph of the person who assaulted and robbed her on 31 July 1966. The officers then went to the hospital at Chapel Hill, at which time Monty Jones selected from the group of photographs the photograph of the defendant, Wayne Darnell Bumper, as being a photograph of the person who assaulted and robbed him on 31 July 1966. Neither Loretta Nelson nor Monty Jones, before 31 July 1966, had ever seen the person who assaulted and robbed them, and did not know the name of the person whose photograph they selected on 2 August 1966.

On 16 August 1966, after Loretta Nelson and Monty Jones were allowed to leave the hospitals, Sheriff Stockard arranged a lineup of ten colored males at the Alamance County jail. Each of the subjects in the lineup was given a card, bearing a number, which he held in front of him. Present for the lineup was Sheriff Stockard, Agent Minter, the District Solicitor, Loretta Nelson, Monty Jones, and defendant's then attorney. Loretta Nelson and Monty Jones identified the defendant Wayne Darnell Bumper as being the person who assaulted and robbed them on 31 July 1966.

Defendant offered evidence which tended to show that on the night of 31 July 1966 he was in his grandmother's house, which is six or seven-tenths of a mile from the Mount Vernon Church Road. He rode his cousin's bicycle from his grandmother's house for about a quarter of a mile to his mother's house, arriving there sometime shortly before eight o'clock in the evening. He stayed at his mother's house about thirty minutes and then rode the bicycle out to the Mount Vernon Church Road. He saw and spoke to some friends who were in an automobile, and then rode his bicycle along Mount Vernon Road some distance to a store. The store was closed so he returned to his grandmother's home. He did not have a rifle, he did not see any car or cars parked on any road leading from the Mount Vernon Church Road, and did not see, assault, or rob Loretta Nelson or Monty Jones. While riding the bicycle that night he was wearing an orthopedic neck brace because of injuries received in an automobile accident on 23 July 1966.

From verdicts of guilty as charged in each of the three indict-

ments, and from judgments of imprisonment for terms of not less than twenty nor more than thirty years (for armed robbery), not less than nine nor more than ten years (for felonious assault), and not less than nine nor more than ten years (for felonious assault), the three sentences to run consecutively, defendant appealed.

Robert Morgan, Attorney General, by Thomas B. Wood, Staff Attorney, for the State.

Clarence Ross for the defendant.

BROCK, J.

The two felonious assault cases were previously tried at the 24 October 1966 Session. Also, at that time an indictment charging defendant with the rape of Loretta Nelson was consolidated for trial with the two felonious assault charges. Defendant's appeal from the 1966 conviction is reported in *State v. Bumpers,* 270 N.C. 521, 155 S.E. 2d 173, in which the convictions were affirmed. However, on *certiorari,* the Supreme Court of the United States (*Bumper v. North Carolina,* 391 U.S. 543, 20 L. Ed. 2d 797, 88 S. Ct. 1788) reversed the convictions upon the ground that the rifle allegedly used in the felonious assaults and rape was introduced in evidence after an unlawful search and seizure thereof. The rape charge has not been retried.

[1] Defendant assigns as error that the trial judge permitted the sheriff to testify that Monty Jones identified the man holding card No. 7 as his assailant. As noted in the statement of facts, when Sheriff Stockard arranged the lineup on 16 August 1966, each subject in the lineup was given a card. Defendant Wayne Darnell Bumper was given a card with the number "7" on it for the first viewing by the witnesses, and he held a card with the number "2" on it for the second viewing. On cross-examination Monty Jones testified that at the 1966 trial he had stated that he believed defendant was holding a card with number "6" on it. He testified that he was confused at trial about what number defendant was holding at the lineup. The witness had viewed the lineup twice with defendant holding a different number on the second viewing. However, the witness testified that after each viewing he went in and told the sheriff the number being held by the man he said attacked him. The sheriff said that after each viewing Monty Jones reported to him the number which was held by Wayne Darnell Bumper. Concerning the first viewing of the lineup, Sheriff Stockard testified that Monty Jones "came back and reported to me that it was No. 7, I believe." De-

fendant contends that it was error to allow the sheriff to so testify because his testimony did not corroborate Monty Jones' testimony at the first trial where Jones had stated that he believed he had told the sheriff No. 6.

[1, 2] It is clear that both Monty Jones and the sheriff did not recall positively which number Jones had told the sheriff that Wayne Darnell Bumper was holding, but this does not render the testimony inadmissible; slight variation in the corroborating testimony affects only the credibility of the evidence. *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354. Also, it is equally clear that both Jones and the sheriff knew it was Wayne Darnell Bumper who had been identified by Jones in both viewings of the lineup. The basic fact to be established was whether the witness properly identified defendant, not whether the witness remembers in January 1969 a number carried by defendant in the first of two lineups in August 1966. A failure to remember positively the number might make good argument to the jury, but it does not affect the admissibility of the testimony. This assignment of error is overruled.

[3] Defendant next assigns as error that the trial judge unduly restricted his cross-examination of the State's witness Monty Jones. On cross-examination of Monty Jones counsel for defendant went into the question of Jones's having stated during the 1966 trial that Wayne Darnell Bumper was holding card No. 6 in the first lineup. The witness admitted several times that at the 1966 trial he had stated he believed he told the sheriff that defendant was holding card No. 6. And when defense counsel made the same inquiry again, upon objection by the State, the trial judge told defense counsel: "Let's don't pursue that particular line of question any further about the number 6."

[4] Defendant had the full benefit of cross-examining the witness on this point; he had clearly established that the witness had stated in the 1966 trial that he believed defendant held the No. 6 card. ". . . [T]he extent to which cross-examination for the purpose of impeachment will be permitted rests largely in the discretion of the trial court. Objections to questions which amount to no more than argument with the witness are properly sustained." 7 Strong, N.C. Index 2d, Witnesses, § 8, p. 703. This assignment of error is overruled.

Defendant next assigns as error that the trial judge allowed the State to introduce into evidence, over defendant's objection, the photograph of defendant which Loretta Nelson and Monty Jones had selected as being a photograph of the person who assaulted and

robbed them. This photograph had been marked State's exhibit 3A, and on this trial had been identified by Loretta Nelson, Monty Jones, Sheriff Stockard, and Mr. Minter as the photograph selected by the two victims as being a photograph of the person who assaulted them. There is some serious question as to whether defendant specifically objected to this photograph being offered in evidence, but we treat the matter as though objection was properly made.

[5] There is no showing or contention that the photographic identification was suggestive in any way to the witnesses to cause them to identify defendant. The witnesses were in separate hospitals in separate towns, and each selected the photograph of defendant from a group of about twelve photographs. In *Simmons v. United States*, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967, it was said: ". . . [w]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

[6] Defendant argues, nevertheless, that it was error to allow the photograph in evidence because defendant had offered no contradictory evidence at the time of its admission. However, defendant carefully cross-examined the witnesses concerning whether defendant's name appeared on the photograph at the time it was exhibited to the witnesses. Obviously the State offered the photograph thereafter to illustrate the testimony of the witness as to what the photograph did and did not show. After defendant's searching cross-examination in an attempt to impeach and discredit the identification process, it was proper to allow the photograph to illustrate the witnesses' testimony that defendant's name did not appear in the photograph.

[7] Defendant argues that the photograph as admitted in evidence and displayed to the jury did show, under defendant's likeness a sign which reads, "Police Department, Burlington, N. C., 9495, 7-10-66." And he argues that to allow this to be displayed to the jury was prejudicial to defendant because it indicated to the jury defendant had previously been in custody of the police, and it thereby improperly placed his character in evidence. While counsel for defendant was cross-examining the State's witnesses concerning defendant's name appearing on the photograph, the photograph was available for an inspection from which he should have known that defendant's name in fact did not appear on the face thereof. Having

injected this effort to impeach and discredit the identification made by the witnesses, defendant can hardly complain that when the State properly offered the photographs to illustrate its witnesses' testimony, the photograph incidentally showed the words of which defendant now complains.

[8] Defendant next assigns as error that the trial judge overruled defendant's motion for nonsuit upon the charge of assault on Monty Jones, and the charge of armed robbery of Monty Jones and Loretta Nelson. Defendant contends there is a fatal variance between the indictments and the proof with respect to the name of the victim. In each of the bills of indictment the name of Monty Jones appears. On direct examination the witness testified: "My name is Manson Marvin Jones, Jr., . . ." On cross-examination he testified: "My legal name is Manson Marvin Jones, Jr. That is the name on my birth certificate." "The name Monty Jones is not my legal name." "It is my nickname. I never changed my name to Monty." On direct examination Loretta Nelson testified: "I am married to Manson Marvin Jones. My husband's nickname is Monty."

It was clear throughout the testimony that Manson Marvin Jones was generally referred to by his nickname "Monty." There was no uncertainty as to the identity of the prosecuting witness. As was said in *Bennett v. United States,* 227 U.S. 333, 57 L. Ed. 531, 33 S. Ct. 288, "Defendant was indicted for having caused the transportation of Opal Clarke; and, it is said, the testimony showed that her correct name was Jeanette, but that she had gone by the names of Opal and Nellie, her real name, however, being Jeanette Laplante. A variance is hence asserted between the allegation and the proof. The court of appeals rightly disposed of the contention. As the court said, the essential thing is the requirement of correspondence between the allegation of the name of the woman transported and the proof is that the record be in such shape as to inform the defendant of the charge against her and to protect her against another prosecution for the same offense." The record in this case is sufficient for both purposes, and defendant cannot be prejudiced by one of the victims having a nickname which was used in the bill of indictment. The record of defendant's trial clearly shows that Monty Jones and Manson Marvin Jones, Jr., are one and the same person; thus he is protected against a second prosecution for the same offense.

Defendant next assigns as error that the trial judge erred in his charge to the jury in failing to require a finding of felonious intent in the armed robbery charge.

Defendant has lifted out of context that portion of the charge in which the trial judge read pertinent portions of G.S. 14-87 and was explaining that in order to find defendant guilty as charged it was necessary to find that the robbery was committed with the use or threatened use of firearms. The judge immediately thereafter fully explained the elements of common law robbery to which the element of use of firearms must be added to convict defendant as charged. Although capable of being explained in other ways, the elements of the offense were fully and amply explained to the jury. The case was submitted to the jury under a clear and appropriate explanation of the applicable principles of law. In the trial we find no prejudicial error.

No error.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. ARTHUR S. GATLING AND CLARENCE B. BANKS

No. 694SC161

(Filed 13 August 1969)

1. Robbery § 4— common-law robbery — sufficiency of evidence

Issue of defendant's guilt of common-law robbery was properly submitted to the jury where State's evidence tended to show that defendants picked up the victim, a hitchhiker, and drove him to a secluded spot, that the hitchhiker "felt something was wrong" and hid his wallet containing $105 under the passenger side of the front seat, that the victim showed defendants the change he had in his pocket and that one of defendants took the money from him, that when the car was stopped defendants passed a straight razor back and forth and began asking the victim questions, and that one of the defendants then took the victim's watch.

2. Robbery § 1— common-law robbery defined

Robbery is the taking of money or goods with felonious intent from the person of another, or in his presence, against his will, by violence or putting him in fear.

3. Robbery § 1— element of force

The element of force involved in the offense of robbery may be actual or constructive.

4. Robbery § 1— degree or extent of force

The degree of force is immaterial so long as it is sufficient to compel the victim to part with his property or property in his presence.

5. Criminal Law § 42— crime-connected article — watch — competency

Where robbery victim identified a watch as the one that defendants took from him, the State is entitled to introduce the watch in evidence, and the fact that the watch was found in a deputy sheriff's car some 48 hours after defendants were in the car does not affect the competency of the evidence but only its credibility.

6. Criminal Law § 103— credibility of evidence — jury question

Credibility of the evidence is a matter for the jury.

7. Criminal Law § 66— in-court identification of defendants — prompt identification in police station

Decision of *U. S. v. Wade*, 388 U.S. 218, relating to police identification lineup, does not render inadmissible robbery victim's prompt identification of the accused, who were unrepresented by counsel, as they entered the police station accompanied by officers.

8. Robbery § 5— common-law robbery — instructions — felonious intent

In prosecution for common-law robbery, charge of the court, when considered as a whole, was sufficient to instruct the jury on the element of felonious intent.

APPEAL by defendants from *Burgwyn, J.*, at the 2 December 1968 Criminal Session, Superior Court of ONSLOW.

The defendants were charged in a bill of indictment, proper in form, with the felony of common law robbery on 24 October 1968 of money and a watch from the person of one Milton J. Russell, Jr. Upon pleas of not guilty defendants were tried by a jury which returned a verdict of guilty as charged to each defendant. From a judgment imposing a sentence of imprisonment defendants appealed.

Attorney General Robert Morgan by Assistant Attorney General George A. Goodwyn for the State.

John H. Harmon for defendant appellant.

MORRIS, J.

[1] The evidence, taken in the light most favorable to the State, tends to show that on 24 October 1968 Milton J. Russell, Jr., left Morehead City, North Carolina, hitchhiking to Jacksonville, North Carolina. The defendants picked Russell up near the main gate of the Camp Lejeune Marine Base at approximately 3:30 p.m. and

took him to Highway 17. From this point Russell walked to Cars Incorporated and placed a down payment on an automobile. The car dealer then took Russell to a standing station near the main gate of Camp Lejeune. Russell was hitchhiking back to Morehead City when the defendants picked him up the second time. However, instead of proceeding toward Morehead City, the defendants turned off on another highway. Russell asked the defendants to let him out of the car and they replied that they would let him out in a minute. Russell stated that he felt something was wrong and, therefore, placed his wallet, which contained $105, under the passenger side of the front seat. Russell stated, "When they stopped at the Stop sign, I said, 'You can let me out here. It will be O.K.,' and they turned again. I told them that if they ware trying to scare me, they were doing it and I had to get back to my ship, . . ." Russell showed the defendants his change and told them that was all the money he had. One of the defendants took the money from him. Defendants continued with Russell in the car. They went on a back road between an old building and some high weeds. When the car was stopped, the defendants took out a straight razor and began passing it back and forth and asking Russell questions. Gatling took Russell's watch. Russell stated that the defendants did not hold the razor up to him, but they held it where it could be seen at all times. After taking the watch the defendants hit him in the face and side. Gatling told him to get out of the car. Russell stated that he got out of the car and ran. Gatling chased him for a short distance before returning to the car. Defendants were later apprehended at the Van Nessa Club in Jacksonville. Russell's wallet was found under the front seat of their car.

[2] Defendants argue that their motion for judgment as of nonsuit and motion to set aside the verdict as being against the weight of the evidence should have been allowed because the evidence shows that Russell voluntarily gave the money and watch to the defendants. "Robbery is the taking of money or goods with felonious intent from the person of another, or in his presence, against his will, by violence or putting him in fear." 6 Strong, N.C. Index 2d, Robbery, § 1, p. 678.

[3, 4] The element of force involved in the offense of robbery may be actual or constructive. Constructive force includes "all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking . . . No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is at-

tended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, the victim is put in fear." *State v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34. "The degree of force is immaterial so long as it is sufficient to compel the victim to part with his property or property in his presence, and the element of force may be actual or constructive." *State v. Sipes,* 233 N.C. 633, 65 S.E. 2d 127. We think that the evidence tested by these principles was sufficient to support a verdict on the offense charged. The defendants' motions were properly overruled.

[5, 6] Defendants argue that the watch belonging to the prosecuting witness should not have been introduced into evidence because it was found in the deputy's car some 48 hours after they had been in the car. The prosecuting witness testified that a watch was taken from him by the defendants. He identified the watch in court as being the one that was taken from him. Clearly, the watch was competent evidence. It served to better explain the evidence to the jury. *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572. The fact that the watch was found in the deputy's car some 48 hours after the defendants were in the car affected credibility, but not competence. Credibility of the evidence is a matter for the jury. Stansbury, N.C. Evidence 2d, § 8.

[7] Defendants' next assignment of error relates to certain testimony concerning identification of the defendants by the prosecuting witness in the police station prior to the trial of this case.

The evidence disclosed that Russell was picked up by a "State Police car" and that he and the patrolman rode around looking for the car driven by the two who had robbed him. About 8:30 the patrolman got a call. Russell was taken to the "police station" where he remained until the officers brought the two men in. When they came in the room Russell promptly identified them as the two men who had robbed him. No questions were asked the two by him or by any officer prior to his identification of them. About three or four hours had elapsed from the time Russell had last seen them and when they came into the station. They were dressed the same as when he last saw them. Russell was certain of his identification. He saw them as they were being brought in.

Counsel for defendants argued, in the absence of the jury, that defendants were entitled to counsel before being placed in a lineup and that the law requires that several people of similar build and size be placed with the suspects before they can be exhibited for

identification purposes. Defendants insist in argument here that the pretrial identification was violative of defendants' Sixth Amendment right to counsel because counsel was not present when they were subjected to a lineup identification, on the authority of *U. S. v. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926; *Gilbert v. California,* 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1951; and *Stovall v. Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967. All of these cases were argued the same day and decided the same day.

Both *Wade* and *Gilbert* involved lineups held at substantial intervals after arrest. Counsel had been appointed but was not present. In each instance, the United States Supreme Court said that a lineup was a critical stage in the criminal proceedings at which the accuseds were constitutionally entitled to have counsel present unless intelligently waived.

Stovall was a federal habeas corpus attack upon a state court conviction. Defendant, a Negro, was arrested within a day after a very brutal assault committed during the course of a robbery. The next day he was taken to the hospital room of the victim who was in critical condition. He was manacled to a white police officer, accompanied by several other officers and prosecutors. He was the only Negro in the room and not represented by counsel. The victim was asked if he "was the man", and she identified him. *Wade* and *Gilbert* were not applicable because they were given only prospective effect.

We are not here concerned with a lineup as in *Wade* and *Gilbert.* We are concerned with a confrontation or presentation of the suspect alone to the witness as in *Stovall.* Some of the language in *Wade* at least implies that a suspect has the right to counsel at any pretrial confrontation arranged by officers, regardless of the circumstances. The Court said in *Wade* that "the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.", and "The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an 'identification parade' or 'showup,' as in the present case, or presentation of the suspect alone to the witness, as in *Stovall v. Denno,* 388 US 293, 18 L ed 2d 1199, 87 S Ct 1967, supra. It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification."

In *Stovall,* decided the same day as *Wade,* but to which the *Wade* rule could not be applied, the Court declared that the confrontation there before the Court "was so unnecessarily suggestive and conducive to irreparable mistaken identification that (defendant) was denied due process of law". The Court held that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it."

The *Stovall* test has been applied by the Supreme Court in two subsequent cases. *Simmons v. U. S.,* 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967, and *Biggers v. Tennessee,* 390 U.S. 404, 19 L. Ed. 2d 1267, 88 S. Ct. 979, reh. den. 390 U.S. 1037, 20 L. Ed. 2d 298, 88 S. Ct. 1401, (see dissenting opinion), both of which were cases in which the identification complained of was prior to *Wade* and *Gilbert,* and the Court sought to determine whether the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification" that due process was denied, this determination to be made by evaluating the identification "in light of the totality of surrounding circumstances".

The confrontation now before us, however, is a post-*Wade* confrontation. We find no case involving a post-*Wade* confrontation in which the *Stovall* test has been held to be the governing criteria. The question before us is whether the *Wade* rule is applicable here.

A similar problem was before the United States Court of Appeals for the District of Columbia Circuit in *Russell v. U. S.,* 408 F. 2d 1280. The opinion, written by Chief Judge Bazelon, was handed down 24 January 1969. The United States Supreme Court denied certiorari on 26 May 1969. 23 L. Ed. 2d 245. There the facts were these: On 28 June 1967, at daybreak, George McCann heard the sounds of a blaring radio and breaking glass at the Community Shoe Shine Shop. On investigation, he saw the radio sitting on the sidewalk outside the broken shop window. He stationed himself in a brightly lighted gas station across the street, and then saw a man emerge from the shop, look across at him and proceed past him up the street. McCann went immediately to a nearby police station and reported the incident. This was within three or four minutes. A radio lookout was broadcast, and officers in a squad car promptly saw Russell in the vicinity. He matched the description given and fled from the police car. Therefore, the officers pursued him and caught up with him on the porch of a house. He had a radio in one hand, a hatful of cigarettes and small change concealed under his coat, and a coathanger and screwdriver in his pocket. He was also wearing gloves. The officers arrested him and took him back to the shop

where McCann identified him as the man he had seen coming out of the shop. The Circuit Court concluded that *Wade* did not require exclusion of McCann's identification resting the holding on a general rule that it is not improper for the police immediately to return a freshly apprehended suspect to the scene of the crime for identification by one who has seen the culprit minutes before. The Court recognized that without doubt confrontations in which a single suspect is viewed in the custody of police can be highly suggestive.

> "Yet, on the other hand, recognition of a person or face would seem to be as much the product of a subjective mental image as of articulable, consciously remembered characteristics. A man may see clearly in his 'mind's eye' a face or a figure which he is hard put to describe adequately in words. Though the image of an 'unforgettable face' may occasionally linger without any translation into words, photographic recall is most often ephemeral. Vivid in the flash of direct observation, it fades rapidly with time. And the conscious attempt to separate the ensemble impression into particular verbalized features, in order to preserve some recollection, may well distort the original accurate image so that it is the verbalized characteristics which are remembered and not the face or the man.
>
> Balancing all the doubts left by the mysteries of human perception and recognition, it appears that prompt confrontations in circumstances like those of this case will 'if anything promote fairness, by assuring reliability. . . .' This probability, together with the desirability of expeditious release of innocent suspects, presents 'substantial countervailing policy considerations' which we are reluctant to assume the Supreme Court would reject."

We agree with the reasoning of the Court in *Russell*. As previously noted, some *language* in *Wade* can be construed as encompassing prompt on-the-scene identifications. However, confrontations in this category do not fall within the *holdings* of *Wade* and *Gilbert*. The Court was obviously directing the holdings to the routine police lineup procedures to obtain evidence for trial. In these situations, where counsel had been retained and time was not a factor, the Court said it could find "no substantial countervailing policy considerations . . . against the requirement of the presence of counsel."

In the confrontations falling within the prompt on-the-scene identification category, there are substantial countervailing policy considerations as pointed out by Chief Judge Bazelon in *Russell*.

Prompt identification by one who has had ample opportunity to observe the culprit just a short time before aids the officers immeasurably in their investigation. If the suspect presented to the eyewitness is not the culprit, his release can be immediate and the officers are free to continue their search while clues are fresh and memory not impaired by the passage of time. Unquestionably identification under such circumstances would be more reliable than after the lapse of an interval of time.

Here the officers immediately returned the defendants whom they had just apprehended to the victim who identified them as he saw them coming in the door. We are not unaware of *Rivers v. U. S.*, 400 F. 2d 935 (5th Cir. 1968), but like the Court in *Russell*, we do not think that *Wade* requires the exclusion of this identification. See *State v. Bertha*, 4 N.C. App. 422, 167 S.E. 2d 33.

If this case were to be governed by the application of the principles of due process of law, certainly it could not be said that the confrontation "was so unnecessarily suggestive and conducive to irreparable mistaken identification" that defendants were denied due process of law.

[8] Defendants' remaining two assignments of error are to the charge of the court. They contend that the court, in one sentence of the charge, failed to include felonious intent as a prerequisite to a conviction and that the court also committed prejudicial and reversible error in commenting in his charge that by the sun four o'clock would be three o'clock ordinarily. However, a review of the entire charge reveals that the court amply instructed the jury that in order to convict the defendants the jury must not only be satisfied beyond a reasonable doubt that the defendants committed the robbery but that "at the time they did so they did it with the felonious intent to deprive the owner of his personal property, permanently, and convert it to their own use permanently; or always . . ." He further instructed that felonious intent is an essential element of the offense and "you must find, as I have said before, that it was done with the felonious intent before you may convict these defendants and you must be satisfied beyond a reasonable doubt . . ."

In his comment upon the time, the court had in response to request of defendants' counsel explained the testimony of a marine sergeant as to the time. The evidence with respect to the time of the occurrence was clear. The time terminology in use at the Marine Base is familiar to the people living in the area. We do not perceive any prejudice to defendants resulting from these alleged errors in

the charge, nor have defendants shown any prejudice. When the charge is construed contextually and considered as a whole, we find no prejudicial error. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548.

Affirmed.

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

GILES W. PEARSON, JR., ALETHA PEARSON, DOREEN PEARSON, FREDERICK J. PEARSON, AND MILDRED PEARSON, PETITIONERS, v. VIRGINIA PEARSON McKENNEY, SUSAN PEARSON BARBOUR AND HUSBAND, A. J. BARBOUR, JULIA PEARSON DAUNT AND HUSBAND, JOHN J. DAUNT, JR., ODESSA PEARSON GALDA AND HUSBAND, F. D. GALDA, RESPONDENTS

No. 6929SC374

(Filed 13 August 1969)

1. Pleadings § 19— office of a demurrer

The office of a demurrer is to determine the legal sufficiency of the pleadings.

2. Partition § 3; Pleadings § 19— demurrer — procedure after answer filed

Demurrer to a petition for partition was improperly allowed where the demurrer and the order sustaining it were primarily based upon procedures in the partitioning proceeding after all the pleadings were filed.

3. Partition § 3— map attached to petition showing contemplated division by former owner

Map attached to a petition for partition showing a division of the land contemplated by the former owner is not a fatal defect in the petition making it subject to demurrer.

4. Partition § 3— requisites of petition

A petition for partition of land should allege that plaintiffs and defendants are tenants in common of the land, should describe the land and state the interest of each party, and should allege that plaintiffs desire to hold their interests in severalty and that they are entitled to partition for that purpose.

5. Pleadings § 20— demurrer after answer — defective cause of action — defective statement of cause of action

While demurrer to a statement of a defective cause of action will lie at any time before final judgment, a demurrer to a defective statement of a good cause of action comes too late after answer.

6. Partition § 3; Pleadings § 20— demurrer after answer — defective statement of a good cause of action

Demurrer to a petition for partition which contains a defective statement of a good cause of action comes too late after answer has been filed, several hearings have been held and orders entered, and commissioners have been appointed and their report filed and confirmed.

APPEAL by petitioners from *May, S.J.*, 1 April 1969 Session, Superior Court of POLK.

Petitioners on 23 September 1967 filed a petition for the partition of lands described in the petition. The petition alleged: Virginia Pearson McKenney, Susan Pearson Barbour, Giles W. Pearson, Jr., Julia Pearson Daunt, Odessa Pearson Galda, Mildred Pearson, Aletha Pearson, Doreen Pearson and Frederick J. Pearson are all parties to the proceeding and claim an interest as tenants in common in a tract of land situate in Polk County and described by metes and bounds, excepting, however, from the described tract four tracts, each particularly described, the first three having been conveyed by Aletha Pearson during her lifetime to three of her daughters as advancements of their share in the real estate. Tract (a) was described in accordance with the recorded deed to A. J. Barbour and Susan P. Barbour and alleged to be an advancement to Susan P. Barbour. Tract (b) was described in accordance with recorded deed to F. D. Galda and Odessa P. Galda and alleged to be an advancement to Odessa P. Galda. Tract (c) was described in accordance with recorded deed to Julia Pearson Daunt and John J. Daunt, Jr., and alleged to be an advancement to Julia P. Daunt. Tract (d) was particularly described as a lot containing 25,004 square feet and being the same lot conveyed by Charles Pearson, widower, and Giles W. Pearson and wife, Aletha Pearson, to Virginia Pearson McKenney, et al., by duly recorded deed. All of the tenants in common are of full age. The name of the spouse of each married tenant was alleged. Aletha M. Pearson died 25 May 1966 seized and possessed of the lands and the relationship to her and the respective interest in the land of each of the tenants in common is alleged. Prior to her death, Aletha M. Pearson made a conveyance to each of three of her daughters, Susan, Julia, and Odessa, as a partial division of her property and as their share of their inheritance in their mother's real estate. The said three daughters accepted the conveyances as their full share and these three have no interest as tenants in common of the lands to be divided. Petitioners desire to hold their interest in the land in severalty; an actual division can be made among the tenants in common without injury to any of the parties;

and a map is attached showing the division of the land contemplated by Aletha M. Pearson prior to her death.

The prayer contained a request that the conveyances to Julia, Odessa, and Susan be adjudged to be advancements; that petitioners and respondent, Virginia Pearson McKenney, be adjudged to be the sole tenants in common of the property, each having a 1/6 undivided interest therein; and that the court order an actual partition.

Odessa and her husband answered disclaiming any interest in the property except for a claimed 10/81 undivided interest in tract (d) described as an exception in paragraph 1 of the petition. They admitted receiving their share as an advancement.

Susan Pearson Barbour and her husband filed a similar answer.

Julia Pearson Daunt and her husband filed answer denying any advancement to them and claiming a 1/7 undivided interest along with Virginia, Giles, Mildred, Aletha, Doreen and Frederick. They also denied that an actual partition could be made without injury and prayed that the court order the lands sold for division.

Virginia Pearson McKenney filed answer denying that any advancements had been made to any heir of Aletha M. Pearson. She alleged that she and her brothers and sisters each owned a 1/9 undivided interest. She also denied that actual partition could be had without injury and requested the court to order a sale for division.

On motion of petitioners, the matter was set peremptorily for trial on 10 February 1969 by order of McLean, J. On 10 February 1969, Judge Jackson entered an order remanding the proceeding to the Clerk of Superior Court for the entry of an order "as to whether the subject land is susceptible to a division in kind in six, seven, and nine parts with the right of any aggrieved party to appeal the order and determination by the Clerk" to the Superior Court. It was further ordered that "regardless of the order to be made by the said Clerk that this cause be immediately transferred thereafter to this Court for a determination by this Court of the issue of the alleged advancement, raised in the pleadings and that all issues raised in the pleadings may be determined in one action."

On 25 February 1969, after a hearing, the Clerk entered an order finding as facts: (1) Petitioners and respondents are *sui juris* and children of Aletha M. Pearson, deceased. (2) Aletha M. Pearson died seized and possessed of the property described in paragraph 1 of the petition. (3) The property is located in Polk County, contains approximately 17 acres, is unimproved with the exception of

Fork Creek Road which traverses it and the foundations and beginnings of a dwelling house on the property. (4) That the map attached to the petition fairly represents the shape and configuration of the property. (5) That Susan and Odessa have filed answers stating that they claim no interest in the property. (6) That Julia has no interest in the property, having received her share by way of advancement. (7) That the beginnings of a dwelling were placed on the property by Mildred prior to the commencement of the action and in good faith when she had no knowledge of any controversy. (8) That the land can be divided into six divisions. The order further adjudged the petitioners and respondent, Virginia Pearson McKenney, to be the tenants in common of the property and appointed commissioners to make a division.

The oath of commissioners was filed on 25 February 1969, and they filed their report on 7 March 1969.

On 10 March 1969 respondents, Virginia Pearson McKenney and Julia Pearson Daunt and her husband, filed a demurrer to the petition for that it failed to state a cause of action because "petitioners had not proceeded in accordance" with Chapter 46 of the General Statutes.

On 18 March 1969, the Clerk entered an order confirming the commissioner's report.

On 20 March 1969, respondents McKenney and Daunt filed notice of appeal from the Clerk's order of 25 February 1969.

On 31 March 1969, respondents McKenney and Daunt moved to have stricken the report of commissioners and order confirming the report.

On 1 April 1969, the demurrer was heard before Judge May and he entered an order sustaining the demurrer. The petitioners excepted and appealed.

Richard B. Ford for petitioner appellants.

Francis M. Coiner for respondent appellees.

MORRIS, J.

The order entered by the court from which petitioners appealed stated that the demurrer to the petition was sustained for the following reasons:

"1. The petition of the petitioners is not drawn in conform-

ance with the mandatory North Carolina Statutes, i.e., Chapters 1 and 46, in that,

(a) The adopted proceedings are in contravention of GS 46-1, requiring that the proceedings be initiated as a Special Proceeding by the petitioners requesting an independent division of the subject premises in conformance with a report of Commissioners and subject to review of the Clerk of Superior Court and this Court.

(b) Commissioners to effect a division of the land were not timely appointed in conformance with GS 46-7 so as to insure a division of the said land by disinterested persons.

(c) Partition of subject premises was not made in conformance with G.S. 46-10 in that petitioners had previously submitted a map as a portion of their pleadings and that no independent map reflecting an equitable division was made in conformance with GS 46-18, but was dependent upon the pleadings of the petitioners.

2. The petition of the petitioners defectively states a good cause of action and is therefore subject to demurrer pursuant to GS 1-127(6) in that it fails to comply in all respects with the mandatory requirements of the statutory remedy afforded to the petitioners in that the petition does not accord to the Clerk of the Superior Court the discretionary power and authority vested in him and insofar as the same relates to the determination of the respective interests of the tenants in common and the appointment of disinterested commissioners and rendering of an adequate report reviewable by this Court."

To these reasons petitioners specifically except. The exceptions are well taken.

[1] The office of a demurrer is to determine the legal sufficiency of the pleadings. 1 McIntosh, N.C. Practice 2d, § 1181. The demurrer filed by respondents states as a cause for demurrer: "That the petition of the petitioners does not state facts sufficient to constitute a cause of action against the respondents in that the petitioners' cause of action and specific remedy are solely and exclusively provided for and established by Chapter 46 of the North Carolina General Statutes relating to the partitioning of real property, either by sale or in kind, and establishing the procedures therefor; that such remedy and procedure are statutory in nature and the petitioners have not proceeded in accordance with the requirements of the aforementioned Chapter of the General Statutes" and further

that petitioners have failed to place the matter in a proper fashion before the Clerk for consideration.

G.S. 1-127 provides that "[t]he defendant may demur to the complaint when *it appears upon the face thereof,* either that: . . . 6. The complaint does not state facts sufficient to constitute a cause of action." (Emphasis added.)

[2, 3] Both the demurrer and the order sustaining it clearly indicate that respondents are primarily objecting to *procedures* in the partitioning proceeding *after* all the pleadings were filed. This, of course, is not the function of a demurrer. If respondents contend that the Clerk failed to appoint impartial commissioners, their remedy is not by demurrer. They seem to contend in their brief and argument that the division by the commissioners was not predicated upon "disinterest" because the petition when filed had a map attached thereto showing a division contemplated by the owner of the land among her children and this "preconceived map" submitted as a portion of the pleadings contravenes G.S. 46-10 requiring a meeting of commissioners to effect an independent division. If respondents objected to the map attached to the petition, it would appear that a motion to strike would have been indicated. Certainly, making the map a part of the petition is not a fatal defect in the petition making it subject to demurrer.

It appears that the court also based its order sustaining the demurrer on the ground that the petition defectively states a good cause of action.

[4] G.S. 46-1 provides that partition of real property under Chapter 46 of the General Statutes shall be by special proceeding. "The petition is in the ordinary form of a complaint in a civil action, and should allege that the plaintiffs and defendants are tenants in common of the land, which should be described, and the interest of each party should be stated; that the plaintiffs desire to hold their interests in severalty, and that they are entitled to partition for that purpose." 2 McIntosh, N.C. Practice 2d, § 2394.

The petition here meets all of the requirements. We do not find wherein it "defectively" states a good cause of action.

[5] However, even if we should so find, respondents' demurrer would have come too late. There is a marked difference between the statement of a defective cause of action and a defective statement of a good cause of action. In the former, the defect goes to the substance of the cause and not to the form of the statement. It is not an enforceable cause of action, regardless of how expertly stated it

may be. Here demurrer will lie at any time before final judgment. *Jenkins v. Fields,* 240 N.C. 776, 83 S.E. 2d 908.

However, if there is an enforceable cause of action but it is stated in general terms, or lacking in some material allegation, it constitutes a defective statement of good cause of action. "That is, if the defect goes to the form of the statement and not to the substance of the cause, it is a defective statement of a good cause. (Citations omitted.)" *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43.

[5, 6] "A demurrer to a defective statement of a good cause of action comes too late after answer. The defendant, by answering to the merits, waives the defect which is not fatal but may be cured by amendment." *Davis v. Rhodes, supra; Graves v. Barrett,* 126 N.C. 267, 35 S.E. 539. Here demurrer was interposed not only after answer, but after several hearings had been had and orders entered, commissioners appointed, without objection, and their report filed and confirmed, without objection.

The same rules respecting demurrers are applicable to pleadings in partitioning proceedings as are applicable to pleadings in any other civil action. *Graves v. Barrett, supra; Coats v. Williams,* 261 N.C. 692, 136 S.E. 2d 113.

For the reasons stated herein, the demurrer should have been overruled.

Reversed.

CAMPBELL and BROCK, JJ., concur.

RUSSELL WADE BORING AND PEGGY M. BORING v. DELORES FLORENCE MITCHELL

No. 6927DC318

(Filed 13 August 1969)

1. Pleadings § 26— demurrer — failure to point out defect in petition

In this special proceeding to determine whether a child is an abandoned child within the meaning of G.S. Ch. 48, respondent's demurrer to the petition is properly overruled where it does not point out any defect in the petition but merely alleges that the petition does not state sufficient facts to make out a case of abandonment.

2. Adoption § 2; Jury § 1— motion for jury trial in District Court

In this special proceeding in the District Court to determine whether

a child is an abandoned child within the meaning of G.S. Ch. 48, it was not error for the trial judge in his discretion to allow petitioners' motion for a jury trial. G.S. 7A-196.

3. Adoption § 2— abandoned child — sufficiency of evidence

In this special proceeding to determine whether a child is an abandoned child, there was sufficient evidence in the light most favorable to petitioners that respondent, mother of the child, had wilfully forsaken her parental duties and had relinquished her parental claims for submission of the issue of abandonment to the jury.

4. Adoption § 2; Appeal and Error § 32— abandoned child — technical error in issue submitted — harmless error

In this special proceeding to determine whether a child is an abandoned child within the meaning of G.S. Ch. 48, the statute requiring an abandonment six months immediately prior to the institution of the proceeding, respondent was not prejudiced by technical error of the court in submitting the issue of abandonment to the jury with a final date of 10 September 1968 when the proceeding was actually commenced on 12 September 1968, there being no evidence that respondent did anything during those two days which would have affected the result of the trial, and respondent having failed to object at the trial to the submission of that issue.

5. Appeal and Error §§ 31, 50— slight misstatement of evidence — duty to call to court's attention

A slight inadvertence by the court in recapitulating the evidence must be called to the attention of the court in time for correction.

APPEAL by defendant from *Friday, J.*, 19 February 1969 Civil Session of District Court held in CLEVELAND County.

This is a special proceeding brought to determine whether Sabrina Sheehan Mitchell (Sabrina) is an abandoned child within the meaning of Chapter 48 of the General Statutes of North Carolina.

The action was initiated by Russell Wade Boring (Russell) and Peggy M. Boring (Peggy) by filing a "Petition for Determination of Abandonment" with the Clerk of Superior Court of Cleveland County on 10 September 1968. Summons was issued herein on 12 September 1968. In the petition it is alleged that the petitioners had filed a petition for adoption of Sabrina in Special Proceeding # 4436 in Superior Court in Cleveland County, that Delores Florence Mitchell (Delores) had wilfully abandoned her daughter, Sabrina (referred to as Sabrina Sheehan Boring in the petition), on or about 15 January 1968 and that said abandonment had existed for more than six months immediately preceding the institution of the action. Delores Florence Mitchell filed an answer denying the material allegations of the petition and sought to have custody of Sabrina

awarded to her. The action was transferred to the District Court for trial. On written motion of petitioners, trial was by jury.

At the trial, the evidence for the petitioners tended to show that Delores, who was unmarried, gave birth to Sabrina on 22 December 1967. The child was born in California where two sisters of Delores were living at the time. Both sisters offered to assist Delores with the child. Shortly after the birth of Sabrina, Delores, who was unemployed, said she could not afford to keep the baby and phoned petitioners at their home in Shelby, North Carolina, to tell them that she wanted to give them the baby. She told them that she wanted them to love and trust Sabrina and to give her a good home and that this would be a permanent arrangement. Peggy flew to California to get Sabrina about 12 January 1968. Peggy took with her a consent to adoption to be signed by Delores. On cross-examination, Peggy testified that "Delores "signed a paper to consent for me to adopt that baby." However, Peggy, on further cross-examination, said four times that Delores did not sign the consent. Russell testified on cross-examination concerning whether Delores had consented to the adoption — "[i]n June when I talked to her I asked her to sign a consent to adopt. She did not refuse to sign it, she had already signed one which I have but it wasn't notarized." Upon further cross-examination Russell testified:

> "It was signed, witnessed but not notarized. I read it, is said on there that if she did sign it she had six months to withdraw it, it was also nine months after she signed it."

Peggy flew back to North Carolina with Sabrina about 15 January 1968. Soon thereafter, Delores went to work for Saturn Airways as a stewardess. From 15 January 1968 to 21 September 1968 Delores never visited Sabrina nor contributed toward her support. During this period Delores sent Sabrina a book of poems upon which was written "[t]o my precious little niece, Sabrina. Love auntie Dee. 1-22-68"; a stuffed animal; and a little suit. Delores never asked for her child back. Delores came to North Carolina on the 20th or 21st day of September 1968 and was served with summons on 25 September 1968.

The evidence for respondent tended to show that she has never been married. Peggy is her sister. Peggy did not know of the birth of Sabrina until their sister, Norma Rae Bryant, informed her of the birth the first week of January 1968. During a phone conversation the early part of January, Peggy called Delores and offered to adopt Sabrina. Delores told her that she did not know what she would do, but the next night Delores told Peggy that she could not

give the baby up for adoption, but that Peggy could take Sabrina back to North Carolina, love her, trust her and give her a good home until she, Delores, was able to bring her back. During this period Delores was unemployed but soon thereafter obtained a job with Saturn Airways which pays her between $500.00 and $1,400.00 per month. Delores did not sign the consent to adoption at the time Peggy was in California but later did sign it and send it to Peggy. The consent was improperly executed in that she did not sign it before a notary public, and it was returned to Delores for proper execution. Delores did not sign the new consent form but brought it with her when she came to North Carolina in September 1968. When Delores arrived at the petitioner's house, she was attempting to get her child back as she had never intended to give her up to the petitioners or anyone else. Russell Boring struck the respondent and ordered her out of the house after telling her that she owed petitioners $7,000.00 for taking care of Sabrina. Respondent also testified that she called the petitioners many times to ask about Sabrina. Delores further testified:

> "I did not abandon my child. When I turned my child over to Mrs. Boring I had no intention of abandoning her. When I gave my child to Mrs. Boring I told her that when I was financially able to support her I wanted her back. I am now financially able. I have asked Mrs. Boring for my child back four different times. I want her back now."

The following issue was submitted to the jury and answered in the affirmative:

> "Did Delores F. Mitchell wilfully abandon the child, Sabrina Sheehan, for at least six consecutive months immediately prior to September 10, 1968?"

From the judgment declaring Sabrina to be an abandoned child and transferring the case to the Clerk of the Superior Court for further proceedings, the respondent appealed to the Court of Appeals, assigning error.

Hamrick, Mauney & Flowers by Fred A. Flowers for petitioner appellees.

Reuben L. Elam for respondent appellant.

MALLARD, C.J.

Defendant asserts that the question involved on this appeal is:

"Did the Court below commit reversible error in sustaining the

verdict of the jury and signing judgment declaring Sabrina Shehan, the infant child of the defendant, to be an abandoned child within the meaning of Chapter 48 of the General Statutes of North Carolina?"

In this case, we are of the opinion and so hold that the trial court did not commit reversible error.

Respondent does not now contend that prejudicial error was committed in transferring this case to the District Court. See G.S. 7A-242.

[1] Respondent's assignment of error No. 4 relates to the trial court's overruling of her demurrer ore tenus to the petition, which was as follows:

"The defendant, through her counsel, demurs ore tenus on the grounds that the facts set out in the complaint do not allege sufficient facts to make out a case of abandonment."

In the case of *Berry v. City of Wilmington,* 4 N.C. App. 648, 167 S.E. 2d 531 (1969), we find the following:

"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 present case, the demurrer does not point out any defect in the petition but merely alleges that it does not state "sufficient facts to make out a case of abandonment." It was not error to overrule this broadside demurrer.

[2] Respondent's assignment of error No. 5 raises the question of whether it was error for the trial court to allow petitioner's motion to have the issue of abandonment decided by a jury.

Respondent asserts that the petitioners waived their right to a jury and cite G.S. 7A-196 as authority. G.S. 7A-196 provides in pertinent part:

"(d) The failure of a party to file a demand as required by this section constitutes a waiver by him of trial by jury. A demand for trial by jury may not be withdrawn without the consent of the parties. Notwithstanding the failure of a party to demand a jury in an action in which demand might have been made of right, the court in its discretion, upon motion of a party, may order a trial by jury of any or all issues."

Upon motion of the petitioners for a jury trial, it was not error for the trial judge in his discretion to allow the motion. No abuse of discretion is alleged or shown.

[3] Assignments of error No. 7 and No. 9 relate to the denial of respondent's motions for nonsuit made at the close of petitioner's evidence and at the close of all the evidence. In the case of *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597 (1962), we find the following language:

"Abandonment requires a wilful intent to escape parental responsibility and conduct in effectuation of such intent. *In re Bair's Adoption,* 393 Pa. 296, 141 A. 2d 873. In *Bair's* case the Pennsylvania Court said this:

'A parent's intent to abandon a child soon becomes evident, especially in the case of an infant, by reason of the inexorable circumstances attending its physical being. A child's natural needs for food, clothing and shelter demand that someone immediately assume the attendant responsibility which an abandoning parent has ignored; and, that responsibility endures constantly. It does not await the capricious decision of an uncertain parent, perhaps, years later. * * *

'Abandonment is not an ambulatory thing the legal effects of which a delinquent parent may dissipate at will by the expression of a desire for the return of the discarded child.' * * *

To constitute an abandonment within the meaning of the adoption statute it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest. If his conduct over the six months period evinces a settled purpose and a wilful intent to forego all parental duties and obligations and to relinquish all parental claims to the child there has been an abandonment within the meaning of the statute."

In the present case, there was sufficient evidence in the light most favorable to the petitioners that respondent had wilfully for-

saken her parental duties and had relinquished her parental claims. It was not error to overrule respondent's motions of nonsuit.

[4] Respondent contends that it was error to submit the issue of abandonment to the jury with the final date of 10 September 1968. She contends that the statute requires an abandonment six months immediately prior to the institution of the proceeding. Summons in this case was not issued until 12 September 1968. Contested special proceedings are commenced in the same manner as civil actions. G.S. 1-394. A civil action is commenced by the issuance of summons. G.S. 1-88. This present action, therefore, commenced on 12 September 1968.

> "A new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial or harmful, amounting to the denial of a substantial right." 1 Strong, N.C. Index 2d, Appeal and Error, § 47, p. 192.

In the present case, there is absolutely no evidence that this two-day difference affected the result of the trial. Both dates are more than six months after the alleged abandonment. There is no evidence that Delores F. Mitchell did anything during those two days which would have affected the outcome of the trial. There is absolutely no showing that the respondent was in any way prejudiced by this technical error. In addition, respondent did not object to the submission of the issue. After the trial the respondent attempted to take exception to the issue submitted. This comes too late. In McIntosh, N.C. Practice 2d, § 1353, it is said:

> "It is sufficient if the issues submitted will allow the parties to present their contentions fully; and if a party is dissatisfied with the form of the issues or desires additional issues, he should raise the question at once by objecting or by presenting the additional issues. If the parties consent to the issues submitted, or *do not object at the time or ask for different or additional issues, the objection cannot be made later;* but it is not necessary to go through the formality of presenting an issue when the court has ruled that it would not be submitted, or has intimated that there was no evidence to sustain it." (Emphasis added).

[5] Respondent also contends that the court misstated the evidence and thus committed prejudicial error. This misstatement of the evidence is asserted to have been when the court said that Peggy testified "that the papers were served upon Delores on 10 Septem-

ber 1968." This slight inadvertence was not called to the attention of the court at the time so that it could be corrected. The rule with respect to slight misstatements of the evidence is set out in *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968), where it is said:

> "Slight inadvertencies in recapitulating the evidence or stating contentions must be called to the attention of the court in time for correction. Objection after verdict comes too late."

The respondent also asserts that the trial judge committed prejudicial error in instructing the jury. We have carefully read the charge and find no prejudicial error therein.

Defendant has abandoned assignments of error # 1, 2, 3, 6, and 8. There are other assignments of error brought forward and argued by respondent which are without merit and require no discussion.

For the reasons stated, in the trial we find

No error.

BRITT and PARKER, JJ., concur.

NORMAN EARL BRANTLEY v. LESTER SAWYER

No. 691SC286

(Filed 13 August 1969)

1. Actions § 10— commencement of action

Except as provided in G.S. 1-88, an action is commenced as to each defendant when the summons is issued against him. G.S. 1-14.

2. Appeal and Error § 45— the brief — abandonment of assignment of error

Assignment of error not brought forward in appellant's brief is deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

3. Process § 2— defective copy of summons — service — designation of wrong county

Where copy of the summons served on defendant commanded him to appear and file answer in a county other than the one in which the action was pending, the copy is fatally defective in not conforming with the original summons which had designated the correct county, and the service of the copy does not confer jurisdiction on the court. G.S. 1-94.

4. Process § 5— amendment of process — fatal defect — jurisdiction of court

Where copy of summons is fatally defective in commanding the de-

fendant to appear and file answer in a county other than the one in which the action was pending, the copy cannot be amended so as to confer jurisdiction upon the court.

APPEAL by defendant from *Parker, J.*, 20 January 1969 Civil Session of Superior Court held in DARE County.

This civil action was instituted by plaintiff to recover for injury alleged to have been sustained in an automobile wreck on 26 November 1962.

From an order denying defendant's motion to dismiss upon his special appearance, and allowing plaintiff's motion to "amend the summons," the defendant appealed.

Broughton & Broughton by J. Mac Boxley for plaintiff appellee.

Teague, Johnson, Patterson, Dilthey & Clay by Bob W. Bowers for defendant appellant.

MALLARD, C.J.

Summons was issued by the Clerk of the Superior Court of Dare County on 26 November 1965.

[1] "An action is commenced as to each defendant when the summons is issued against him." G.S. 1-14. See G.S. 1-88 for exceptions thereto.

[2] The original summons issued herein is in substantial compliance with the provisions of G.S. 1-89. Defendant abandoned his assignment of error relating thereto by not bringing it forward in his brief. See Rule 28 of the Rules of Practice in the Court of Appeals.

In G.S. 1-94 it is provided, in part, that "(t)he officer to whom the summons is addressed must note on it the day of its delivery to him and serve it by delivering a copy thereof to each of the defendants."

The sheriff in this case did not serve a correct copy of the original summons on the defendant. The copy of the summons delivered to the defendant by the sheriff on 1 December 1965 reads as follows:

"STATE OF NORTH CAROLINA
DARE COUNTY. IN THE SUPERIOR COURT

NORMAN EARL BRANTLEY,
Plaintiff
against
LESTER SAWYER,
Defendant

SUMMONS

THE STATE OF NORTH CAROLINA,

To the Sheriff of Dare County-Greetings

YOU ARE COMMANDED to summon Lester Sawyer Manns Harbor, N. C., the defendant—above named, if he be found within your County, to appear before the Clerk of the Superior Court for the County of Pasquotank, at his office in Elizabeth City, N. C. within thirty (30) days after the day of service hereof, and answer the complaint, which has been filed in the office of the said Clerk of the Superior Court of said County, a Copy which is served herewith. And let him take notice that if he fail to answer said complaint within the time specified, the plaintiff will apply to the Court for the relief demanded in the complaint.

Herein fail not and of this summons make due return.

Given under my hand and seal of said Court, this 26 day of November, 1965.

C. S. MEEKINS,
Clerk Superior Court."

On 31 December 1965 defendant filed an entry of "Special Appearance and Motion to Dismiss" as follows:

"Now comes Lester Sawyer, the defendant herein, and enters a special *appearance solely* for the purpose of making this motion and upon such appearance moves the Court that the service of summons be quashed and that this action be dismissed for that the Court has not in this action properly acquired jurisdiction over the person of this defendant.

And as grounds for this motion this defendant respectfully shows unto the Court:

That summons, photostatic copy of which is attached hereto, was issued on November 26, 1965, by the Clerk of Superior

Court of Dare County, North Carolina, commanding the Sheriff of Dare County to summon Lester Sawyer, Manns Harbor, N. C., 'the defendant above named, if he be found within your County, to appear before the Clerk of the Superior Court for the County of Pasquotank, at his office in Elizabeth City, N. C. within thirty (30) days after the day of service hereof, and answer the complaint, which has been filed in the office of the said Clerk of the Superior Court of said County, a Copy which is served herewith. And let him take notice that if he fail to answer said complaint within the time specified, the plaintiff will apply to the Court for the relief demanded in the complaint.'

That there is no suit presently pending in Pasquotank County, to which this defendant can file answer and that defendant has, therefore, not been properly served with process in this cause.

WHEREFORE, defendant respectfully moves the Court that this action be dismissed for that the court has not in this action properly acquired jurisdiction over the person of this defendant.

This 30th day of December, 1965."

This motion was not ruled upon until 1 March 1969, which was after plaintiff had filed a motion to amend the copy of summons on 20 January 1969.

Upon a hearing the court found facts and entered an order as follows:

"This matter coming on to be heard before the undersigned Judge Presiding at the January, 1969, Civil Term of the Superior Court of Dare County upon the special appearance and motion to dismiss of the defendant and motion to amend summons filed by the plaintiff and the Court after hearing counsel for the plaintiff and counsel for the defendant and after reviewing written briefs filed on behalf of the respective parties and reviewing the various other documents on file, finds as follows:

(1) That summons and complaint were filed in the office of the Clerk of the Superior Court of Dare County, November 26, 1965, with summons having been issued by the Clerk of Superior Court of Dare County on the same date.

(2) That the original summons issued by the Clerk of Superior Court and on file in said office is proper and correct in all particulars.

(3) That under date of December 1, 1965, the defendant was served with a copy of the summons issued November 26, 1965, which summons had attached to it a copy of the complaint; that said summons was served on the defendant by Samuel O. Smith, a Deputy Sheriff of Dare County and a member of the staff of Sheriff Frank Cahoon of Dare County whose name appears on the back of said summons along with that of Deputy Samuel O. Smith.

(4) That the copy of the summons served upon the defendant was a form customarily used for summonses issued from the Superior Court of Pasquotank County, the County in which one of plaintiff's attorneys, Mr. Forrest V. Dunstan, maintained his office; that said copy of the summons was signed November 26, 1965, by Honorable C. S. Meekins, Clerk of Superior Court of Dare County, it appearing that at the top of the page of said summons the word 'Pasquotank' had been marked out and the word 'Dare' inserted on the same line and just before the word 'County'; that the word 'Pasquotank' appears in that part of the copy of the summons which refers to time within which defendant shall have to answer the complaint and the place where defendant shall appear within said time.

(5) That plaintiff was represented at the time the lawsuit in question was commenced by the filing of the complaint and summons by Mr. Forrest V. Dunstan of Elizabeth City, North Carolina, and Mr. Wallace R. Gray of Manteo, North Carolina.

(6) That as of November 26, 1965, the Honorable C. S. Meekins had an unbroken period of service as clerk of the Superior Court of Dare County totaling thirty-nine (39) years; that the defendant at the time of service of the summons and complaint upon him had been a resident of Dare County for a period of thirty-five (35) years and the defendant knew that said C. S. Meekins was and had been serving as Clerk of the Superior Court of Dare County; that the Honorable Frank Cahoon had been Sheriff of Dare County for a number of years prior to November 26, 1965, and was known to the defendant, although Deputy Sheriff Smith was not.

(7) That the copy of the complaint which was delivered to the defendant at the time he was served with copy of the summons had at the top of the first page and as a part of the caption of the case the words 'North Carolina — Dare County'; that the complaint alleges, among other things, that the plaintiff and defendant are citizens and residents of Dare County,

and that the subject matter of said suit occurred on November 26, 1962, one mile from the City limits of Manteo, North Carolina, the county seat of Dare County; that the plaintiff verified the complaint before a notary public of Dare County.

(8) That the summons served upon the defendant while having the word 'Pasquotank' appearing as referred to in (4) above, nevertheless had sufficient information upon it to provide the defendant with notice that the suit had been instituted in Dare County Superior Court, and the inadvertence in not inserting the word 'Dare' in lieu of the word 'Pasquotank' at said point does not constitute a fatal defect and grounds for the dismissal of this action.

(9) That the Court in its discretion should allow plaintiff to correct said non-fatal defect in the copy of the summons by an appropriate amendment.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion of the defendant be and the same is hereby overruled and that the motion of the plaintiff to amend said summons is hereby allowed; that the plaintiff shall proceed to serve upon the defendant an amended summons with the defendant having thirty (30) days from date of said service within which to file answer.

By consent of the parties, this order is signed out of term and out of the district, this 1st day of March, 1969."

[3] This appeal turns upon the question of whether the copy of the summons served on the defendant commanding him to appear before the Clerk of the Superior Court of Pasquotank County when in fact the action was pending in Dare County is a fatal or non-fatal variance. In this case, we hold that it was a fatal variance.

The court did not acquire jurisdiction over the person of the defendant because proper summons was not served upon him. In the case of *Williams v. Cooper,* 222 N.C. 589, 24 S.E. 2d 484 (1943), the court said:

> "Jurisdiction of the person depends on notice and the duty to give notice by service of a valid summons rests upon plaintiff. When jurisdiction of the person is challenged for that there was no legal service of a valid summons a motion to dismiss made on special appearance is ordinarily the proper method of presenting the question for decision."

See also *Credit Corp. v. Satterfield,* 218 N.C. 298, 10 S.E. 2d 914 (1940), and *McLeod v. Pearson,* 208 N.C. 539, 181 S.E. 753 (1935).

In *Washington County v. Blount,* 224 N.C. 438, 31 S.E. 2d 374 (1944), Justice Denny (later Chief Justice), speaking for the court, said:

> "Where the statute requires service of summons by delivery of a copy of the original writ to the defendant, such copy should, as a matter of course, conform exactly to the original, but frequently errors and omissions occur in the preparation of copies and it becomes necessary for the courts to determine the effect of particular clerical errors and omissions. In such cases it seems to be the general rule to disregard a clerical error or an omission where the party served has not been misled. Clerical errors or omissions in the copy of a summons delivered to a defendant will not affect the jurisdiction of the court, when they consist of mere irregularities, such as the 'want of the signature of the officer who issued it, the omission of the date of summons, or the failure to endorse thereon the date and place of service,' 50 C.J., sec. 79, p. 484. 49 Am. Jur., sec. 19, p. 20; *Lyon v. Baldwin,* 194 Mich., 118, 160 N.W., 428; *Flanery v. Kuska,* 143 Minn., 308, 173 N.W., 652; *Harris v. Taylor,* 148 Ga., 663, 98 S.E., 86; *Mayerson v. Cohen,* 108 N.Y.S., 59; *Cochran v. Davis,* 20 Ga., 581."

In the case of *Harrell v. Welstead,* 206 N.C. 817, 175 S.E. 283 (1934), a default judgment was set aside where the defendant had been summoned to appear before the clerk of court in the wrong county. The court said:

> ". . . [S]aid defendant had never been summoned to appear in Currituck County. Its summons was to appear before the clerk of the Superior Court of Pasquotank County and answer the complaint filed in his office. Therefore, unless the corporate defendant had come in by answer, it was not in court at all, . . ."

[3, 4] Speaking of the type of variance that had occurred in *Harrell,* the Supreme Court in *Washington County v. Blount, supra,* described it as "a fatal variance between the place where defendant was commanded to appear and file its answer and the place where the suit was actually pending." While the *Harrell* case is factually distinguishable from the present case, there can be no doubt that in both cases, the defendant was commanded to appear before the clerk of Superior Court in a county where the action was not pending. The conclusion is inescapable that in the present case the purported copy of the summons served upon the defendant was fatally defective in that it was not a copy of the original. Therefore, the

defendant was not delivered a copy of the summons as required by G.S. 1-94, and the court acquired no jurisdiction. Amendments may not be made to confer jurisdiction. The court could not by amendment cure such jurisdictional defect. McIntosh, N.C. Practice 2d, § 1284. The amendments provided for in G.S. 1-163 do not permit an amendment to a summons of such a nature as to give jurisdiction where none existed. To do so in this case might prejudice the right of the defendant to plead the statute of limitations. See McIntosh, N.C. Practice 2d, § 868. See also *Scott v. Jarrell,* 167 N.C. 364, 83 S.E. 563 (1914); 6 Strong, N.C. Index 2d, Process § 1, and Annot., 93 A.L.R. 2d 376.

In an annotation in 154 A.L.R. 1019, 1020, the following appears:

> "It goes almost without saying that a summons or other process in which an error or omission as regards the court or judge or the place of the court's convening is found to render the writ void cannot be amended, since, being void, it is a nullity and there is nothing to amend. . . ."

This cause of action arose out of an automobile wreck which was alleged to have occurred on 26 November 1962. It was commenced three years later on 26 November 1965. Motion to dismiss was filed 31 December 1965. It appears to us that plaintiff's motion to amend, filed on 20 January 1969, over three years after the motion to dismiss, reveals a lack of diligence on his part to prosecute his action.

The order overruling defendant's motion to dismiss and allowing plaintiff's motion to "amend the summons" is

Reversed.

BRITT and PARKER, JJ., concur.

RONALD W. HALES v. NORTH HILLS CONSTRUCTION CO., AND IOWA NATIONAL MUTUAL INSURANCE CO.

No. 6810IC328

(Filed 13 August 1969)

1. Master and Servant § 96— workmen's compensation — review of Commission's findings

The findings of fact of the Industrial Commission are binding on appeal when they are supported by any competent evidence, even though there be evidence that would have supported a contrary finding. G.S. 97-86.

2. Master and Servant §§ 53, 61— injuries compensable — acts performed for third persons — dual or "lent" employment

Findings and conclusion of the Industrial Commission that the accident resulting in plaintiff's injury did not arise out of and in the course of his employment with defendant, and that plaintiff was not a "lent" employee at time of accident, *are held* supported by evidence that plaintiff was employed as a carpenter by defendant construction company, that on the morning of the accident plaintiff was instructed by his foreman, defendant's assistant superintendent, to do some work on a house being built by the foreman, that plaintiff was injured on his way to the house when his station wagon was involved in an accident, that the foreman served as his own contractor in building the house and paid plaintiff by personal check for his time spent thereon, and that defendant had no connection whatsoever with the building of the house, notwithstanding there was also some evidence that tools, building materials and construction equipment owned or rented by defendant were used in the construction of the house, and that on prior occasions plaintiff had used his personal station wagon to go on defendant's jobs at the direction of his foreman.

3. Master and Servant § 97— workmen's compensation — remand of proceedings

In case findings of fact of the Industrial Commission are insufficient to determine the rights of the parties, the Court of Appeals may remand the proceedings to the Commission for additional findings.

4. Master and Servant § 55— workmen's compensation — injuries compensable

The Workmen's Compensation Act is not intended to provide general health and accident insurance; to be compensable the injury must spring from the employment.

5. Master and Servant § 61— injuries compensable — acts performed for third persons

An injury to an employee while he is performing acts for the benefit of third persons is not compensable unless the acts benefit the employer to an appreciable extent.

APPEAL by plaintiff employee from North Carolina Industrial Commission, Opinion and Award of 14 May 1968.

Defendant employer, North Hills Construction Company (North Hills) is a construction company engaged in the business of building homes, business establishments, and doing repair work. Plaintiff was employed by North Hills as a carpenter and on 6 September 1967 had been so employed for approximately fifteen months. On that date plaintiff was injured when his station wagon, in which he was riding, was involved in an automobile accident. Plaintiff's claim for workmen's compensation benefits was denied by North Hills and its insurance carrier. At the hearing before the Chairman of the Industrial Commission the parties stipulated that they were

subject to the provisions of the North Carolina Workmen's Compensation Act and that plaintiff was injured as a result of the automobile accident. The sole controversy was whether the accident arose out of and in the course of his employment with North Hills. After hearing evidence, the Chairman filed an opinion in which he found the following additional facts:

"7. That the assistant superintendent of the defendant employer, Mr. Jones, was building a dwelling house for himself, which is in no way related to the defendant employer's business.

"8. That the plaintiff had been doing work on Mr. Jones' home at intervals, for which he was paid by Mr. Jones for the time that he worked on the house.

"9. That on September 6, 1967 the plaintiff reported to work for the defendant employer at North Hills; that he worked for an hour and a half and then he was instructed by Mr. Jones to go to work on Mr. Jones' house; that on the way to Mr. Jones' house the plaintiff was involved in the automobile wreck.

"10. That the plaintiff, after working 1½ hours for the defendant employer, for which time he was paid by the defendant employer, was on his own time on the way to Mr. Jones' house where he was to work for Mr. Jones.

"11. That the plaintiff's injury did not arise out of and in the course of his employment with the defendant employer since the plaintiff had checked out and was on his own time for which he was being paid by Mr. Jones."

On these findings of fact the Chairman concluded as a matter of law that plaintiff's injuries did not result from an accident arising out of and in the course of his employment with defendant employer North Hills, and entered an award denying plaintiff's claim for compensation. On appeal to the full Commission, the Commission modified the findings of fact in a respect not pertinent to this appeal, and as so modified, affirmed the original opinion and award. From the opinion and award of the full Commission denying plaintiff's claim for compensation, plaintiff appeals.

Gene C. Smith for plaintiff appellant.

Young, Moore & Henderson, by Joseph C. Moore, for defendant appellees.

PARKER, J.

[1] Appellant's first assignment of error is that finding of fact No. 7 "controverts competent evidence." His second assignment of error is that finding of fact No. 8 is "contrary to the evidence." His third and fourth assignments of error are that findings of fact Nos. 10 and 11 are not supported by competent evidence. In considering all of these assignments of error, however, the only question for this Court to determine on this appeal is whether the challenged findings of fact were supported by any competent evidence. If so, they are binding upon appeal. G.S. 97-86; *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649; *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439. This is true even though there be evidence that would have supported a contrary finding. *Keller v. Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342; *Searcy v. Branson*, 253 N.C. 64, 116 S.E. 2d 175.

[2] In our opinion there is evidence to support the Commission's crucial findings in this case. The defendant employer's general superintendent, as well as Jones himself, testified that North Hills had no connection whatsoever with the building of Jones' house. Jones testified that he served as his own contractor in building his house. The plaintiff himself testified that when he had worked full weeks on the Jones house, he had kept a record of the time he worked as well as the time worked by other laborers who were helping him on the house, and that Jones had paid them by personal checks for this time. Defendant's general superintendent also testified that defendant North Hills had not paid plaintiff for time he worked on the Jones house. There was evidence that on the day of the accident plaintiff had reported for work with North Hills at 7:30 o'clock in the morning and had worked for approximately an hour and a half on a store building under construction by North Hills, for which time he had been paid by North Hills. Jones testified he had then asked plaintiff to do some work on his house. Plaintiff himself testified that he was on his way to work on the Jones house when the accident occurred. This evidence was amply sufficient to support the challenged findings.

Appellant assigns as error (assignments of error Nos. 5 through 9) that the Commission failed to find certain facts which, contrary to the facts which it did find, would have tended to show that the defendant North Hills had some connection with the building of the Jones house. There was some evidence that tools and building materials belonging to North Hills had been used in construction of the Jones house; that some construction equipment rented by North Hills had also been used at the site of the Jones house; that

Jones was plaintiff's foreman at North Hills and plaintiff was subject to his orders; and that on previous occasions plaintiff had used his personal station wagon to go from job to job for North Hills at the direction of his foreman. This evidence might have supported, but certainly did not compel, a finding that defendant North Hills was to some extent involved in construction of the Jones house. The Industrial Commission, which was the fact finding body, on competent evidence has found to the contrary. Its findings are binding on this appeal. G.S. 97-86, and cases cited *supra.*

[2, 3] Appellant's remaining assignments of error are directed to the Commission's failure to find, both as a fact and as a conclusion of law, that plaintiff was injured by an accident which arose out of and in the course of his employment with North Hills and that the Commission failed to find plaintiff was a "lent" employee at the time of the accident and that he was at that time following the directions of his supervisory foreman. In case findings of fact of the Industrial Commission are insufficient to determine the rights of the parties, this Court may remand the proceedings to the Commission for additional findings. *Brice v. Salvage Co., supra.* However, in our view the findings of fact made by the Commission in this case were sufficient under the law of our State to determine the rights of the parties. Appellant, in support of his argument that there should have been a finding on his status as a "lent" employee at the time of the accident, has cited *Leggette v. McCotter,* 265 N.C. 617, 144 S.E. 2d 849. That case involved an accident which resulted in the death of an employee who was employed as operator of certain heavy loading equipment. One phase of the business of his general employer was the leasing to its customers of heavy equipment complete with operator at a stipulated sum per hour. The accident occurred while the employee was engaged in operating the equipment under the direction of such a lessee. The Supreme Court affirmed the award of the Industrial Commission which held both the lessor general employer and the lessee special employer liable under the workmen's Compensation Act. The Court held that case to be one of dual employment, laying stress on the fact that the employee was engaged in work which was beneficial to his general employer and which was part of the general employer's business. In the present case there is no evidence that the building of the Jones house was in any way beneficial to North Hills, and the Commission has found on competent evidence that the building of that house was in no way related to North Hills' business. We do not believe the holding in *Leggette v. McCotter, supra,* is applicable to the circumstances of the present case. The holding in *Burnett v. Paint Co.,* 216 N.C. 204,

4 S.E. 2d 507, would seem more nearly apposite. In that case the employee was employed as a janitor at a paint store owned by an individual. The store employed more than five employees and was subject to the Workmen's Compensation Act. During his regular working hours and while being paid on the store's payroll, he was sent by his employer to work at her residence. While there engaged in mowing grass he was injured. The Supreme Court held he was not entitled to an award of workmen's compensation. Speaking through Devin, J. (later C.J.) the Court said:

> "It is clear, we think, if the employer had been a corporation or partnership, of which Mrs. Lipe was an executive, an injury to an employee of the company while engaged in private and personal work for her, having no relation in character or location to the business of the company, would not have been compensable by the company or its insurance carrier under the act. And we think the same reasoning would apply when the same person operates a business or industry, and also has personal service rendered in and around a private residence at another location."

[4, 5] The Workmen's Compensation Act is not intended to provide general health and accident insurance. To be compensable the injury must spring from the employment. An injury to an employee while he is performing acts for the benefit of third persons is not compensable unless the acts benefit the employer to an appreciable extent. *Lewis v. Tobacco Co.*, 260 N.C. 410, 132 S.E. 2d 877.

In the present case, plaintiff employee was injured after he had left his work at North Hills and while he was on his way to perform work solely for the benefit of Jones. The accident did not arise out of and in the course of his employment with North Hills, and the award of the Industrial Commission denying recovery of compensation is

Affirmed.

BROCK and BRITT, JJ., concur.

JANARAH W. JONES, ADMINISTRATRIX OF THE ESTATE OF PEARL HOUSTON MARTIN v. METROPOLITAN LIFE INSURANCE COMPANY, ORIGINAL DEFENDANT, AND ELWOOD NEWMAN, SUBSTITUTE DEFENDANT

No. 693SC287

(Filed 13 August 1969)

1. Evidence § 29— business records — photographic copies

In this action to determine the beneficiary of a federal employees life insurance policy, the trial court did not err in refusing to admit into evidence a photostatic copy of a purported written designation of plaintiff by deceased as the beneficiary of deceased's governmental life insurance benefits, where plaintiff failed to show that the copy was made in the regular course of business or activity of any federal agency or by whom it was made. G.S. 8-45.1.

2. Insurance § 37— action on life insurance policy — sufficiency of evidence

In this action to recover the proceeds of a federal employees life insurance policy, the trial court properly allowed defendant's motion for nonsuit of plaintiff's case at the conclusion of plaintiff's evidence.

3. Appeal and Error § 57— conclusiveness of findings by trial court

When jury trial is waived, findings of fact by the court are conclusive on appeal if supported by any competent evidence, and the judgment supported by such findings will be affirmed even though there is evidence contra.

4. Insurance § 29— life insurance beneficiary — findings and conclusion of the court

In this action to determine the beneficiary of a federal employees life insurance policy, heard by the court without a jury, the court's findings of fact are supported by competent evidence and are sufficient to support the conclusions of law and decision of the court that defendant is entitled to receive the insurance proceeds.

APPEAL by plaintiff from judgment of 6 March 1969 by *Cowper, J.*, in CRAVEN Superior Court.

In her complaint filed 14 August 1968, plaintiff alleged: She is administratrix of the estate of Pearl H. Martin who died intestate on 18 January 1968. Mrs. Martin was sole heir of her daughter Grace W. Newman (Grace), also a resident of Craven County, who died intestate on 2 March 1967. Grace, the insured, was employed as an elementary school teacher in the Camp Lejeune Dependent School and was a member of Federal Employees Group Life Insurance, funded by the defendant insurance company. Plaintiff is entitled to the proceeds of the policy.

Defendant insurance company filed a motion for a bill of inter-

pleader, seeking to pay the proceeds of the policy into court and having Elwood Newman substituted as defendant. An order to this effect was entered 11 October 1968.

Defendant Newman (Elwood) answered 15 January 1969, alleging substantially as follows: He married Grace 8 June 1962 and they remained husband and wife up to her death. No beneficiary of the policy having been designated, under applicable regulations he was entitled to the proceeds.

Plaintiff replied 12 February 1969 alleging abandonment of Grace by Elwood on 28 July 1964, after which Grace resided with her mother, and that an action for support was pending at the time of Grace's death. Plaintiff alleged that she was entitled to the insurance benefits regardless of the effectiveness of the designation of beneficiary on 10 December 1965.

By agreement, the case was heard by the court, sitting without a jury. The court found facts and concluded that Elwood was entitled to the proceeds. Plaintiff appealed.

Kennedy W. Ward and A. D. Ward for plaintiff appellant.

Downing, Downing & David by Harold D. Downing and Ray C. Vallery for defendant appellee Newman.

BRITT, J.

Determination of the proper party to receive the insurance benefits involved in this action is governed by federal statute. Plaintiff contends that Grace's request for naming her mother the beneficiary was effective as of 14 December 1965, at which time 5 U.S.C.A. 2093 read in part as follows:

> "Any amount of group life insurance and group accidental death insurance in force on any employee at the date of his death shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date of his death, in the following order of precedence:
>
> First, to the beneficiary or beneficiaries as the employee may have designated by a writing received in the employing office prior to death;
>
> Second, if there be no such beneficiary, to the widow or widower of such employee;
>
> * * *"

Elwood contends that even if Grace made the alleged written re-

quest that her mother be the beneficiary, the effective date of the request was subsequent to 23 March 1966 and on that date the applicable proviso of the federal statute aforesaid was amended to read as follows:

"* * *

First, to the beneficiary or beneficiaries, as the employee may have designated *by a signed and witnessed writing* received prior to death in the employing office * * *. For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed shall have no force or effect;

* * *" (Emphasis added.)

The first assignment of error brought forward and discussed in plaintiff's brief is that the trial court erred in refusing to admit into evidence plaintiff's exhibit No. 2, a photographic copy of the purported written designation by Grace Newman of her mother, Pearl Martin, as the beneficiary of her government life insurance benefits. Whether plaintiff's evidence was sufficient to survive the motion for nonsuit depends upon the answer to the first assignment of error.

Plaintiff's exhibit No. 2, which was not permitted to be introduced, is what appears to be a photostatic copy of a letter in words and form as follows:

"10 December 1965

From: Mrs. Grace W. Newman

To: Industrial Relations Officer

Via: Superintendent, Camp Lejeune Schools

Subj: Government Life Insurance Beneficiary; change of

1. I, Grace W. Newman, hereby request that my mother be made the beneficiary of my Government Life Insurance.

2. My mother is Mrs. Pearl Martin, 506 George Street, New Bern, North Carolina.

Grace W. Newman

Hand carried to Mr. Tuck 14 Dec. 1965.

L. James"

The name "Grace W. Newman" is typed in the letter, but the "Hand carried to Mr. Tuck 14 Dec. 1965. L. James" is handwritten and according to the evidence was written by Mrs. Lois James. It would appear that the letter could qualify as a proper request for designation of beneficiary as the federal statute read in December

1965 but not as it read on and after 23 March 1966. For the reasons hereinafter stated, it is not necessary for us to determine whether the statute or the amendment applies.

[1] Plaintiff contends that her exhibit No. 2 was admissible by virtue of G.S. 8-45.1, pertinent portions of which provide as follows:

> "If any business * * * or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, *and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic* * * * or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business * * *. *Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not* * * *." (Emphasis added.)

G.S. 8-45.1 was enacted by the 1951 General Assembly, and its provisions have been subject to limited interpretation by our Supreme Court. In *State v. Shumaker,* 251 N.C. 678, 111 S.E. 2d 878, the court held that photostatic copies of deposit slips and checks made by an employee of a bank in the usual course of business and identified by such employee are competent as primary evidence without proof of the loss or destruction of the originals; G.S. 8-45.1, et seq., are cited as authority for this proposition. However, in the opinion, written by Higgins, J., we find the following:

> "Enough appears in the evidence in this case to show a regular employee of the Wachovia Bank & Trust Company in the usual course of business made the photostats. She identified them. From this showing they were admissible in evidence. * * *"

A careful review of the testimony in the instant case fails to reveal that the copy which plaintiff attempted to introduce into evidence was made in the "regular course of business or activity," or by whom it was made.

Ralph Piper testified as a witness for plaintiff, and pertinent portions of his testimony are summarized as follows: He was employed at the Camp Lejeune Marine Corps Base as Industrial Relations officer in 1965 and 1966 and had supervision of the Federal Employees Group Life Insurance Program. He had the official records relating to Grace Newman that were kept in his office. He did not have the

official personnel folder, that being the property of the Civil Service Commission and in their custody. At the time of trial, he had a copy of a document dated 10 December 1965 from Grace Newman to the Industrial Relations Officer, sent through the Camp Lejeune Schools Superintendent's Office, and plaintiff's exhibit No. 2 is that document. He never saw the original, "just a copy like this." On cross-examination, Mr. Piper testified: "I do not know that any document ever existed except the one that I have in my office. The only one ever received is the one that I have identified here, Plaintiff's Exhibit Number 2."

Talmage Lancaster testified as a witness for plaintiff, and his testimony is summarized as follows: At the time of trial, he was employed as Superintendent of the Camp Lejeune Schools, the position formerly held by Mr. Tuck, having held the position since July 1966. He had never seen the paper referred to as plaintiff's exhibit No. 2 and the original of that paper was not in his office.

Mrs. Lois James testified as a witness for plaintiff, and pertinent portions of her testimony are summarized as follows: She was employed as Teacher-Principal in the Camp Lejeune Schools in 1964 and 1965 and in that capacity had contact with Grace Newman who was one of the teachers under her supervision. The record then discloses the following:

> "Yes, I can read the writing reflected at the bottom of the Plaintiff's Exhibit No. 2, which you have handed me, and I can identify it. It reads 'Hand carried to Mr. Tuck.' It is my signature at the bottom of the writing, and I think the date is December 14, 1965. At that time, Mr. Tuck held the position as Superintendent of the Camp Lejeune Schools. I did not participate in the employment of Mrs. Newman."

We hold that plaintiff failed to show that her exhibit No. 2 was reproduced by any photographic, photostatic or other accurate process by an agency of the United States Government in the regular course of business or activity and that said exhibit was not sufficiently identified to warrant its introduction into the evidence. The assignment of error is overruled.

[2] Plaintiff's second assignment of error is to the allowance of defendant's motion for nonsuit of plaintiff's case at the conclusion of plaintiff's evidence. Inasmuch as plaintiff's exhibit No. 2 was properly excluded from the evidence, plaintiff failed to make out her case and nonsuit was properly granted. The assignment of error is overruled.

Plaintiff assigns as error the entry of judgment which nonsuited plaintiff and which adjudged that defendant Elwood Newman was entitled to receive the insurance proceeds.

[3, 4] We have heretofore discussed the question of nonsuit. As to the remaining portion of the judgment, it is well established that when jury trial is waived the court's findings of fact are conclusive if supported by any competent evidence, and the judgment supported by such findings will be affirmed even though there is evidence contra. 1 Strong, N.C. Index 2d, Appeal and Error, § 57, p. 223. The findings of fact were supported by competent evidence and were sufficient to support the conclusions of law and decision of the court. The assignment of error is overruled.

We have carefully considered each of the assignments of error brought forward and discussed in plaintiff's brief, but finding them without merit, they are all overruled and the judgment of the superior court is

Affirmed.

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

IN THE MATTER OF THE CANCELLATION OR SUSPENSION OF THE OPERATOR'S LICENSE OF JOHN LINARD AUSTIN

No. 6929SC293

(Filed 13 August 1969)

1. Automobiles § 2— revocation of driver's license — review

Discretionary revocation of a driver's license is reviewable under the provisions of G.S. 20-25, but mandatory revocations are not reviewable.

2. Automobiles § 2— revocation of license — conviction of driving under influence

Revocation of petitioner's driver's license for four years upon receipt of record of his second conviction for driving under the influence of intoxicating liquor is mandatory. G.S. 20-17(2), G.S. 20-19.

3. Automobiles § 2— mandatory revocation — review in superior court

Where the original revocation of petitioner's driver's license for a second conviction of driving under the influence of intoxicating liquor is mandatory under G.S. 20-17, the superior court is without authority to hear a petition and render a judgment revoking or modifying the revocation. G.S. 20-25.

4. Automobiles § 2— illegal denial of license — review in superior court

If a petitioner is unlawfully and illegally denied a license upon a hearing on a petition for reinstatement of his license, the judge of the superior court, upon proper allegations in a petition and proper notice to the respondent as provided in G.S. 20-25, is authorized to take testimony, examine the facts of the case, and determine whether petitioner was illegally and unlawfully denied a license under provisions of the Uniform Driver's License Act.

5. Automobiles § 1— authority to issue license

Where driver's license is revoked for four years upon a second conviction for driving under the influence of intoxicating liquor, authority to issue a new license after the expiration of two years is granted to the Department of Motor Vehicles, not to the courts. G.S. 20-19(d).

6. Automobiles § 2— revocation of license — review in superior court — rescission of revocation

In the absence of evidence that the revocation of petitioner's driver's license upon a second conviction of driving while intoxicated was not mandatory or that petitioner was unlawfully and illegally denied a license, it was error for the superior court to enter an order rescinding the revocation of petitioner's license and requiring Department of Motor Vehicles to return petitioner's license forthwith.

7. Automobiles § 2— revocation of license — review in superior court — notice to Department

Letter of petitioner's attorney to the Chief Hearing officer of the Department of Motor Vehicles informing him that petitioner "desires to appeal to the Superior Court of Henderson County which convenes on December 16, 1968" the action of the Department in denying petitioner's application for reinstatement of his license, *is held* not to comply with the provisions of G.S. 20-25 requiring 30 days written notice to the Department.

ON *certiorari* to review judgment of *Collier, J.*, 9 December 1968 Criminal Session of Superior Court held in HENDERSON County.

From the record it appears that John Linard Austin's driver's license was revoked for a period of four years on 12 September 1966. The revocation was imposed for a second conviction of driving while under the influence of intoxicating liquor. On 27 September 1968, at Austin's request, a hearing was held by the Department of Motor Vehicles to consider reinstatement of petitioner's license. Austin's request for reinstatement of his license was denied for the reason that he had failed to provide satisfactory proof of good behavior for the period required by law and that his conduct and attitude were not such as to entitle him to favorable consideration for restoration of his driver's license. On 8 October 1968, Austin filed a petition in the Superior Court to review the action of the Department of Motor Vehicles. This petition was filed allegedly pursuant

to G.S. 20-25. By letter of 8 October 1968, petitioner's counsel forwarded a copy of the petition to the chief hearing officer of the Department of Motor Vehicles. The letter states that Austin "desires to appeal to the Superior Court of Henderson County which convenes on December 16, 1968." On 24 October 1968 respondent filed a reply to the petition denying the material allegation thereon and alleging, among other things, "that the petitioner herein was arrested and found guilty of public drunkenness in the City of Hendersonville on May 18, 1968, June 9, 1968, and September 9, 1968," and praying for a dismissal of the action. On 18 December 1968, without notice to the respondent, the trial court undertook to hear this matter which was not on the court calendar. No notice was given to the respondent of the hearing other than the statement of petitioner's counsel in a letter dated 8 October 1968 to the Chief Hearing Officer of the N. C. Department of Motor Vehicles which reads as follows:

> "Pursuant to your order dated September 30, 1968 regarding the cancellation or suspension of the driving privilege of John Linard Austin, you will take notice that Mr. Austin desires to appeal to the Superior Court of Henderson County which convenes on December 16, 1968.
>
> I am enclosing copy of the petition which has been duly filed in the Superior Court, for your convenience, which I presume you will deliver to the Department of Justice for attention.
>
> I shall be glad to work with the Department of Justice and have this matter set for a day certain."

Respondent did not take part in this proceeding. After receiving three affidavits in behalf of the petitioner, the trial court entered the following judgment:

> "This cause coming on to be heard before the undersigned judge presiding and holding the courts of the 29th Judicial District of North Carolina, and being heard upon the petition herein filed, and the answer or reply filed by the Department of Motor Vehicles, and being heard upon sworn testimony introduced in open court, it is therefore,
>
> CONSIDERED, ORDERED AND ADJUDGED that the order entered by the Department of Motor Vehicles of the State of North Carolina, revoking or suspending the operator's license of John Linden (sic) Austin be and the same is hereby recinded (sic); that the Department of Motor Vehicles shall immediately and forthwith return to John Linden (sic) Austin

his operator's license. However, the operation of any motor vehicle by the said John Linden(sic) Austin is hereby restricted in that he is permitted to operate a motor vehicle and drive same to his work and from his work and operate a motor vehicle in connection with his work, but he shall not operate any motor vehicle for pleasure or upon the highways of the State of North Carolina, except in the promotion and the operation of his business until September 12, 1970.

This the 18th day of December, 1968."

The Department of Motor Vehicles had no notice of the entry of this judgment until 8 January 1969 when it received a copy together with a letter from petitioner's counsel requesting a return of Austin's driver's license. The time for appeal having already expired, the respondent filed a petition for certiorari which was allowed.

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

Arthur J. Redden for petitioner.

MALLARD, C.J.

G.S. 20-25 provides:

"Any person denied a license or whose license has been cancelled, suspended or revoked by the Department, *except where such cancellation is mandatory under the provisions of this article,* shall have a right to file a petition within thirty (30) days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding court of that district, or special or emergency judge holding a court in such district in which the violation was committed, and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon thirty (30) days' written notice to the Department, and thereupon 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." (Emphasis added).

[1] Discretionary revocation of a driver's license is reviewable under the provisions of G.S. 20-25, but mandatory revocations are not. *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2 (1968). G.S. 20-17(2) provides that the Department

of Motor Vehicles (Department) shall forthwith revoke the license of one whose conviction for driving under the influence of intoxicating liquor has become final.

> "It is mandatory under the provisions of G.S. 20-17(2) for the Department to revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for 'driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug.'" *Carmichael v. Scheidt, Comr. of Motor Vehicles,* 249 N.C. 472, 106 S.E. 2d 685 (1959).

[2] In this case, it was mandatory that the Department of Motor Vehicles revoke the license of petitioner upon receipt of a record of his conviction for driving under the influence of intoxicating liquor. Where there is a mandatory revocation under the provisions of G.S. 20-17(2) "the period of revocation shall be as provided in G.S. 20-19." *Carmichael v. Scheidt, Comr. of Motor Vehicles, supra.* G.S. 20-19(d) provides in part:

> "When a license is revoked because of a second conviction for driving under the influence of intoxicating liquor or a narcotic drug, occurring within three years after a prior conviction, the period of revocation shall be four years; provided, that the Department may, after the expiration of two years, issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past two years and that his conduct and attitude are such as to entitle him to favorable consideration and upon such terms and conditions which the Department may see fit to impose for the balance of said period of revocation; . . ."

[3] It is clear from the statute that the petitioner's license was mandatorily revoked for a period of four years. "There is no right of judicial review when the revocation is mandatory pursuant to the provisions of G.S. 20-17." *Carmichael v. Scheidt, Comr. of Motor Vehicles, supra.* Since the original revocation of petitioner's license was mandatory under the provisions of G.S. 20-17, the superior court was without authority to hear a petition and render a judgment revoking or modifying the mandatory revocation in this case; however, it appears that the petitioner also sought review by the Superior Court of the order of the Chief Hearing Officer of the North Carolina Department of Motor Vehicles after the hearing on 27 September 1968. This order, as alleged in the petition filed 8 October 1968 which allegation was not denied, reads as follows:

> "As a result of a recent hearing, the Department has decided

that the revocation of the above mentioned person's driving privilege will remain in effect until 12 September, 1970.

Signed, J. Reece Welch,
Chief Hearing Officer."

In his petition to the Superior Court petitioner alleges and the respondent denies:

"That more than three years has elapsed since the petitioner's license was revoked or suspended and that he presented to the Hearing Officer in Henderson County, North Carolina an affidavit of his good character and also produced evidence that he had not operated a motor vehicle on the highways of the State of North Carolina for more than three years. That the Department perfunctorily and arbitrarily, illegally and unlawfully continued the revocation of the petitioner's driving privilege until the 12th day of September, 1970, without considering any evidence of the petitioner whatsoever."

[4] We think that if a petitioner is *unlawfully and illegally* denied a license upon a hearing on a petition for reinstatement of his license, the judge of the Superior Court, upon proper allegations in a petition and proper notice to the respondent as provided in G.S. 20-25 is authorized to take testimony, examine into the facts of the case, and determine whether the petitioner was illegally and unlawfully denied a license under the provisions of the Uniform Driver's License Act.

[5] Before the Department is permitted to issue to the former licensee a new license, two years must have elapsed from the beginning of the period of mandatory revocation and the Department must find "upon satisfactory proof that the former licensee has been of good behavior for the past two years and that his conduct and attitude are such as to entitle him to favorable consideration." After that has been determined the Department may impose such terms and conditions as it sees fit for the remainder of the revocation period. Reinstatement, or the receipt of a new license during the revocation period, is not a legal right of the defendant but an act of grace which the General Assembly permits, but does not require, the Department to apply. The authority to exercise or apply this act of grace is granted to the Department, not to the courts. G.S. 20-19(d).

The petitioner by alleging that he had produced an affidavit of his good character and also had produced evidence that he had not operated a motor vehicle on the highways of the State of North Carolina for more than three years does not support his conclusion

that the Department "perfunctorily and arbitrarily, illegally and unlawfully continued the revocation of the petitioner's driving privilege. . . ."

[6] Petitioner offered no evidence in Superior Court in support of his allegations that the revocation was not mandatory or that he was unlawfully and illegally denied a license.

It was error for the Superior Court to enter the order rescinding the revocation of petitioner's license and requiring the Department to "forthwith return to John Linden (sic) Austin his operator's license."

[7] It was also error for the judge of the Superior Court to proceed to hear this matter without giving the Department notice of the hearing as required by G.S. 20-25. The letter of the petitioner's attorney informing the Chief Hearing Officer of the Department that the petitioner "desires to appeal to the Superior Court of Henderson County which convenes on December 16, 1968" does not comply with the provisions of the statute requiring 30 days written notice to the Department.

The judgment of the Superior Court is

Reversed.

BRITT and PARKER, JJ., concur.

WILLIAM W. BUNDY v. WILL AYSCUE (ASKEW) AND JAMES R. WALKER, JR., GUARDIAN AD LITEM

No. 691SC185

(Filed 13 August 1969)

1. Trial § 3— motion for continuance — discretion of court

A motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable in the absence of manifest abuse of discretion.

2. Judgments § 24; Trial § 3— motion to set aside judgment for excusable neglect — denial of continuance

The trial court did not abuse its discretion in denying defendant's motion for a continuance of the hearing on his motion to vacate a judgment against him on the grounds of mistake, surprise and excusable neglect, where defendant had more than four months to prepare for the hearing on his motion.

3. Judgments §§ 24, 34; Jury § 1— motion to vacate judgment for excusable neglect — questions of fact — jury trial

The trial court did not err in the denial of defendant's motion for a jury trial on the questions of fact raised by his motion to vacate a judgment against him on the grounds of mistake, surprise and excusable neglect, questions of fact arising on such motion being for the court and not issues of fact for a jury.

4. Appeal and Error § 57; Judgments § 34— motion to vacate judgment under G.S. 1-220 — findings of fact — appellate review

Findings of fact by the trial court on motion to vacate a judgment for mistake, surprise or excusable neglect are binding on appeal if supported by competent evidence.

5. Appeal and Error § 42— evidence not in record — presumption

When the evidence is not in the record, it will be presumed that there was sufficient evidence to support the trial court's findings of fact.

6. Judgments § 25— excusable neglect — mental incompetency — deliberate refusal to attend trial

The trial court properly denied defendant's motion under G.S. 1-220 to vacate a judgment rendered against him on the ground that his failure to appear at the trial and defend the action was due to mental incompetency, where the court found that defendant was mentally competent at the time of the trial and that he deliberately refused to attend the trial, defendant's failure to defend the action not being the result of excusable neglect.

7. Judgments §§ 24, 29— excusable neglect — meritorious defense

There must be both excusable neglect and a meritorious defense in order to warrant vacating a judgment under G.S. 1-220.

APPEAL by defendants from order of *Fountain, J.*, entered 11 November 1968 in Chambers.

This is an appeal from an order denying defendants' motion to set aside a judgment on the grounds of mistake, surprise and excusable neglect.

On 15 November 1963 plaintiff instituted a civil action in the Superior Court of Perquimans County against the defendant, Will Ayscue, to obtain specific performance of a contract to convey real property belonging to defendant. Plaintiff alleged in his complaint that: On 4 November 1962 Ayscue had contracted to sell to him and he had agreed to purchase from Ayscue a particularly described tract of land for the sum of $3,000.00, of which $100.00 had been paid by check at the time of making the agreement; a written memorandum of the agreement was made in the form of a notation on the face of the $100.00 check which had been endorsed by defendant; in apt time as required by the agreement plaintiff had tendered

the full balance of the purchase price, but Ayscue had refused to comply with his agreement. Summons and copy of the complaint were personally served on the defendant Ayscue on 16 November 1963. Thereafter, after obtaining extension of time, Ayscue filed answer, admitting ownership of the land in question but denying the contract to convey and specifically pleading that the alleged agreement was not in writing as required by G.S. 22-2.

The case was calendared for trial at the January-February 1966 Session of Perquimans Superior Court, at which time Ayscue was advised of the trial date by his attorneys but refused to attend court. Trial was continued and set peremptorily for the March 1966 Session, at which time Ayscue's attorneys reported to the court that the defendant had refused to confer with them with reference to the case, had falsely accused them of "selling out," and had informed them that he was not going to appear in court. On 7 March 1966 the presiding judge entered an order allowing Ayscue's attorneys to withdraw from the case, and a copy of this order was served on him on 22 April 1966. The case again appeared on the calendar for the March 1967 Session of Superior Court, at which time the judge presiding again continued trial of the case and directed that a copy of the order be served on defendant Ayscue, including a notification "that he be advised that he is to procure counsel to represent him if he so desires." This notice was served on defendant on 7 March 1967. The case was again calendared for trial at the March 1968 Session of Superior Court, a copy of the court calendar for that session being mailed to defendant Ayscue by regular U.S. mail. The defendant did not appear for the trial either in person or by attorney. The case was tried at the March 1968 Session of Perquimans Superior Court before judge and jury, the jury answering issues in favor of the plaintiff, and judgment being entered on the verdict on 7 March 1968 in favor of the plaintiff directing specific performance of the contract.

On 9 July 1968 defendant Ayscue, through newly employed counsel, filed a motion to set aside the 7 March 1968 judgment pursuant to G.S. 1-220, on the grounds of mistake, surprise and excusable neglect. As grounds for this motion, defendant Ayscue alleged fraudulent misrepresentations on the part of the plaintiff at the time the alleged agreement of sale had been entered into on 4 November 1962, and further alleged that at that time as well as at the date of the trial and judgment, defendant Ayscue had been mentally incompetent. On these grounds defendant Ayscue moved that a guardian ad litem be appointed to represent him and that the 7 March

1968 judgment be vacated. On 19 July 1968 plaintiff filed a reply to defendant's motion, denying the allegations as to fraud and as to defendant's mental incapacity. At the October 1968 Session of Perquimans Superior Court Ayscue's attorney filed a motion that the matter of the defendant's competency be referred to the clerk of superior court for hearing and decision and that hearing on the motion to vacate the judgment be continued for the term. On 30 October 1968 the court entered an order in which it is expressly stated that the court did not find defendant Ayscue to be incompetent, but found that "he is present in his own proper person, and with his attorney, and as a precautionary measure, and at the request of defendant's counsel," the court appointed defendant's counsel, James R. Walker, to represent the defendant not only as attorney but as guardian ad litem at the hearing on his motion to vacate the judgment. On 31 October 1968 the court entered an order in which it is recited that the court had indicated it would not grant defendant's motion for continuance of the hearing on the motion to vacate the judgment, "but this Session concluded while the defendant's counsel was engaged in court elsewhere, and as an accommodation to him and his client the Court, on its own motion continues the hearing to be heard" on 11 November 1969. On 11 November 1969 defendant's counsel again moved to continue the hearing on defendant's motion to vacate the judgment, and also moved for a jury trial on the issues raised in the motion to vacate as to the alleged fraud on the part of the plaintiff in inducing defendant to make the contract of sale, and as to defendant's incompetency at the time of the contract and at the time of the trial. The court denied the motion to continue, denied the motion for a jury trial, and proceeded to hear defendant's motion to vacate the 7 March 1968 judgment on affidavits offered by each party and on the record, no oral evidence being tendered by either party. The court then entered an order finding as a fact "that the defendant at the time of the institution of this action against him, and at the time of the trial of his cause, was mentally competent to know and understand the nature and cause of action against him, and that he deliberately refused to attend the trial and the trial was regularly conducted, and judgment was entered on the verdict, and no sufficient cause is made to appear as to why the Judgment should be set aside."

On these findings, the court denied defendant's motion to vacate the 7 March 1968 judgment, and defendant appealed.

Silas M. Whedbee and W. H. Oakey, Jr., for plaintiff appellee.

James R. Walker, Jr., for defendant appellant.

PARKER, J.

[1, 2] Defendant first assigns as error the denial of his motions for a continuance of the hearing on his motion to vacate the judgment which had been rendered against him. "A motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable in the absence of manifest abuse of discretion." 7 Strong, N.C. Index 2d, Trial, § 3, p. 258. In the present case there is no basis for appellant's contention that denial of his motions for continuance was a manifest abuse of the trial court's discretion. Appellant filed his motion to vacate the 7 March 1968 judgment which had been rendered against him on 9 July 1968. The motion was not heard and ruled upon until 11 November 1968. Appellant had more than four months in which to prepare for the hearing on his own motion. Clearly the court did not abuse its discretion in refusing to grant him additional time.

[3] Appellant next assigns as error the denial of his motion for a jury trial on the questions of fact raised by his motion to vacate the judgment. There is no merit in this assignment of error. A motion to set aside a former judgment on the grounds of mistake, surprise, or excusable neglect, is addressed to the court. G.S. 1-220. Questions of fact arising thereon are for the court to decide and are not issues of fact for a jury. 2 McIntosh, N.C. Practice and Procedure 2d, § 1717; *cf. Coker v. Coker,* 224 N.C. 450, 31 S.E. 2d 364; *Cleve v. Adams,* 222 N.C. 211, 22 S.E. 2d 567.

[4-7] In the present case the court found as a fact that the defendant at the time of the institution of the action against him and at the time of the trial was mentally competent, and that he deliberately refused to attend the trial. The court also found as a fact that the trial was regularly conducted, judgment was entered on the verdict, and no sufficient cause was made to appear why the judgment should be set aside. These findings are binding on appeal if supported by competent evidence. *Coker v. Coker, supra.* The affidavits submitted by the parties and considered by the court before making its findings have not been included in the record on appeal. When the evidence is not in the record, it will be presumed that there was sufficient evidence to support the trial court's findings of fact. *In re Warrick,* 1 N.C. App. 387, 161 S.E. 2d 630; 1 Strong N.C. Index 2d, Appeal and Error, § 42, p. 185 and cases cited. Since the trial court has found as a fact that defendant was mentally competent at the time of the trial which resulted in the judgment against him and that he had deliberately refused to attend the trial, there is no basis in the record for any finding that defendant's failure to

defend the action was the result of any mistake, surprise, or excusable neglect on his part. In the absence of any showing of mistake, surprise or excusable neglect, the question of whether defendant had a meritorious defense becomes immaterial. *Meir v. Walton*, 2 N.C. App. 578, 163 S.E. 2d 403. The trial judge has considered the evidence and has found the facts which he deems to be established thereby, and these facts fail to show a case of excusable neglect. There must be both excusable neglect and a meritorious defense in order to warrant vacating the judgment. *Lumber Co. v. Cottingham*, 173 N.C. 323, 92 S.E. 9.

Affirmed.

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

STATE OF NORTH CAROLINA v. WILLIAM FISHER CRUTCHFIELD

No. 6926SC301

(Filed 13 August 1969)

1. Constitutional Law § 31; Criminal Law § 91— motion for continuance — scope of review

Ordinarily, a motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable except for manifest abuse, but when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and the order of the court is reviewable.

2. Criminal Law § 167— appeal — burden to show prejudicial error

Regardless of whether defendant bases his appeal upon an error of law or an abuse of discretion, to be entitled to a new trial he must show not only error but prejudicial error.

3. Constitutional Law § 31; Criminal Law § 91— motion for continuance — illness of counsel

Defendant was not prejudiced by trial court's denial of his motion for continuance made on day preceeding trial on basis of a letter from defense counsel's doctor that counsel was ill and would be severely handicapped in a trial because of his condition, where the doctor's letter gave no description of the ailment and where the record reveals that counsel on the trial conducted extensive cross-examinations of the State's witnesses and in other respects provided defendant with vigorous and competent representation.

4. Automobiles § 131— hit-and-run driving — warrant — allegations of property and ownership

In prosecution under G.S. 20-166(b) charging defendant with failing to stop his automobile after an accident resulting in property damage, the fact that the warrant failed to set out any description of the property damaged other than the word automobile and failed to state the name of the owner is not fatal.

5. Automobiles § 131— hit-and-run driving — personal injury — sufficiency of evidence

In prosecution charging defendant with failing to stop his automobile after a collision with a police car resulting in personal injury, evidence of bodily injuries received by the police officers was sufficient to be submitted to the jury.

6. Criminal Law § 114— instructions — recapitulation of evidence — length of charge — expression of opinion

Fact that trial court's recapitulation of the State's evidence consisted of six pages in the transcript as compared to two pages for defendant's evidence does not constitute an expression of opinion on the evidence, since the State had the burden of proof and since the testimony of the State's witnesses was considerably more lengthy than that of the defense witnesses. G.S. 1-180.

7. Automobiles § 131— hit-and-run driving — element of offense

Personal injury or death is a necessary element of the offense of failure to stop a motor vehicle involved in an accident or collision resulting in injury or death to any person. G.S. 20-166(a).

8. Automobiles § 131— hit-and-run driving — failure to define "personal injury"

Failure of trial court to define "personal injury" in prosecution under G.S. 20-166(a) was not error.

APPEAL by defendant from *Falls, J.*, at the 2 December 1968 Schedule "A" Criminal Session of MECKLENBURG Superior Court.

Defendant was charged in four warrants and one bill of indictment with committing the following offenses around midnight on 15 August 1968: (1) failing to stop after the automobile he was operating was involved in a collision causing property damage; (2) speeding in excess of 65 mph in the City of Charlotte; (3) reckless driving; (4) failing to heed a police blue light and siren; and (5) (bill of indictment) failing to stop the automobile he was operating after a collision resulting in injury to Police Officers Brown and Freeman and failing to give name, address, license number, render aid, etc.— a felony.

Trial was by jury and defendant was found guilty as charged in the four warrants and bill of indictment aforementioned. In the hit-

and-run case involving property damage (68-CR-77), defendant was given a twelve-month prison sentence; in the felony indictment (68-CR-79), defendant was given a two-year prison sentence to begin at expiration of sentence in 68-CR-77; in the speeding case he was given a thirty-day prison sentence, in the reckless driving case, a ninety-day prison sentence, and in the failure to heed siren case, a thirty-day prison sentence, these three sentences to run concurrently with the two-year sentence imposed in 68-CR-79. From judgments imposing said sentences, defendant appealed.

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

Peter A. Foley for defendant appellant.

BRITT, J.

Defendant assigns as error the failure of the trial court to grant his motion for postponement of the trial due to illness of defendant's attorney.

At his trial in superior court, defendant was represented by Attorney Joe L. Kirkley. The record discloses that during the calling of the calendar on the day preceding the trial, Mr. Kirkley handed the court a written motion for postponement and a letter for a Dr. Phelps stating that Attorney Kirkley was under his care and in the doctor's opinion Mr. Kirkley "would be unable to attend his normal duties and would be severely handicapped because of his condition in a trial." The judge denied the motion. Defendant contends that the court's denial of his motion to postpone the case in effect deprived him of his constitutional right to counsel as guaranteed by Article I, section 2 (sic) of the North Carolina Constitution and by Amendment XIV of the United States Constitution.

[1-3] Ordinarily, a motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not subject to review on appeal except in a case of manifest abuse. *State v. Creech*, 229 N.C. 662, 51 S.E. 2d 348. However, when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and the order of the court is reviewable. *State v. Phillip*, 261 N.C. 263, 134 S.E. 2d 386; *State v. Lane*, 258 N.C. 349, 128 S.E. 2d 389. Regardless of whether the defendant bases his appeal upon an error of law or an abuse of discretion, it is elementary that to entitle him to a new trial he must show not only error but prejudicial error. *State v. Phillip, supra.* Defendant has shown neither in this case. Defendant's written motion re-

ferred to in the record is not set forth in the record, therefore, we do not have the benefit of the information contained in that document. Dr. Phelps' letter gives no description of counsel's ailment, therefore, we are unable to say if it was the type of physical difficulty that might hamper the attorney in the trial of the case. Furthermore, a review of the record, including the transcript of the testimony, reveals that defendant's trial attorney conducted extensive cross-examinations of the State's witnesses and in other respects provided defendant with vigorous and competent representation. The assignment of error is overruled.

In his next assignment of error, defendant contends that the trial court erred in denying his motions for judgment as of nonsuit and in arrest of judgment, and particularly as to case No. 68-CR-77 charging hit and run involving property damage and case No. 68-CR-79 charging hit and run involving personal injury.

[4] He argues that the warrant in 68-CR-77 charged a violation of G.S. 20-166(b) but that the warrant fails to set out any description of the property damaged other than the word automobile and fails to state the name of the owner of the property alleged to have been damaged. G.S. 15-153 provides that "[e]very 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."

Defendant presents no authority, and we are unable to find any, for his contention that a warrant charging a violation of G.S. 20-166(b) must provide a description of the property damaged and the name of the owner. We hold that the warrant was sufficient.

[5] As to the bill of indictment charging failure to stop after involvement in a collision resulting in personal injury, defendant argues that the State failed to offer evidence as to any personal injury. We disagree. Sergeant Glenn of the Charlotte Police Department testified that Officers Brown and Freeman were injured in the collision between the police car they were operating and defendant's car. He testified that he saw "* * * no blood or anything like that, but both of them were barely moving. They complained of back and neck injuries, etc., couldn't hardly stand up really." Officer Brown testified that "it (the collision) injured my back, my neck and left knee." He further testified that he went to the hospital the

night of the collision for examination and x-rays; that two days later he consulted a physician and was given shots to ease his pain and was given physical therapy. Officer Freeman testified that he went to the hospital the night of the collision, was examined, and that thereafter he consulted a physician who treated him for pain and back injury. The evidence was fully sufficient to be submitted to the jury on the question of bodily injury received by Officers Brown and Freeman in the collision. The assignment of error relating to denial of the defendant's motions for judgment as of nonsuit and arrest of judgment are overruled.

[6] In his third assignment of error, defendant contends that the trial court in its charge to the jury violated G.S. 1-180 in that in summarizing the evidence the court did not give equal weight to the defendant's evidence. Defendant points out that the transcript discloses that the court's recapitulation of the State's evidence consists of some six pages as compared to two pages for the defendant.

In *State v. Cureton,* 218 N.C. 491, 11 S.E. 2d 469, the court held that where the State had a number of witnesses and only the defendant testified for the defense, the fact that the trial court necessarily consumed more time in outlining the evidence for the State than that of the defendant did not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the State. In the instant case, the testimony of the State's witnesses was considerably more lengthy than that of the defense witnesses; furthermore, the State had the burden of proof. We have carefully considered the charge relative to the recapitulation of the evidence for the State and the defendant and conclude there was no undue emphasis on the testimony or contentions of the State. The assignment of error is overruled.

[7, 8] Finally, defendant contends that the trial court erred with regard to the felony charge by failing, in its charge to the jury, to define "personal injury." Although personal injury or death is a necessary element of the offense envisioned by G.S. 20-166(a), we do not think a definition of "personal injury" was required under the facts in this case. The assignment of error is overruled.

Having fully considered each of the assignments of error brought forward and discussed in defendant's brief and finding them without merit, we conclude that the defendant 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. JAMES FRANCIS BREEDIN

No. 694SC322

(Filed 13 August 1969)

1. Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of the evidence — recent possession doctrine

In prosecution for felonious breaking and entering and felonious larceny, evidence that a building occupied by a corporation was broken and entered at some time between one o'clock on November 29 and seven o'clock a.m. on November 30, and that some of the property stolen from the corporation was in defendant's possession on the morning of November 30, *held* sufficient, under the doctrine of recent possession, to withstand defendant's motion for nonsuit.

2. Burglary and Unlawful Breakings § 6; Larceny § 8— instructions — recent possession doctrine

In prosecution for felonious breaking and entering and felonious larceny, trial court correctly and adequately charged the jury with respect to the doctrine of recent possession.

3. Criminal Law § 113— instructions — recapitulation of evidence — inadvertence

Slight inadvertence of the trial court in recapitulating the evidence, which was not called to attention of the court in time for correction, *held* not prejudicial under the circumstances of this case.

APPEAL by defendant from *Cohoon, J.*, February 1969 Session of Superior Court held in SAMPSON County.

Defendant was tried upon a three count bill of indictment charging him (1) with the felony of breaking and entering, (2) with the felony of larceny, and (3) with the felony of receiving stolen property knowing it to have been stolen.

Upon plea of not guilty trial was by jury. The third count was not submitted to the jury. Verdict was guilty as charged upon the first count of the felony of breaking and entering and on the second count of the felony of larceny. Both counts were consolidated for the purpose of the imposition of sentence and from judgment imposing a prison sentence of ten years, the defendant appealed to the Court of Appeals.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Trial Attorney Charles M. Hensey for the State.

David J. Turlington, Jr., for the defendant.

MALLARD, C.J.

The State's evidence is quoted in part and summarized in part as follows: A window in the place of business operated by Clinton Grains, Inc., in Clinton, was broken and the building was entered sometime between one o'clock on Friday, 29 November 1968, and seven o'clock A.M. on Saturday, 30 November 1968. The coke machine and the cracker machine had been moved. Papers were strewn about in the office. Three numbered, blank, printed checks owned by Clinton Grains, Inc., which were identified as State's Exhibit 3A, 3B and 3C, were missing, as well as one of its cancelled checks dated 28 June 1963 and identified as State's Exhibit 3. The manager of the Clinton Grains, Inc., testified relative to State's Exhibits 3, 3A, 3B, and 3C:

> "I have looked at State's exhibit 3 and it has my signature. This is a used check it was on file. It had been run through the bank and cancelled. It just happened to be on file. It was dated June 28, 1963, and is an old check. It was made payable to the order of Josephine Ship for forty dollars and eight cents. Our check machine made that on that. We run them through a machine. State's exhibit 3A is mine. We had several blank checks there. Our machine makes the marks that is on that and the number fits the one that we have here and compares with the one that was missing. We stopped payment on it. State's exhibit 3B is the same thing, a check made out on our machine, and 3C is the same as the others. Our checks each have a number and we keep up with the numbers and these numbers were missing after the alleged break-in. That is an F & E check writer that makes these impressions on the checks. Each one puts a number on it and registers it. No two are alike. Our machine made those marks. I checked each one of them. 3175 and 3125."

Also missing was the key to the lock to the cracker machine which was identified as State's Exhibit 2. A cigar box from the safe containing about $15.00 in nickles, dimes and quarters had been taken. The manager of the corporation discovered that the above property was missing at about seven A.M. on 30 November 1968. About 9:30 or 10 A.M. on Saturday, 30 November 1968, Patricia Ann Bronson (Patricia), with whom the defendant was living, saw the defendant with some checks. The defendant showed Patricia four checks. One of these checks was "for $200" and was the check identified and marked State's Exhibit 3C, which had been stolen from the office of Clinton Grains, Inc. The defendant also told Patricia he had a check for $200 "and he would cash it but he was

afraid to." The defendant was placed in jail on Sunday, 1 December 1968, where he remained until the trial of this case.

On Sunday, 1 December 1968, members of the Clinton Police Department, pursuant to the authority granted by a search warrant in connection with another matter, searched the room occupied by Patricia and defendant in the home of Patricia's mother and stepfather. There they found in a suitcase a cigar box similar to the one missing which contained the defendant's name tag, and State's Exhibit 2 which was the missing key from the lock to the cracker machine, six dollars in nickels and one Canadian penny. This cigar box was the one usually kept in the bedroom and used by the defendant. Patricia testified:

> "I saw him put things in this cigar box, the box was at my mother's house when we got there. He put some of his stuff in the box; he put some change in the box, and his check where he got paid for work. When he got off from work he would put his name plate in there."

The place of business of Clinton Grains, Inc., was located outside the City of Clinton and on Saturday, December 7, 1968, the Sampson County Sheriff's Department made another search of the room formerly occupied by Patricia and defendant in connection with an investigation of this case. At the time this search was made, Patricia's parents were also present. The officers discovered the four checks that were missing from Clinton Grains, Inc., under the spread or tablecloth in the room occupied by the defendant and Patricia; these four checks were under that portion of the spread where the T.V. was located. These checks were treated with a nitrate solution in an attempt to develop fingerprints; this treatment caused them to change color. No fingerprints were developed.

Defendant, through his counsel, and in his own proper person, in the absence of the jury, informed the court that he did not desire to testify or offer any evidence, and he did not offer evidence.

Defendant contends that the trial judge committed error in failing to allow his motion for judgment of nonsuit made at the close of the evidence.

In 2 Strong, N.C. Index 2d, Criminal Law, § 106, the applicable rule is stated thus:

> "Circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth, and in many cases is sufficient to overrule defendant's motion to nonsuit even though

the individual facts may be weak in themselves, when they present a strong case considered together."

[1] There is ample evidence that the building occupied by Clinton Grains, Inc., was feloniously broken into and entered at some time during the period between one o'clock on 29 November 1968 and seven o'clock A.M. on 30 November 1968, and that some of the property stolen therefrom was in the possession of the defendant on the morning of 30 November 1968. This was "recent possession" of stolen property. We think the evidence in this case, when viewed in the light most favorable to the State as we are required to do on a motion by a defendant for judgment as of nonsuit, was sufficient to withstand the defendant's motion for nonsuit. *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969).

[2] Defendant assigns as error certain portions of the charge of the court relating to what is often referred to in connection with the crime of breaking and entering and larceny as the "doctrine of recent possession," as well as other portions of the charge.

In the case of *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578 (1965), the Supreme Court said:

> "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."

We are of the opinion and so hold that the trial judge fully, adequately and correctly charged the jury with respect to the doctrine of recent possession in accordance with the law of this State. *State v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725 (1943); *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62 (1966).

The defendant further contends that the court committed error in stating the evidence to the jury that Patricia said "that she saw the defendant put the tag and put the key and some change in a cigar box that was offered in evidence."

What the witness did say, among other things, was:

> "James was using that box for sorta of a catch all on his dresser or the bureau in my room; to put his money and his change and things like that. He put things in that box there in the room."

While the witness did not specifically state that the defendant

put the key in the cigar box the defendant did not call this inadvertence to the attention of the judge before the verdict. In the case of *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968), the Supreme Court said:

> "Slight inadvertencies in recapitulating the evidence or stating contentions must be called to the attention of the court in time for correction. Objection after verdict comes too late."

[3] We are of the opinion and so hold that under the circumstances of this case this inadvertence in recapitulating the evidence does not constitute prejudicial error. See *State v. Cornelius,* 265 N.C. 452, 144 S.E. 2d 203 (1965).

When the charge is considered contextually, no prejudicial error is made to appear.

Defendant has other assignments of error which are without merit and require no discussion.

In the trial we find

No error.

BRITT and PARKER, JJ., concur.

HARDEE'S FOOD SYSTEMS, INC. v. CLAWSON A. HICKS

No. 697SC312

(Filed 13 August 1969)

1. Frauds, Statute of §§ 2, 7; Vendor and Purchaser § 1— real property — option — sufficiency of memorandum — letter by corporate officer

Where, during the life of an agreement giving plaintiff an option to purchase from defendant real property which defendant expected to acquire, the parties orally agreed to an extension of time for performance by defendant, a letter signed by plaintiff's vice-president after the expiration date of the original agreement which referred to "a delay in your being able to furnish a deed to us" and stated that "We look forward to as early a date as possible to finalize the Western Blvd. transaction," *is held* a sufficient memorandum of the extension agreement, when considered with the original agreement, to satisfy the Statute of Frauds. G.S. 22-2.

2. Vendor and Purchaser § 1— extension of option — sufficiency of consideration

Where plaintiff was given an option to purchase real property which

defendant expected to acquire, additional legal fees and other expenses incurred by defendant in continuing his efforts to acquire the property are sufficient consideration, as a detriment to defendant, to support an agreed extension of time for performance by defendant.

3. Contracts § 17— duration — reasonable time

Where the duration of a contract is not specified, it will continue for a reasonable time, taking the purposes of the parties into account.

4. Contracts § 17; Vendor and Purchaser § 2— extension of option — unspecified time — reasonable time

In this action to recover an advance payment made by plaintiff to defendant under an agreement giving plaintiff the option to purchase real property which defendant expected to acquire, the original agreement being for a two-week period and the parties having agreed to an unspecified extension of time for performance by defendant, whether defendant's tender of clear title to the property two months after the original contract expired was within a reasonable time is a question of fact which should have been determined by the trial court, who heard the case without a jury.

APPEAL by defendant from *Hubbard, J.*, sitting without a jury at the January 1969 Civil Session of NASH Superior Court.

This is a contract action in which plaintiff in its complaint alleges: Plaintiff and defendant entered into an agreement, denominated an option, under the terms of which the defendant agreed to furnish a fee simple deed to a parcel of land, specifically described, to the plaintiff on 5 November 1965. Plaintiff advanced $5,000 to defendant, which amount was to be forfeited by plaintiff if it refused to accept the property. The agreement further provided that the deposit would be returned to the plaintiff if defendant was unable to furnish the fee simple title. The defendant also agreed to deliver to the then landowner the full amount of his selling price upon receipt of such funds from the plaintiff.

At the time the agreement was executed, 22 October 1965, the parties realized that the defendant did not own the property but expected to obtain it from the estate in which the property was then lodged. Defendant was unable to do so by 5 November 1965. Plaintiff therefore sued for the return of the $5,000, alleging it was ready, willing and able to perform its obligations on 5 November 1965.

Defendant answered and admitted execution of the option and receipt of the $5,000. He further alleged that the parties, having talked the matter over, orally agreed prior to 5 November 1965 to extend the time for performance until a special proceeding involving the land could be consummated. Subsequently, by virtue of the special proceeding, defendant obtained the right to the property and

made it available to plaintiff, who declined to accept the property and demanded return of the deposit.

By reply, plaintiff denied the existence of an extension and further alleged that any such extension was unenforceable for lack of consideration and not being in compliance with G.S. 22-2.

At the trial in which the parties waived jury trial, plaintiff offered certain stipulations into evidence; also the option agreement, a letter dated 23 November 1965 from plaintiff's vice-president, Mr. Bennett, to defendant, and letter of 26 January 1966 from plaintiff to defendant in which plaintiff demanded return of the $5,000. The stipulations included the following:

> "* * * [O]n or a few days prior to November 5, 1965, the defendant telephoned Mr. Robert E. Bennett and stated that it would be impossible, due to the need for the aforementioned Special Proceeding, for title to be acquired by November 5, 1965. That Mr. Bennett indicated at that time that Hardee's Food Systems, Inc. was still desirous of acquiring title to the real estate * * *.
>
> * * * That during the course of the aforesaid telephone conversation and at the request of the defendant, the parties orally agreed that the defendant would have to take some additional amount of time in order to acquire title. The period of time necessary to clear title was left indefinite as to duration and no additional monetary consideration was paid by either party subsequent to the payment of the $5,000.00 by plaintiff. * * *"

The defendant testified to certain conversations between the parties prior to 5 November 1965, in which plaintiff advised defendant to continue his efforts to acquire title to the property. No specific time limitation was made as to an extension because of the difficulty of predicting when the title could be cleared.

The court made findings of fact and conclusions of law culminating in the judgment that plaintiff was entitled to the return of the deposit. Defendant appealed.

Spruill, Trotter & Lane by DeWitt C. McCotter for plaintiff appellee.

Jordan, Morris & Hoke by Charles B. Morris, Jr., and Eugene Hafer for defendant appellant.

BRITT, J.

Defendant appellant contends that the trial court erred in failing to find that the verbal agreement had the effect of extending the

option. The conclusions of law made by the trial court were as follows:

"1. That the paperwriting executed on 22 October, 1965 was an option and not a contract for the purchase and sale.

2. The plaintiff, having been informed that the sale could not be consummated on 5 November, 1965 as provided in the option, was under no duty to tender the balance of the purchase price nor demand deed.

3. The verbal agreement made in the telephone conversation between the vice-president of the plaintiff company and the defendant did not have the effect of continuing the option in force or extending it. And the letter of 23 November, 1965, is not a memorandum of the agreement in such form as to comply with the statute of fraud.

4. According to the terms of the agreement of 22 October, 1965 the defendant having failed to furnish fee simple title to the property to the plaintiff under the terms of the option, he is bound by the terms of the option to return the $5,000.00 option payment."

There was before the court a letter dated 23 November 1965, signed by plaintiff's executive vice-president and received by defendant, pertinent portions of which were as follows:

"* * *

Since we have encountered a delay in your being able to furnish a deed to us on the property on Western Boulevard in Raleigh, we request that you return at least $4,500 of the initial $5,000 that we gave to you as advance payment. Upon receipt of your check for $4,500, we will then owe you a balance of $52,250 at the time you are able to furnish us with a deed to the property in fee simple title. We think you will agree that the sum of $5,000 is far in excess of a normal option in relation to the length of time that will be required for you to furnish us a deed.

* * *

If you have any questions on any of the above, please feel free to contact me. We look forward to as early a date as possible to finalize the Western Blvd. transaction.

* * *"

[1] It was not necessary that the memorandum have been signed prior to 5 November 1965, since the agreement, as stipulated, was made prior to that time. The memorandum was sufficient, when com-

bined with the earlier document, to take the agreement out of the operation of G.S. 22-2. *Millikan v. Simmons,* 244 N.C. 195, 93 S.E. 2d 59; 4 Strong, N.C. Index 2d, Frauds, Statute of, § 2, p. 62.

[2, 3] The additional legal fees and any other expenses incurred by the defendant in continuing his efforts to acquire the property after 5 November 1965 were sufficient consideration, as a detriment to the defendant, to support the agreed extension. *Helicopter Corp. v. Realty Co.,* 263 N.C. 139, 139 S.E. 2d 362; *Johnson v. Noles,* 224 N.C. 542, 31 S.E. 2d 637.

The original agreement was dated 22 October 1965 and provided for performance on 5 November 1965. The extension specified no definite time. On 29 December 1965, defendant notified plaintiff that he would be ready to close the transaction on 5 January 1966. Where the duration of the contract is not specified, it will continue for a reasonable time, taking the purposes of the parties into account. *Scarborough v. Adams,* 264 N.C. 631, 142 S.E. 2d 608. The question arises as to whether the two-month period here was an unreasonable time in light of the fact that the original agreement had specified a two-week period.

"Reasonable time is generally conceived to be a mixed question of law and fact. 'If, from the admitted facts, the Court can draw the conclusion as to whether the time is reasonable or unreasonable, by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or circumstances are numerous and complicated, and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences cannot be reasonably drawn from them, that the question ever becomes one of law.' [Citations]" Quoted from *Trust Co. v. Insurance Co.,* 199 N.C. 465, 154 S.E. 743, in *Apostle v. Insurance Co.,* 208 N.C. 95, 179 S.E. 444.

[4] Considering the stipulations and evidence before the trial court, we think it erred in its conclusions of law and particularly the conclusion that the letter of 23 November 1965 "is not a memorandum of the agreement in such form as to comply with the statute of fraud." The judgment does not disclose that the court considered the question as to whether a two-month additional period for defendant to tender a good and sufficient deed was a reasonable time. We think an answer to this question is vital to a just determination of the controversy. It would not be proper for us to answer the question as the authority of this Court, under the facts presented,

is limited to a review of the proceedings and rulings in the trial court. 1 Strong, N.C. Index 2d, Appeal and Error, § 2, p. 105.

For the reasons stated, the judgment of the superior court is vacated and a new trial is ordered.

New trial.

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

LULA WILSON, EXECUTRIX OF THE ESTATE OF DAMUS B. WILSON v. CRAB ORCHARD DEVELOPMENT COMPANY, INC., LEON OLIVE, LEWIS B. FROST, AND FRED DENSON

No. 6926SC257

(Filed 13 August 1969)

1. Assignment for Benefit of Creditors § 1— transfer for valuable consideration

Where defendant and wife assigned their rights in certain certificates of deposit to the corporate defendant and in return for these certificates the corporate defendant assigned all shares of its corporate stock to defendant to be used by him in satisfying his creditors, the transfer to the corporate defendant was for a valuable consideration and was, therefore, not an assignment for the benefit of creditors as envisioned by G.S. 23-1 *et seq.*

2. Assignment for Benefit of Creditors § 1— limitation of action

Three-year statute of limitation applies to creditor's action for relief under G.S. 23-1 *et seq.* G.S. 1-52(2).

3. Assignment for Benefit of Creditors § 1; Limitation of Actions § 7 — accrual of action — ignorance of creditor

Cause of action under statute relating to assignment for benefit of creditors, G.S. 23-1 *et seq.*, accrues at the time of the assignments, and not at the time creditor first learns of the transactions.

4. Trusts § 14— creation of constructive trust

A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.

APPEAL by plaintiff from *Ervin, J.*, at the 3 February 1969 Regular Civil "C" Session of MECKLENBURG Superior Court.

The series of transactions involved in this action and the com-

panion case of *Estridge v. Crab Orchard Development Co.*, argued and decided at this session, were the subject of prior litigation and a prior appeal, and the Supreme Court opinion will provide further illumination of the facts and contentions. See *Estridge v. Denson and Paving Co. v. Denson and Wilson v. Denson*, 270 N.C. 556, 155 S.E. 2d 190.

Summons was issued and complaint was filed in this case on 5 July 1967. The pertinent facts, as alleged in the complaint, are summarized as follows: On 19 October 1960, defendant Crab Orchard Development Company, Inc. (Crab Orchard) came into existence. On 20 October 1960, Fred Denson (Denson) and wife assigned their rights in certain certificates of deposit in First Federal Savings and Loan Association, Inc., to Crab Orchard. These deposits, amounting to $70,500, were being held by First Federal apparently as additional security for loans on houses built and sold by Denson. In return for assignment of the deposits, on 28 October 1960 Crab Orchard assigned all shares of its corporate stock to Denson to be used by him in satisfying his creditors. On 31 December 1960, Crab Orchard, Denson as President of Crab Orchard, Denson and wife individually, Leon Olive, Secretary, and stockholders Lewis Frost, Lean Olive, S. L. McManus, Helen D. McManus, and G. A. Burrows made an assignment of $10,000 of the savings and loan deposits to R. S. Pate (Pate), a creditor of Denson, in return for which Pate forebore to attempt to set aside the assignment of 28 October 1960 as a preference. At the time of the assignments, plaintiff was a creditor of Denson and on 24 October 1961 obtained judgment for her claim. Plaintiff prayed (1) that she recover judgment against the defendants, and each of them, in the sum of $5,000 plus interest; (2) that defendants be required to give plaintiff "an equal share with all other creditors" of Denson existing at the time of the assignments, together with a declaration that defendants hold the same in trust for that purpose; and (3) that each of the assignments be declared an assignment for the benefit of creditors and that the defendants having received the proceeds of the certificates be required to "apply to the plaintiff that equal share with the other creditors of Fred Denson existing at the time of the assignments."

Defendants, except Denson, filed answer and among other defenses pleaded the three-year statute of limitations. On 5 December 1968, the answering defendants filed written motion for judgment on the pleadings on the ground that it appears upon the face of the pleadings that plaintiff's action is barred by the three-year statute of limitations. Following a hearing, the motion was allowed and from judgment dismissing the action, plaintiff appealed.

Newitt & Newitt by John G. Newitt, Sr., for plaintiff appellant.

Barnes & Dekle by W. Faison Barnes for defendant appellees.

BRITT, J.

The case of *Estridge v. Denson and Paving Co. v. Denson and Wilson v. Denson,* 270 N.C. 556, 155 S.E. 2d 190, held that at the time the plaintiffs therein (including plaintiff herein) sought to levy upon the certificates of deposit involved here to pay off judgments obtained against Denson, Denson did not own the certificates of deposit. The court ruled that the certificates were the property of Crab Orchard as the result of a valid transfer for a valuable consideration. The court specifically declined to discuss whether the transaction amounted to an assignment for benefit of creditors or whether the plaintiffs had any rights against the recipients of shares of stock from Denson.

G.S. 23-1 provides:

> "Upon the execution of any *voluntary* deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once, and no such deed of trust or deed of assignment shall contain any preferences of one creditor over another, except as hereinafter stated." (Emphasis added.)

[1] "Voluntary" has been defined as "without consideration." *Gas Co. v. Leggett,* 273 N.C. 547, 161 S.E. 2d 23. Here, the transfer to Crab Orchard was for a valuable consideration. *Estridge v. Denson and Paving Co. v. Denson and Wilson v. Denson, supra.* Therefore, the transfer of the savings and loan certificates from Denson to Crab Orchard was not an assignment for the benefit of creditors as envisioned by G.S. 23-1 et seq. Although there are cases where transfers of property which were not clearly voluntary were treated as assignments for benefit of creditors, those cases involved transfers to creditors of the transferror for preexisting debts; such is not the case here, Crab Orchard being the transferee of Denson but not a creditor of Denson. *Bank v. Tobacco Co.,* 188 N.C. 177, 124 S.E. 158. We hold that the facts alleged in the complaint do not constitute an assignment for the benefit of creditors.

[2] Assuming, *arguendo,* that the facts alleged did constitute an assignment for the benefit of creditors, the relief afforded by G.S. 23-1, et seq., is relief afforded by statute and does not arise out of common law. *United States Rubber Co. v. American Oak Leather Co.,* 181 U.S. 434, 21 S. Ct. 670, 45 L. Ed. 938. Consequently, G.S.

1-52(2) would apply, creating a three-year limitations on the time for bringing suit.

[3] Plaintiff alleged complete lack of knowledge of the transactions until "sometime in 1966"; however, the cause of action, had there been one, accrued at the time of the assignments and the statutory period began to run at that time. 5 Strong, N.C. Index 2d, Limitation of Actions, § 7, p. 239.

The decision of the superior court dismissing the action was correct, unless the ultimate facts alleged in the complaint, liberally construed, could support a finding that the defendants hold the certificates of deposit under a constructive trust for the benefit of creditors of Denson, however ascertained.

[4] "A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." Lee, North Carolina Law of Trusts, § 13a, p. 76. As otherwise defined, "[c]onstructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust. They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership." Quoted from Pomeroy on Equity Jurisprudence, § 1044, in *Speight v. Trust Co.*, 209 N.C. 563, 183 S.E. 734.

The complaint does not allege that the defendants obtained the deposits in violation of an equitable duty to anyone; this conclusion is supported by the holding in *Estridge v. Denson and Paving Co. v. Denson and Wilson v. Denson, supra.* Facts sufficient to constitute a constructive trust are not alleged.

We hold that the superior court properly granted defendants' motion for judgment on the pleadings dismissing the action.

Affirmed.

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

MRS. EVELYN W. ESTRIDGE, PLAINTIFF AND BIVENS FLOOR & CABINETS, INC., AND HAWTHORNE SALES COMPANY, INTERVENORS v. CRAB ORCHARD DEVELOPMENT COMPANY, INC., AND R. S. PATE

No. 6926SC330

(Filed 13 August 1969)

Appeal and Error §§ 10, 41— dismissal of appeal — amendment of record

Court of Appeals allows co-defendant's written motion to dismiss the appeal as to him on ground that the record on appeal does not contain any motion for judgment on the pleadings nor any other judgment applicable to co-defendant, even though intervenors' answer to the motion contains a judgment on the pleadings entered on behalf of co-defendant, since treating the answer as an amendment to the record would violate Rule of practice in the Court of Appeals No. 5.

APPEAL by plaintiff and intervenors from *Ervin, J.*, at the 3 February 1969 Regular Civil "C" Session of MECKLENBURG Superior Court.

In her complaint filed on 14 July 1967, plaintiff alleges that she is a creditor of Fred Denson (Denson) and wife, Letha B. Denson; that in 1960 Denson and wife assigned certain certificates of deposit in the amount of $70,500 to Crab Orchard Development Company, Inc. (Crab Orchard), and in exchange Crab Orchard agreed to assign all its corporate stock to Denson; and that because of this transaction the funds so assigned to Crab Orchard should be distributed in accordance with the law applicable to assignments for the benefit of creditors.

On 8 August 1967, an order was issued by Exum, J., restraining the distribution of the funds held by Crab Orchard until the matters set forth in plaintiff's complaint were adjudicated. By "consent order allowing intervention," Hawthorne Sales Company and Bivens Floor & Cabinets, Inc., were made parties to this action and allowed to assert their rights, as creditors of Denson and wife, against the defendants.

It is also alleged by the original plaintiff that on 31 December 1967 Crab Orchard assigned $10,000 interest in the certificates of deposit to R. S. Pate (Pate), and in consideration of this assignment Pate agreed not to institute a suit in any court or in any other way object to the assignment of the certificates of deposit by Denson and wife to Crab Orchard. Plaintiff alleges that this assignment to Pate constituted a preference.

Crab Orchard and Pate answered each of the complaints, and in

their answers each defendant alleged, as an affirmative defense, that the action which the plaintiff and the intervenors were attempting to maintain was created by G.S. 23-1, et seq., and, therefore, barred by the three-year statute of limitations as provided by G.S. 1-52. On 5 December 1968, Crab Orchard filed written motion for judgment on the pleadings on the ground that it appears upon the face of the pleadings that plaintiff's and intervenors' action is barred by the three-year statute of limitations. Pursuant to hearing, this motion was allowed and plaintiff and intervenors appealed.

Henry E. Fisher for plaintiff appellant.

Craighill, Rendleman & Clarkson by Hugh B. Campbell, Jr., for intervenor appellants.

Barnes & Dekle by W. Faison Barnes for defendant appellee Crab Orchard Development Company, Inc.

Kennedy, Covington, Lobdell & Hickman by Hugh L. Lobdell for defendant appellee R. S. Pate.

BRITT, J.

On 13 June 1969, Pate filed written motion in this Court for dismissal of this appeal as to him for the reason that the record now before us does not contain "any motion * * * for judgment on the pleadings nor any judgment applicable to this defendant." The motion is well taken. Intervenors' answer to the motion contains a judgment on the pleadings entered on behalf of the defendant Pate; however, to allow an amendment to the record at this time would, in essence, be allowing an appeal from an order entered on 12 February 1969. This, of course, would be in violation of Rule 5, Rules of Practice in the Court of Appeals of North Carolina.

This case was consolidated with the case of *Wilson v. Crab Orchard,* No. 6926SC257, for hearing in this Court. Rule 14, Rules of Practice in the Court of Appeals of North Carolina. The issues involved in the two cases are the same, except for the dismissal of defendant Pate, and the discussion set forth therein is equally applicable to this case. For the reasons stated in *Wilson v. Crab Orchard, supra,* the judgment of the superior court dismissing the actions of all plaintiffs against defendant Crab Orchard Development Company, Inc., is affirmed.

Affirmed as to Crab Orchard.

Appeal dismissed as to Pate.

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

H. R. CRADDOCK v. T. A. LOVING AND COMPANY

No. 691SC336

(Filed 13 August 1969)

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

On motion for nonsuit at the close of all the evidence, all of the evidence which tends to support plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom.

2. Negligence § 29— allowing timber from dismantled bridge to remain in water

Plaintiff's evidence *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in allowing timber from a bridge dismantled by defendant to remain in the water and cause severe damage to plaintiff's fishing nets during a storm.

3. Negligence § 37— instructions — damage to fishing nets by floating timber from dismantled bridge

In this action for damages to plaintiff's fishing nets allegedly caused by defendant's negligence in allowing timber from a bridge dismantled by defendant to remain in the water, the trial court erred in instructing the jury to the effect that plaintiff contended that defendant was under contract with the State to dismantle the bridge without leaving any of the timber floating in the water, since plaintiff's action is based on common law negligence and the jury may have based its verdict upon a belief that defendant had a strict contractual duty to retrieve any timber which fell into the water rather than upon negligence and proximate cause.

APPEAL by defendant from *Parker, J.*, January 1969 Session, Superior Court of DARE.

This action was instituted by plaintiff to recover damages, including loss of profits, resulting from damage to plaintiff's fishing nets allegedly caused by wood and timber negligently allowed to remain in the water by defendant in the dismantling of an old wooden bridge which spanned the Currituck Sound from Point Harbor to the Outer Banks.

Plaintiff set two "sets" of pound nets along the southern shore of the Albemarle Sound in the early part of September 1966. The nets were between eight and ten miles almost due south of the bridge site. Between the bridge site and the nets was open, unobstructed water. During the summer and fall, defendant, pursuant to a contract with the State Highway Department, was engaged in dismantling the bridge.

From time to time during the fall of 1966, plaintiff discovered pieces of wood and timber in his nets. Most of these he removed

while fishing his nets with only slight damage resulting to the nets. Prior to 26 November 1966, a storm of three or four days duration occurred. The storm carried winds from the northeast of 40 miles per hour. After the storm, plaintiff found his nets littered with timber similar to that taken from the bridge. He had taken one set consisting of three nets from the water before the storm. After the storm, he took up the other set, consisting of seven nets. Plaintiff's evidence tended to show that the set removed after the storm was severely damaged by the wood and timber and of little, if any, value.

At the conclusion of all the evidence, defendant moved for a judgment as of involuntary nonsuit, which motion was denied. The issues submitted to the jury were answered in favor of the plaintiff. From judgment entered thereon, defendant appealed.

Wilkinson & Vosburgh by John A. Wilkinson for plaintiff appellee.

Rodman & Rodman by Thomas E. Archie for defendant appellant.

MORRIS, J.

The defendant on appeal relies primarily on two assignments of error: Failure of the court to sustain its motion for judgment as of nonsuit at the close of all the evidence and prejudicial error in the charge.

[1] In considering whether defendant's motion for nonsuit at the close of all the evidence should be granted, all of the evidence which tends to support plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, *Clarke v. Holman*, 274 N.C. 425, 163 S.E. 2d 783, because the jury may give more weight to the plaintiff's evidence and may find according to plaintiff's evidence. *The Geltman Corporation v. Neisler Mills, Inc.*, 1 N.C. App. 627, 162 S.E. 2d 99.

[2] The evidence, when subjected to these rules tends to show that all of the wooden material in the bridge was creosote material except the handrail; that most of the material from the bridge was loaded by cranes on barges as the bridge was dismantled; that several operations were going on at the same time; that pilings were being pulled from the sound at the same time the decking was being removed, the decking was creosoted 2 by 10 spiked together and 3 by 4 creosoted deck board. The stringers were 6 by 16, approxi-

mately 19 feet in length. The caps were 12 by 12, approximately 21 feet in length. The pilings were creosoted timber piling. Timber and debris was seen washed up all along the shore in the area of plaintiff's nets after the November storm. The timber was thickly scattered up and down the shore for about 5 or 6 miles. It ranged in size from small to large — some 3 by 10, some 6 by 6, some 12 by 12 around 21 or 22 feet long. The material was black "like it might have been painted with something black, creosote, or something of that nature." Two pieces of 12 by 12 by 21 with bolts in them were taken from the nets. These were similar to the material in the bridge. Quite a bit of the material was seen floating in the sound. During the dismantling process, witnesses observed defendant's workmen "throwing" timber into the water and observed timber "falling" into the water. During dismantling operations debris of sizes varying from two feet to ten feet was seen floating around the bridge. Quite a few pieces of "good material" went "overboard". Part of it was retrieved but all of it was not. There was a boat there to pick it up, and some of it was picked up. Some was left that got away. Defendant was quite anxious to get through with the job and was on the workers "quite a bit to move faster". The job ran thirteen days overtime, and the superintendent was "chewed out" about it. It cost the company $900. According to the superintendent, if the timbers in the nets "weren't mine they were just exactly like mine."

We are of the opinion that the motion for judgment as of involuntary nonsuit was properly overruled and the question of negligence of defendant properly submitted to the jury. This assignment of error is overruled.

[3] Defendant contends that prejudicial error was committed by the court in its charge to the jury. The portions of the charge assigned as error are:

> "[I]n that under the terms of the contract they were supposed to take down and demolish and remove this bridge without allowing the various parts of the structure to fall into the water, and float about, or move from place to place by reason of the tides, the winds, or what-not,".
>
> "The plaintiff says and contends that the defendant had a contractual liability with and to the State of North Carolina, that is, the defendant was under contract to take this bridge down, and to see that none of the timbers fell in the water without being retrieved; that they were to remove this old bridge entirely from Currituck Sound, without allowing any of the timbers to get away, or affect anyone's property, lawfully working

in or operating upon the waters of Currituck Sound, and any other adjacent waters that might be affected thereby, and that the defendant failed to do so;".

"The plaintiff says and contends that it was negligence on the part of the defendant's employees in allowing its material to float freely in the Sound, and that if they had followed the terms of the contract, and they had exercised due care and diligence in removing this material from the dismantling process that the damage to his nets would not have occurred, that is, this negligence on the part of the defendant, in removing this material, and allowing it to fall into the water, was the proximate cause, was the cause without which the damage to the nets of the plaintiff would not have occurred;".

"The court instructs you that if the plaintiff, who has the burden of proof on this issue, has satisfied you from the evidence, and by its greater weight, that the defendant was negligent, as that term has been defined to you by the court, in dismantling the wooden structure over the Currituck Sound, from Point Harbor, over to the Outer Banks, in that the defendant failed to retrieve, or the defendant allowed certain portions of this structure being demolished to fall into the waters of Currituck Sound, and failed to retrieve the same from that Sound, and the plaintiff has further satisfied you from the evidence, and by its greater weight, that these materials came in contact with the nets of the plaintiff, and that the same materials was — caused damage, and that the negligence on the part of the defendant, T. A. Loving and Company, was the proximate cause of such injury and damage to the nets belonging to the plaintiff, then it would be your duty to answer the first issue 'Yes.'"

The position of defendant is well taken. Plaintiff's action is bottomed on common law negligence. There was no contract between defendant and plaintiff, nor has plaintiff contended that defendant had any contractual duty. We think the court's instructions with respect to defendant's duty under a contract could have misled the jury to the extent that the jury could have based its verdict upon a belief that the defendant had a contractual duty and was held thereunder to the strict duty to retrieve any and all timber which got into the water in any manner. Since we are of the opinion that the jury's verdict could possibly have been based on this theory under the charge rather than on negligence and proximate cause, the charge in these respects constitutes prejudicial error and defendant is entitled to a new trial.

Defendant brings forward some 36 exceptions to the rulings of the court on the admission or exclusion of evidence. Since there must be a new trial, nothing will be gained by a discussion of these exceptions.

New trial.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. JOSEPH LINTON HURDLE

No. 691SC366

(Filed 13 August 1969)

Homicide § 19— evidence competent on self-defense — uncommunicated threats to defendant

Where defendant offered evidence that he killed deceased in self-defense, it was error to exclude evidence of deceased's threats to the physical safety of defendant, even though uncommunicated to defendant, since the evidence tended to throw light on the occurrence and aid the jury to a correct interpretation thereof.

APPEAL by defendant from *Parker, (Joseph W.) J.*, 3 March 1969 Session, CURRITUCK Superior Court.

Defendant was charged in a bill of indictment with the first degree murder of Tulley Leo Banks. After defendant pleaded not guilty the solicitor announced in open court that he would not ask for a conviction of first degree murder but would seek a verdict of guilty of murder in the second degree, or manslaughter, as the evidence may justify.

The State's evidence tended to show the following. On the day in question one Otis Stone operated a combination filling station and grocery store which was situated on Highway 168, between Moyock and Sligo, in the northern section of Currituck County. Mrs. Ruth Banks, wife of Tulley Leo Banks, was an employee of Otis Stone, and worked in his store. Defendant, as a part of his farming operations, cultivated the lands lying to the rear of the Otis Stone store and filling station. On the day in question the State's witness Bobby Meiggs went to Otis Stone's store at about 12:15 p.m. to get something for lunch. When Meiggs arrived the deceased, Tulley Leo Banks, was already inside the store eating lunch; Banks'

truck was parked near a front corner of the store. Shortly after Meiggs arrived, and while he was still eating his lunch, the defendant drove up in his automobile alone and stopped in front of the store. Defendant was parked with the driver's side away from the store, and did not get out of his automobile. When Leo Banks saw defendant parked in front of the store he walked out of the store a little over half way to defendant's automobile; and signaled to defendant by pointing with his finger in a direction towards Moyock and away from the store premises. Defendant slid a little way towards the center of the front seat of his car, looking at Leo Banks. Banks went back into the store, went around behind the counter, picked up a rifle, and started towards the front door again. Mrs. Ruth Banks stood between her husband and the front door to prevent him from going out with the rifle, and the witness Bobby Meiggs took the rifle from Leo Banks' hands. Banks then sat down inside the store for a while talking to Meiggs before deciding to get in his truck and go back to work. Banks then went out the front door, walked six or seven steps towards his truck, and then turned towards defendant's automobile. Banks walked around the front of defendant's automobile and up to the window on the driver's side where he engaged in conversation with the defendant. After about a minute or a minute and a half, defendant shot Banks through the open window of the automobile. Banks staggered towards the hood of the car and fell to the ground in front of the car. Defendant then backed his car up and drove off in the direction of Moyock.

The State's evidence further tended to show that Tulley Leo Banks was dead on arrival at the hospital. The body was examined by a surgeon and a bullet was removed from the first lumbar vertebra. The path of the bullet was from entry at the lower end of the breast bone, traveling through the large blood vessels which go to the stomach, through the liver, through the artery leading from the heart to the kidneys and lower extremeties, and lodging in the lumbar vertebra. Tulley Leo Banks bled to death internally from the damage caused by the bullet.

Defendant offered evidence which tended to show the following. Defendant is sixty-four years of age and engages in farming. On the day in question he had men gathering and hauling hay. At about 12:30 p.m. he drove to Otis Stone's store on Highway 168 to take a lunch bucket to one of his workmen. When he arrived in front of Stone's store he parked to wait for his workman to show up. The window on the driver's side of his car, which was towards the highway, was about halfway down; and the window on the passenger

side, which was towards the store, was completely closed. While defendant was sitting in his car Leo Banks came out of the store waving his arms and saying something, but defendant could not understand what he said. Banks went back in the store, but a few minutes later came out waving his arms, saying something, and came towards defendant's car. As Banks came around to the driver's side of defendant's car, defendant slipped over a little towards the center of the seat. Banks reached through the partially opened window and said "You s.o.b., I am going to drag you out of that car and kill you." He said "I know you've got a gun but you aint got nerve enough to use it." Defendant picked up his pistol which was lying on the seat beside him, slipped further over towards the passenger side, and told Leo Banks not to open the door. Banks opened the door, leaned into the car, and defendant shot him. Banks staggered backwards to the front of the car where he fell. Defendant said he shot Leo Banks "to keep him from killing me."

From a verdict of guilty of manslaughter and an active sentence of not less than eight nor more than twelve years, defendant appealed.

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

Gerald F. White and John T. Chaffin for the defendant.

BROCK, J.

Defendant relied upon the principle that he acted in self-defense and assigns as error that the trial judge excluded from evidence certain statements made by Tulley Leo Banks before he went up to defendant's car, and which statements the defendant did not hear.

Lillian Sawyer, daughter of Tulley Leo Banks, testified as a witness for defendant. On direct examination she testified that shortly after defendant parked in front of the Otis Stone store, her father (Leo Banks) "burst out the store;" "he was cursing," "throwing his hands up." Then she was asked: "What did he say?" Objection to this question was sustained, but, if the witness had been permitted to answer, she would have answered: "He said, 'you common s.o.b., get the hell off the road, I mean leave here now. You are not fit to live here, or stay here.' "

Such menacing gestures and words can only be considered as threats to the physical safety of defendant. And, though they were not communicated to defendant, they tend to show that deceased was the aggressor in support of defendant's plea of self-defense.

The opinion in *State v. Minton,* 228 N.C. 15, 44 S.E. 2d 346, is *apropos,* and we quote:

> "Generally speaking, uncommunicated threats are not admissible in homicide cases. See Stansbury, North Carolina Evidence, Sec. 162, p. 342. But there are exceptions to the rule which must be considered in the light of the facts of the particular case. Such exceptions occur where the evidence has an explanatory bearing on the plea of self-defense. The statement of the rule in *S. v. Baldwin,* 155 N.C., 494, 495, 71 S.E., 212, is as specific as the nature of the case admits, and omitting matter not relevant to the present situation, is applicable here: 'It is now generally recognized that in trials for homicide uncommunicated threats are admissible . . . where they tend to throw light on the occurrence and aid the jury to a correct interpretation of the same, and there is testimony *ultra* sufficient to carry the case to the jury tending to show that the killing may have been done from a principle of self-preservation,' citing *Turpin's case,* 77 N.C., 473; *S. v. McIver,* 125 N.C., 645, 34 S.E., 439; Hornigan & Thompson Self-defense, 927; *Stokes' case,* 53 N.Y.; *Holler v. State,* Ind., 57; *Cornelius v. Commonwealth,* 54 Ky., 539."

Accord, *State v. Goode,* 249 N.C. 632, 107 S.E. 2d 70; 40 Am. Jur. 2d, Homicide, § 324, p. 593.

The testimony of the defendant was sufficient to carry the case to the jury tending to show that the killing may have been done in self-defense, and these uncommunicated threats would tend to throw light on the occurrence and aid the jury to a correct interpretation of the same. We think, under the circumstances of this case, the exclusion of this evidence was error.

We have not overlooked defendant's assignments of error to the charge of the court to the jury, some of which seem to have merit; but under the circumstances, we feel that no useful purpose could be served by discussing them.

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. HORACE ANDERSON

No. 6928SC323

(Filed 13 August 1969)

1. Constitutional Law § 34; Criminal Law § 26— plea of former jeopardy — felony — conviction of misdemeanor in county court for same occurrence — appeal pending in superior court

In this prosecution in the superior court for the felony of assault with intent to commit rape, the trial court did not err in the denial of defendant's plea of former jeopardy based upon his conviction in the general county court of the misdemeanor of assault on a female for the same occurrence, where the charge of assault on a female is pending in the superior court on appeal *de novo* from the general county court, since upon appeal to the superior court the judgment of the county court is completely annulled and is not thereafter available for any purpose.

2. Criminal Law § 81— best evidence rule

In this prosecution for assault with intent to commit rape, admission of parol testimony of the contents of a note handed to the prosecutrix by defendant violated the best evidence rule where the State offered no explanation for the absence of the note itself, and the contents of the note being a vital part of the State's evidence in showing defendant's intent, defendant is entitled to a new trial.

3. Rape § 17— assault with intent to commit rape — elements

In order to convict a defendant of assault with intent to commit rape, the evidence must show not only an assault but that the defendant intended to gratify his passion on the person of the woman at all events, notwithstanding any resistance on her part.

APPEAL by defendant from *Froneberger, J.*, at the 10 March 1969 Regular Criminal Session of BUNCOMBE Superior Court.

Defendant was charged in an indictment, proper in form, with assault with intent to commit rape. Briefly summarized, the evidence tended to show: The defendant (41) went to the home of the prosecuting witness, a fifteen-year-old girl, around 5:00 p.m. on 23 November 1968 and arranged for her to baby-sit for his sister. Defendant returned later and picked up the prosecuting witness and her eight-year-old companion, telling them that they were to meet his sister at a certain hamburger stand. After waiting a period of time at the hamburger stand and the sister did not appear, the defendant indicated they would go on to his sister's house. As they proceeded on certain streets of the City of Asheville, the defendant handed the prosecuting witness a note, not produced at the trial, which read: "Keep quiet, don't say anything to the child. Give me what I want or I'll kill you." The prosecuting witness threw her

companion from the car, which was still in motion, struggled free of the defendant's grasp and got out of the car herself. The two girls then walked to a nearby house and obtained a ride home.

Shortly thereafter, two warrants were issued by the Clerk of the General County Court. Warrant No. 3634 charged the defendant with assault with intent to commit rape, a felony. Warrant No. 3633 charged the defendant with assault on a female, a misdemeanor. It is conceded that both warrants are based on the same occurrence. The cases were consolidated for purposes of hearing. On 20 December 1968, the county court found probable cause in case No. 3634 and bound the defendant over to the 6 January 1969 Session of Buncombe Superior Court. Case No. 3633 was continued to the February 1969 Session of county court.

On 27 February 1969, the defendant was tried in the General County Court and found guilty of the charge of assault on a female. From judgment imposed, defendant gave notice of appeal to the Superior Court of Buncombe County.

The indictment presently before this Court was returned at the 19 February 1969 Session of Buncombe Superior Court and charged assault with intent to commit rape. The defendant was tried on this indictment 15 March 1969. From a verdict of guilty and judgment thereon, defendant appealed.

Attorney General Robert Morgan, Deputy Attorney General Jean A. Benoy and Special Assistant Thomas J. Bolch for the State.

Sanford W. Brown for defendant appellant.

BRITT, J.

[1] The first question presented is whether the superior court erred in overruling defendant's plea of former jeopardy, based upon the proceedings in the county court.

So far as the record indicates, the misdemeanor charge of assault on a female remains pending in the superior court, on appeal *de novo* from the county court. "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.*" (Emphasis added.) *State v. Goff,* 205 N.C. 545, 172 S.E. 407. See also *State v. Stilley,* 4 N.C. App. 638; G.S. 15-177.1; G.S. 7A-288.

The defendant might well raise the plea of former jeopardy, based upon a final judgment in this case, as a bar to further prosecution of the warrant charging assault on a female. *State v. Midyette,* 270 N.C. 229, 154 S.E. 2d 66; *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838; 2 Strong, N.C. Index 2d, Criminal Law, § 26, p. 518. However, the misdemeanor case is not presently before us. We hold that the superior court did not err in overruling defendant's plea of former jeopardy interposed in the felony case now before us.

[2] The next question presented is whether the parol testimony of the contents of the note handed to the prosecuting witness by the defendant violated the best evidence rule.

This rule appears to be well established in this jurisdiction. "Evidence that a record or document had been lost and could not be found after due diligence, or had been destroyed, is sufficient foundation for the admission of secondary evidence thereof, either by introducing a properly identified copy thereof, or by parol evidence of its contents. But as a general rule parol evidence in regard to writings is properly excluded in the absence of a showing of any effort to procure the writings to offer them in evidence." 3 Strong, N.C. Index 2d, Evidence, § 31, p. 647. Also Stansbury, N.C. Evidence 2d, § 192, p. 503. Here, the record of the proceedings in superior court is devoid of any explanation for the absence of the note itself. We may not speculate as to its whereabouts and disregard the rule.

The State contends that the contents of the note were collateral and therefore the admission of the parol testimony was not prejudicial, citing Stansbury, N.C. Evidence 2d, § 191, p. 499, and *State v. Ferguson,* 107 N.C. 841, 12 S.E. 574.

[3] It is clear that an essential element of the offense involved here is the defendant's intention at the time of the assault. *State v. Walsh,* 224 N.C. 218, 29 S.E. 2d 743; *State v. Jones,* 222 N.C. 37, 21 S.E. 2d 812; *State v. Adams,* 214 N.C. 501, 199 S.E. 716. In *State v. Jones, supra,* in an opinion by Winborne, J. (later C.J.), and quoting from *State v. Massey,* 86 N.C. 658, it is said: "In order to convict a defendant on the charge of assault with intent to commit rape, the evidence should show not only an assault, but that the 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."

[2] The contents of the note were a vital part of the State's evidence in showing the intent of defendant; certainly, the contents of the note were pertinent to the issue rather than collateral. When

defendant's counsel objected to the oral testimony regarding the contents of the note, he specifically stated that "the note itself is the best evidence." Inasmuch as the contents of the note were directly in issue, the State was under an obligation to explain the absence of the note itself. We are not convinced that this note falls within the exception for "loose, casual papers." *Herring v. Ipock,* 187 N.C. 459, 121 S.E. 758; *State v. Credle,* 91 N.C. 640; Stansbury, N.C. Evidence 2d, § 191, p. 500. The assignment of error is well taken, necessitating a new trial.

While the State's evidence tends to show evil abuse of the young prosecuting witness, the defendant, upon his plea of not guilty, is entitled to a trial free from substantial error in law before he may be convicted and punished for the commission of so serious a crime. *State v. Walsh, supra.*

As there must be a new trial, we deem it unnecessary to consider the other questions brought forward and argued in defendant's brief.

New trial.

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

DANIEL J. CRAVEN v. JOEL DIMMETTE, LUTHER OEHLBECK, ROBERT L. ROGERS, D/B/A THE SPORTS CENTER

No. 6925DC273

(Filed 13 August 1969)

1. Pleadings § 2— cause of action

A cause of action consists of the facts alleged.

2. Sales § 16— breach of express warranty — pleadings

Allegations of the complaint *are held* to state a cause of action for breach of express warranty in the sale of a boat.

3. Sales § 5— express warranty defined

An express warranty is any affirmation of fact or any promise by the seller relating to the goods which has the natural tendency to induce the buyer to purchase the goods.

4. Sales § 17; Boating— breach of express warranty — boat — sufficiency of evidence

In an action for damages for breach of express warranty in the sale of a boat which was billed as a "new demonstrator," plaintiff's evidence

that the boat listed twelve to fourteen inches to one side *is held* sufficient to be submitted to the jury on issue of breach of dealer's express warranty that the boat was a good, new boat which would serve plaintiff's purpose in pulling water skiers.

APPEAL by plaintiff from *Snyder, J.*, February 1969 Civil Session of District Court held in CALDWELL County.

Civil action for damages for breach of warranty in the sale of a boat.

From a judgment of nonsuit entered on motion of the defendants at the close of plaintiff's evidence, the plaintiff appealed.

Ted S. Douglas for plaintiff appellant.

Townsend and Todd by J. R. Todd, Jr., for defendant appellees.

MALLARD, C.J.

[1] The parties are not in agreement as to whether plaintiff alleged a cause of action for fraud, or for breach of warranty. A cause of action consists of the facts alleged. *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21 (1960).

In his amended complaint, plaintiff alleges:

"III. That on or about the 10th day of August, 1966, the plaintiff purchased from the defendants a 16-foot Larson boat (motor No. 1945306) for a total price of $4,000.00 when boat was billed to the plaintiff as a NEW DEMONSTRATOR.

IV. Prior to, and at the time of the purchase of this boat by the plaintiff from the defendants, the defendants told the plaintiff and represented to the plaintiff that this boat was a NEW DEMONSTRATOR, in perfect condition and had been owned and used only by Mr. Oehlbeck, one of the defendants, as a demonstrator, and that the boat was suitable for the purposes for which the plaintiff intended to use the boat.

V. That the aforesaid representations of the defendants concerning the boat were false, and were known by the defendants to be false, at the time that the defendants made them; that these false representations were made by the defendants with intent to deceive the plaintiff, and to induce the plaintiff to purchase the boat, and they did in fact deceive the plaintiff, and in reliance upon them, he purchased said boat from the defendants and made the down payment of his used boat which had a fair market value of $1,350.00, financing the balance of

$2,650.00 with the Commercial Credit Corporation, Hickory, North Carolina.

VI. On or about the 13th day of August, 1966, the plaintiff discovered for the first time that the same boat which he had purchased from the defendants on August 12, 1966, did not perform properly upon the water and was defective in that the boat listed to one side — on approximately 45 degrees list — and would not perform properly under normal conditions, was dangerous and unsafe under normal conditions and use, and was not suitable for the purpose for which the plaintiff intended to use the boat, all of which were known to the defendants.

VII. That on or about the 17th day of August, 1966, the plaintiff notified the defendants of the defect in said boat and returned the boat to the defendants on that date for repairs to be made.

VIII. That the defendants retained the boat for two weeks, attempted to repair the boat and informed the plaintiff on August 31st that the boat was repaired. That on the same day the plaintiff and the defendants' manager took the boat on a trial run and discovered that the boat had not been repaired but continued to list the aforementioned degrees and was in the same condition as it was the day the plaintiff purchased the boat. That the plaintiff on the same day returned the boat to the defendants again for the purpose of making repairs and remedying the defect.

IX. That the defendants retained the boat for the purposes of remedying the defect, and the plaintiff made numerous visits to the defendants place of business inquiring as to whether or not the boat had been repaired.

X. That on or about the 20th day of December, 1966, the plaintiff was informed by one of the defendants, Joel Dimmette, that the boat was repaired and the defendant Joel Dimmette accompanied the plaintiff to the river for another trial run. That the defendants admitted that the boat was defective in that it continued to list at about a 45-degree angle and that it was unsafe to operate the boat in this condition, being the same condition as it was the day the plaintiff purchased it.

XI. That the plaintiff made the September payment of $87.96 and the November payment of the same amount during which time the defendants made repeated promises to repair the defect in the boat, and continuously failed to do so.

XII. That the plaintiff refused to make further payments until the boat was repaired and that the manager and agent of the defendants informed the plaintiff that the boat's defect could not be remedied.

XIII. That the aforementioned defect was not observable to the plaintiff upon a thorough inspection, but was an inherent and hidden defect and not detectable while the boat is out of the water.

XIV. That the plaintiff requested that the defendants return his boat and the payments in the amount of $175.92, but the defendants refused to and further refuses to make the repairs necessary to operate the boat safely.

XV. That at the time of the defendants' false representations to the plaintiff as to the condition of said boat, the defendants well knew that the boat had previously been used by one of the defendants, Luther Oehlbeck, and that said Luther Oehlbeck knew the boat did not operate properly, but was dangerous and unsafe in that condition, and was not suitable for the purpose for which the plaintiff intended to use the boat for.

XVI. As a direct and proximate result of the fraud practiced upon him by the defendants, as herein set forth, the plaintiff has been damaged in the sum of $4,000.00"

The defendants answered denying the material allegations of the complaint and by way of counterclaim sought to recover $1418.06 plus interest as the balance allegedly due on the contract for the sale of the boat. In the transcript of the testimony, it is revealed that the defendants took a voluntary nonsuit as to their counterclaim after the entry of the nonsuit.

In the case of *Hill v. Parker,* 248 N.C. 662, 104 S.E. 2d 848 (1958), involving the purchase of an automobile that had been used as a demonstrator, the Supreme Court held that a complaint in language similar to that used in the complaint in the case before us constituted a cause of action for breach of express warranty. The court there said:

"It is manifest that the plaintiff has alleged a cause of action for damages for breach of express warranty. (Citations omitted). This being so, we are not concerned with whether the complaint also superadds a cause of action for false warranty. (Citations omitted). Nor are we concerned with whether the complaint alleges other causes of action, including one based on total failure of consideration on the hypothesis that the auto-

mobile was worthless and unfit for the purpose for which it was sold." (Citations omitted).

[2] We think, in this case, the pleadings when liberally construed (G.S. 1-151) allege a cause of action based upon express warranty.

> "A warranty, express or implied, is contractual in nature. Whether considered collateral thereto or an integral part thereof, a warranty is an element of a contract of sale. 77 C.J.S., Sales § 302; 46 Am. Jur., Sales § 299.
>
> 'The obligation arising under a warranty is that of an undertaking or promise that the goods shall be as represented or, more specifically, a contract of indemnity against loss by reason of defects therein.' 77 C.J.S., Sales § 302(d). 'The effect of an express warranty undoubtedly is to bind the seller absolutely for the existence of the warranted qualities. . . .' *Williston on Sales, Revised Edition,* § 237." *Wyatt v. Equipment Co.,* 253 N.C. 355, 117 S.E. 2d 21 (1960).

[3] In defining the nature of an express warranty, Justice Bobbitt in *Insurance Co. v. Chevrolet Co.,* 253 N.C. 243, 116 S.E. 2d 780 (1960), said:

> "Our decisions are in accord with the provision of the Uniform Sales Act that 'any affirmation of fact or any promise by the seller relating to the goods is *an express warranty* if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.' "

Plaintiff's only assignment of error is to the entry of the judgment of nonsuit at the close of his evidence.

[4] The defendants were dealers in boats. Plaintiff offered evidence tending to show that he told defendant Oehlbeck that he wanted a boat "to pull skiers and just run about in." Defendant Oehlbeck told him that it was a new demonstrator and was the same as a new boat, a good boat, "a cream puff," and a boat that would serve plaintiff's purpose. Plaintiff testified that he relied upon such representations. He purchased the boat after being induced by such representations. The boat was not as represented, in that when he put it in the water, it listed twelve to fourteen inches to one side, threw water high in the air so that skiers being pulled could not be seen, and it did not handle properly. Such conditions were not corrected. The evidence further tends to show that the defendant Oehlbeck knew that the boat listed and did not handle properly at the time of informing the plaintiff that it would serve his purpose. The

jury should be permitted to decide whether such was intended as a warranty and whether there has been a breach thereof. *Hodges v. Smith,* 158 N.C. 256, 73 S.E. 807 (1912).

For the reasons stated, the judgment of nonsuit is

Reversed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. DWIGHT HARRINGTON

No. 6919SC134

(Filed 13 August 1969)

1. Constitutional Law § 28— waiver of indictment

An accused in a criminal proceeding, when represented by counsel, may, in all except capital cases, waive indictment under rules prescribed by the Legislature. N. C. Constitution, Art. I, § 12.

2. Constitutional Law § 28— waiver of indictment — appeal from inferior to superior court

Until the Legislature shall prescribe regulations governing the waiver of an indictment in a case heard in superior court on an appeal from an inferior court, an accused in such a case may not waive indictment and be tried upon an information. N. C. Constitution, Art. I, § 12.

3. Criminal Law § 18— appeal from inferior to superior court — invalidity of trial upon information

Where defendant appealed to the superior court from his sentence imposed in a recorder's court, defendant could be lawfully tried in the superior court only upon the original warrant or upon an indictment, the statute relating to waiver of indictment in misdemeanor cases not being applicable, and it was error for the superior court to sentence defendant upon an information. G.S. 15-140. N. C. Constitution, Art. I, § 12.

4. Criminal Law § 150— unauthorized dismissal of appeal — prejudicial error

Where defendant's appeal was perfected and was heard by the Court of Appeals, defendant has suffered no prejudice by reason of unauthorized order of the clerk of superior court purporting to dismiss his appeal.

5. Criminal Law § 150— withdrawal of appeal — authority of clerk

Clerk of superior court was without authority to enter an order purporting to dismiss defendant's appeal, which order was entered after defendant, without joinder of counsel, had filed a written withdrawal of

the appeal, the clerk at most having the authority only to file and make an entry of such withdrawal. G.S. 15-184.

APPEAL by defendant from *Anglin, J.*, 19 August 1968 Criminal Session of CABARRUS Superior Court.

Defendant was tried in Cabarrus County Recorder's Court on 11 July 1968 on warrant charging misdemeanor escape. He pleaded guilty and from judgment imposing active prison sentence, gave notice of appeal to the superior court. The case came on for trial at the 19 August 1968 Criminal Session of Cabarrus Superior Court. On 21 August 1968 the presiding judge appointed counsel to represent defendant. On 22 August 1968 defendant and his counsel waived indictment and the case was heard upon an information charging defendant with misdemeanor escape alleged to have been committed on the same date as charged in the original warrant. Defendant pleaded guilty to the charge contained in the information and judgment was entered thereon imposing an active prison sentence. Defendant gave notice of appeal in open court and the court thereupon appointed defendant's original trial counsel to represent him upon the appeal. On 23 August 1968 appellant, without advice or joinder of his counsel, signed a written "withdrawal of notice of appeal." On the same date the clerk of superior court entered an order dismissing the appeal. A written notice of appeal, statement of indigency, and request for appointment of counsel, all dated 25 August 1968 were filed by appellant on 29 August 1968. On the same date the judge presiding at the 26 August 1968 Civil Session of Cabarrus Superior Court appointed defendant's present counsel to represent him on the appeal. On 30 August 1968 defendant, through his newly appointed counsel filed a written motion to set aside the order theretofore entered by the clerk of superior court purporting to dismiss the appeal. On the same date the clerk denied the motion. Thereafter the case on appeal was duly served and docketed in the Court of Appeals within apt time as extended by timely orders of the superior court.

Attorney General Robert Morgan and Staff Attorney L. P. Covington for the State.

Thomas K. Spence for defendant appellant.

PARKER, J.

Defendant assigns as error his trial, sentence, and commitment on the information in superior court, contending that since he was

before the superior court upon appeal from judgment rendered in the recorder's court, he could only be lawfully tried either on the original warrant or on an indictment.

[1] Article I, § 12 of the Constitution of North Carolina provides:

> "No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment, or impeachment, *but any person, when represented by counsel, may, under such regulations as the Legislature shall prescribe, waive indictment in all except capital cases.*" (Emphasis added.)

By virtue of this section an accused in a criminal proceeding, when represented by counsel, may, in all except capital cases, waive indictment under rules prescribed by the Legislature. *State v. Stevens,* 264 N.C. 364, 141 S.E. 2d 521; *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283.

The Legislature has in G.S. 15-140 prescribed the regulations under which an accused may waive indictment in misdemeanor cases, and in G.S. 15-140.1 has prescribed the regulations under which an accused may waive indictment in non-capital felony cases. G.S. 15-140, relating to waiver of indictment in misdemeanor cases, is as follows:

> "In any criminal action in the superior courts where the offense charged is a misdemeanor, the defendant may waive the finding and return into court of a bill of indictment. If the defendant pleads not guilty, the prosecution shall be on a written information, signed by the solicitor, which information shall contain as full and complete a statement of the accusation as would be required in an indictment. No waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel in such action who shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court. *The provisions of this section shall not apply to any case heard in the superior court on an appeal from an inferior court.*" (Emphasis added.)

[2, 3] Appellant was tried in the present case in the superior court on an appeal from his sentence imposed in an inferior court. Therefore, by its express language, G.S. 15-140 does not apply. Since the Legislature has chosen not to prescribe any regulations for waiver of indictment in such cases, defendant could only be lawfully tried in superior court either upon the original warrant or upon an

indictment. *State v. Gay*, 273 N.C. 125, 159 S.E. 2d 312; *State v. Razook*, 179 N.C. 708, 103 S.E. 67. Until the Legislature shall prescribe regulations governing the waiver of an indictment in a case heard in superior court on an appeal from an inferior court, an accused in such a case may not waive indictment and be tried upon an information. Article I, § 12, Constitution of North Carolina; see, *State v. Thomas, supra.* It was, therefore, error in the present case to sentence defendant upon an information in superior court when he was before that court only upon appeal from the recorder's court. Defendant's appeal, however, is still pending in the superior court, and the solicitor may yet try defendant upon the original warrant. See, *State v. Stevens, supra.*

[4, 5] The clerk of superior court was without authority to enter the order dated 23 August 1968 purporting to dismiss defendant's appeal, which order was entered after the defendant, without joinder of his counsel, had filed a written withdrawal of the appeal. At most the clerk had authority only to file and make an entry of such withdrawal. G.S. 15-184. However, appellant has suffered no prejudice by reason of the clerk's order purporting to dismiss his appeal, since in any event his appeal has been perfected and has been heard by this Court.

For the error noted above, the judgment against appellant is arrested and the case remanded to the superior court.

Error and remanded.

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

STATE OF NORTH CAROLINA v. HARVEY CULP

No. 6926SC32

(Filed 13 August 1969)

1. Indictment and Warrant § 10— use of alias names in indictment

Description of the accused in a bill of indictment by whatever alias names he may have been known to use is proper if done in good faith, and may even afford protection to a defendant if called upon to prove former jeopardy.

2. Criminal Law §§ 114, 165— instruction — reference to accused by alias name

Although the use of aliases may at some times be associated in the

public mind with the "criminal" class, defendant in this prosecution for breaking and entering and larceny was not prejudiced by court's references to him in the charge as "Harvey Culp, alias James William Hill," the names used to designate defendant in the indictment, where testimony at the trial raised no question as to the identity of defendant as the person who committed the offenses charged, and the character and credibility of defendant were in no way placed in question.

3. Criminal Law §§ 102, 116, 165— interrogation of accused in presence of jury as to whether he desired to testify

In this prosecution for breaking and entering and larceny, defendant was not prejudiced by the fact that his trial counsel, in the presence of the jury, questioned him as to whether he wished to take the witness stand, and at the request of defendant's counsel this question and defendant's answer were repeated into the record by the trial court, where the court instructed the jury that they should not consider the fact that defendant did not testify to his prejudice at any stage of the proceedings, although the better procedure is to place such a statement in the record outside the hearing of the jury.

4. Criminal Law § 168; Receiving Stolen Goods § 6— instructions — inadvertent reading of receiving count to jury

In this prosecution upon an indictment charging defendant with felonious breaking and entering, felonious larceny and receiving stolen property, defendant was not prejudiced when the court inadvertently read the receiving count to the jury in the charge, where immediately thereafter the court instructed the jury that they should not consider any portion of the bill of indictment which had to do with receiving stolen goods.

5. Constitutional Law § 36— cruel and unusual punishment

Imposition of two consecutive ten-year sentences upon defendant's conviction of felonious breaking and entering and felonious larceny cannot be considered cruel and unusual punishment in a constitutional sense, the sentences being within valid statutory limits.

APPEAL by defendant from *Beal, J.*, 2 September 1968 Schedule "D" Regular Criminal Session of MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment, which designated him as "Harvey Culp, alias James William Hill," with the crimes of felonious breaking and entering, felonious larceny, and receiving. He pleaded not guilty. Evidence for the State was in substance as follows: Shortly before midnight on 2 August 1968 defendant came to a service station located approximately one-half block around the corner from the Hollywood Grill in the City of Charlotte, N. C. There he borrowed a tire tool and rubber hammer, stating he had a flat tire. Approximately fifteen minutes later he returned and asked for a heavier hammer and tire tool, saying he was having a hard time changing the tire. At that time defendant had a gash in his arm and was bleeding. He explained he received this injury while

working on the tire. The filling station operator loaned defendant the heavier tools. The operator became worried that defendant would not bring his tools back and telephoned the police, who dispatched a cruiser to the area. The police found defendant inside the Hollywood Grill and arrested him on the spot. Property belonging to the owner of the Grill, including a check which the owner had left in the cash register on closing the business on the previous afternoon, was found in defendant's pockets. One hammer, a flashlight, and a blood-streaked rag were found inside the Grill. The other hammer was found in an upstairs room propping open a window which had been broken out. The tire tool was found in the grass around the corner of the building. The mesh-wire glass of the door to the Grill had been smashed. Defendant's arm was cut and blood was found inside the Grill and in the upstairs room.

The owner of the Grill testified he had closed it at 3:00 o'clock in the afternoon; that he did not know the defendant; and that he had not given defendant permission to enter the premises.

The jury found defendant guilty of felonious breaking and entering and of felonious larceny as charged in the first two counts of the indictment. The court entered judgment sentencing defendant to prison for a term of ten years upon the verdict of guilty on each count, the sentences to run consecutively. Defendant appealed.

Attorney General Robert Morgan and Staff Attorney Sidney S. Eagles, Jr., for the State.

George S. Daly, Jr., for defendant appellant.

PARKER, J.

[1, 2] Appellant assigns as error the court's references to defendant in its charge to the jury as "Harvey Culp, alias James William Hill," the names used to designate the defendant in the indictment. Description of the accused in a bill of indictment by whatever alias names he may have been known to use, if done in good faith, is proper and may even afford protection to a defendant if called upon to prove former jeopardy. It is true that the use of aliases may at some times be associated in the public mind with the so-called "criminal" class. For that reason some jurisdictions have held that the court's reference to an accused during the course of a trial by an unproved alias name may under certain circumstances constitute prejudicial error. See: *Commonwealth v. Torrealba,* 316 Mass. 24, 54 N.E. 2d 939; *People v. Klukofsky,* 201 Misc. 457, 114 N.Y.S. 2d 679; *State v. Smith,* 55 Wash. 2d 482, 348 P. 2d 417; *United States*

v. Monroe, 164 F. 2d 471; *United States v. Solowitz,* 99 F. 2d 714; *D'Allessandro v. U. S.,* 90 F. 2d 640. However, under the circumstances of this case we do not believe the defendant was prejudiced in any way by the court's reference to the alias. Testimony at the trial raised no question as to the identity of the defendant as the person who committed the offense charged. All of the testimony was to the effect that he was arrested while actually in the course of perpetrating the crime. The character and credibility of defendant were in no way placed in question. The only problem for the jury was whether they should believe the State's witnesses. In any event it is incumbent upon appellant to show not only error but that the error was prejudicial. "An error cannot be regarded as prejudicial to a substantial right of a litigant unless there is a reasonable probability that the result of the trial might have been materially more favorable to him if the error had not occurred." *Call v. Stroud,* 232 N.C. 478, 479, 61 S.E. 2d 342, 343.

[3] Appellant next assigns as error that he was prejudiced in that his trial counsel, in the presence of the jury, questioned him as to whether he wished to take the witness stand, and at the request of defendant's counsel this question and defendant's answer were repeated into the record by the presiding judge. While the better procedure would have been to have this statement placed in the record outside the hearing of the jury, any possible prejudicial effect to defendant was cured when the court, in its charge to the jury, properly and fully instructed the jury that they should not consider the fact that the defendant did not testify to his prejudice at any stage of the proceedings. *State v. Lewis,* 256 N.C. 430, 124 S.E. 2d 115.

[4] Appellant assigns as error that portion of the court's charge to the jury in which, while reading the bill of indictment, the court read the third count therein which charged defendant with the crime of receiving stolen property. Reading this count was, in the first instance, an obvious inadvertence on the part of the trial judge. Any possible prejudicial effect to defendant was removed when the court, immediately after reading the third count, clearly instructed the jury that they should not consider any portion of the bill of indictment which had to do with receiving stolen goods. The remaining assignments of error directed to the charge have been reviewed and have been found to be without merit.

[5] Appellant's final assignment of error is that the punishment imposed by the court, which was two consecutive ten-year terms, was "cruel and unusual" within the meaning of Article I, § 14, of the North Carolina Constitution. In this case, the sentences imposed

were within valid statutory limits and cannot be considered cruel and unusual punishment in a constitutional sense. *State v. Robinson*, 271 N.C. 448, 156 S.E. 2d 854; *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216; *State v. Stansbury*, 230 N.C. 589, 55 S.E. 2d 185.

No error.

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

STATE HIGHWAY COMMISSION v. HENRY WILSON ROWSON; ABRAHAM ROWSON, JR., EXECUTOR; KNOWN AND UNKNOWN BORN AND UNBORN HEIRS OF ABRAHAM ROWSON, DECEASED; AND RICHARD POWELL ANCILLARY ADMINISTRATOR

No. 692SC232

(Filed 13 August 1969)

1. Judgments § 8— consent judgment defined

A consent judgment is the contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval.

2. Judgments § 8— jurisdiction of court to enter consent judgment — consent of parties

The power of a court to sign a consent judgment depends upon the unqualified consent of the parties thereto, which consent must still subsist at the time the court is called upon to exercise its jurisdiction and sign the consent judgment.

3. Judgments § 8— jurisdiction of court to sign consent judgment repudiated by one party

In this highway condemnation action, the trial court was without power to sign a judgment, based upon the consent of the parties, after defendant repudiated the agreement and withdrew his consent thereto.

4. Judgments § 21— setting aside consent judgment — motion in the cause — judgment void on its face

Ordinarily when a party to a purported consent judgment denies that he actually consented thereto, the question is properly raised by a motion in the cause, but where the consent judgment shows on its face that defendant who appealed from the judgment had repudiated his agreement and no longer consented to the judgment at the time it was signed, the judgment is void on its face and it was not necessary for the non-consenting defendant to move to set it aside.

APPEAL by defendants, Henry Wilson Rowson and Richard Powell, Ancilliary Administrator, from *Cowper, J.*, 12 November 1968 Session of WASHINGTON Superior Court.

This is a condemnation proceeding instituted by plaintiff to acquire title to certain lands owned by defendant Henry Wilson Rowson for Highway Project No. 8.2266501. Plaintiff filed complaint and declaration of taking pursuant to G.S. 136-103 in which plaintiff estimated the sum of $6,000.00 to be just compensation for the taking, and plaintiff deposited that amount with the clerk of superior court at the time the suit was instituted. The defendant, Henry Wilson Rowson, filed answer, alleging he was sole owner of the land in question and that he had been damaged in the amount of $22,500.00 as a result of the taking, which amount he seeks to recover from plaintiff. The case came on for trial at the 12 November 1968 Session of Washington Superior Court. The following appears in the minutes of that session of court:

> "This case was called and agreement was reached between all parties in open court. It was agreed that judgment be prepared and same be signed out of term, out of the county and out of the district."

Thereafter, under date of 27 January 1969, the judge of superior court signed a "consent judgment" containing the following:

> "THIS CAUSE coming on to be heard and being heard before the undersigned Judge of the Superior Court and it appearing to the Court and the Court finding as fact:
>
> * * * * *
>
> "That this case was set for trial on November 12, 1968, before the Honorable Albert W. Cowper in the Superior Court of Washington County. That upon the request of the plaintiff and the defendants, Judge Cowper held up the trial of this action for several hours while the plaintiff and defendants attempted to negotiate a settlement in this action. That a settlement was reached in open court before Judge Cowper, witnessed by Richard Powell of Greenville, North Carolina and David Rublin of Mount Vernon, New York, Attorneys for the defendants. W. L. Whitley and James E. Magner, Attorneys for the defendant, State Highway Commission, also witnessed this settlement, the plaintiff agreed to pay and the defendants agreed to accept an additional sum of ONE THOUSAND DOLLARS ($1,000.00) which included interest plus the original deposit of SIX THOUSAND DOLLARS ($6,000.00) making a total of SEVEN THOUSAND DOLLARS ($7,000.00) as full and just compensation for the appropriation of the interest and area taken as set forth in the Complaint and Declaration of Taking and as hereinafter more particularly described; for any and all dam-

ages caused by the construction of State Highway Project 8.2266501, Washington County and for the past and future use thereof by the State Highway Commission, its successors and assigns, for all purposes for which the Highway Commission is authorized by law to subject the same.

"That upon the presentation of the Judgment to said defendant, Henry Wilson Rowson, for his signature, he refused to sign the Judgment and stated that he will refuse to sign any Consent Judgment concerning the settlement of this case, thereby repudiating his agreement reached in open court before Judge Cowper and the witnesses that are hereinabove set out. That the plaintiff, State Highway Commission, has in its possession a check for the additional ONE THOUSAND DOLLARS ($1,000.00) agreed upon and will deposit said check with the Clerk of Court of Washington County as soon as the Judgment is signed by the undersigned Judge of the Superior Court of North Carolina."

Based on these findings, Judge Cowper ordered the plaintiff Highway Commission to pay the additional $1,000.00 into court and adjudged that the sum of $7,000.00, being the total amount of the original deposit plus the additional $1,000.00, was the full, fair and adequate value of the land involved in this proceeding, and represented just compensation for the taking.

To the entry of this judgment the defendant, Henry Wilson Rowson, and Richard Powell, Ancillary Administrator, excepted and appealed.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Staff Attorney James E. Magner for State Highway Commission, plaintiff appellee.

Richard Powell for defendant appellants.

PARKER, J.

[1-3] It is a settled principle of law in this State that a consent judgment is the contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval. *King v. King,* 225 N.C. 639, 35 S.E. 2d 893; *Keen v. Parker,* 217 N.C. 378, 3 S.E. 2d 209. "Moreover, the power of a court to sign a consent judgment depends upon the unqualified consent of the parties thereto, *King v. King, supra,* and 'the consent of the parties must still subsist at the time the court is called upon to exercise its juris-

diction and sign the consent judgment.'" *Lee v. Rhodes,* 227 N.C. 240, 242, 41 S.E. 2d 747, 748. The last cited case is determinative of the case presently before us. In *Lee v. Rhodes, supra,* after the trial had been in progress for two days, the parties agreed to a settlement, the terms of which were communicated to the trial judge by plaintiff's counsel in open court, in the presence of the plaintiff, who made no objection thereto. The trial judge expressed approval of the settlement. However, when several days later judgment was tendered in accordance with the terms of the compromise agreement, the plaintiff repudiated the agreement. On appeal the North Carolina Supreme Court in an opinion by Denny, J. (later C.J.) held that the trial court "was without power to sign a judgment, based upon the consent of the parties, after one of the parties repudiated the agreement and had withdrawn his consent thereto."

[4] Ordinarily when a party to a purported consent judgment denies that he actually consented thereto, the question is properly raised by a motion in the cause. *Overton v. Overton,* 259 N.C. 31, 129 S.E. 2d 593; *King v. King, supra.* In the present case, however, the consent judgment shows on its face that the appealing defendant, Henry Wilson Rowson, had repudiated his agreement and no longer consented to the judgment at the time it was signed. Therefore the judgment was void upon its face, and it was not necessary for the non-consenting defendant to move to set it aside. The judgment appealed from being void, the same should be stricken and this cause remanded to the superior court for trial.

Reversed and remanded.

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

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

No. 6910DC349

(Filed 13 August 1969)

1. Negligence § 14; Insurance § 69— uninsured motorist policy — assumption of risk — contractual relationship

In this action to recover under an uninsured motorist provision for injuries received by plaintiff mechanic when an uninsured automobile which plaintiff was repairing fell on him, the doctrine of assumption of risk is

available to defendant insurer where the allegations of the pleadings tend to show a contractual relationship between plaintiff and the automobile owner for plaintiff to make the repairs.

2. Negligence § 38— contributory negligence — instructions

In this action to recover under an uninsured motorist provision for injuries received by plaintiff mechanic while repairing an uninsured automobile, the trial court's instructions on the issue of contributory negligence were so susceptible of creating confusion in the minds of the jury that they constitute prejudicial error.

APPEAL by plaintiff from *Ransdell, J.*, February 1969 Civil Session, District Court, WAKE Division of the General Court of Justice.

This is an action to recover under an "Uninsured Motorist" policy for personal injuries sustained by original plaintiff, Perry Clay Williams (husband of defendant's insured), while he was repairing an automobile belonging to one James Singletary. The question of coverage under the policy has been decided by the Supreme Court in *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102. Perry Clay Williams died prior to the trial of the matter though not from injuries received in this accident, and his widow, Margaret B. Williams, qualified as administratrix and was substituted as plaintiff.

The complaint, in addition to jurisdictional allegations and allegations of insurance coverage, alleged that original plaintiff, a mechanic, at the request of Singletary, went to the residence of Singletary to repair an automobile belonging to Singletary. He found the car up on blocks, inspected the blocks, satisfied himself that the car was secure, and crawled under the automobile to commence his work. While original plaintiff was under the automobile, Singletary carelessly and negligently raised the automobile and removed the left front wheel, and as a result the automobile fell or rolled on original plaintiff causing serious bodily injury.

Defendant answered admitting the issuance of the policy of insurance, admitting the allegation that "plaintiff is a mechanic by profession and at times goes to the residence of his clientele to make repairs on their automobiles", admitting the allegation that plaintiff was requested to make repairs on Singletary's car which was not brought to plaintiff's place of business but was located at a barn used by Singletary. All other allegations were denied, and defendant averred that if Singletary were an uninsured motorist, which was denied, he was guilty of no negligence in placing the car on blocks and further that the car was jacked up and the left front wheel removed in a careful manner. By its second further answer and defense, defendant alleged the contract of employment with Singletary

and pleaded the doctrine of assumption of risk and by his third further answer and defense defendant pleaded the contributory negligence of plaintiff.

Plaintiff interposed a demurrer to the second further answer and defense. The demurrer was overruled and plaintiff excepted.

Upon trial the matter was submitted to the jury upon four issues: (1) negligence of Singletary, (2) contributory negligence of plaintiff's intestate, (3) damages, (4) whether Singletary was an uninsured motorist under the provisions of the defendant's policy as alleged in the complaint. The jury answered the first and second issues "Yes", did not answer the other issues, and plaintiff appealed.

Vaughan S. Winborne for plaintiff appellant.

Bailey, Dixon & Wooten by Wright T. Dixon, Jr., for defendant appellee.

MORRIS, J.

Plaintiff assigns as error the overruling of the demurrer interposed to the second further answer and defense, the failure of the court to set aside the verdict on the second issue, and certain portions of the charge to the jury.

[1] The allegations of the pleadings tend to show a contractual relationship between the original plaintiff and Singletary. Therefore, we are of the opinion that the doctrine of assumption of risk is available to this defendant as a defense. *Clark v. Freight Carriers,* 247 N.C. 705, 102 S.E. 2d 252. We note from the record that defendant tendered an issue on assumption of risk which was declined by the court. The question of the sufficiency of the evidence to support such an issue is not before us.

[2] We think plaintiff's exceptions to the charge of the court are well taken. The court instructed the jury that the burden of proof on the second issue was on the defendant. There followed immediately this: "Now, if the defendant has failed to satisfy you on this second issue, and to satisfy you by the greater weight of the evidence, or after a fair and impartial consideration of all the evidence, you are unable to determine where the truth lies on this second issue, then it would be your duty to answer this issue YES." While obviously an inadvertent error, we think this error and others in the charge necessitate a new trial. After the court had discussed all four issues, he advised the jury that he would read what the Supreme Court has said constitutes negligence and contributory negligence.

He did then read a discussion of negligence, proximate cause, and foreseeability. He then instructed the jury as to the interest or lack of interest of a witness, his own lack of opinion and the duty of the jury to recollect the facts. He then restated the issues and after restating the first issue said "and I believe I did not tell you that contributory negligence is just simply negligence on the part of the plaintiff. That is the only reason it is called contributory negligence." After instructing the jury again that if they answered the first issue YES, they would consider the second issue, the charge was as follows: "The burden shifts on the defendant to satisfy you, and satisfy you by the greater weight of the evidence, that the plaintiff, Perry Clay Williams, now deceased, contributed to his own damage, to his own injuries, in any manner in which he performed his work on this car, or in any other way while he was on the premises of the defendant then you would answer that issue YES. If he has failed to satisfy you and satisfy you by the greater weight of the evidence, or if you cannot determine where the truth is, then you would answer that issue NO."

The portions of the charge of the court having to do with the second issue are, we think, so susceptible of creating confusion in the minds of the jury that they constitute prejudicial error, nor can we say that the charge, when read as a whole, presents the law of the case to the jury in such a manner as to leave no reasonable cause to believe that the jury was misled or misinformed.

Plaintiff also contends that the evidence was insufficient to support the verdict of the jury on the second issue. Since there must be a new trial, we refrain from discussing the sufficiency of the evidence.

New trial.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES W. SMITH

No. 6922SC372

(Filed 13 August 1969)

1. Criminal Law § 85— evidence of defendant's character — prior indictment — admissibility

Where defendant took the stand and testified in his own behalf, but solicitor did not elect to cross-examine him concerning a previous indict-

ment charging him with assault on a female, it was error to permit solicitor thereafter to question defendant's character witnesses as to whether they were aware that defendant had been previously indicted.

2. Assault and Battery § 14— felonious assault — evidence of serious injury — nonsuit

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries not resulting in death, State's evidence that a tire tool wielded by defendant struck the victim a glancing blow on the head and that the victim had swollen areas about the back part of his skull, *held* sufficient to be submitted to the jury on the question of serious injury.

APPEAL by defendant from *McConnell, J.*, 3 February 1969 Session, IREDELL Superior Court.

Defendant was charged in a bill of indictment with the felony of assault with a deadly weapon (to wit: his feet and a tire tool) with intent to kill, inflicting serious injuries not resulting in death upon one Robert Ebert. Defendant pleaded not guilty to the bill of indictment.

Evidence for the State tended to show that on 7 April 1968, at approximately 9:00 or 9:30 p.m., Robert Ebert, the prosecuting witness, drove into the parking lot of his apartment and saw the defendant standing facing the door to his apartment; that defendant walked towards Ebert's car and as Ebert spoke to defendant and extended his hand, defendant pulled a tire tool from behind him, raised it up, charged at Ebert, and said, "I am going to kill you;" that defendant struck Ebert with the tire tool a glancing blow on the back of his head, on the shoulder of his neck, and the neck muscles; that Ebert was dazed, dizzy, and fell while holding onto the tire tool; that when he fell to the ground, defendant started hitting him in the face with his fist, kicking, and stomping him with his feet while screaming, "I'm going to kill you; I'm going to kill you; I'm going to disfigure your face;" cursing and saying, "I'm going to fix your face so she won't like it;" that defendant continued to kick and stomp Ebert, occasionally stopping, then starting again, for a period of fifteen to twenty minutes; and that Ebert sustained injuries to his head, face, arms, ribs and spine. His right cheek bone was caved in, his face was swollen, his right eye was shut; there was a laceration on his lower lip; there were swollen areas about his skull, particularly the back part; there was pain in his chest and in breathing and he was tender over the dorsal spine; he required surgery on his face, seven days hospitalization, and had medical expenses of $1,065.14.

Defendant's evidence tended to show that at the time of this incident Ebert had been dating defendant's fiancee and had just spent a weekend with her; that he went to Ebert's apartment to get his fiancee; that he had a tire tool to break into the apartment if necessary; and that Ebert angered him by making derogatory statements about his fiancee, as a result of which he slapped Ebert and a fight ensued. Defendant denied hitting Ebert with the tire tool or kicking him.

The jury returned a verdict of guilty of felonious assault, upon which verdict the court entered judgment sentencing defendant to a term of three to seven years, suspended for a period of three years on the condition that defendant be placed on probation and pay a fine of $1,500.00. From this verdict and judgment defendant appealed.

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

Bennett, Kelly & Long, by George W. Hendon, for defendant appellant.

BROCK, J.

[1] Defendant assigns as error that the trial court allowed the State to cross-examine defendant's character witnesses as to whether they were aware of a previous indictment against defendant for assault. At the trial defendant took the stand and testified in his own behalf. The defendant then availed himself of his right to introduce evidence of his own good character by calling witnesses to testify. After they testified as to the defendant's good character, the solicitor was permitted to ask each witness the following question, over defendant's objection: "Were you aware when you testified as to his character of the fact that he had been indicted for assault on a female?"

Defendant testified in his own behalf before he offered his character witnesses; but, for some reason not apparent from the record, the solicitor did not elect to ask the defendant about an indictment for assault on a female. Such cross-examination would have been proper if fairly done; *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297; and defendant's answer would have been binding on the State. 2 Strong, N.C. Index 2d, Criminal Law, § 86, p. 606. Had defendant denied that he had ever been so indicted, certainly the State could not have pursued the inquiry through other witnesses. 2 Strong, N.C. Index 2d, *supra.* Having elected not to cross-examine the de-

fendant and give him the opportunity to admit or deny such an indictment, the State could not go into the question of specific acts of misconduct through defendant's character witness.

> "Ordinarily where a defendant introduces evidence of his good character it is error to permit the State to cross-examine the character witness as to particular acts of misconduct on the part of the defendant. Neither is it permissible for the State to introduce other evidence of such misconduct. Under such circumstances, however, the State is permitted to introduce evidence of the defendant's bad character. (Citing cases.)
>
> "The above rule is subject to certain exceptions, among them being where a defendant goes upon the stand and admits certain specific acts of misconduct, as the defendant did in the trial below, and then introduces evidence of his good character, the State has the right to cross-examine such character witness regarding the admitted acts of misconduct in order to ascertain his conception of what constitutes good character. (Citing cases.)" *State v. Church*, 229 N.C. 718, 51 S.E. 2d 345.

[2] Defendant next argues that the trial court erred in denying defendant's motions for nonsuit as to the felony charge because of the absence of any proof that the deadly weapon (the tire tool) inflicted any serious injury. However, the State's evidence tended to show that as defendant approached Ebert he reached from behind his body and pulled out a tire tool, held it up in the air, charged at Ebert and brought the tire tool down. Ebert reached up and grabbed it at the same time. The tool came down and hit him a glancing blow on the head and stopped in his shoulder, at which point he became dazed and dizzy. The State's evidence further tended to show that Mr. Ebert had swollen areas about the back part of his skull. It is manifestly evident that a blow on the head with a tire tool might cause serious injury. Whether it did or did not must be determined from the facts of the particular case and is a question the jury must answer under proper instructions. *State v. Jones*, 258 N.C. 89, 128 S.E. 2d 1.

We have not overlooked defendant's assignments of error to the charge of the court to the jury. These assignments of error seem to have some merit, but under the circumstances we feel they will not reoccur upon a new trial.

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. CURTIS M. HUGHES

No. 6921SC368

(Filed 13 August 1969)

1. Constitutional Law § 32; Criminal Law § 66— right to counsel — confrontation — identification of defendant — evidence

Confrontation for the purpose of identification is a critical stage of pre-trial criminal proceedings and requires the presence of an attorney unless voluntarily waived; evidence of an out-of-court identification not meeting these requirements is incompetent, and an in-court identification is incompetent if it is a result of the illegal out-of-court confrontation.

2. Criminal Law §§ 66, 84— pre-trial identification of defendant — right to counsel — illegal confrontation

Even if jailhouse confrontation between robbery victim and defendant for purpose of identification had violated defendant's constitutional right to be advised of right to counsel, it was nonetheless proper to admit victim's in-court identification of defendant where such identification was clearly based upon the victim's observation of defendant through the rear view mirror of victim's taxicab at the time of the robbery.

3. Criminal Law § 66— pre-trial identification of defendant — illegal confrontation — findings of fact

Failure of trial judge to insert into the record findings relating to jailhouse confrontation for identification purposes between defendant and robbery victim will be deemed harmless error where the evidence is uncontradicted that the victim's in-court identification of defendant was not based on the jailhouse confrontation but had an independent origin in the victim's observation of defendant at the time of robbery.

4. Criminal Law § 91— continuance — discretion of court

The granting of a continuance is a matter entirely within the discretion of the trial judge and not reviewable unless there is a clear abuse of discretion.

5. Criminal Law § 91— continuance — temporary absence of defense witnesses — discretion of court

Where defendant's attorney excused three defense witnesses for the rest of the day in the mistaken belief that the State would take the remainder of the afternoon in presenting its evidence, trial court did not abuse its discretion in denying defendant's motion for continuance until the next day because of the absence of the witnesses.

6. Criminal Law § 170— remarks of court — defendant as a witness — prejudicial error

Any violation of defendant's constitutional privilege against self-incrimination resulting from trial court's inquiry to defense counsel, in the presence of the jury, as to whether defendant would be offered as a witness, *held* effectively removed by the charge.

STATE *v.* HUGHES

APPEAL by defendant from *Armstrong, J.*, 21 April 1969 Criminal Session, Superior Court of FORSYTH.

Defendant was charged, under an indictment proper in form, with the attempted armed robbery of one Gerald Ward Casey on 17 November 1968.

On 17 November 1968 Gerald Ward Casey (Casey) was operating a taxicab in the area of the Union Bus Station in Winston-Salem, North Carolina. At the bus station he picked up a passenger, identified in court as being the defendant in this case. Casey was ordered by the passenger to go to 11th and Dunleith. Before arriving at this destination Casey was ordered by the defendant to stop the taxicab. Defendant then put a butcher knife to Casey's throat and ordered Casey to give him his money, or, defendant stated, he would kill him. Casey began to struggle with the defendant, and during the course of this struggle the taxicab rolled backwards into a pole. Defendant jumped from the cab and ran.

From a verdict of guilty as charged and sentence of imprisonment the defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Staff Attorney D. M. Jacobs for the State.

Deal, Hutchins and Minor by Edwin T. Pullen for defendant appellant.

MORRIS, J.

The prosecuting witness Casey testified on direct examination, over objection, that when he first saw the defendant on the night in question he was standing near the bus station near a lighted area. Casey pointed to the defendant Hughes and stated that he was the man he saw standing near the bus station and who later robbed him. Casey also testified that he observed the defendant in his rear view mirror as he drove toward the purported destination. The witness stated that his in-court identification of the defendant was based on observations made on the night of the robbery.

On cross-examination, it was brought out by defendant's attorney, that Casey had been called by the police approximately one week following the robbery and asked to come to the jail and look at a suspect. When Casey arrived at the jail, the defendant was brought out into the hallway and immediately identified by Casey. There is no evidence that the defendant had been informed of his right to have counsel at this confrontation. At the close of the State's

evidence the defendant moved "to strike the testimony of the prosecuting witness as to the identification." This motion was denied by the trial judge.

[1] Recent cases have established that confrontation for the purposes of identification is a critical stage of pretrial criminal proceedings and requires the presence of an attorney unless voluntarily waived. *U. S. v. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926; *Gilbert v. California,* 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1952. Evidence of an out-of-court identification, not meeting these requirements is incompetent. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581. And an in-court identification is incompetent if it was a result of the illegal out-of-court confrontation. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353.

We need not decide whether the out-of-court confrontation violated recently enunciated constitutional standards under our interpretation of this case. We need only decide whether the in-court identification, assuming that the out-of-court identification was improper, was "tainted" by the out-of-court identification. As stated in *U. S. v. Wade, supra:*

> "We think it follows that the proper test to be applied in these situations is that quoted in *Wong Sun v. United States,* 371 U.S. 471, 488, 9 L ed 2d 441, 455, 84 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. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup." Quoted in *State v. Williams, supra.*

[2, 3] In the present case Casey stated that when the defendant got into the taxicab he was standing in a lighted area, and that he observed the defendant through his rear view mirror at various times while in route to the destination. Casey stated: "I base it [the in-court identification] on what I saw on November the 17th, on a

Sunday night. That is what I base that on." We think it was uncontradicted that the in-court identification was not "tainted" by the confrontation which took place in the jail, and had its origin independently of the witness's observation of the defendant at the jail. The trial judge correctly overruled defendant's motion to exclude this evidence. The evidence of Casey's opportunity to observe the defendant being uncontradicted, the failure of the trial judge to insert such findings into the record was harmless error. *State v. Williams, supra.*

[4, 5] Defendant argues that the trial judge committed prejudicial error in refusing to allow a continuance until the next day because of the absence of witnesses. Defendant's attorney during the course of the trial excused three of the defendant's witnesses upon the belief that the State would take the balance of the afternoon in presenting their evidence. This was not the case. The granting of a continuance is a matter entirely within the discretion of the trial judge and not reviewable unless there is a clear abuse of discretion. *Dupree v. Insurance Co.*, 92 N.C. 418; *State v. Banks*, 204 N.C. 233, 167 S.E. 851; and *State v. Murphy*, 4 N.C. App. 457, 167 S.E. 2d 8. We think this rule is in accord with sound policy. In this day of crowded court calendars, Judges, with the aid of attorneys, should and must take steps to insure the smooth flow of cases. However, in some cases, in the interest of justice, a continuance should be granted. Absent a clear showing of an abuse of discretion, the trial judge's decision on this matter should stand. This assignment of error is overruled. Likewise, the court's refusal to allow defendant to reopen his case must stand. *State v. Graves*, 252 N.C. 779, 114 S.E. 2d 770; *State v. Coffey*, 255 N.C. 293, 121 S.E. 2d 736.

[6] Upon the request for a continuance until the next day by defendant's counsel, the trial judge asked if defendant had any other evidence to present. Defendant's attorney answered no, and the trial judge then inquired if the defendant was going to testify. After a conference at the bench, the court again stated, "You're not going to offer the defendant then?" These statements were made in the presence of the jury. Defendant argues that these statements by the trial judge violated his constitutional privilege against self-incrimination. If any error was committed, we think the trial judge in his charge to the jury "properly and effectively removed any prejudicial effect that might have resulted" from these statements. *State v. Lewis*, 256 N.C. 430, 124 S.E. 2d 115, and cases there cited.

Affirmed.

CAMPBELL and BROCK, JJ., concur.

CHOATE MOTOR COMPANY v. CHARLES RAY GRAY

No. 6923SC325

(Filed 13 August 1969)

1. Pleadings § 26— demurrer — construction of allegations of complaint

Upon demurrer, the allegations of the complaint will be taken as true and the complaint liberally construed in favor of plaintiff, and unless the pleading is fatally defective or wholly insufficient, demurrer should not be sustained.

2. Pleadings § 26— demurrer — contributory negligence as matter of law — sufficiency of complaint

In this action for damages sustained when plaintiff's automobile struck the rear of defendant's automobile, which had stopped in plaintiff's lane of travel, the complaint is sufficient to withstand defendant's demurrer on the ground that it shows on its face plaintiff's contributory negligence as a matter of law.

3. Automobiles § 56— hitting vehicle stopped on highway — sufficiency of evidence

In this action for damages resulting from an automobile collision, plaintiff's evidence *is held* sufficient to be submitted to the jury where it tends to show that when plaintiff rounded a curve, he saw defendant's automobile stopped in his lane of travel 100 feet away, and that plaintiff applied his brakes but was unable to stop before striking defendant's automobile.

APPEAL by defendant from *Johnston, J.*, 27 March 1969 Session, Superior Court of ALLEGHANY.

Plaintiff instituted this action to recover for damage to its automobile resulting from a collision which occurred on 1 December 1966. Plaintiff alleged that Murphy was driving its 1962 Chevrolet in a westerly direction on N.C. Highway 18 at a point about 18 miles east of Sparta, at approximately 4:40 p.m.; that Murphy, driving at a speed of about 45 miles per hour in a 55 mile-per-hour zone, came around a blind curve; that defendant, also traveling in a westerly direction had caused his automobile suddenly to be parked and stopped on the right hand portion of the highway while he was "illegally attempting to flag down another automobile approaching from the opposite direction, and in a blind curve"; and that, due to defendant's negligence, Murphy hit the defendant's car in the rear. Plaintiff alleged that defendant was negligent in that: he parked his automobile on the paved portion of the highway when it was practical to park it off of said highway; that he parked it without leaving an unobstructed width of 15 feet of pavement; that he parked it

where there was not an unobstructed view of the vehicle for 200 feet in both directions; that he parked it in a blind curve; that he knew or should have anticipated that the view of an approaching motorist would be obstructed; that he failed to give adequate warning or notice to approaching traffic of his standing vehicle; and that he failed to take such precaution as would reasonably be calculated to prevent injury, all of which was in direct violation of G.S. 20-161.

Plaintiff also alleged that defendant failed to keep a proper lookout, operated his automobile carelessly and heedlessly, in wanton and willful disregard of the rights of others, that he failed to observe plaintiff and failed to yield the right of way to an automobile then and there on the highway, that these acts of negligence were the sole and proximate cause of plaintiff's damage.

Defendant answered denying all allegations of negligence, averred that defendant was operating his automobile westerly on N.C. Highway 18, that Murphy was operating plaintiff's car at the same time in the same direction upon said highway in a careless, reckless and dangerous manner at a speed greater than prudent and failed to bring his automobile under control after he saw, or in the exercise of due diligence, should have seen defendant's automobile, that the highway was straight for a long distance, and plaintiff's damages, if any, resulted solely from and were proximately caused by Murphy's negligence.

By second further answer and counterclaim defendant averred that defendant, traveling on a straight stretch of road, gave a hand signal for slowing his vehicle, when his vehicle was suddenly and without warning struck from the rear by the automobile operated by Murphy. The specific acts of negligence attributed to Murphy were set out and defendant prayed for recovery of damages to person and property.

The issues submitted to the jury and the answers thereto were: "1. Was the plaintiff's property damaged by the negligence of the defendant? Answer: 'No.' 2. Was the defendant injured and his property damaged by the negligence of the plaintiff? Answer: 'No.'" From judgment entered thereon defendant appealed.

Arnold L. Young and J. Colin Campbell for defendant appellant.
No appearance for plaintiff appellee.

MORRIS, J.

[1, 2] Defendant, on appeal, demurs *ore tenus* to plaintiff's complaint contending that the complaint shows on its face plaintiff's

contributory negligence as a matter of law. Defendant presents no argument in support of the demurrer. Upon demurrer, the allegations of the complaint will be taken as true and the complaint liberally construed in favor of plaintiff and unless the pleading is fatally defective or wholly insufficient, demurrer should not be sustained. 6 Strong, N.C. Index 2d, Pleadings, § 26, p. 348. While this complaint may not be a model of clarity, we think it sufficient to withstand demurrer. The demurrer is overruled.

[3] Defendant earnestly contends that his motion for nonsuit, made at the close of plaintiff's evidence and renewed at the close of all the evidence, should have been sustained and that the verdict of the jury was contrary to fact and applicable law.

On a motion to nonsuit, plaintiff's evidence must be taken as true and 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. *Perkins v. Cook,* 272 N.C. 477, 158 S.E. 2d 584. When these well-known rules are applied to plaintiff's evidence, it tends to show: On 1 December 1966, Murphy, an employee of plaintiff, was driving a 1962 Chevrolet in a westerly direction along N.C. Highway 18 about 4:30 in the afternoon. He was close to Edward Wright's which is about a mile from the top of the mountain or Parkway and about 300 or 400 yards west of the road that goes up to the old Pack Murphy place. The road was crooked. There is a "pretty stiff curve." The highway was about 20 feet in width and the weather was fair. He came around the curve "and this automobile was stopped in front of me." He was flagging down a 1964 Ford station wagon. The station wagon came on by and Murphy "slid into" the rear of defendant's car. The defendant's car was on his right side of the road and completely on the hard surface. Murphy was traveling at a speed of about 45 miles per hour. When he first observed defendant's car as he came around the curve it was about 100 feet away. Murphy was traveling about 15 miles per hour when he hit defendant's car. His tires were good and they skidded. There were about 54 feet of skid marks from all four wheels of the Murphy vehicle. When the patrolman arrived, the vehicles were sitting about 150 or 200 feet from the curve. Defendant stated to the patrolman that he was traveling west on N.C. Highway 18, "looking for a fellow and met him there and that this fellow he wanted to see, he met him traveling in the other direction; and, consequently, he stopped or was attempting to stop to flag this fellow down." The shoulder is a very narrow shoulder on the right and then a bank or fill.

In our view of the evidence, the jury could have found that plaintiff's damage proximately resulted from the negligence of defendant and we think the motion to nonsuit was properly overruled.

No error.

CAMPBELL and BROCK, JJ., concur.

DORIS REID, ADMINISTRATRIX OF THE ESTATE OF CURTIS CHARLES ELLERBEE, DECEASED v. BOBBY NATHANIEL SMITH AND L. V. MILLER SMITH

No. 6914SC341

(Filed 13 August 1969)

Executors and Administrators § 2; Death §§ 3, 4— wrongful death action — false allegation of appointment as administratrix — subsequent appointment — relation back

A party who has not been appointed as administratrix and has not offered herself for qualification may not, upon a false allegation that she has qualified as administratrix, commence an action for wrongful death and, following the expiration of the statute of limitations, validate that action by a subsequent appointment as administratrix.

ON writ of certiorari issued on 30 January 1969 to Superior Court of DURHAM.

This action for recovery for wrongful death was commenced on 10 April 1968 and complaint was filed on this same date.

The facts which are pertinent to this appeal were stipulated by the parties as follows:

Curtis Charles Ellerbee, plaintiff's intestate was killed on 8 January 1965. On 31 May 1965, an action was filed in the Superior Court of Durham County entitled "Doris Reid, Administratrix of the Estate of Curtis Charles Ellerbee, Deceased vs. Bobby Nathaniel Smith and L. V. Miller Smith." Although in the action started on 31 May 1965, it was alleged that Doris Reid had qualified as the administratrix of the estate of Curtis Charles Ellerbee, in fact, she had not qualified as administratrix, had not offered herself for qualification, nor had any other person qualified or offered to qualify as administrator or administratrix. On 17 August 1967 (more than two years after the death of Curtis Charles Ellerbee) Doris Reid quali-

fied as administratrix of the estate of Curtis Charles Ellerbee. On 13 November 1967 judgment of voluntary nonsuit was entered in the action started on 31 May 1965.

The action now before this Court was commenced on 10 April 1968. By answer filed on 14 October 1968 defendants deny plaintiff's allegations of negligence and as a first further answer and defense allege that this action is barred by the statute of limitations, which is expressly pleaded as a bar to this action. The defendants' plea in bar was heard by Judge Clark upon consent of the parties and upon facts stipulated by the parties as above stated. By order filed on 20 December 1968, the defendants' first further answer and defense was denied. Defendants' petition for writ of certiorari to the Superior Court of Durham was allowed by this Court on 30 January 1969.

A. H. Borland and C. Horton Poe, Jr., for plaintiff appellee.

Haywood, Denny & Miller by George W. Miller, Jr., for defendant appellants.

MORRIS, J.

This case presents for determination the question of whether a party who has not been appointed administrator or administratrix, and who has not offered herself for qualification, may, upon a false allegation of appointment, commence an action for wrongful death, and, following the expiration of the statute of limitations, validate that action by a subsequent appointment.

G.S. 28-173 provides for recovery in the case of a wrongful death by an *executor, administrator, or collector of the decedent.* G.S. 1-53(4) provides that an action brought pursuant to the provisions of G.S. 28-173 is subject to a two-year statute of limitations. Therefore, when Doris Reid qualified on 17 August 1967 the time within which the action could be brought had expired. Did the appointment of Doris Reid on 17 August 1967 as administratrix of the estate of Curtis Charles Ellerbee, relate back to the commencement of the original action, so that under the provisions of G.S. 1-25, the present action would not be barred by the statute of limitations applicable to this action?

In *Graves v. Welborn,* 260 N.C. 688, 133 S.E. 2d 761, our Supreme Court was faced with a situation in which a widow had sued for the wrongful death of her husband alleging that she was the duly appointed administratrix of her husband's estate. In reality she had taken the oath, signed the bond as principal, and left it with the

clerk so that it could be signed by the surety. However, the bond was not signed by the surety until following the expiration of the statute of limitations. In an opinion by Sharp, J., the Court held that the plaintiff's letters of administration, when issued, related back to the commencement of the action and, therefore, the action was not barred by the statute of limitations.

In reaching this result, our Supreme Court cited a number of cases from other jurisdictions. In *Pearson v. Anthony,* 218 Iowa 697, 254 N.W. 10, an action was instituted by a widow alleging that she was a duly appointed administratrix when in fact she merely expected to be appointed in the future. She was actually appointed after the expiration of the statute of limitations. The Iowa Court held that the actions of an individual *"pretending"* to act as administratrix were ineffective to commence the action, therefore, the action was dismissed because of the statute of limitations. In *Douglas v. Daniels Bros. Coal Co.,* 135 Ohio St. 641, 22 N.E. 2d 195, a widow instituted an action for the wrongful death of her husband alleging that she had been appointed administratrix. In fact she had presented herself for appointment and received forms from the probate court which she erroneously believed to be letters of administration. The error was not discovered until after the expiration of the statute of limitations. The Ohio Court held:

> ". . . where a widow institutes an action as administratrix, for damages for the wrongful death of her husband, *under the mistaken belief that she had been duly appointed and had qualified as such,* thereafter discovers her error and amends her petition so as to show that she was appointed administratrix after the expiration of the statute of limitation applicable to such action, the amended petition will relate back to the date of the filing of the petition, and the action will be deemed commenced within the time limited by statute." (Emphasis supplied.)

Speaking on these cases, Sharp, J., stated:

> "We think that the reasoning of the Ohio Court in *Douglas v. Daniels Bros. Coal Co., supra,* is sound and applicable to the facts of the instant case. Unlike *Pearson v. Anthony, supra,* our case was not instituted by one *pretending* to be the administrator. Plaintiff, in good faith, and with some reason, albeit mistakenly, believed herself to be the duly appointed administratrix of the estate of . . . (her husband) . . ."
>
> "However, we must not be understood as holding that one who has never applied for letters or who, having applied, had no

reasonable grounds for believing that he had been duly appointed, can institute an action for wrongful death, or any other cause, upon a false allegation of appointment and thereafter validate that allegation by a subsequent appointment. We think that the Iowa Court correctly dealt with a pretender."

In the present case it does not appear that the plaintiff had made an effort to obtain letters of administration. Nor does it appear that she, for any reason, mistakenly believed herself to be the duly appointed administratrix of the estate of Curtis Charles Ellerbee. We think this case should be governed by *Pearson v. Anthony, supra,* and the principles stated in *Graves v. Welborn, supra.* We hold that this wrongful death action is now barred by the statute of limitations.

Reversed.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. HAROLD ATHEGENE MUNDAY, JR.

No. 6919SC324

(Filed 13 August 1969)

1. Rape § 18— assault with intent to commit rape — instructions

In this prosecution for assault with intent to commit rape, the trial court amply instructed the jury as to the elements necessary to be proved to convict defendant of the crime charged.

2. Rape § 18— assault with intent to commit rape — instructions — intent to have carnal knowledge

In this prosecution for assault with intent to commit rape, statement in the charge that it is incumbent upon the State to satisfy the jury beyond a reasonable doubt that defendant assaulted prosecutrix with intent to have carnal knowledge of her does not constitute prejudicial error in failing to state that defendant must have intended to have carnal knowledge of prosecutrix at all events, forcibly and against her will and notwithstanding resistance on her part, where the court correctly instructed the jury in sentences immediately preceding and following the erroneous statement.

3. Rape § 18— assault with intent to commit rape — instructions — assault on a female

In this prosecution for assault with intent to commit rape, trial court's instructions did not leave the impression that if the jury found defendant

not guilty of assault with intent to commit rape, they must find him guilty of assault on a female.

4. Rape § 18— assault with intent to commit rape — instructions — consent of prosecutrix

In this prosecution for assault with intent to commit rape, the trial court adequately instructed the jury with respect to defendant's defense of consent by the prosecutrix.

APPEAL from *Seay, J.*, 9 December 1968 Criminal Session, Superior Court of ROWAN.

Defendant was tried for and convicted of assault with intent to commit rape. From judgment entered on the verdict, defendant appealed.

Defendant's only assignments of error are to the charge of the court. The questions presented do not necessitate a statement of the facts.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Trial Attorney Fred P. Parker, III, for the State.

Graham M. Carlton for defendant appellant.

MORRIS, J.

[1] Defendant first complains that the trial judge in defining assault erred in explaining what facts were necessary in order to find the defendant guilty of the crime charged. It appears that the court amply instructed the jury as to the elements necessary to be proved to convict a person of assault with intent to commit rape. *State v. Overcash,* 226 N.C. 632, 39 S.E. 2d 810; *State v. Jones,* 222 N.C. 37, 21 S.E. 2d 812. This assignment of error is without merit.

[2] Defendant next contends that prejudicial error was committed by the court in this quoted excerpt from the charge: "So, you see, it is incumbent upon the State, not only to satisfy you beyond a reasonable doubt that the defendant assaulted the prosecuting witness, but that he assaulted her with the intent to have carnal knowledge of her", for that the court failed to state that the intent to have carnal knowledge of her must have been "at all events against her will and notwithstanding any resistance she may make". Lifted out of context and standing alone, it is conceded that the sentence quoted is error. However, when the sentence is read in context with the sentence immediately preceding it and the one immediately following it, no prejudicial error could have resulted. The court instructed the jury immediately preceding the sentence excepted to as follows:

> "The terms carnal knowledge and sexual intercourse are synonymous. The burden of proof with reference to the offense charged in the Bill of Indictment rests upon the State of North Carolina to satisfy you, and each of you, from the evidence and beyond a reasonable doubt that Harold A. Munday, Jr., assaulted the prosecuting witness, Shirley Messick, a female person; that he assaulted her with the intent to gratify his passion, to have carnal knowledge of her at all hazards, forcibly and against her will, notwithstanding any resistance on her part."

The sentence immediately following was:

> "Now, the intent to commit a rape is the intent which would exist in the minds of a man at the time he committed the assault on the woman to gratify his passion, and to have carnal knowledge of her at all cost, forcibly and against her will, notwithstanding any resistance on her part."

This assignment of error is overruled.

[3] The defendant next contends that the court did not adequately explain to the jury that they could find defendant not guilty of both assault with intent to commit rape and assault of a female but left the impression that if they found him not guilty of assault with intent to commit rape, they must find him guilty of assault on a female. On the contrary, the court clearly instructed the jury that they could find the defendant guilty of the crime charged, or not guilty; that if they found him guilty of assault with intent to commit rape they would not consider assault on a female; that if they found him not guilty of assault with intent to commit rape, they would consider whether he was guilty of assault on a female, and as to that, could find him guilty or not guilty. We do not perceive that confusion could have resulted from the charge in this respect in either portion of the charge in which it occurred. This assignment of error is overruled.

[4] The defendant also contends that the court failed adequately to instruct the jury with respect to defendant's main defense — consent of the prosecuting witness. However, the court clearly instructed the jury that defendant contended that on the occasion in question he used no force, that he did not assault the prosecuting witness, that the sexual intercourse they had was had with her consent and with her co-operation, and that it was not done against her will. The jury was repeatedly instructed that in order to convict the defendant the jury would have to find the assault was committed with intent on the part of defendant to gratify his passion, or to have

carnal knowledge of the prosecuting witness at all hazards *without her consent,* forcibly and against her will, notwithstanding any resistance on her part.

Considering the charge as a whole, and not disconnectedly, as every charge must be, *Beanblossom v. Thomas,* 266 N.C. 181, 146 S.E. 2d 36, we are of the opinion and so hold that it leaves no reasonable cause to believe the jury was misled or misinformed. The assignments of error directed to the charge are overruled.

No error.

CAMPBELL and BROCK, JJ., concur.

BONNIE SANDIFER COOK v. CLIFTON CALVIN COOK

No. 697DC373

(Filed 13 August 1969)

1. Constitutional Law § 24— due process — right of litigants — right to hear evidence

In a court proceeding all parties are entitled to be present at all of its stages so that they may hear the evidence and have an opportunity to refute it. N. C. Constitution, Art. I, § 35.

2. Constitutional Law § 24; Infants § 9— custody proceeding — examination of child in chambers — absence of parties — due process

In a proceeding for the custody of a minor child, trial court committed reversible error in privately questioning the child in chambers in the absence of the parties but in the presence of counsel, despite plaintiff's objection thereto and her specific request that child's testimony be taken in the presence of the parties.

APPEAL by plaintiff from *Neville, J.,* 26 February 1969 Session, WILSON District Court.

This action involves a custody dispute between divorced parents. Pursuant to Rule 19(e), Rules of Practice in the Court of Appeals of North Carolina, the parties have prepared and submitted in lieu of the Record on Appeal an agreed statement of the case in pertinent part as follows:

> "Upon the opening of the hearing, William L. Stagg, attorney for the father, Appellee herein, indicated to the Court that he wished the Court to hear the testimony of the six-year old child

whose custody was at issue and suggested to the Court that this should probably be done in chambers in the absence of the parties. William H. Holdford, counsel for the mother of the child, the Appellant herein, objected to the Court hearing any testimony from the child on the ground that the child was incompetent as a witness by reason of his tender years and lack of understanding. When the Court indicated that it intended to hear testimony from the child, counsel for Bonnie Sandifer Cook (Ellis) stated to the Court that any testimony taken from the child should be taken in open court in the presence of the parties. When the Court indicated that it was not going to require the testimony to be given in open court but was going to hear the child in chambers in the absence of the parties but in the presence of counsel for the parties, counsel for the plaintiff objected to any testimony being taken from the child out of the presence of the parties. The Court in chambers, did question the child over plaintiff's counsel's objection and out of the presence of the parties. The child testified that he had been beaten by Sam Ellis, plaintiff's second husband. The Court conducted the entire examination of the minor child.

"One of the contentions of the defendant in his motion in the cause for custody was that plaintiff and her husband, Sam Ellis, had physically abused David Christopher Cook, the child whose custody was at issue, to the extent that he bore scratches and welts upon his body from being beaten by either the plaintiff or by her second husband, Sam Ellis. Before the Court heard testimony from the child over objections out of the presence of the parties, the plaintiff had testified in open court that neither she nor her husband, Sam Ellis, had ever beaten the child. In his final argument, counsel for the defendant stated to the court that it had heard something in direct conflict with plaintiff's testimony to that effect. Custody of the child was awarded to the defendant. Plaintiff filed timely appeal to the Court of Appeals."

Narron & Holdford, by William H. Holdford, for plaintiff appellant.

Stagg and Reynolds, by William L. Stagg, for defendant appellee.

BROCK, J.

[1, 2] Plaintiff argues convincingly that the trial court committed reversible error in privately questioning the minor child over plain-

tiff's objection and despite a specific request from plaintiff that any testimony taken from the child be taken in the presence of the parties. In a court proceeding all parties are entitled to be present at all of its stages so that they may hear the evidence and have an opportunity to refute it. N.C. Const. Art. I, § 35. Our Supreme Court has upheld this constitutional right in a custody proceeding. See *Raper v. Berrier,* 246 N.C. 193, 97 S.E. 2d 782, where the trial court, over objection, in the absence of counsel and the parties, conferred privately with the minor child. Reversing the award of custody because the trial judge interviewed the child in private without consent of the parties, the Court stated: "While we recognize that in many instances it may be helpful for the court to talk to the child whose welfare is so vitally affected by the decision, yet the tradition of our courts is that their hearings shall be open. Without doubt the court may question a child in open court in a custody proceeding but it can do so privately only by consent of the parties." *Raper v. Berrier, supra,* p. 195.

It may be that the custody issue was resolved so as to reach a correct and proper result; nevertheless procedural safeguards must be adhered to in our courts. For the reason indicated, the judgment of the trial court is vacated and the cause is remanded for a new trial.

Reversed and remanded.

CAMPBELL and MORRIS, JJ., concur.

NOAH H. KEY AND BURLENE KEY MOORE, ADMINISTRATORS OF THE ESTATE OF ASTOR COLON KEY v. MERRITT-HOLLAND WELDING SUPPLIES, INC.

No. 6920SC370

(Filed 13 August 1969)

1. Witnesses § 8— cross-examination — skid marks

In this action for wrongful death arising out of a collision between two trucks, the trial court did not err in allowing defense counsel to cross-examine plaintiffs' witness, who had testified at length concerning marks on the highway which led to defendant's truck, as to whether the marks were "just tire marks and not black skid marks," it being appropriate for the witness to be cross-examined as to the lightness or darkness of the marks.

2. Witnesses § 9— limiting redirect examination — repetitious testimony

In this action for wrongful death arising out of a motor vehicle collision, the trial court did not err in limiting plaintiffs' redirect examination of the investigating officer concerning marks on the road at the accident scene where the officer had exhaustively described the marks on direct examination.

3. Trial § 38— tendered instructions given in substance

In this wrongful death action, the trial court did not err in failing to give tendered instructions exactly as requested where the requested instructions were given in substance.

APPEAL by plaintiffs from *Exum, J.*, 20 January 1969 Session, MOORE Superior Court.

This is a civil action instituted by the administrators of the estate of the deceased for damages for the wrongful death of their intestate. Plaintiffs allege that defendant's agent was negligent in the operation of defendant's truck, and that such negligence was the proximate cause of the death of their intestate. Defendant's agent is not a party. Defendant answered, denying negligence, and in the alternative alleging that plaintiffs' intestate was negligent and that his negligence was one of the proximate causes of his death.

The evidence tends to show the following. Plaintiffs' intestate was driving a truck loaded with coal, traveling east on Highway 27 between Robbins and Carthage in Moore County. At a point approximately five miles east of Robbins a dirt road (# 1493) intersects Highway 27 from the north. Plaintiffs' intestate was in the process of delivering a load of coal to a customer who lived on the dirt road (# 1493) and was in the act of turning to his left from Highway 27 into the dirt road (# 1493) when the collision in question occurred. Defendant's truck was being operated by its agent, also traveling east on Highway 27 between Robbins and Carthage. As defendant's truck overtook the truck being operated by plaintiffs' intestate, defendant's truck was undertaking to pass and plaintiffs' intestate was undertaking to make a left turn into the dirt road (# 1493). Defendant's truck struck the left side of the truck being operated by plaintiffs' intestate, and plaintiffs' intestate died as a result of the injuries received in the collision.

There was considerable controversy over the speed of defendant's truck, over the length of skid marks, and over whether plaintiffs' intestate gave a signal of his intention to turn. Issues of negligence and contributory negligence were submitted to and both answered by the jury in the affirmative. Plaintiffs appealed.

Dock G. Smith, Jr., and John Randolph Ingram, by John Randolph Ingram, for plaintiffs-appellants.

Pittman, Staton & Betts, by J. C. Pittman, for defendant appellee.

BROCK, J.

[1, 2] Plaintiffs assign as error that the trial judge allowed defense counsel to cross-examine plaintiffs' witness (the investigating State Trooper) concerning whether the marks on the highway were "just tire marks and not black skid marks." On direct examination the witness had testified at length concerning the marks on the highway which led to defendant's truck, and it was appropriate for the witness to be cross-examined concerning the lightness or darkness of the marks. Plaintiffs further assign as error that they were limited in their redirect examination of the investigating officer concerning the marks on the road. The officer had just responded to questions by counsel for plaintiffs that "they were black marks" made by defendant's truck. It seems to us that the trial judge had already allowed plaintiffs' counsel wide latitude in examining this witness, and that the marks on the highway had been exhaustively described. "The trial court may properly sustain objection to a question asked on redirect examination which is merely repetitious and directed to matter fully testified to by the witness on his direct examination, however proper the matter may have been in the first instance." 7 Strong, N.C. Index 2d, Witnesses, § 9, p. 706. Plaintiffs' assignment of error No. 1 is overruled.

[3] Plaintiffs next assign as error that the trial court failed to give the tendered instructions exactly as requested. The requested instructions were given in substance. The litigants are not entitled to determine the exact sequence of the charge to the jury, and are not entitled to have the trial judge use the words and expressions as formulated by the litigant. The trial judge functions under the mandate of G.S. 1-180, and a compliance with this statute gives to the jury instructions which are designed to be fair to both sides. Plaintiffs' assignment of error No. 2 is overruled.

Plaintiffs' assignments of error numbers 3 through 15 are directed to the charge of the court to the jury. We have carefully reviewed the pleadings, the evidence, and the charge and we hold that the case was submitted to the jury under proper explanations of the applicable principles of law. Plaintiffs' assignments of error to the charge are feckless and we do not discuss them either collectively or seriatim. Assignments of error numbers 3 through 15 are overruled.

Plaintiffs' assignments of error numbers 16 and 17, are formal, and, in view of what has heretofore been said, they are overruled.

In the trial we find no error prejudicial to plaintiffs. The jury has found the facts contrary to plaintiffs' contentions, but they have nevertheless been resolved according to law.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

DAVID D. BROTHERTON v. WILLIAM T. PARAMORE

No. 6926SC355

(Filed 13 August 1969)

1. Torts §§ 1, 2; Master and Servant § 32; Judgments §§ 36, 54— injury to third persons — recovery against employer — liability of employee — respondeat superior

Where plaintiff was injured by a State Highway Commission employee acting in the course and scope of his employment and has recovered damages in a tort claim proceeding against the Commission under the principle of *respondeat superior* for the negligence of its employee, plaintiff may not thereafter maintain an independent action against the employee to recover for the same injury.

APPEAL by plaintiff from *Clarkson, E. J.*, 17 February 1969 Schedule D Session, MECKLENBURG Superior Court.

On 7 August 1967, defendant, an employee of the State Highway Commission acting within the course and scope of his employment, drove a State Highway Commission automobile into the rear of plaintiff's automobile causing personal injury to plaintiff.

On 17 April 1968 plaintiff filed a claim under the Tort Claims Act seeking an award of damages for personal injury from the State Highway Commission by reason of the negligent act of its employee William T. Paramore (the defendant in this action) on 7 August 1967. On 10 May 1968, plaintiff filed complaint in this action alleging negligence against defendant and seeking an award of damages from the defendant for personal injury to plaintiff on 7 August 1967. Summons in this action was not served on defendant until 23 July 1968 (the day of the hearing before the Industrial Commission).

A hearing under the Tort Claims Act was conducted on 23 July 1968 as a result of which the hearing commissioner found the Highway Commission employee, William T. Paramore, guilty of negligence and awarded to the plaintiff the sum of $6,000.00 as compensation for his personal injury. No appeal has been perfected by either party from this award, and plaintiff has been paid and has accepted the $6,000.00.

Thereafter defendant filed an amendment to his answer in this case alleging plaintiff's recovery under the Tort Claims Act for the same personal injury, and by reason of the negligence of the same person, as alleged in this action. The amendment prayed for dismissal of this action on the grounds that the award under the Tort Claims Act was *res adjudicata.*

Judge Clarkson allowed defendant's motion to dismiss and plaintiff appealed.

Strickland and Robinson, by William G. Robinson, for plaintiff appellant.

Wardlow, Knox, Caudle & Wade, by J. J. Wade, Jr., and Robert Morgan, Attorney General, by Fred P. Parker, III, for defendant appellee.

BROCK, J.

The Attorney General appears for defendant upon defendant's request as a state employee under G.S. 143-300.2 *et seq.*

The defendant, Paramore, and the State Highway Commission are not alleged to be joint tort-feasors; the recovery against the Highway Commission was upon the principle of *respondeat superior.* There is no negligent conduct alleged against anyone but Paramore and the ultimate liability was his; liability of the Highway Commission is predicated solely upon the principle of *respondeat superior.* Recovery against it was bottomed upon negligence of Paramore while acting as its employee within the course of his employment.

We think the rationale of the opinion in *Bowen v. Insurance Co.,* 270 N.C. 486, 155 S.E. 2d 238, is clearly applicable here. The plaintiff has recovered damages from and has been paid by Paramore's employer for the negligence of Paramore at the time and place in question in this lawsuit; plaintiff cannot now, in an independent action against Paramore, seek to enhance his original recovery.

Plaintiff argues that he should be allowed to proceed with this

action because he is constitutionally entitled to trial by jury which he did not receive under the Tort Claims Act. There is no merit in this contention. The immunity of the State against being sued was waived by the State to the extent of and under the conditions set out in the Tort Claims Act. Plaintiff availed himself of this opportunity to proceed against the State; he was not required to do so.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC. v. N. CONE BEAL, HESTER C. BEAL AND EDISON BEAL, T/A N. C. BEAL & SONS

No. 6927DC291

(Filed 13 August 1969)

1. Trial § 58— trial by court without jury — separate findings of fact and conclusions of law

Rule that upon trial of an issue of fact by the court, its decision shall be in writing and shall contain a statement of the facts found and the conclusions of law separately, applies in the district court division of the General Court of Justice as well as in the superior court. G.S. 1-185, G.S. 7A-193.

2. Trial § 58— trial by court without jury — nonsuit

Where the trial is heard by the court without a jury, a written judgment of nonsuit is equivalent to a finding that all evidence, considered in the light most favorable to plaintiff, is insufficient to support findings of fact entitling plaintiff to recover on any issue raised by the pleadings.

3. Gas § 5— damage to underground gas lines

In this action for damages to plaintiff's gas lines which occurred while defendants were performing grading and construction work as subcontractors on a street widening project, the trial court erred in allowing defendants' motion for nonsuit where plaintiff's evidence tended to show that an official of plaintiff pointed out to defendants' bulldozer operator the location of a valve on the gas line and told him the line was shallow in the area, and that the bulldozer operator thereafter damaged the valve on the gas line and a service line in the area, allowing gas to escape.

4. Evidence § 3— facts within common knowledge — underground gas lines

It is common knowledge that underground gas lines are in common use in most cities and towns in North Carolina.

APPEAL by plaintiff from *Friday, J.*, January 1969 Civil Session, GASTON District Court.

The plaintiff is a corporation engaged in the distribution of natural gas and has its principal office in Gastonia, North Carolina. This action was brought to recover for damages to various of its gas lines located under the surface of certain streets in Sanford, North Carolina. The damage occurred while the defendants were performing grading and construction work as subcontractors on a street widening project, and allegedly resulted from their negligence in failing to use due care to avoid striking and damaging the gas lines. The defendants' answer admitted that on one occasion a hole was torn in plaintiff's gas lines "but this resulted from the fact that said gas lines were not three feet under the surface of said street as plaintiff's local manager had informed defendants."

By agreement of parties and counsel the case was heard by the court without a jury. At the close of the plaintiff's evidence the court allowed the defendants' motion for judgment of nonsuit and entered a written judgment which contained no findings of fact or conclusions of law. The plaintiff appealed, assigning as error the court's allowing of defendants' motion and the entering of the judgment nonsuiting the plaintiff's action.

Mullen, Holland & Harrell by Philip V. Harrell for plaintiff appellant.

Sanders & Lafar by Julius T. Sanders for defendant appellees.

PARKER, J.

[1, 2] G.S. 1-185 provides that upon trial of an issue of fact by the court, its decision shall be in writing and shall contain a statement of facts found, and the conclusions of law separately. This rule of procedure applies in the district court division of the General Court of Justice as well as in the superior court. G.S. 7A-193. A written judgment of nonsuit is equivalent to a finding that all evidence, considered in the light most favorable to plaintiff, is insufficient to support findings of facts entitling plaintiff to recover on any issue raised by the pleadings. *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508; *Harrison v. Brown,* 222 N.C. 610, 24 S.E. 2d 470; *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 7 S.E. 2d 13. If the evidence in this case, when taken in the view most favorable to the plaintiff, would have supported a finding in its favor, the assignment of error must be sustained. *Harrison v. Brown, supra.*

[3] The plaintiff's evidence tended to show that in May of 1965 Mr. R. L. Shaw, an official of the plaintiff, went to the scene of the street project in Sanford and pointed out to the defendants' bulldozer operator the location of a valve on the gas line and told him the line was shallow in the area. Shaw expressed concern to him that there would be damage because of the manner in which the curb and sidewalk were being removed. About thirty minutes later, Shaw was notified that the valve had been damaged. Upon inspection he found that the stem of the valve had been broken off and gas was escaping. Shortly thereafter a service line in the vicinity was also damaged by the defendants' grading operation. In response to a question asked on cross-examination, Shaw stated: "I did see the damage done to the service line. The operator of the bulldozer doing the grading did the damage to the service line." He further testified that the defendants were the only ones engaged in work in that area at the time of the damage.

[4] We are of the opinion the plaintiff's evidence was sufficient to withstand a motion for judgment as of nonsuit. It is common knowledge that gas lines such as are described here are in common use in most cities and towns in North Carolina. (See *Hayes v. Wilmington,* 243 N.C. 525, 545, 91 S.E. 2d 673, 688). Furthermore, there was ample evidence here that defendants had actual knowledge of the existence of the plaintiff's gas lines within the area of the street project. They in fact admit as much in paragraph three of their further answer and defense which states in part: "That Mr. Cone Beal, one of the defendants, was in charge of this work, and he knew that gas lines were installed in the street." The defendants' asserted defense is that they had been advised that the gas lines were located at least three feet under the surface. The plaintiff's evidence is in direct contradiction.

[3] Knowing that the gas lines were in the area of their grading work, it was the duty of the defendants to exercise due care to avoid damaging them. The plaintiff's evidence could support findings leading to the conclusion that the defendants failed to do so and the judgment of the trial court is therefore reversed.

Reversed.

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

STATE OF NORTH CAROLINA v. MARVIN HEATH BENNETT

No. 6926SC363

(Filed 13 August 1969)

Criminal Law § 163— assignments of error to the charge — identification of portions excepted to

Where the portions of the charge to which defendant assigns as error are not identified in the record by letter, parentheses or in any other manner, the purported assignments of error are ineffective to challenge the correctness of the charge.

APPEAL from *Falls, J.*, 8 April 1969 Session of Superior Court of MECKLENBURG.

Defendant was charged with armed robbery and entered a plea of not guilty. He was represented by counsel, but the record is silent as to whether counsel was privately retained or court appointed. The jury returned a verdict of guilty of common law robbery, and from judgment entered thereon, defendant appealed. Upon a finding by the court of defendant's indigency, counsel who had represented him at trial was appointed to perfect his appeal.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Staff Attorney James E. Magner for the State.

Wayne M. Brendle for defendant appellant.

MORRIS, J.

All of defendant's purported exceptions and assignments of error are to the charge of the court. However, the portions thereof assigned as error are not set out in the assignments of error, and no exceptions appear with respect thereto except under the purported assignments of error. The portions of the charge to which defendant takes exception are not identified in the record by letters, parentheses, or in any other manner. These purported assignments of error are ineffective to challenge the correctness of the charge. *Vail v. Smith,* 1 N.C. App. 498, 162 S.E. 2d 78; *State v. Dunn,* 264 N.C. 391, 141 S.E. 2d 630. For the reasons stated herein, the motion of the State to dismiss the appeal is well taken and is allowed.

Dismissed.

CAMPBELL and BROCK, JJ., concur.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1969

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION, AND VIRGINIA ELECTRIC AND POWER COMPANY v. WOODSTOCK ELECTRIC MEMBERSHIP CORPORATION AND NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION

No. 6910UC339

(Filed 27 August 1969)

1. Electricity § 2; Utilities Commission § 7 — electric service areas — assignment of same area to two suppliers

In this proceeding for the assignment of electric service areas pursuant to G.S. 62-110.2(c)(1), order of the Utilities Commission assigning areas to an electric membership corporation for loads up to 400 KW demand and jointly to the electric membership corporation and an electric power company for loads with contract demand greater than 400 KW, subject to consumers' reasonable choice of supplier, does not in effect leave the areas unassigned for loads exceeding 400 KW, since under the Commission's order other electric suppliers may not extend their lines into the areas to serve demands of more than 400 KW.

2. Electricity § 2; Utilities Commission § 7— assignment of same electric area to two suppliers—statutory authority

The Utilities Commission did not exceed its authority under G.S. 62-110.2 in assigning the same areas jointly to two electric suppliers, subject to consumers' reasonable choice of supplier, since under appropriate circumstances and appropriate findings by the Commission, public convenience and necessity may require such an assignment.

3. Electricity § 2; Utilities Commission § 7— assignment of same electric service areas to two suppliers—arbitrariness

The Utilities Commission did not arbitrarily exercise its discretion in assigning the same areas jointly to two electric suppliers, the Commission

having exercised its discretionary authority in good faith in the light of existing facts and circumstances.

4. Electricity § 2; Utilities Commission § 7— assignment of electric service areas to two suppliers—maximum individual assignment—necessity for findings of fact

In this proceeding for the assignment of electric service areas wherein the Utilities Commission assigned certain areas to an electric membership corporation for loads up to 400 KW demand and jointly to the electric membership corporation and an electric power company for loads with contract demand greater than 400 KW, portion of the Commission's order establishing a 400 KW load as the maximum of the individual assignment to the electric membership corporation is arbitrary and must be reversed where the Commission made no findings of fact to justify such 400 KW maximum.

5. Electricity § 2; Utilities Commission § 7— assignment of same electric service areas to two suppliers—constitutionality

Order of the Utilities Commission assigning electric service areas to an electric membership corporation for loads up to 400 KW demand and jointly to the electric membership corporation and an electric power company for loads with contract demand greater than 400 KW, subject to consumers' reasonable choice, *is held* not to violate the constitutional rights of the electric membership corporation or the consuming public, neither having shown any constitutional right to have the areas assigned to any electric supplier.

APPEAL by Woodstock Electric Membership Corporation and North Carolina Electric Membership Corporation from an order of the North Carolina Utilities Commission entered 18 December 1968.

Commissioner Eller drafted the order which was concurred in by Chairman Westcott and Commissioners McDevitt and Williams. Commissioner Biggs dissented as to portions of the order which are not pertinent to this appeal.

Pursuant to Commission Rules, Woodstock Electric Membership Corporation (hereinafter referred to as Woodstock) on 5 September 1967, made application for assignment to it under G.S. 62-110.2(c)(1) of areas of Beaufort, Hyde, and Washington Counties. Virginia Electric and Power Company (hereinafter referred to as VEPCO) likewise, on 9 October 1967, made application for assignment to it under G.S. 62-110.2(c)(1) of areas of Beaufort, Hyde, and Washington Counties. The applications of the parties overlapped in several particulars, and the applications were consolidated for purposes of hearing before the Commission and its assignment order.

G.S. 62-110.2(c)(1), which was enacted in 1965, provides as follows:

"In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign, as soon as practicable after January 1, 1966, to electric suppliers all areas,

by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments; provided, that the Commission may leave unassigned any area in which the Commission, in its discretion, determines that the existing lines of two or more electric suppliers are in such close proximity that no substantial avoidance of duplication of facilities would be accomplished by assignment of such area. The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers.

Electric power companies and electric membership corporations are defined by statute as "electric suppliers;" municipally-owned systems are not so defined. G.S. 62-110.2(a)(3).

From the total area covered by the two applications there arose four categories of area: (1) Area claimed by Woodstock which is not contested by VEPCO; (2) area claimed by VEPCO which is not contested by Woodstock; (3) area claimed by both Woodstock and VEPCO; and (4) area claimed by Woodstock which VEPCO seeks to leave unassigned, or, in the alternative, assigned to VEPCO. This appeal is not concerned with categories (1) and (2); and although parts of category (3) were assigned by the Commision to one or the other of the claimants without exception being taken, this appeal is concerned with a portion of category (3) and all of category (4).

The areas in controversy on this appeal have not been described by metes and bounds, but, subsequent to the original filing of applications, maps were prepared upon which the areas are drawn and colored. For convenience of discussion the map filed in this cause as VEPCO Exhibit No. 2 is used for reference by the Commission, by both parties in their briefs, and by this Court. Category (3) areas are colored yellow, and category (4) areas are colored blue. The areas in controversy on this appeal are labeled and colored on the map (VEPCO Exhibit No. 2) as follows: B-1 in blue, B-2 in yellow, B-3 in blue, B-4 in yellow, B-5 in yellow, and B-6 in blue.

Areas B-1, B-2, B-3, and B-5 lie in a corridor running generally north-east from the City of Washington to the Town of Pantego. Area B-4 lies north-east of the City of Washington, east of Pinetown, and extends generally north toward the Town of Plymouth. Area B-6 is a large area bordering on the north bank of the Pamlico River, and lying generally south of the Town of Belhaven. This area (B-6) has

Bath Creek (near the Town of Bath) as its western boundary, and the Pungo River as its eastern boundary.

The Utilities Commission found as a fact that "[t]he areas designated B-1, B-2, B-3, B-4 and B-5 (by VEPCO's Exhibit No. 2) are areas of potential industrial development . . . ," and further found as a fact that "[t]he area designated B-6 (by VEPCO's Exhibit No. 2) as previously described is an area of great industrial potential . . ." These areas were thereafter assigned by the Commission in the following manner:

> "To Woodstock for purposes of loads up to and including 400 KW demand; all loads with contract demands greater than 400 KW being hereby assigned jointly to VEPCO and Woodstock; provided that this joint assignment is made subject to the consumers' reasonable choice of supplier, with prior notice to the Commission as herein provided, all those areas designated B-1, B-2, B-3, B-4, B-5 and B-6."

From this assignment Woodstock and the intervenor, North Carolina Electric Membership Corporation, appealed.

Crisp, Twiggs & Wells, by William T. Crisp, for Woodstock Electric Membership Corporation and North Carolina Electric Membership Corporation, appellants.

Joyner, Moore & Howison, by R. C. Howison, Jr., for Virginia Electric and Power Company, appellee.

Edward B. Hipp and Larry G. Ford for North Carolina Utilities Commission.

BROCK, J.

Appellants have abandoned all exceptions and assignments of error to the findings of fact by the Utilities Commission. The record on appeal contains the following *ex parte* statement by appellants: "Inasmuch as appellants have not based their exceptions, or any of them, upon the ground that the evidence was insufficient to support the Commission order appealed from the record of the evidence has not been narrated, nor will the transcript thereof be filed with the Court of Appeals . . . ."

Although appellants' assignments of error Nos. 1, 2, 3, 4 and 5 are addressed to certain of the findings of fact by the Commission, and although these same assignments of error are listed as supporting their argument in the brief, we are foreclosed from considering them because of the absence of the full transcript. Also appellants open

their argument in the brief with the following concise statement of their position:

"IN ASSIGNING AREAS B-1 THROUGH B-6 TO WOODSTOCK ONLY FOR LOADS UP TO 400 KW DEMAND, AND BY 'ASSIGNING' THE SAME AREAS TO BOTH APPLICANTS FOR HIGHER LOADS SUBJECT TO CONSUMER CHOICE, THE COMMISSION (A) EXCEEDED ITS STATUTORY AUTHORITY, (B) ACTED ARBITRARILY AND CAPRICIOUSLY, AND (C) VIOLATED THE CONSTITUTIONAL RIGHTS OF BOTH WOODSTOCK AND THE CONSUMING PUBLIC.

"(Appellants' Assignments of Error 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 20, and 21, Rpp. 94-103).

"(It was because of appellants' firm belief in the correctness of the foregoing point that they saw no necessity in relying upon any insufficiency of the evidence and therefore proposed that no testimony should be narrated or cited to the Court in this appeal. See appellants' Statement Pertaining to the Record on Appeal, Rpp. 106-107.)"

In view of the foregoing, the facts of this case are now established by the findings of facts of the Utilities Commission. Therefore, since the outcome of this appeal rests largely upon the findings of facts, we quote here in full the findings of facts made by the Utilities Commission.

"1. Both VEPCO and Woodstock are electric suppliers as defined by Section 62-110.2(a)(3) of the North Carolina General Statutes; both are properly before the Commission, which has jurisdiction over the subject matter of the proceeding. None of the municipalities having lines in the area are electric suppliers as defined by the statute; nor were any of them parties to the proceeding.

"2. VEPCO is an electric public utility furnishing wholesale and retail electric service for profit to the general public in, among other areas, Beaufort County, Hyde County, and Washington County. VEPCO generates the preponderance of the electric power it sells.

"3. Woodstock is a nonprofit electric membership corporation furnishing electric service to its members in the various areas in the same three counties named in Finding No. 2. Woodstock does not generate electric power, but purchases the preponderance of its total requirements as a wholesale customer of VEPCO.

"4. Both VEPCO and Woodstock are capable of supplying, and do supply, good, adequate, and dependable electric service for the requirements of their existing customers and members, respectively, in the areas of the three counties mentioned.

"5. The North Carolina Utilities Commission has extensive jurisdiction over the rates, services, and level of earnings of VEPCO; it has limited jurisdiction over Woodstock relating primarily to the assignment of territory, preventing or relieving promotional rebates, preferences, and unjust discriminations in service and rates, compelling efficient, adequate, and dependable service, and the licensing of generating plants.

"6. The total area involved in the applications is generally outlined on the south by the Pamlico River, on the southwestern corner by the City of Washington, on the northwestern side by the City of Plymouth and the Roanoke River, on the north by Albemarle Sound, on the northeast by Tyrrell County, Pettigrew State Park (Lake Phelps) and Alligator Lake, and on the southeast by Swan Quarter. Included within this general outline are the Towns of Pantego, Pinetown, Belhaven, Bath, Roper, Creswell, and Cherry, together with numerous unincorporated communities, points, and places. The Dismal Swamp lies in the central portion of the total area. The Intracoastal Waterway winds northerly from the Pamlico River to the Pungo River and thence generally northeast out of the area. The Pungo River runs generally southeast from Plymouth practically through the center of the total area to confluence with the Pamlico. Bath Creek, Pungo Creek, and Little Creek are in the southern portion of the total area. Scuppernong River, Deep Creek, and Bull Creek are in the north of the general area. The Norfolk & Southern Railway runs through the area northeast from the City of Washington to Pinetown from which it branches northeast to Pantego and Belhaven and northerly to Plymouth and points north.

"7. The entire area of the applications, being situate outside the corporate limits of municipalities, and more than 300 feet from the lines of another supplier as defined by the Act, must be described as rural and agricultural. Some portions of the general area, as will be discussed more particularly later, are areas of industrial potential, but they cannot be presently described as industrialized. Topographically, the area is low and flat with a number of swamps. Drainage and development of much of the low, swampy areas for agricultural purposes is underway.

"8. The historical development of electrical facilities in the

area as a whole may be described as follows: For many years, VEPCO has served Woodstock as well as the municipal systems of the Cities of Washington and Belhaven at wholesale. VEPCO serves the Towns of Roper, Creswell, Cherry, and Plymouth at retail. VEPCO's distribution facilities in the general area radiate almost exclusively southwest and northeast from the City of Plymouth and in all directions from Roper, Creswell, and Cherry. VEPCO's distribution facilities are concentrated almost exclusively in the northern third of the total area. For the purpose of moving bulk power, VEPCO has a 34.5 KV line in the southern portion of the total area extending generally northeasterly and paralleling the railroad from the City of Washington to the Towns of Pantego and Belhaven. VEPCO has one (1) retail distribution customer on this line at approximately 400 KW demand.

"Woodstock has its headquarters at Pantego in the south-central portion of the total area, at which point the cooperative also takes its power from VEPCO at wholesale. Woodstock's distribution facilities extend in all directions from Pantego and, in general, may be said to cover the southern two-thirds of the area, reaching south to the Pamlico, southwest to the City of Washington, northwest to the City of Plymouth, north to and beyond the western edge of Pettigrew State Park (Lake Phelps), northeast to a point near the southwestern edge of Alligator Lake, and east to Swan Quarter, covering generally all intermediate areas. Woodstock serves Pantego and a small part of Pinetown at retail.

"The distribution facilities of the City of Washington and Woodstock overlap and intertwine to a substantial degree in the area outlying the City of Washington and extending east along the Pamlico as far as Bath and Bayview, and northwest to and through Pinetown.

"9. There are virtually no facilities of any supplier as defined in the Act other than VEPCO in the portions of the total area shown in red on the maps of the parties and which VEPCO seeks to have assigned to it without opposition in these proceedings. In one area shown in red and sought without opposition by VEPCO, to wit, the Great Swamp Area northeast of the City of Washington in Beaufort County, there are no lines of consequence by a supplier as defined by the Act, although there appear to be a number of lines of the City of Washington in the southwestern portion of said red area.

"10. There are virtually no facilities of any supplier as defined in the Act other than Woodstock in the portions of the total

area shown in green on the maps of the parties and which Woodstock seeks to have assigned to it without opposition in these proceedings, although as stated, there appear to be a number of lines of the City of Washington in said green areas.

"11. In one large area in Beaufort County shown in blue on the maps of the parties (marked B-6 on VEPCO Exhibit No. 2 and hereafter referred to as the 'B-6' area) there are no lines of any supplier as defined in the Act other than Woodstock, although there are lines of the City of Washington as herein discussed.

"This area is bounded by the Pamlico River on the south, Bath Creek on the west, Pungo Creek on the north and the Pungo River as it leads into the Pamlico River on the east.

"Woodstock seeks to have this area assigned to it; VEPCO seeks to have the area left unassigned or, in the alternative, assigned to VEPCO.

"12. In the areas colored blue on the maps of the parties and marked B-1 and B-3 on VEPCO Exhibit No. 2 (and hereafter referred to by reference to the VEPCO Exhibit) there are virtually no facilities of any supplier as defined in the Act other than Woodstock, except for VEPCO's 34.5 KV line through Area B-3 and the VEPCO retail customer in Area B-1, as previously found. The evidence reveals that the City of Washington has lines in the area, but the evidence does not permit their specific identification, location, or description.

"13. The areas numbered H-1, W-1, W-2, W-3, W-4, W-5, W-6, W-7, W-8, W-9, W-10, W-11, and B-4 (by VEPCO Exhibit No. 2), and colored in yellow on the maps of both parties have either no lines or very limited 'Dead-end' lines of any supplier as defined by the Act. These areas are in large measure undeveloped, unpopulated areas sought by both Woodstock and VEPCO. The location of the areas in proximity to other areas served by the respective suppliers predominates over the actual location of the suppliers lines in the territories. In some of these areas, particularly B-4 and B-5, there are lines of municipal systems, but the evidence does not permit their specific identification, location, or description.

"14. The area marked B-2 (by VEPCO Exhibit No. 2) and colored yellow on the maps of the parties has the aforesaid 34.5 KV line running east-west through the south-central portion. The area marked B-5 (by VEPCO Exhibit No. 2) and colored yellow has the aforesaid 34.5 KV line running along the northern

border thereof. There are no other lines of a supplier as defined by the Act in either area. Woodstock and VEPCO each seek to have the areas assigned to themselves. The evidence indicates the City of Washington has substantial distribution facilities within the areas, but the evidence does not permit identification, description, and evaluation of these facilities.

"15. The areas designated B-1, B-2, B-3, B-4, and B-5 (by VEPCO's Exhibit No. 2) are areas of potential industrial development in that they are characterized by proximity to the railroad, major highways, have available sources of large power supply, are topographically suited for industry, have good communications facilities, and are near the population centers of the total area.

"16. The area designated B-6 (by VEPCO Exhibit No. 2) as previously described is an area of great industrial potential in that it has been established that the area contains one of the richest phosphate deposits in the United States, is under active consideration for phosphate mining operations in the order of those now at the so-called Texas Gulf Sulphur site immediately south of and directly across the Pamlico River. Much of the area is already under lease or option for large phosphate mining operations. These mining operations and processes usually require complex and technical electric power accommodations, very large blocks of available power, alternate sources of power supply, and experienced supplier personnel readily available and technically trained. Further, such mining operations tend to attract allied industrials, such as chemicals and fertilizer, having large power requirements, and requiring large capital investments to install service.

"17. Industrial and manufacturing concerns tend to locate on and demand the services of VEPCO as opposed to Woodstock. There are many reasons for this. Some industries are philosophically opposed to, and wary of, becoming members in cooperatives where they have no more protection than a single vote in rate and policy matters; i.e., they prefer the regulation of the State Commission to the regulation of the Cooperatives' membership and the REA. Others base their preference on the electric utility's financial strength and its ability to supply operational expertise, specialized equipment, alternate and emergency supplies of energy and many others.

"Industries usually have more than one available site for location and, all other things being equal, tend to choose that site

served or to be served by VEPCO and tend not to choose the site to be served by Woodstock. While the phosphate deposit in the B-6 area will require the mining industry to locate there without regard to which supplier is assigned the area, the testimony of mining officials is to the effect that assignment to Woodstock would tend to cause their companies not to perform all their mining processes on site and that they probably would only mine the basic product and ship it elsewhere for operations and processes requiring heavy electric loads. The testimony further indicates that manufacturers and producers other than mining will tend not to locate near the mines if the area is assigned exclusively to Woodstock.

"18. Of the total territory sought (1196 square miles) throughout the three (3) counties involved, approximately 22.6% (270 square miles) is claimed by VEPCO without substantial controversy; 56.7% (677 square miles) is claimed by Woodstock without substantial controversy; and 20.7% (249 square miles shown in 15 separately designated yellow and three (3) separately designated blue areas) is claimed in one way or another by both parties.

"19. The areas where Woodstock's facilities are located are predominantly residential and farming, or rural, areas. In 1967 Woodstock sold 17,515,490 kilowat hours (KWH) of electricity. It serves 3,531 members, of which 3,206 are residential customers. Woodstock serves two (2) industrial customers with demands greater than 50 KW. Its largest service demand is to Coastal Lumber Company, with a demand exceeding 240 KW and possibly as high as 400 KW demand.

"20. The portions of the total area in which VEPCO's facilities are located are also predominantly residential and farming, or rural, areas. However, VEPCO has a number of very large power users in this and other states. It has a permanent staff of experts in promoting industrial development and attending to complex power supply and load requirements.

"21. Woodstock has 601 miles of distribution lines in the three-county area. VEPCO has approximately one-third (⅓) as many miles distribution facilities in the total area as Woodstock in addition to 60 miles of 34.5 KV line and 20 miles of 115 KV line.

"22. At December 31 1967, VEPCO had $380,337,681 in equity capital and retained earnings; Woodstock had 'patronage capital' amounting to $549,411.

"23. VEPCO is financed by capital furnished from the sale of securities in the financial markets and from internally generated funds. Its bonds are rated AA, and it has a proven ability to raise large sums of capital on comparatively short notice. Woodstock is dependent upon appropriations of the United States Congress and the approval of the Rural Electrification Administration administrator and upon internally generated funds for its capital. While Woodstock has never been called upon to provide service for which it could not obtain capital, it nevertheless has not been called upon to raise capital to meet the electric needs of extremely large industrial customers.

"24. Woodstock is organized and exists for the purpose of furnishing electricity to persons in rural areas not otherwise having central station service. It is not organized to, and does not operate on, the basis of 'pecuniary profit,' as does VEPCO. For this reason, the procurement of large volume industrial loads is not as fully compatible with the corporate and public objectives of Woodstock as it is with VEPCO."

[1] With respect to appellants' assertion that the Utilities Commission exceeded its statutory authority, appellants contend that the area is effectively left unassigned as to loads exceeding 400 KW, and that the Commission has no authority to designate an area as unassigned except under those conditions set out in the statute. However, we hold that the Commission's order does not purport to leave or designate the areas as unassigned. If unassigned, conceivably, any electric supplier might extend its lines into the areas to serve demands of more than 400 KW; but such is not possible under the Commission's order. The order specifically assigns the areas to Woodstock for loads up to and including 400 KW, and to Woodstock and VEPCO for loads in excess of 400 KW. This clearly constitutes an assignment of the areas to Woodstock and VEPCO for service of loads in excess of 400 KW.

[2] Appellants additionally contend that the statute does not contemplate or allow a joint assignment of the same territory to two or more electric suppliers. Thus they contend the Commission was without authority to assign the areas jointly to Woodstock and VEPCO for loads in excess of 400 KW.

Counsel for appellants engage in an ingenious exercise in semantics in arriving at the conclusion that ". . . the applicable statutes clearly forbid this . . ." joint assignment. However, we do not determine that such a statutory prohibition exists. The statutes are silent on the subject, the legislature being content to admonish the

Commission to ". . . make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers. . . ." G.S. 62-110.2(c)(1), *supra*. While it may be that public convenience and necessity may determine that the majority of assignments under the statutes should properly be to a single electric supplier; nevertheless, under appropriate circumstances and appropriate findings by the Commission, public convenience and necessity may determine that some areas be assigned to two or more electric suppliers with later determination of the circumstances under which a particular electric supplier may properly extend service to a particular consumer. This is not to say that the Commission can arbitrarily attach conditions to a franchise, for it must exercise its discretion in good faith in the light of existing facts and circumstances. "But the vesting of discretionary power in an administrative agency connotes the authority to choose between alternate courses of action, and the courts are without authority to act as supervisory agencies to control and direct the exercise of such discretion when it is exercised in good faith and in accordance with law." 1 Strong, N.C. Index 2d, Administrative Law, § 3, p. 39.

We have not ignored the cases cited by appellants *(Western Colorado Power Co. v. Public Utilities Com'n,* 428 P. 2d 922; *Public Utilities Com'n v. Home Light and Power Co.,* 428 P. 2d 928) and the case cited by appellee (*Public Util. Com. v. Grand Val. Rural Power Lines, Inc.,* 447 P. 2d 27) which each of them argue is determinative of the question. However, after carefully studying those cases we find that the factual differences between the cases, and the statutory, constitutional and case law differences between Colorado and North Carolina render the opinions of little value to us.

[3] We consider now whether the Commission has arbitrarily exercised its discretion in assigning jointly to Woodstock and VEPCO the areas B-1 through B-6 for service of consumer demands in excess of 400 KW. In addition to the findings of fact by the Commission, which have been quoted in full above, the Commission made numerous general statements and conclusions relative to its resolution of this controversy. Although lengthy, we feel it appropriate to quote these statements and conclusions rather than undertake to paraphrase or summarize them.

"We believe the underlying guides to territorial assignments between electric suppliers are:

"(1) The reasonable present and probable future electric

power needs and preferences of the public in the affected areas as a whole.

"(2) The establishment of territorial integrity for the respective suppliers reasonably consistent with their financial and operational abilities and objectives.

"(3) The avoidance of future unnecessary duplication of electric facilities to the maximum reasonable extent.

"Specifically, in making the territorial assignments hereinafter, we have considered and weighed the following factors, among others:

"(1) THE PHYSICAL CHARACTERISTICS OF THE AREAS INVOLVED. This includes:

"(a) The size of the area to be assigned. We consider it generally inadvisable to assign very small, isolated areas to a supplier since small, 'island' territories would be difficult to administer;

"(b) The topography of the area. Such natural and man-made features as rivers, mountains, railroads, and highways are frequently natural boundaries of communities of interest and should be considered;

"(c) The location and population density of an area. A built-up area immediately adjacent to a municipality in which one supplier already serves is related to the municipality and the supplier serving within the municipality;

"(d) Whether an area is essentially residential, agricultural, commercial, light industrial, or heavy industrial. These characteristics have a bearing on the needs of the area as well as on the ability of a supplier to serve those needs.

"(2) THE EXISTENCE OF ELECTRIC LINES IN THE AREA. This includes:

"(a) Whether the lines are for transmission or distribution. For example, we consider that the mere existence of a transmission line through a residential or agricultural area of itself has little bearing on whether the area should be assigned to the owner of the transmission line, for it generally is neither practicable from an engineering standpoint nor feasible economically to perform the step-down transformation which would be necessary to serve a residential, small commercial, or agricultural load directly from the line. On the other hand, the existence of a transmission line through an area with

industrial potential may have a direct bearing on assignment of that area because transformation directly from the line to meet a large demand would be both practicable and feasible.

"(b) If the lines are distribution lines, their voltage level and type of conductors must be considered. For example, a single phase distribution line is not necessarily duplicated by the construction of a three-phase line to serve a load which the single phase line will not accommodate.

"(c) The historic existence of the lines. If a line is historically a 'tie-line' not built to serve customers, or if it was built solely for territorial purposes and is not serving customers, this is insufficient to justify an assignment wholly on the basis of pre-existing lines. On the other hand, if a supplier has active, adequate distribution lines in an area and historically has sought to and has served the particular needs of the area, we believe this should be given weight toward assigning that area and that load to the historic supplier.

"(3) ELECTRICAL CAPABILITY. This includes the location of lines, their type, and their electrical capabilities as already discussed. In addition, however, it includes facilities the respective suppliers have in the general area which would benefit the area and permit economical service. For example, the presence or absence of nearby substations, offices where complaints may be taken, maintenance and repair crews for both ordinary and emergency service, etc., must be considered. Where one supplier has a large convenient operation offering multiple services and the other supplier is limited, we have given weight to the supplier who can render service more readily and economically than the other. Travel time of repairmen, installers, etc., is not only an expense item to be considered, but a significant factor in service reliability. In making these assignments, we have given consideration to comparisons of travel time and distances from the respective supplier's offices to points in the areas.

"(4) THE NEEDS AND PREFERENCES OF THE PUBLIC IN THE AREA IN QUESTION. Pertinent to this consideration is the growth potential and type of future service needs of the area in question. While such considerations are admittedly speculative to some extent, we are convinced it must not be excluded from consideration. In this regard, as already alluded, we have weighed as best we can whether each area in-

volved in the main has residential, commercial, or industrial potential. For example, while the statute accords each supplier a 600-foot corridor along all existing lines—whether transmission or distribution—we hold it to be more in accordance with public convenience and necessity if, rather than arbitrarily establishing a one-mile corridor along all transmission lines, we establish a wider corridor in certain areas with industrial potential or in areas where it is reasonable to expect the owner of the transmission line to serve residential and commercial loads while in other areas conferring no rights upon the same owner of the transmission line except those already provided by law.

"From the testimony and from experience in other matters involving electric cooperatives and power companies, it appears to us almost universally true that cooperative members prefer a continuation and expansion of cooperative service and territory.

"On the other hand, industry, particularly heavy industry, just as strongly prefers the service of the power company. Each preference is grounded on understandable and realistic considerations and philosophies. The areas of high industrial potential, highly promoted and having pre-existing residential distribution lines of the cooperative with no, or very few, VEPCO distribution lines give us greatest pause. We realize that the cooperative has made great contributions to the social and economic betterment of the State and its people by serving areas considered unprofitable by the power companies and, therefore, unserved by them.

"At the same time, the cooperative is a non-profit organization and the power company can only exist on profits. Traditionally, the cooperative has not attracted industry to its service area while the power company has. The attraction of the capital wealth of industry also builds up residential loads. We are convinced that many areas of the State will be handicapped in, if not precluded from, obtaining industry, unless weight is given to industry's obvious preferences for the power company.

"Further, we hold that the power company is better equipped and better able to serve heavy industrial loads. We are of the considered opinion that it would be harmful both to the cooperative and to the public in an area with industrial potential to assign that area to the cooperative for all purposes. On the other hand, where in many cases the cooperative has histori-

cally served the residential, agricultural, and small commercial loads, we think it would be manifestly unjust and duplicative to take this area and their potential residential, agricultural, and commercial loads from the cooperative.

"Our solution in these areas of high industrial potential where there are cooperative lines is, therefore, to assign the area to cooperative for certain load purposes, and effectively, assign the heavy industrial load in the area to both the cooperative and the power company. We say 'assign to both' because either is left free to serve the heavier load upon reasonable choice of the consumer. If either is chosen to provide a service which it cannot reasonably provide, or which the other supplier more reasonably should provide, we shall consider the individual circumstances when they arise. We are aware that this may not at first appear the ideal solution for either supplier, but we believe it will prove best in the long run for the areas and the contending supplies as well and is consistent with the spirit of the statutes under which our duties arise.

"(5) THE LOCATION OF MUNICIPAL ELECTRIC SYSTEMS. Notwithstanding that municipally owned and operated systems are not defined as electric suppliers under the Act, and, therefore, are not protected from the competition of these suppliers (nor does our assignment protect these electric suppliers from the competition of municipal systems), we would prefer to make assignments in cognizance of the areas where municipal systems are directly involved. We consider this to be in the interests of economics and harmony in the electric industry of the State.

"In this instance there appears to be a high incidence of municipal lines in some of all the areas involved, whether red, green, blue, or yellow. The record does not, as already said, permit us to determine that these areas be left unassigned under the statute. To do so could do injustice to the suppliers seeking to serve the areas and to the people in those areas. There arises from the record no inference that the competitive relationship as among the cooperative, the power company, and the several municipal systems has been or will become destructive. Further, in making the assignments under this Order, we do not encourage—in fact, we shall attempt reasonably to prevent—any exodus en masse from muncipal systems to the systems of either the power company or the cooperative. Before ordering an assigned supplier to serve a customer proxi-

mate to the lines of a municipal system, we shall — as we have done in the past—look carefully into the project's economic feasibility, its potentiality for waste and duplication, and the quality, type, and manner of service available from said proximate municipal facilities. (See Docket E-22, Sub 81, May 4, 1966).

"(6) TELEPHONE EXCHANGES. Whether the public in an area can contact the office of the supplier without paying a long distance charge for telephone service is a factor related to the public convenience and necessity and we have given weight to this in making the territorial assignments herein.

"The foregoing are the major considerations taken into account.

Our judgment resulting in the assignments hereinafter has given no particular priority or importance to any single factor. Rather, we have sought to balance all factors and, where contradictions appeared, have sought to resolve them in terms of the overall public interest as set forth in the three general guidelines at the beginning."

[3] As can be seen from the findings of facts and from the above-quoted statements and conclusions, the Commission has given detailed consideration to most, if not all, of the factors bearing upon a determination of how to assign areas B-1 through B-6. It is no arbitrary action by the Commission to choose the alternative of assigning jointly to VEPCO and Woodstock. Insofar as assigning areas jointly for some purposes is concerned, the Utilities Commission has exercised its discretionary authority in good faith in the light of the existing facts and circumstances, and we are not at liberty to direct it to choose another alternative. 1 Strong, N.C. Index 2d, *supra.*

[4] However, there are no findings of fact which justify the Commission's establishment of the 400 KW load as being the maximum of the individual assignment to Woodstock. Numerous factors are left to conjecture. What are the capabilities of Woodstock's existing lines? Are they capable of adequately serving customer demands in excess of 400 KW? Would it best serve the public convenience and necessity for Woodstock to rework its existing lines to serve in excess of 400 KW demands, or for VEPCO to construct a heretofore non-existent distribution system? What is the relation between 400 KW demand and heavy industrial loads? Do loads in excess of 400 KW generally require an alternate source of power? These are other questions are left unanswered by the findings of fact in this record. The Commission has found no basis for establishing 400 KW as the maximum of Wood-

stock's individual assignment, and to that extent its order is arbitrary and must be reversed.

[5] Appellants' final contention is that the Commission's order violated the constitutional rights of both Woodstock and the consuming public. We dispose of this contention with the observation that neither Woodstock nor the consuming public has shown any constitutional right to have the areas assigned to any electric supplier. Certainly Woodstock cannot claim that it has a franchise which is being destroyed.

For the reasons stated above the order of the Utilities Commission is reversed and this cause is remanded for such further proceedings as may be appropriate.

Reversed and Remanded.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; VIRGINIA ELECTRIC AND POWER COMPANY; THE TOWN OF ROBERSONVILLE; MARTIN COUNTY; AND MARTIN COUNTY ECONOMIC DEVELOPMENT COMMISSION v. EDGECOMBE-MARTIN COUNTY ELECTRIC MEMBERSHIP CORPORATION

No. 691OUC347

(Filed 27 August, 1969)

1. Electricity § 2; Utilities Commission § 7— assignment of same electric service area to two suppliers

In this proceeding for the assignment of electric service areas pursuant to G.S. 62-110.2(c)(1), the Utilities Commission did not exceed its statutory authority in assigning an area jointly to two electric suppliers.

2. Electricity § 2; Utilities Commission § 7— assignment of same electric service area to two suppliers

Order of the Utilities Commission assigning an electric service area to an electric membership corporation for loads up to 150 KW demand and jointly to the electric membership corporation and an electric power company for higher contract demands, *is held* not to violate the constitutional rights of the electric membership corporation or the consuming public.

3. Electricity § 2; Utilities Commission § 7 — assignment of electric service areas to two suppliers — maximum individual assignment — necessity for findings of fact

In this proceeding for the assignment of electric service areas wherein the Utilities Commission assigned certain areas to an electric membership

corporation for loads up to 150 KW and jointly to the electric membership corporation and an electric power company for contract demands of 150 KW or greater, portion of the Commission's order establishing a 150 KW load as the maximum of the individual assignment to the electric membership corporation is arbitrary and must be reversed where the Commission made no findings of fact to justify such 150 KW maximum.

4. Evidence § 33; Electricity § 2; Utilities Commission § 7 — assignment of electric service areas — opinion testimony as to preference of industry for private power companies — hearsay evidence rule

In this proceeding before the Utilities Commission for the assignment of electric service areas, the hearsay evidence rule was not violated by the admission of opinion testimony that industrial consumers generally prefer to be served by a private power company, where the witnesses were expressing their opinion which had been formed from the totality of their experience and were not undertaking to relate someone else's statements.

APPEAL by Edgecombe-Martin County Electric Membership Corporation from an order of the North Carolina Utilities Commission entered 13 January 1969.

Commissioner Williams drafted the order which was concurred in by Chairman Westcott and Commissioners Eller, McDevitt and Biggs.

Pursuant to Commission Rules Edgecombe-Martin Electric Membership Corporation (hereinafter referred to as EDGECOMBE-MARTIN), Halifax Electric Membership Corporation (hereinafter referred to as HALIFAX), and Virginia Electric and Power Company (hereinafter referred to as VEPCO) filed a joint application requesting assignment to them under G.S. 62-110.2(c)(1) of areas in Martin County in accordance with their joint application.

G.S. 62-110.2(c)(1), which was enacted in 1965, provides as follows:

"In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign, as soon as practicable after January 1, 1966, to electric suppliers all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments; provided, that the Commission may leave unassigned any area in which the Commission, in its discretion, determines that the existing lines of two or more electric suppliers are in such close proximity that no substantial avoidance of duplication of facilities would be accomplished by assignment of such area. The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the

service of electric suppliers, but not considering rate differentials among electric suppliers."

The County of Martin, the Martin County Economic Development Commission, and the Town of Robersonville were permitted to intervene. Each of the intervenors protested the assignment to EDGECOMBE-MARTIN of a small area near the Town of Robersonville. This small area lies within and along the edge of a larger area which EDGECOMBE-MARTIN, HALIFAX and VEPCO had agreed in their joint application should be assigned to EDGECOMBE-MARTIN. The protested area is described as follows:

"Description of Area which Petitioner Town of Robersonville Requests Remain Unassigned

"Lying approximately 1 mile east of the Town of Robersonville, having as its western boundary the eastern boundary of the area which the applicants in this cause request remain unassigned and beginning at the point where the northern and eastern boundaries of such requested unassigned area meet: thence in a straight line to the point where distribution line of Edgecombe-Martin County Electric Membership Corporation crosses S.R. 1159 and continuing approximately 500 feet beyond such crossing in a continuation of such straight line to a point; thence in a straight line approximately south to the junction of U. S. Highway 64 and S.R. 1152; thence in a generally southeasterly direction along the eastern right of way line of S.R. 1152 to its junction with S.R. 1151 and the eastern boundary of the area which applicants request be unassigned; thence with said unassigned area boundary line to the point and place of BEGINNING."

The intervenors alleged that the highest and best use of the above-described land is ". . . for commercial and industrial development purposes because of the topography and drainage of the land, the location of transportation facilities by highway, rail and air, the close proximity to Robersonville and the ability to obtain municipal water and sewer services."

The Commission assigned all of the areas in accordance with the joint application except the above-described area which it assigned as follows: "The protested area described in Exhibit 1, hereto attached, is assigned to EDGECOMBE-MARTIN for purposes of loads up to 150 kw demand; all loads with contract demand of 150 kw or greater are assigned jointly to VEPCO and EDGECOMBE-MARTIN, subject to consumer's reasonable choice of supplier . . . ."

From the entry of this portion of the order EDGECOMBE-MAR-

TIN appealed. HALIFAX is not concerned in the protested area and has not participated in this appeal.

Crisp, Twiggs & Wells, by William T. Crisp for Edgecombe-Martin Electric Membership Corporation, appellant.

Joyner, Moore & Howison, by R. C. Howison, Jr., for Virginia Electric and Power Company, appellee.

Peel & Peel, by Elbert S. Peel, for County of Martin and the Martin County Economic Development Commission, appellees.

Paul D. Roberson for the Town of Robersonville, appellee.

Edward B. Hipp and Larry G. Ford for North Carolina Utilities Commission.

BROCK, J.

Our decision in *State of North Carolina, ex rel. Utilities Commission, and Virginia Electric and Power Company v. Woodstock Electric Membership Corporation and North Carolina Electric Membership Corporation,* which was filed the same day as this, is dispositive of the primary questions raised in this appeal.

Appellant contends here, as in the *Woodstock Electric* case, that in assigning the controverted area to EDGECOMBE-MARTIN only for loads of less than 150 KW demand, and by assigning the same area to both EDGECOMBE-MARTIN and VEPCO for higher contract demands, subject to consumer choice ". . . the Commission (A) exceeded its statutory authority, (B) acted arbitrarily and capriciously, and (C) violated the constitutional rights of both EDGECOMBE-MARTIN and the consuming public."

[1, 2] In *Woodstock Electric, supra,* we ruled that the Commission did not exceed its statutory authority in making an assignment of an area jointly to two electric suppliers. And here, as in *Woodstock Electric, supra,* we hold that no constitutional rights are involved.

[3] Without setting out the lengthy findings of fact by the Commission, we merely point out that the Commission made no findings of fact to justify setting a limit of 150 KW as the load level below which EDGECOMBE-MARTIN was individually assigned the area. In *Woodstock Electric, supra,* the load level for the individual assignment was set at 400KW, and we held there that the Commission had failed to find facts to justify the setting of that limit. The same questions are left unanswered in this case. For the failure of facts to justify the establishment of a limit of 150 KW below which EDGE-

COMBE-MARTIN was individually assigned the area, the order appealed from is arbitrary and must be reversed.

[4] Additionally, appellant assigns as error the admission of testimony bearing upon the preference of industrial consumers to be served by a private power company. The witnesses had each had experience in site locations for industry and the factors considered by industry in selecting a site. Each stated in effect that in his opinion, industries generally preferred electrical service by a private power company over electrical service by a municipality or an electric membership corporation. Appellant contends that the admission of this testimony violated the rule of evidence which prohibits the admission of hearsay testimony. Obviously, in the totality of their experience in this field, these witnesses had at times conversed and corresponded with officers and agents of industrial concerns, and had read brochures and reports, but they were not undertaking by their testimony to relate someone's statements. Their testimony was an expression of their opinions which had been formed from the totality of their experience; the factors that influenced the formation of their respective opinions bear upon the weight to be given to the testimony, not its admissibility. These assignments of error are overruled.

For the reasons stated above, and the reasons more fully set out in the *Woodstock Electric* case, *supra,* the order of the Commission is reversed and this cause is remanded for such further proceedings as may be appropriate.

Reversed and Remanded.

CAMPBELL and MORRIS, JJ., concur.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. ASHEVILLE SCHOOL, INC.

No. 6928SC132

(Filed 27 August 1969)

1. Eminent Domain § 3— condemnation to provide private driveway— public use — landlocked property

Condemnation of property by the Highway Commission for the sole purpose of providing a private driveway into adjoining property which had been landlocked as the result of the construction of a controlled access freeway *is held* to constitute a taking for a public purpose, where the driveway was constructed in connection with the freeway project and not as

a separate and distinct project completely unrelated to any public undertaking, and since the landlocking of the property was a damage to the owners thereof, which, if not repaired, would have entitled them to compensation. G.S. 136-19.

2. Eminent Domain § 1— power of Highway Commission

As a state agency the Highway Commission possesses the power of eminent domain for the purpose of acquiring property and property rights necessary to carry out its designated functions. G.S. Ch. 136.

3. Eminent Domain § 3— authority of Highway Commission — condemnation for public use

G.S. Ch. 136 does not vest in the Highway Commission the right to acquire property except for public use; nor could it do so without being in violation of both the State and Federal Constitutions.

4. Eminent Domain § 3— public use — judicial question

What is a public use is a judicial question to be decided by the court as a matter of law.

5. Eminent Domain § 3— what constitutes a public use

What constitutes a public use of such a nature as to subject property to eminent domain is incapable of a precise and comprehensive definition applicable to all cases, but each case must be evaluated in the light of its peculiar circumstances and the then current opinion as to the proper function of government.

6. Eminent Domain §§ 3, 7— damage caused by highway project— duty to repair — public purpose

The Highway Commission has the responsibility of repairing, whenever possible, damage caused by a highway project, and it is not precluded by the law or Constitution from making reasonable use of land acquired for the project in doing so.

7. Eminent Domain §§ 7, 14— consent order between Commission and landowner — rights acquired — res judicata

Where terms of consent order between Highway Commission and landowner adjudged that the Commission was entitled to acquire, and did acquire, the interest and areas over the landowner's property described in the order, the consent order involved a substantial right and was *res judicata* on the issue of Commission's right to condemn the property, and trial court had no authority to permit an amendment to the answer of defendant denying that right or to hear testimony or to consider stipulations relating to that or any other issue which had already been decided by the consent order.

8. Judgments § 21— attack on consent order — grounds for setting aside

A consent order cannot be modified or set aside without consent of the parties except for fraud or mistake.

9. Judgments § 21— attack on consent order — burden of proof

The burden is on the party attacking a consent order to allege facts showing that because of fraud, mutual mistake or lack of consent it is entitled to relief.

10. Pleadings § 33— amendment to pleading — scope of discretionary power

The right to permit amendments to pleadings is an inherent and statutory power of superior courts which they may ordinarily exercise at their discretion; but this right is not unlimited, and does not extend to amendments which change a cause of action or set up a wholly different cause of action, nor does it permit amendments as a matter of discretion where prohibited by statute or where vested rights are involved.

11. Eminent Domain §§ 7, 14— rights acquired by Commission in land — consent order — landowner's motion to amend answer

Trial court had no discretionary authority to permit landowner to amend its answer so as to challenge the authority of the Commission to acquire rights in landowner's property for highway purposes, where such authority had been admitted in landowner's answer and had been confirmed by a consent order entered into by the Commission and the landowner, and where the Commission had acquired the rights more than four years before landowner moved to amend.

12. Eminent Domain § 7— attack on land acquisition — landowner's acceptance of benefits

Where landowner withdrew the amount paid into court by the Highway Commission as its estimate of just compensation for all of landowner's property and enjoyed the use of the money for almost four years, landowner is now precluded from attacking the Commission's authority to condemn the property in question.

APPEAL by plaintiff from *McLean, J.*, 14 Ocotber 1968 Civil Session of BUNCOMBE Superior Court.

The plaintiff Highway Commission instituted this proceeding for the condemnation of approximately 5.78 acres of defendant's land by the filing of complaint, declaration of taking and notice of deposit on 11 May 1964 pursuant to G.S. 136-19 and G.S. 136-103. The taking was allegedly for public use in connection with highway project 8.19095, Buncombe County, which project included construction of Interstate Highway 40. The defendant was served on 12 May 1964 and on 21 May 1964 withdrew from the Superior Court of Buncombe County $4,300.00 that had been deposited by the plaintiff as its estimate of just compensation for the taking.

After receiving extensions of time, the defendant answered on 11 November 1965 and admitted the essential elements of the complaint except for the amount of compensation. On 20 October 1966 a consent order was filed purporting to determine all issues other than damages and adjudging that the State Highway Commission was entitled to acquire, and did acquire on 11 May 1964, the interest sought in defendant's land. On 10 May 1968, almost four years after the taking was adjudged to have occurred, the defendant filed a motion

to amend its answer and to deny that it was necessary to condemn and appropriate for public purposes a certain portion of defendant's property lying east of the property line of C. A. Mashburn and to allege that the appropriation was for a private purpose in that it was for the construction of a driveway from the Mashburn property to relocated Sand Hill Road. The motion to amend was allowed by Judge McLean on 11 June 1968. On 16 October 1968, also by order of Judge McLean, the plaintiff was permitted to amend its complaint and declaration of taking to allege that the original taking, in addition to being pursuant to G.S. 136-19 *et seq.*, was also pursuant to the provisions of G.S. 136-18, G.S. 136-54 and G.S. 136-89.48 through G.S. 136-89.58 and pursuant to a resolution passed by the plaintiff. On 16 October 1968 the plaintiff, with the consent of the defendant, added as additional grounds for its condemnation of defendant's lands G.S. 136-18(16) and the defendant answered, alleging that if G.S. 136-18(16) purports to give the plaintiff the power to condemn excess lands beyond those necessary for right-of-way or for maintenance of right-of-way purposes, it is an unconstitutional delegation of power to plaintiff and violates Section 17, Article I of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States.

The parties entered into stipulations that in substance established that on 10 February 1964 C. A. Mashburn and wife indicated to the plaintiff Highway Commission that they would probably accept the Commission's offer of $8,300.00 for right-of-way needed for project 8.19095 if their driveway was relocated on property belonging to the defendant. On 3 June 1964 a written agreement was entered between the plaintiff and the Mashburns conveying to the plaintiff the needed right-of-way and containing the following pertinent language:

> "It is further agreed herein that the undersigned grants to the State Highway Commission the right to enter upon their lands outside of the right of way to the extent as is necessary to relocate and construct the undersigneds' drive. . . . Said drive is to be 12 ft. in width, approx. 105 ft. in length, and will be surfaced with crushed stone. The drive shall be constructed and connected to the Sand Hill Road as is shown upon the plans in the State Highway Commission office in Raleigh, N. C. . . .
>
> ". . . This conveyance is made for the purposes of a freeway and the grantor hereby releases and relinquishes to the

grantee any and all abutter's rights of access, appurtenant to grantor's remaining property, in and to said freeway."

The parties further stipulated that had not the plaintiff utilized a portion of the land acquired from the defendant for the construction of a driveway to the Mashburns' property, the property would be landlocked as a result of Highway Project 8.19095, and that the reason the property in question was condemned was to provide access to the Mashburns' property from relocated Sand Hill Road.

A hearing was held before the Honorable W. K. McLean, Judge Presiding at the 14 October 1968 Session of Buncombe County Superior Court, for the purpose of determining the issues raised by the pleadings. The court heard testimony, found facts as stipulated to by the parties and in addition entered findings to the effect: (1) The tract of land in question was not taken for use in Highway Project 8.19095; (2) the driveway serves only the lands of Mashburn and is not a public or state maintained road; (3) the plaintiff moved to amend its answer immediately upon learning that a private driveway was to be constructed on its lands that had been acquired for a public purpose; (4) the defendant entered into the consent order of 20 October 1966 in good faith, relying on plaintiff's allegations and having no knowledge that its lands were to be used for other than a public purpose.

Upon its findings of fact, the court concluded that the disputed area was not taken for a public purpose but for a private purpose; that G.S. 136-18(16) is unconstitutional insofar as it attempts to give plaintiff the right to condemn lands in excess of those necessary for actual use in the right of way of any highways described in plaintiff's complaint; and that defendant waived none of its rights to contest the purported condemnation. The court thereupon ordered and decreed that the plaintiff did not acquire title to the disputed area by the institution of this action; that the consent order be amended to conform to the findings of fact and conclusions of law of the court, and that plaintiff return dominion and control of the land in question to the defendant. The plaintiff excepted to the court's findings of fact and conclusions of law and appealed.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Trial Attorney I. B. Hudson, Jr., for the State.

Bennett, Kelly & Long, by Harold K. Bennett, for defendant appellee.

PARKER, J.

[1] The plaintiff's exceptions and assignments of error raise the following question: Was the taking of the property in question in connection with a controlled access highway project and for the sole purpose of providing a private driveway into property that had been landlocked by the same project, a taking for a "public use"?

We note that the disputed area contains .074 acres of the 5.78 acres of new right-of-way which the plaintiff is seeking to acquire from a tract of defendant's land consisting of some 277 acres. Irrespective of the size or value of land taken, however, "(i)t is not a trivial thing to take another's land." *City and County of San Francisco v. Grote,* 120 Cal. 59, 52 P. 127. As stated by Lake, J., in *Highway Commission v. Thornton,* 271 N.C. 227, 241, 156 S.E. 2d 248, 259:

> "It is not a sufficient answer that the landowner will be paid the full value of his land. It is his and he may not be compelled to accept its value in lieu of it unless it is taken from him for a public use. To take his property without his consent for a non-public use, even though he be paid its full value, is a violation of Article 1, Sec. 17 of the Constitution of this State and of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States."

[2] Chapter 136 of the North Carolina General Statutes vests in the plaintiff Highway Commission broad discretionary powers in establishing, constructing, and maintaining highways as a part of a statewide system, including the power to establish controlled access facilities. As a state agency the plaintiff Highway Commission possesses the power of eminent domain for the purpose of acquiring property and property rights necessary to carry out its designated functions. An illustration of the authority granted to the plaintiff is G.S. 136-19 which provides in part:

> "The State Highway Commission is vested with the power to acquire either in the nature of an appropriate easement or in fee simple such rights of way and title to such land, . . . as it may deem necessary and suitable for road construction, maintenance, and repair, and the necessary approaches and ways through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine to enable it to properly prosecute the work, either by purchase, donation, or condemnation, in the manner hereinafter set out."

[3, 4] It is agreed, however, that Chapter 136 does not vest in

the plaintiff the right to acquire property except for public use; nor could it do so without being in violation of both our State and Federal Constitutions. What is a public use is a judicial question to be decided by the court as a matter of law. *Charlotte v. Heath,* 226 N.C. 750, 40 S.E. 2d 600.

[5] What constitutes a public use of such a nature as to subject property to condemnation by a sovereign or its agent is incapable of a precise and comprehensive definition applicable to all cases. Each case must be evaluated in the light of its peculiar circumstances and the then current opinion as to the proper function of government. *Highway Commission v. Thornton, supra; Highway Commission v. Batts,* 265 N.C. 346, 144 S.E. 2d 126.

The defendant insists that this case is controlled by the decision in *Highway Commission v. Batts, supra.* There the State Highway Commission sought to condemn a portion of defendant's property for use in the construction of a road to extend 3,316 feet from Secondary Road 1717 and end in a *cul-de-sac* at a point in the property of J. M. Batts. The Supreme Court held that the taking was for a private purpose in view of uncontradicted evidence that at the time the taking was initiated only three buildings fronted on the proposed road with a fourth being added thereafter and that the buildings were occupied by W. M. Batts and wife, and a few relatives; and the further fact that there was no showing that the road was required by a public necessity, convenience or utility.

[1, 6] When viewed in the abstract the use of defendant's property for the construction of the Mashburn driveway appears to be even less of a public use than was present in the *Batts* case. The distinction, however, is that here the Highway Commission constructed for the Mashburns a road or driveway in connection with project 8.19095, and not as a separate and distinct project completely unrelated to any public undertaking. The 5.78 acres of defendant's land was appropriated for use in connection with project 8.19095. There is no question but that this project, which includes the construction of a controlled access freeway (I-40), was an undertaking of great public importance and that the plaintiff had the authority to procure by condemnation such rights-of-way or lands as were necessary to properly prosecute and complete the project. *Browning v. Highway Commission,* 263 N.C. 130, 139 S.E. 2d 227. Most of the land acquired from the defendant was for use within the controlled access area of I-40. The .074 acres that is in dispute was used for the purpose of providing access to the Mashburn property which had been completely landlocked by the Highway Project. The ques-

tion is presented: Was this use such a deviation from the duties and responsibilities of the plaintiff in connection with project 8.19095 as to remove it from within the scope of the project? We think it was not. Certainly the plaintiff has the responsibility of repairing, whenever possible, damage caused by a highway project, and it is not precluded by the law or Constitution from making reasonable use of land acquired for the project in doing so. The landlocking of the Mashburns' property was a damage to them, which if not repaired, would have entitled them to compensation. *Highway Commission v. Phillips,* 267 N.C. 369, 148 S.E. 2d 282; *Snow v. Highway Commission,* 262 N.C. 169, 136 S.E. 2d 678. It is obvious that in the agreement with the Mashburns, the plaintiff undertook to repair the damage rather than to pay compensation for it. We are of the opinion and so hold that in using a reasonable amount of land acquired from the defendant for this purpose the plaintiff was acting within its statutory and constitutional authority.

In 2 Nichols, Eminent Domain, § 7.51211, it is stated at page 716:

> "Procuring an easement and creating a right of way for the benefit of parcels of land incidentally deprived of all or of some means of access to an existing way by reason of the construction of a turnpike, throughway, freeway or other limited access highway has been held to be for a public use."

Decisions by courts in a majority of states where similar condemnation proceedings have been challenged are in accord with our holding here. *Luke v. Massachusetts Turnpike Authority,* 337 Mass. 304, 149 N.E. 2d 225; *May v. Ohio Turnpike Commission,* 172 Ohio St. 555, 178 N.E. 2d 920; *Tracey v. Preston,* 172 Ohio St. 567, 178 N.E. 2d 923; *State High. Com'r. v. Totowa Lumber & Sup. Co.,* 96 N.J. Super. 115, 232 A. 2d 655; *Mississippi State Highway Commission v. Morgan,* 253 Miss. 398, 175 So. 2d 606; *Sturgill v. Commonwealth, Department of Highways (Court of Appeals of Kentucky),* 384 S.W. 2d 89; *Andrews v. State (Indiana),* 229 N.E. 2d 806. The First District Court of Florida reached a contrary conclusion in a two to one decision. *Brest v. Jacksonville Expressway Authority (Dist. Ct. of Appeals of Florida),* 194 So. 2d 658.

In *Luke v. Massachusetts Turnpike Authority, supra,* the Massachusetts court considered the taking of property from the plaintiff to provide private access into property belonging to one Powers. In holding that the taking did not under the circumstances constitute a taking for private use the court stated:

> "The 'Powers private way' is, of course, located in the permanent easement taken by the Authority. If the easement

> or the private way should be viewed in the abstract, no public purpose would appear. Such an approach, however, would be closing the eyes to reality. The laying out of the turnpike the length of the commonwealth and the acquisition of numerous sites essential to that object are attributes of one huge undertaking. Procuring an easement and creating a right-of-way for the benefit of parcels of land incidentally deprived of all or of some means of access to an existing way are but a by-product of that undertaking."

In *Andrews v. Indiana, supra,* the plaintiff contested the taking of his property to provide access to the property of one Baldwin whose property had been landlocked by the construction of an Interstate Highway. The court stated:

> "In truth and in fact, we must conclude that a service road would alleviate a landlocked condition of the Baldwin property and would certainly have the effect of reducing the amount of damages payable to the Baldwins. If the State of Indiana is not in a position to minimize the damages paid to landowners, then the cost of Interstate Highways would soar astronomically and Indiana would be dotted abnormally with landlocked real estate."

In light of the language of the *Andrews* case we note that in this case one of the witnesses for the State Highway Commission testified that "all we paid Mashburn was $8,300.00. Possibly we would have had to pay him $40,000.00 if we hadn't taken the property from Asheville School."

[1] Though we hold that it was error for the court below to find that the defendant's land in question was taken for a private purpose, we do so apart from any consideration of the constitutionality of G.S. 136-18(16). In our opinion this case does not involve an exchange of property under the provisions of that particular statute. In our opinion G.S. 136-19 vests in the Highway Commission ample authority for the taking here in question as this taking was necessary in order for it to "properly prosecute the work" involved with project 8.19095.

The plaintiff also challenges the court's findings and conclusions that the defendant waived none of its rights to contest the condemnation of the area in question, contending that the consent order could be attacked only for fraud, mutual mistake or lack of consent; and further, that the defendant's withdrawal of plaintiff's deposit of estimated compensation precluded its later denial of plaintiff's authority to appropriate the land in question.

[7, 8] Under the terms of the consent order entered in this cause on 20 October 1966 it was adjudged that the plaintiff was entitled to acquire, and did acquire, on the 11th day of May, 1964, the interest and areas over the lands of defendant described in the order and including the area now under dispute. This consent order purporting to finally settle and adjudicate this essential issue was in effect the contract of the parties entered with the approval and sanction of the court, and it could not thereafter be modified or set aside without consent of the parties except for fraud or mistake. *King v. King,* 225 N.C. 639, 35 S.E. 2d 893; *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209. "While the court has the power to change an interlocutory order or judgment while the action is pending, if such judgment is by consent, the court can change it only by the consent of the parties, or upon motion or petition showing the existence of circumstances of fraud or mistake." 2 McIntosh, N.C. Practice 2d, § 1684. The defendant herein made no motion to modify or vacate the consent order on the grounds specified above but sought by amending its answer to raise the very issues which had been adjudicated by the consent order. As long as the consent order remained in effect, it was res judicata on the issue of the plaintiff's right to condemn the defendant's property, and the court had no authority to permit an amendment to the answer denying that right or to hear testimony or to consider stipulations relating to that or any other issue which had already been decided by the consent order. *Highway Commission v. Nuckles,* 271 N.C. 1, 155 S.E. 2d 772. The consent order in question was not an incidental order relating to the progress of the trial and subject to being stricken or modified. It involved a substantial right. "A decision which disposes not of the whole, but merely of a separate and distinct branch of the subject matter in litigation" is final in nature. 4 Am. Jur., 2d, Appeal and Error, Sec. 53.

[9-11] The defendant in its motion to amend answer filed 10 May 1968 made no mention of the consent order filed on 20 October 1966. It did not move to vacate or modify the order, nor did it allege facts to show that because of fraud, mutual mistake or lack of consent it was entitled to relief from its "contract" with the plaintiff. The burden was clearly on the defendant to do so. Strong, N.C. Index 2d, Judgments § 21. The court's order allowing the amendment likewise makes no mention of the consent order but purports to grant the motion "in its discretion." It is true that the right to permit amendments to pleadings is an inherent and statutory power of superior courts which they may ordinarily exercise at their discretion. G.S. 1-163; *Gilchrist v. Kitchen,* 86 N.C. 20. But this right is not

unlimited. It does not, for instance, extend to amendments which change a cause of action or set up a wholly different cause of action. *Thompson v. R. R.,* 248 N.C. 577, 104 S.E. 2d 181. Neither does it permit amendments as a matter of discretion where prohibited by some statutory enactment or where vested rights are involved. *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22. The Highway Commission here had acquired the rights which it sought in the defendant's property more than four years before the defendant moved to amend its answer and question the authority of the Commission. Its authority to do so had been admitted in defendant's answer filed 1 November 1965 and it had been confirmed by the consent order of 20 October 1966. An amended answer resurrecting an issue that had been so long settled and one that was so vital to the plaintiff and to the public was without question "an amendment effecting vested rights." As such it was beyond the discretionary authority of the trial judge to allow it.

[12] Furthermore, the defendant's withdrawal of the amount paid into court by the plaintiff as its estimate of just compensation precluded the attack now attempted on the plaintiff's authority to condemn the property in question. The deposit was for all of the property, not just the portion which the defendant admits the plaintiff had the right to take. The defendant enjoyed the use of the money for almost four years before attempting to deny the plaintiff's authority to take the land in question. None of the deposit has been returned. The defendant may not accept benefits while attacking the source from which the benefits are derived. *City of Durham v. Bates,* 273 N.C. 336, 160 S.E. 2d 60; *Highway Commission v. Matthis,* 2 N.C. App. 233, 163 S.E. 2d 35.

The order appealed from is vacated and this cause remanded for further proceedings not inconsistent herewith.

Reversed and remanded.

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

M. & J. USED CARS, INC. v. SAM EASTON

No. 6911DC360

(Filed 27 August 1969)

1. Automobiles § 5; Sales § 1— memorandum — bill of sale

Paper writing entitled "Here Is The Deal" describing an automobile by year, make, body type and serial number, and setting forth the cash sales price, down payment, and due date for the unpaid balance was at most only a memorandum and did not constitute a bill of sale.

2. Trial § 58— waiver of jury trial — review of findings by trial court

Where the parties waive jury trial and agree that the court find the facts, the court has the function of weighing the evidence, and its findings are conclusive on appeal if supported by any competent evidence, notwithstanding that evidence to the contrary may have been offered.

3. Automobiles § 5— vesting of title

The vesting of title to an automobile is deferred until the purchaser has the old certificate endorsed to him and makes application for a new certificate.

4. Automobiles § 5— transfer of title — bill of sale

Title to a motor vehicle cannot be transferred in this State by bill of sale.

5. Automobiles § 5— transfer of title — written memorandum — findings by court

In this action to recover possession of an automobile, the trial court erred in finding that defendant had acquired title to the automobile where all the evidence shows that, pursuant to a business arrangement which had existed for several years, the automobile was purchased by draft drawn on plaintiff corporation by a partner of another automobile company, that the automobile was sold and title was issued to the new owner, subject to a bank lien, with the profit on the sale being divided between plaintiff and the automobile partnership, that the new owner later requested the partner of the automobile company to sell the automobile for her, that the partner gave possession of the automobile to defendant upon receipt of $500 from defendant, either as a down payment on the purchase price or as a loan, that the partner gave defendant a paper writing entitled "Here Is The Deal" setting forth a description of the automobile, the purchase price, down payment of $500, and due date of the balance, and that title was thereafter transferred to plaintiff by the owner upon payment of a draft drawn upon plaintiff by the partner, the memorandum given by the partner to defendant being insufficient to convey title to defendant, and the evidence establishing that plaintiff has title to the automobile.

APPEAL by plaintiff from *Morgan, C.J.*, 25 March 1969 Session, JOHNSTON County District Court.

Plaintiff instituted this action 25 October 1968 to recover one

1962 Chevrolet Corvette automobile (Corvette). Simultaneously with the institution of the action, plaintiff instituted ancillary claim and delivery proceedings.

Defendant filed answer denying plaintiff's ownership of the Corvette and asserting his own title thereto. Defendant posted a bond and retained possession of the vehicle.

The case was tried without a jury, and the trial judge entered the following judgment:

"This matter coming on to be heard before the undersigned Judge of the District Court Division of the General Court of Justice for Johnston County, North Carolina, jury having been waived, and being heard before the undersigned, and the Court finds the following facts:

1. That the plaintiff is a corporation organized and existing under the laws of the State of North Carolina with its main office in Johnston County, North Carolina; that the defendant, Sam Easton, is a citizen and resident of Wayne County, North Carolina.

2. That this is an action to determine ownership and the right of possession to a 1962 Chevrolet Corvette, Serial No. 20867S107598; that the defendant now has possession of said automobile, he having caused a bond to be filed in this matter to retain possession of said vehicle.

3. That L & T Motors is a partnership with its office in Johnston County, North Carolina, and one of the partners in that business is Tommy Pittman.

4. That for approximately two years prior to the occasion complained of in the complaint, the partnership of L & T Motors and the plaintiff, M & J Used Cars, Inc., entered into an agreement whereby Tommy Pittman of L & T Motors, would buy automobiles, and would pay for said automobiles by executing a draft to the owner of same and would sign said draft, pursuant to an agreement with the plaintiff, as follows: 'M & J Used Cars, Inc., by Tommy Pittman'; that on some occasions the cars purchased in this manner by Tommy Pittman would be titled in the name of L & T Motors and sometimes the title was in the name of the plaintiff; that the cars were then washed, repaired, and otherwise gotten ready for sale and were either sold at retail or wholesale, and following the sale and the payment of the draft, the net profit realized from the sale of said automobile was split as follows: L & T Motors two-

thirds and the plaintiff one-third; that the plaintiff authorized Tommy Pittman to execute the name of the plaintiff on titles to motor vehicles, selling the interest of the plaintiff, in said automobiles, this authority being used primarily out of the state of North Carolina but on several occasions said practice was followed in the State of North Carolina.

5. That during the month of October, 1966, L & T Motors, acting by and through Tommy Pittman, bought the automobile which is the subject matter of this action from Cobb Motor Company in Goldsboro, North Carolina, and paid for it by issuing a draft for the purchase price against M & J Used Cars, Inc., the said Tommy Pittman signing said draft as follows: 'M & J Used Cars, Inc., by Tommy Pittman'; that said car was thereafter sold to Rendie Ferrell Barbee; that the bill of sale for the car was given to the purchaser on a bill of sale from the plaintiff, signed by its president, George McLamb. That the Department of Motor Vehicles in Raleigh, North Carolina, on November 2, 1966, issued its North Carolina certificate of title to Rendie Ferrell Barbee and showed a lien in favor of the First Citizen Bank & Trust Company, Smithfield, North Carolina; that upon receipt of the money for the automobile from the purchaser, the plaintiff and L & T Motors, divided the profit realized upon the sale of said automobile in accordance with the terms hereinabove set out; that approximately thirty days thereafter Rendie Ferrell Barbee brought the automobile back to Tommy Pittman and surrendered it to him; that on December 27, 1966, Tommy Pittman sold the 1962 Chevrolet Corvette automobile, Serial No. 20867S107598, to the defendant for $1,000.00 and signed the bill of sale as follows: 'L & T Motors, by Tommy Pittman'; that the defendant paid $500.00 down and agreed to pay the balance in the amount of $500.00 on January 7, 1967, that being the time that Tommy Pittman indicated that he could have the title to said vehicle, it at that time being retained by the First Citizens Bank & Trust Company, Smithfield, North Carolina, pursuant to the original sale to Rendie Ferrell Barbee.

6. That neither the plaintiff nor L & T Motors paid Rendie Ferrell Barbee for said automobile at the time that it was returned to Tommy Pittman, but the payments were kept up at the First Citizens Bank & Trust Company by Tommy Pittman; that on May 10, 1967, Tommy Pittman executed a draft in the amount of $1350.00 to Rendie Ferrell Barbee in payment for

said automobile and signed it, 'M & J Used Cars, Inc., by Tommy Pittman'; that Rendie Ferrell Barbee presented said draft to the First Citizens Bank & Trust Company on May 18, 1967, and said bank then caused the North Carolina certificate of title to be executed by her and showed the purchaser to be the plaintiff; that the plaintiff's bank in due course, pursuant to instructions from the plaintiff, honored said draft.

7. That the 1962 Chevrolet Corvette, described above, has remained continuously in the possession of the defendant since December 27, 1966, and no demands or questions concerning the right of possession was raised by the plaintiff until the filing of this suit and the plaintiff accompanied the Sheriff to the place of business of the defendant.

8. That the defendant is a registered dealer, authorized by the laws of this state, to buy and sell motor vehicles as a dealer in the same manner as is the plaintiff in this action.

9. That no North Carolina certificate of title has been delivered by Tommy Pittman, L & T Motors, or the plaintiff, to the defendant for the 1962 Chevrolette Corvette described in the pleadings. That numerous demands for a title have been made by the defendant upon Tommy Pittman.

10. That at the time the said Tommy Pittman executed the draft to Rendie Ferrell Barbee in the amount of $1350.00, and at the time that it was presented to the bank and approved by the plaintiff for payment, Tommy Pittman advised George McLamb, president and principal owner of the plaintiff corporation, that he had borrowed $500.00 on said automobile from the defendant and the plaintiff, acting by and through its agent, George McLamb, agreed to pay the sum of $500.00; that the defendant had agreed that he would surrender possession of said automobile upon the payment to him of $500.00.

11. That the plaintiff did not pay the $500.00 and the plaintiff and L & T Motors discontinued and terminated the relationship which existed between them and the plaintiff issued claim and delivery for the automobile described in the pleadings.

UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. That the court has jurisdiction of the parties and the subject matter.

2. That at the time of the sale of the 1962 Chevrolet Cor-

vette automobile, Serial No. 20867S107598, on December 27, 1966, by L & T Motors, the bill of sale having been executed as follows: 'L & T Motors, by Tommy Pittman', the said Tommy Pittman was at that time acting in accordance with and in furtherance with the agreement and arrangement then and there existing between L & T Motors and the plaintiff and was the agent of the plaintiff, and the defendant is the owner and entitled to possession of said automobile.

The court therefore answers the issues submitted to it as follows:

1. Is the plaintiff the owner and entitled to the possession of the 1962 Chevrolet Corvette, Serial No. 20867S107598, as alleged in the Complaint?

ANSWER: No.

2. What was the value of the 1962 Chevrolet Corvette, Serial No. 20867S107598, on the 25th day of October, 1968, the date said vehicle was seized by the Sheriff of Wayne County?

ANSWER: .....

3. Is the defendant the owner and entitled to the possession of the 1962 Chevrolet Corvette, Serial No. 20867S107598, as alleged in the Answer?

ANSWER: Yes.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant is the owner and entitled to possession of the 1962 Chevrolet Corvette automobile, Serial No. 20867S107598.

It is further ordered, adjudged and decreed that the defendant and his bondsman be and they are hereby discharged.

It is further ordered, adjudged and decreed that since the defendant has never paid the balance of the purchase price for said automobile and having stipulated his willingness to pay the same upon the presentment of title properly executed, free of all liens, it is ordered that the plaintiff be paid the sum of $500.00 by the defendant upon the delivery to him of the North Carolina Certificate of Title to said vehicle, properly endorsed over to him, free and clear of all encumbrances.

It is further ordered, adjudged and decreed that upon the failure of the plaintiff to execute said title, the North Carolina Department of Motor Vehicles shall cause a duplicate Certificate of Title to be issued to the defendant for said automobile

and that the defendant then tender by certified check by registered mail the sum of $500.00 to the plaintiff and should said tender of payment be rejected, that the law in such cases made and provided be invoked against the plaintiff.

It is ordered and directed that the costs of this action be taxed against the plaintiff.

This the 25th day of March, 1969.

s/ ROBERT B. MORGAN, SR.
Judge Presiding"

From this judgment the plaintiff appealed to this Court.

The facts are contained in the opinion.

L. Austin Stevens for plaintiff appellant.

Braswell, Strickland, Merritt & Rouse by Roland C. Braswell for defendant appellee.

CAMPBELL, J.

The plaintiff makes two assignments of error. The first to the effect that the "verdict and judgment is contrary to and unsupported by any of the evidence." The second is "such verdict and judgment is contrary to the applicable law."

M. & J. Used Cars, Inc., is a North Carolina corporation with its principal stockholder and president being George McLamb (McLamb).

L & T Motor Company (L & T) was a partnership with two partners, Tommy Pittman (Pittman) and Larry Hall.

Both plaintiff and L & T carried on their business operations in Johnston County, North Carolina.

The defendant lives in Goldsboro, Wayne County, North Carolina, and is engaged in a mobile home business and in connection with his business has a used car dealer's automobile license.

At the time involved in the transactions pertaining to the Corvette automobile in this case, L & T conducted the partnership business from property which it rented on a month-to-month basis from plaintiff.

Plaintiff, acting through McLamb, and L & T acting through Pittman, over a period of several years conducted business transactions wherein Pittman would locate an automobile, and in order

to purchase the automobile, Pittman would issue a draft drawn on plaintiff by him. The title to the automobile would be taken either in the name of L & T or in the name of plaintiff. The automobile would be conditioned by L & T and then sold by L & T. The proceeds from the sale would be applied first to repay plaintiff for the purchase price of the vehicle and then the profit would be divided with one-third going to plaintiff and two-thirds going to L & T. This course of conduct had been going on for several years.

In October 1966 Pittman purchased the Corvette from Cobb Motor Company in Goldsboro. The purchase of the Corvette was handled in the same manner as previous purchases, namely, Pittman issued a draft drawn on plaintiff for the purchase price, and the title was placed in the name of L & T.

Shortly after purchasing the Corvette, Pittman sold the Corvette to a Mrs. Barbee. Mrs. Barbee borrowed $1,603.25 on 29 October 1966 from First Citizens Bank, Smithfield, North Carolina, and used the Corvette as security for said loan. The purchase price received from Mrs. Barbee was divided between plaintiff and L & T as usual.

The Department of Motor Vehicles of the State of North Carolina issued a certificate of title for the Corvette to Mrs. Barbee dated 2 November 1966, and showed on the face of the certificate of title the first lien in the amount of $1,603.25 dated 29 October 1966 and lienholder to be First Citizens Bank, Smithfield, North Carolina.

In December 1966 the Corvette was owned by Mrs. Barbee subject to the first lien to First Citizens Bank, Smithfield, North Carolina. The bank had the certificate of title issued by the North Carolina Motor Vehicles Department, and neither plaintiff nor L & T had any interest whatsoever in said vehicle.

During the month of December 1966, Mrs. Barbee brought the Corvette to Pittman and requested him to sell the Corvette for her. Pittman took the Corvette to Goldsboro and in his words "pawned" it to the defendant for $500.00. This was done on 27 December 1966. In addition to getting $500.00 from the defendant, Pittman gave possession of the Corvette to the defendant and gave him a piece of paper reading in part:

"Here Is The Deal

CASH SALES PRICE — $1,000.00
TOTAL DOWN PAYMENT — $500.00
UNPAID CASH BALANCE — $500.00

Payable in one installment of $500.00
First Installment Becomes Due on January 7, 1967.

s/ L & T MOTORS
By: Tommy Pittman"

The Corvette was described in the paper writing by year, make, body type and serial number. The paper writing was a printed form, and in addition to the portions quoted above contained other printed matter and blank spaces unfilled.

[1] At most the printed paper writing signed by Pittman and given to the defendant on 27 December 1966, represented only a memorandum and certainly did not constitute a bill of sale.

[2] In this case trial by jury was waived and the parties agreed that the Court find the facts. "It is the rule in North Carolina that where the parties waive a jury trial and agree that the Court may find the facts, they thereby transfer to the Judge the function of weighing the evidence, and his findings are conclusive on appeal if supported by any competent evidence, notwithstanding the fact that evidence to the contrary may have been offered. . . ." *Huski-Bilt, Inc., v. Trust Co.,* 271 N.C. 662, 157 S.E. 2d 352.

The first four numbered findings of fact by the trial court are supported by some of the evidence in the case.

[5] Finding of Fact No. 5 is supported by some of the evidence in the case except for that portion reading, ". . . that on December 27, 1966, Tommy Pittman sold the 1962 Chevrolet Corvette automobile, Serial No. 20867S107598, to the defendant for $1,000.00 and signed the bill of sale as follows: 'L & T Motors, by Tommy Pittman'. . . ."

The defendant introduced evidence, and Pittman testified as a witness for the defendant. Pittman testified that after the automobile had been sold to Mrs. Barbee and after she had acquired the certificate of title thereto issued by the Department of Motor Vehicles which she had left at the First Citizens Bank at Smithfield as security for the first lien on the automobile in the amount of $1,603.25, she returned the automobile to him and requested that he sell it for her. At that time the plaintiff knew nothing about the transaction between Mrs. Barbee and Pittman. The plaintiff had no interest

whatsoever in the automobile at that time. Pittman testified that he was acting as an agent for Mrs. Barbee in trying to sell her automobile.

While Pittman had the automobile trying to sell it for Mrs. Barbee, he needed $500.00, and he went to Goldsboro for the purpose of obtaining $500.00. He testified that in the transaction with the defendant in Goldsboro he was acting for himself and not for Mrs. Barbee and that he borrowed the $500.00 for himself. He testified, "I was borrowing $500.00 and pawning the car." At the time of obtaining the $500.00 from the defendant, Pittman gave defendant the paper writing above mentioned and titled "Here Is The Deal." Pittman described it as being, "[w]ell, I had to give the man something" when he was borrowing $500.00 on the automobile.

Pittman never repaid the $500.00 which he claimed to have borrowed from the defendant. Later in the month of May 1967, Pittman drew a draft on the plaintiff for $1,350.00 payable to Mrs. Barbee. This draft was dated May 10, 1967, and the plaintiff declined to recognize the draft and authorize its payment. A few days thereafter, Mrs. Barbee and Pittman met with McLamb, the President and principal stockholder of plaintiff, and McLamb authorized plaintiff's bank to accept the draft of $1,350.00 and pay it. This was done on 18 May 1967 and simultaneously with the payment of the draft, Mrs. Barbee executed the assignment of title transferring the title to the automobile to plaintiff, and First Citizens Bank released its first lien. Pittman testified that at this time he informed plaintiff that he owed the defendant $500.00 on the automobile and Pittman agreed to pay the $500.00 that he owed the defendant. Pittman further testified that he expected to get the $500.00 when he settled up with plaintiff. He testified, "we were to straighten up and settle up, and I should have had enough money coming to pay the $500.00, and that is what I agreed to do that day, but of yet, we have never settled up." Plaintiff never agreed to pay anything more.

The defendant testified in his own behalf that he had a license to deal in motor vehicles in North Carolina and has done so since 1960. That he had known Pittman since 1960; that he knew McLamb by sight, but had had "[n]o business transactions" with him. Pursuant to a telephone call, he went to the place of business of a Mr. Sasser who also was in the automobile business. On arriving there, he had a conversation with Pittman. He gave Pittman $500.00 in cash and accepted possession of the automobile and the paper writing "Here Is The Deal." Since that time he has had possession of the automobile. He testified that he did not know that plaintiff had

any interest in this particular automobile. He thought he was purchasing the automobile from Pittman and L & T Motors. He testified that he thought he was making a $500.00 down payment and that Pittman was supposed to get the title to the vehicle some time thereafter, and when he delivered the title to him, he would then pay the remaining $500.00. He testified that he kept after Pittman on several occasions about the title, and "[i]n numerous conversations, he always had some type of an excuse. . . . On another occasion, Tommy asked me what it would take to get the car back from me. This was after I had had the car for some time and could not get a title. I told Tommy that I wanted my money back, or I wanted the title. He asked me if I would give him the car back, if he paid me my $500.00 back. . . . On numerous occasions, I told him 'yes.'" He further testified that Pittman told him that he was the owner of the automobile, that is L & T Motors was the owner. Pittman did not mention Mrs. Barbee to the defendant, and the defendant never saw a title to the automobile.

[3] Since 1961 transfer of ownership of an automobile by an owner thereof is not effective until the statute has been complied with. "What the amendments of 1961 say is: The vesting of title is deferred until the purchaser has the old certificate endorsed to him and makes application for a new certificate." *Credit Co. v. Norwood,* 257 N.C. 87, 125 S.E. 2d 369.

[4] The defendant did not acquire title to the Corvette and the paper writing "Here Is The Deal" at most was merely a memorandum of what the parties, the defendant and Pittman, intended to do in the future. Even if that paper writing had been a valid bill of sale, it would not have conveyed title as title to a motor vehicle cannot be transferred in North Carolina by that method. *Bank v. Motor Co.,* 264 N.C. 568, 142 S.E. 2d 166. Pittman had no title to the Corvette and no right to deliver possession to the defendant. Defendant acquired no rights in the Corvette as Pittman had none to give.

[5] There was no evidence in the trial of this case to support the findings of fact made by the trial court that the defendant had acquired title to the Corvette.

There is no evidence to support the finding of fact that plaintiff ever agreed to pay anything to the defendant. The defendant never considered the plaintiff involved in the transaction between the defendant and Pittman with regard to this Corvette automobile. The defendant has no claim whatsoever against the plaintiff. The defendant dealt with and relied on Pittman whom he had known for years.

All of the evidence establishes the fact that the plaintiff is the owner and has title to the Corvette automobile.

The judgment of the District Court is reversed, and this cause is remanded for the entry of a judgment not inconsistent with this opinion.

Error and remanded.

BROCK and MORRIS, JJ., concur.

C. J. WHITLEY v. MONROE M. REDDEN, EXECUTOR ESTATE OF LEON D. HYDER

No. 6929SC285

(Filed 27 August 1969)

1. Pleadings § 37— issues raised by pleadings

Issues arise on the pleadings when a material fact is asserted by one party and denied by the other. G.S. 1-196, G.S. 1-198.

2. Pleadings § 37— issue of fact

An issue of fact arises when a material allegation appearing in the complaint is denied in the answer.

3. Pleadings § 37— material fact

A material fact is one which constitutes a part of the plaintiff's cause of action or the defendant's defense.

4. Pleadings § 37— submission of issues — duty of trial court

It is the duty of the trial judge to submit such issues as are necessary to settle the material controversies in the pleadings, and in the absence of such issues and without admissions of record sufficient to justify the judgment rendered, the Court of Appeals will remand the case for a new trial.

5. Judgments § 3; Bills and Notes § 16— conformity of judgment to pleadings — issues — indebtedness of defendant

Where, in an action to recover upon two promissory notes, the complaint raises the issue of the indebtedness of defendant, it is error for the trial judge to enter judgment in favor of plaintiff absent an admission of indebtedness in the pleadings or by stipulation, or a finding by the jury that defendant was indebted to plaintiff.

6. Evidence § 11— action on promissory notes — dead man's statute — testimony by plaintiff

In an action against an executor to recover on two notes allegedly executed by the decedent to the plaintiff and to plaintiff's witness, testi-

mony by plaintiff and his witness that the decedent had been in bad financial condition and had requested their help in obtaining a loan for one million dollars and that the notes were given to them in settlement for their help, although admitted by the trial court for the sole purpose of disclosing the basis of the witnesses' opinion as to the mental capacity of decedent to execute the notes, *is held* incompetent and inadmissible under G.S. 8-51, since the testimony related to a personal transaction with decedent and tended, in support of plaintiff's claim against the executor, to establish the execution and delivery of the notes and the consideration therefor.

7. Evidence § 11; Trial § 17— dead man's statute — mental competency of decedent — evidence competent for restricted purpose

Where evidence is admissible under the rule that testimony of personal transactions and communications with a decedent is competent on the question of the mental capacity of the decedent, but such evidence is also inadmissible under the "dead man's statute," G.S. 8-51, in that the testimony tends directly to establish the material facts in issue, the evidence should be excluded.

APPEAL by defendant from *Thornburg, S.J.*, January 1969 Special Session of Superior Court held in HENDERSON County.

In this civil action plaintiff seeks to recover on two notes, the first dated 11 June 1965 in the sum of $120,000, and the second dated 2 August 1965 in the sum of $65,000. Both notes are alleged to have been executed for value received and delivered by defendant's testator, Leon D. Hyder (Hyder), to C. J. Whitley (Whitley) and E. R. Flowers (Flowers). Flowers subsequently assigned his interest in the two notes to Whitley. Each of the assignments was made in the following language: "FOR VALUE RECEIVED, the undersigned hereby sell, assign and transfer his interest in this Note to C. J. Whitley." Plaintiff also alleged that Hyder died testate on 3 September 1967 and that defendant was indebted to him in the sum of $185,000, plus interest.

Defendant answered and denied the indebtedness and the execution and delivery of the notes. Defendant also alleged a lack of consideration for the notes and by amendment to the answer asserted that on the dates alleged Leon D. Hyder did not have sufficient mental capacity to execute and deliver the notes.

Issues were submitted to the jury and answered as appear in the following judgment which was entered herein:

"This cause coming on to be heard before Honorable Lacy H. Thornburg, Judge presiding over the January 20, 1969, Civil Session of Superior Court of Henderson County, and a jury;

And the jury having answered the issues submitted as follows:

1. Did Leon D. Hyder sign the note dated June 11, 1965, payable to C. J. Whitley and E. R. Flowers, in the sum of $120,000.00 and deliver same to them, as alleged in the complaint?

ANSWER: Yes.

2. Did Leon D. Hyder on June 11, 1965, have sufficient mental capacity to sign and deliver said note?

ANSWER: Yes.

3. Was said promissory note issued for valuable consideration?

ANSWER: Yes.

4. Did Leon D. Hyder sign the note dated August 2, 1965, payable to C. J. Whitley and E. R. Flowers in the sum of $65,000.00 and deliver same to them, as alleged in the complaint?

ANSWER: Yes.

5. Did Leon D. Hyder on August 2, 1965, have sufficient mental capacity to sign and deliver said note?

ANSWER: Yes.

6. Was said promissory note issued for valuable consideration?

ANSWER: Yes.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that plaintiff have and recover of the defendant the sum of One hundred and eight-five thousand ($185,000.00) Dollars, together with interest thereon at the rate of 6% per annum from December 28, 1967.

It further appearing to the Court that Drs. Fortescu and Sellers were duly subpœnæd and qualified to testify, and testified as expert witnesses on behalf of the defendant during the trial of this action, and that the sum of $50.00 is reasonable expert witness fee for said doctors;

IT IS THEREFORE, further ordered that Drs. Fortescu and Sellers be, and each is allowed expert witness fee in the sum of $50.00, same to be taxed as part of the cost of this action.

IT IS FURTHER ORDERED that the cost of this action as determined by the Clerk shall be and is hereby taxed against the defendant.

This the 30th day of January, 1969."

Defendant assigned error and appealed to the Court of Appeals.

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

Redden, Redden & Redden for defendant appellant.

MALLARD, C.J.

Plaintiff alleged the following in paragraph 8 of the complaint:

"That there is now due and owing to the plaintiff from the defendant the sum of One Hundred Eighty-Five Thousand ($185,000.00) Dollars, together with interest thereon at the rate of six (6%) per cent per annum from December 28, 1967, no part of which amount has been paid."

Defendant in answering this allegation of the complaint said:

"That the allegations contained in Paragraph 8 of the complaint are untrue and are denied."

[1-3] It is elementary that issues arise upon the pleadings when a material fact is asserted by one party and denied by the other. G.S. 1-196; G.S. 1-198. An issue of fact arises when a material allegation appearing in the complaint is denied in the answer. *Baker v. Construction Corp.*, 255 N.C. 302, 121 S.E. 2d 731 (1961). "A material fact is one which constitutes a part of the plaintiff's cause of action or the defendant's defense." *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16 (1952). See also *In Re Wallace,* 267 N.C. 204, 147 S.E. 2d 922 (1966).

G.S. 1-200 requires:

"Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues arising upon the pleadings, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reduced to writing, before or during the trial."

[4] The rule as to the duty of the trial judge is succinctly stated by Justice Sharp in *Heating Co. v. Construction Co.,* 268 N.C. 23, 149 S.E. 2d 625 (1966), as follows:

"The sum and substance of the foregoing precepts is that it is the duty of the judge to submit such issues as are necessary to settle the material controversies in the pleadings. In the absence of such issues, without admissions of record sufficient to justify the judgment rendered, this Court will remand the case for a new trial. *Tucker v. Satterthwaite,* 120 N.C. 118, 27 S.E. 45."

[5] In the case before us the issue of indebtedness was raised by the pleadings. There does not appear in the pleadings or stipulations an admission, nor was there a determination by the jury, that the plaintiff was entitled to recover any sum of the defendant. Absent an admission of indebtedness in the pleadings or by stipulation, or

a finding by the jury that the defendant was indebted to the plaintiff, it was error for the judge to enter the judgment in this case. *Oil Co. v. Fair,* 3 N.C. App. 175, 164 S.E. 2d 482 (1968).

We refrain from discussing the evidence in detail since a new trial is awarded. *Baker v. Construction Co., supra.* However, we deem it necessary to discuss assignments of error based upon exceptions to certain testimony of Flowers and Whitley.

The evidence tended to show that the notes sued on were payable to Flowers and Whitley. Flowers, by endorsement, transferred his interest in the notes to Whitley. Flowers and Whitley, as plaintiff's witnesses, were permitted to testify, over objection by the defendant, about personal transactions and communications between them and Hyder.

The court attempted to limit or restrict the testimony of the witness Flowers by instructing the jury on one occasion as follows:

> "Members of the jury, again, the Court instructs you that the answers to the previous question, and this further testimony, is offered for the sole purpose of disclosing the basis of this witness' opinion as to the mental capacity of the deceased, and assist you in determining the credibility, or worthiness of belief of that opinion, if you find that it does tend to do so, and for no other purpose, and these instructions will apply to the following testimony at each time that an objection is made by counsel to this witness' testimony, and overruled by the Court, until you are further advised by the Court that the instructions do not apply."

Flowers testified, over objection, that Hyder told him in the presence of Whitley that the two of them were his (Hyder's) best friends. Some of the testimony of Flowers tended to show that Hyder repeatedly told them he was in a bad financial condition and that Flowers and Whitley helped him by obtaining a commitment for a loan of one million dollars. Immediately after this the following occurred:

> "Q. Tell the jury what else he said. OBJECTION. OVERRULED. EXCEPTION.
>
> DEFENDANT'S EXCEPTION NO. 28.
>
> THE COURT: It is admitted under the instructions previously given you concerning this witness' testimony, members of the jury.
>
> A. Mr. Hyder then said this would enable him to keep the

company, and he recalled his conversation in Florida with us in reference to what we — OBJECTION. OVERRULED. EXCEPTION.

DEFENDANT'S EXCEPTION NO. 29.

A. Mr. Hyder said that with this million dollars, I can continue to operate the Clay Hyder Trucking Lines; I'm not forced to sell it, and, in my original obligation to you, stands, in full, and, one other thing, that you and Mr. Whitley would have to operate this company, that was one of the stipulations — MOTION TO STRIKE ANSWER. MOTION DENIED. DEFENDANT EXCEPTS.

DEFENDANT'S EXCEPTION NO. 30.

THE COURT TO THE JURY: You will not consider the witness' remark that that was one of the stipulations, members of the jury, in any point in your deliberations.

Q. Well, Mr. Flowers, is that what Mr. Hyder said to you?

OBJECTION. OVERRULED. EXCEPTION.

DEFENDANT'S EXCEPTION NO. 31.

A. That's what Mr. Hyder said to me.

THE COURT: OVERRULED. It is admitted for the purpose previously given, concerning this witness' testimony, members of the jury."

We think that the instructions and rulings by the court tended to confuse the jury when the motion to strike was denied, and then partially allowed. It was confusing when the judge told them not to consider the witness' remark that "that was one of the stipulations" and then permitted counsel in substance to repeat and the witness to answer the same question. It was also confusing to the jury to instruct them "it is admitted for the purpose previously given, concerning this witness' testimony."

We do not think that the jury could follow and properly apply the many different instructions given by the court in its effort to limit and restrict to the issue of mental capacity the effect of the testimony of Flowers and Whitley relating to their conversations and communications with Hyder.

[6] Flowers and Whitley were both permitted to testify in substance, over objection, that Hyder had been in bad financial condition and requested their help, that he had the notes sued on and each stated their conclusion as to what Hyder wanted to do with the

notes and many other things, and also that the two notes were to be given to them in settlement for what they had done for him in obtaining a commitment for a million dollar loan. In brief, under the guise of limiting the testimony for the sole purpose of disclosing the basis of the opinion of the witness as to the mental capacity of the deceased, and assisting the jury to determine the credibility or worthiness of belief of that opinion, the court permitted Flowers and Whitley to tell of the conversations with Hyder about the very transactions that were involved in the case. We think this was directly in contravention of the express terms of G.S. 8-51 which reads in pertinent part as follows:

> "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; . . ."

In the case of *Sherrill v. Wilhelm,* 182 N.C. 673, 110 S.E. 95 (1921), it is said:

> "We think a fair test in undertaking to ascertain what is a 'personal transaction or communication' with the deceased about which the other party to it cannot testify is to inquire whether, in case the witness testify falsely, the deceased, if living, could contradict it of his own knowledge. *Carey v. Carey, supra.* Death having closed the mouth of one of the parties, it is but meet that the law should not permit the other to speak of those matters which are forbidden by the statute. Men quite often understand and interpret personal transactions and communications differently, at best; and the Legislature, in its wisdom, has declared that an *ex parte* statement of such matters shall not be received in evidence. Such is the law as it is written, and we must obey its mandates."

In the case before us Whitley is a party interested in the event, and Whitley received by assignment an interest in the notes from Flowers. They were both testifying in the interest of Whitley and against the representative of the deceased Hyder. The testimony re-

lated to a personal transaction or communication between them and the deceased Hyder. The personal representative had not "opened the door" by testifying or offering the testimony of the deceased person. See Stansbury, N. C. Evidence 2d, § 66.

If Flowers and Whitley were testifying falsely about their personal transactions and communications with Hyder, as to whether the notes were given for a valuable consideration and as to whether the notes were executed and delivered by Hyder, then the logical party to rebut such testimony would be Hyder. When death sealed the lips of Hyder, we think the statute G.S. 8-51 sealed Flowers' and Whitley's lips. The statute itself contains only two exceptions, one of which relates to the identity of the driver of a motor vehicle, and the other relates to cases in which the representative of the lunatic or deceased person has "opened the door" by testifying or offering the testimony of the deceased or insane person.

In *McLeary v. Norment,* 84 N.C. 235 (1880), and other cases involving the mental capacity of a deceased person, the Supreme Court has stated what seems to be another exception to the above statute which provides that after a witness has stated his opinion as to the mental capacity of such deceased person, and where this opinion has been formed from conversations and communications with such person, it is competent to offer such in evidence as constituting the basis of such opinion. While it is conceded that a sane declaration by a person may be some evidence of sanity, the statute as written by the Legislature does not contain this exception.

The plaintiff cites *In Re Hinton,* 180 N.C. 206, 104 S.E. 341 (1920), and quotes from it and the case of *McLeary v. Norment, supra,* as authority for the admission of the testimony of Flowers and Whitley relating to personal transactions and communications with Hyder. We do not think that the principles of law enunciated in these two cases and others of like import can be applied as a correct interpretation and application of the statute G.S. 8-51 in relation to the facts in this case.

In the case before us the testimony of Flowers and Whitley tended directly to establish, in addition to the mental capacity of Hyder, the execution and delivery of the notes and the consideration involved in the transaction.

[7] In this case the statute G.S. 8-51 is in conflict with the rule that testimony of personal transactions and communications is competent on the question of the mental capacity of a deceased person where the opinion of the interested witness as to the mental competency has been formed from conversations and communications

with such deceased person. We think that when these two principles of law conflict with each other because the testimony of an interested witness concerning personal transactions and communications with a deceased person tends directly to establish the material facts in issue, in addition to mental capacity, then the statute should control.

The rule that evidence offered is admissible if it is competent for any purpose ought not to be used as a sword with which to attack a decedent's estate by destroying the express provisions of G.S. 8-51. We think that the shield provided by G.S. 8-51 excludes that testimony of Flowers and Whitley which tended directly to establish the execution and delivery of the two notes, as well as the consideration given for them. *In Re Will of Chisman,* 175 N.C. 420, 95 S.E. 769 (1918).

When all the competent and incompetent evidence that was admitted is considered, we think there was sufficient evidence to overrule the motion for nonsuit. However, we do not express an opinion with respect to what the competent evidence on a new trial will show.

There were other assignments of error with respect to the admission of evidence and to the charge of the court; some of them have merit, but we do not discuss them for the reason they may not recur on a new trial.

Because of the errors herein pointed out, the defendant is awarded a

New trial.

BRITT and PARKER, JJ., concur.

MRS. ROBERT H. PEASELEY, EXECUTRIX OF THE WILL OF ROBERT H. PEASELEY, DECEASED v. VIRGINIA IRON, COAL AND COKE COMPANY, A CORPORATION

No. 6826SC276

(Filed 27 August 1969)

1. Appeal and Error § 30— record fails to show what excluded evidence would have been

Ordinarily an exception to the exclusion of evidence will not be sustained on appeal when it is not made to appear what the excluded evidence would have been.

2. Brokers and Factors § 6; Principal and Agent § 10— liability of seller for commissions after death of sales agent

In this action for an accounting and for recovery of sales commissions for coal shipped by defendant to a power company after death of defendant's sales agent, the trial court erred in allowing defendant's motion for nonsuit where plaintiff's evidence tended to show that by written contract the sales agent was given the exclusive right to sell defendant's coal to the power company for a specified commission, that the sales agent, through diligent efforts extending over a substantial period of time, was instrumental in developing a business relationship between defendant and the power company involving the sale of coal, that this relationship became embodied in a written contract executed by defendant and the power company during the life of the sales agent, that coal has continued to be shipped under this contract since the sales agent's death, and that defendant has refused to pay any commission thereon to the estate of the sales agent.

3. Brokers and Factors § 6; Principal and Agent § 10— liability of seller for commissions after death of sales agent

A sales agent whose efforts are the procuring cause of a sale made during the period the agency relationship existed is entitled to commissions thereon even though actual delivery of the article sold be made after termination of the agency, absent a clear understanding to the contrary.

4. Brokers and Factors § 6; Principal and Agent § 10— liability of seller for commissions after death of sales agent

Defendant coal company is obligated to pay commissions to the estate of its sales agent for coal shipped by defendant after the death of the sales agent under a contract which was the product of the agent's skill and efforts as a salesman, in the absence of any evidence that defendant was to be relieved of commissions thereon.

APPEAL by plaintiff from *Ervin, J.*, 26 February 1968 Schedule "A" Civil Session of MECKLENBURG Superior Court.

Civil action for an accounting and for recovery of sales commissions. Plaintiff in her complaint in substance alleged: Defendant is engaged in the business of producing and selling coal. Plaintiff's testator, Robert H. Peaseley (Peaseley), a resident of Mecklenburg County, N. C., was for many years prior to his death on 11 May 1965 engaged in a brokerage business, primarily relating to the purchase and sale of coal. Through diligent efforts extending over a substantial period of years, Peaseley had been instrumental in developing a business relationship in the sale and purchase of coal between the defendant and Mill Power Supply Company (Mill Power), agent for Duke Power Company (Duke). In consideration of these efforts defendant agreed, in a written contract dated 30 August 1960, that Peaseley and his "associates" should have exclusive right to offer and sell all coal produced and/or sold by defendant to Mill

Power for use by Duke, so long as the amount equaled 420,000 tons per year, and that defendant would pay a commission of 10¢ per ton on all coal thus purchased from defendant by Mill Power, agent for Duke. In each year preceding Peaseley's death shipments of coal from defendant to Mill Power and Duke exceeded 420,000 tons. On 19 June 1963 the relationship between defendant and Mill Power, agent for Duke, was embodied in a written contract which prescribed the quantity of coal to be shipped from defendant to Mill Power or Duke at not less than 960,000 tons per year. This contract remained in effect until Peaseley's death and is still in effect. Up until the time of Peaseley's death the defendant fulfilled its agreement with him and paid him 10¢ per ton on all coal shipped by defendant to Mill Power or Duke. Defendant continues to ship coal to Mill Power and Duke just as it did prior to Peaseley's death, but defendant has refused to pay any commission on coal thus shipped and delivered since Peaseley's death. Plaintiff prayed for judgment directing defendant to account for all coal shipped by it to Mill Power or Duke since Peaseley's death and for judgment against defendant calculated at 10¢ per ton of such coal, plus interest.

Defendant answered, admitting it had entered into the written contract with Peaseley dated 30 August 1960; that under this contract Peaseley sold prior to his death and defendant delivered substantial amounts of coal to Mill Power for use by Duke; that in each year prior to Peaseley's death shipments of such coal exceeded 420,000 tons; that on 19 June 1963 it had entered into a written contract with Mill Power which remained in effect until Peaseley's death; and that defendant had not paid any commission on such coal shipped and delivered after his death. Defendant attached as exhibits to its answer copies of the 30 August 1960 agreement with Peaseley and the 19 June 1963 contract with Mill Power, and in a further answer alleged that the 30 August 1960 contract was terminated by Peaseley's death, which made further performance of the contract by him impossible.

Defendant filed motion for judgment on the pleadings, which was denied.

At the trial the plaintiff introduced in evidence the written contract between defendant and Peaseley dated 30 August 1960, which was in the form of a letter and which was as follows:

"VIRGINIA IRON COAL AND COKE COMPANY
P. O. Box 1871
Roanoke 8, Virginia
Diamond 5-8124

August 30, 1960

Mr. R. H. Peaseley,
802-04 Johnston Bldg.,
Charlotte, N. C.

Dear Mr. Peaseley:

This is to confirm our conversation in my office August 16, 1960.

Beginning September 1, 1960, the Virginia Iron, Coal and Coke Company gives to you or your associates the exclusive right to offer and sell all coal produced and/or sold by Virginia Iron, Coal and Coke Company to Mill Power Supply Company for use by Duke Power Company.

In consideration for the exclusive right to sell this account, you agree to limit your commission to (10¢) ten cents per net ton. This commission will be paid directly to you by separate remittance on tons actually shipped, determined by railroad weights.

This agreement is to remain in effect as long as you are able to place for use by the Duke Power Company comparable Virginia Iron, Coal and Coke Company tonnage as shipped in 1959, or approximately 420,000 tons per year.

We look forward to a continuation of the pleasant business relationship we have enjoyed in the past.

Yours very truly,

F. X. Carroll
F. X. Carroll

Executive Vice President

FXC:JCE
ACCEPTED
R. H. Peaseley
R. H. Peaseley
Date: Sept. 6th 1960"

Plaintiff also introduced in evidence the written contract between defendant and Mill Power executed 19 June 1963. In this contract Mill Power, as agent for its principal, Duke, is referred to as "Buyer" and defendant is referred to as "Seller." For purposes of the questions presented by this appeal, the pertinent portions of this contract are as follows:

"ARTICLE I

CONSIDERATION

Section 1. In consideration of the following terms and conditions, the Seller agrees to sell and deliver and the Buyer agrees to buy and accept, subject to the provisions of this agreement, the quantity and kind of Bituminous Coal more particularly described below.

* * * * *

"ARTICLE III

TERM

Section 1. This contract shall become effective July 1, 1963 and shall continue in force for a period of three years thereafter. Said contract shall continue in force and effect after expiration of said three-year term until terminated as hereinafter provided. At any time after the completion of the first year of the contract either Seller or Buyer shall have the right to terminate this contract upon giving twenty-four (24) months' written notice of termination to the other party.

* * * * *

"ARTICLE VI

QUANTITY

Section 1. (a) The quantity of coal to be delivered hereunder shall be 960,000 tons during the first year of contract, ten per cent more or less, at Buyer's option.

(b) Quantity in subsequent years, may at Buyer's option, be increased 10 per cent over preceding year by giving Seller six (6) months written notice, prior to beginning of each new year under the contract. Ten per cent more or less, at Buyer's option to be effective on new quantity.

* * * * *

"ARTICLE VII

DELIVERY

Section 1. Subject to the provisions of Section 1 of Article VI, the coal sold and purchased under this Agreement shall be shipped by Seller and accepted by Buyer in substantially equal weekly quantities.

Section 2. The Buyer shall designate periodically in advance to the Seller the destinations to which the coal is to be shipped.

* * * * *

"ARTICLE IX

TERMS OF PAYMENT

Section 1. Buyer shall pay Seller by cash or check, in United States Funds, on or before thirtieth (30th) day of month following the month of shipment for the coal shipped hereunder.

Section 2. The weights of the coal shipped and accepted hereunder shall be determined by railroad scale weights. Weight shortages shall be adjusted between Buyer and the railroad company."

Other portions of the contract set forth specifications for quality and type of coal to be delivered and specified a base price per ton, which price was subject to be increased or decreased by changes in production costs beyond seller's control.

Plaintiff also introduced evidence tending to show: Peaseley first began to do business with defendant in 1956, at which time he was already selling substantial tonnage of coal for other producers. The first year he sold approximately 10,000 tons for defendant, and increased the amount sold for defendant each year thereafter. The year before he died he sold approximately 950,000 tons for defendant. At the same time he was increasing his sales of defendant's coal, he gradually decreased his sales of coal for other producers. In 1956 he had sold approximately 550,000 tons for other producers, and such sales for other producers were reduced each year thereafter, the amount sold by him for other producers in the year before his death being approximately 84,000 tons.

Plaintiff also introduced evidence that Mill Power is a wholly owned subsidiary of Duke and acts as Duke's purchasing agent; that defendant was not selling any coal to Mill Power or Duke until the sales that Peaseley made for defendant; that defendant sold coal to Mill Power and Duke entirely through Peaseley; that after the commission contract was signed in 1960, the volume of defendant's

coal sold by Peaseley to Mill Power for Duke gradually increased; that Peaseley constantly worked on the Mill Power-Duke account, promoting the sale of more coal, and most of his time in the last two or three years was spent on this account.

Plaintiff also introduced evidence that the tonnage of coal sold by Peaseley for defendant and the total tonnage sold by him for all producers, including the defendant, for the years 1956 through 1964 was as follows:

Year	*Tonnage of Defendant's Coal Sold*	*Total Tonnage Sold*
1956	10,620	565,000
1957	103,000	682,000
1958	182,000	763,000
1959	430,000	878,000
1960	425,000	691,000
1961	520,000	759,587
1962	715,000	931,000
1963	876,000	1,060,585
1964	956,000	1,040,000

Mrs. Byrd, Peaseley's office secretary, testified she had worked for Peaseley as secretary-bookkeeper in his office in Charlotte, N. C., from 1955 until his death; that when Peaseley was out of town she would handle any complaints by Mill Power with defendant; that on the 20th or 25th of each month orders specifying the quantity of coal to be shipped each week were sent by Mill Power to Peaseley's office, and she made copies of these and sent them to defendant; that the orders came through automatically, the coal having already been sold; that prior to Peaseley's death he operated under the name "R. H. Peaseley;" that since Peaseley's death she continued to work as secretary for Mrs. Peaseley, who operated the business of manufacturer's agent as sole proprietor under the name "R. H. Peaseley Associates," mainly handling textile products; that since Peaseley's death coal has continued to move under the contract between defendant and Mill Power just the same as it did before his death; that no commission has been paid by defendant on it since Peaseley's death.

The President of Mill Power, called as a witness for plaintiff, testified that after Peaseley's death and effective 1 June 1965 there had been a price increase in the contract dated 19 June 1963 between Mill Power, as agent for Duke, and the defendant; and that beginning 1 May 1965, 634,401 tons moved under the contract from

defendant to Duke in that year, 848,074 tons in the year 1966, and 868,933 tons in 1967.

At the close of plaintiff's evidence the court allowed defendant's motion for involuntary nonsuit, and from judgment dismissing the action plaintiff appealed.

Blakeney, Alexander & Machen, by Whiteford S. Blakeney, for plaintiff appellant.

Helms, Mulliss & Johnston, by Fred B. Helms and E. Osborne Ayscue, Jr., for defendant appellee.

PARKER, J.

[1] Plaintiff appellant's assignments of error 1 through 19 relate to the trial court's rulings sustaining defendant's objections to certain questions asked of plaintiff's witnesses. The record does not disclose what the excluded answers would have been and we are therefore unable to determine whether appellant was in anywise prejudiced by the trial court's rulings. Ordinarily an exception to the exclusion of evidence will not be sustained on appeal when it is not made to appear what the excluded evidence would have been. *Heating Co. v. Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625; 1 Strong, N.C. Index 2d, Appeal and Error, § 30, p. 165; Stansbury, N.C. Evidence 2d, § 29. In our view of this case, however, the trial court's rulings on evidence are immaterial.

[2] Appellant's assignments of error 20 and 21 are directed to the judgment of nonsuit. In entry of this judgment there was error.

Defendant has never questioned its obligation to pay Peaseley commissions on coal sold and shipped by it to Mill Power prior to Peaseley's death. This coal was sold and shipped under the written contract entered into between defendant and Mill Power on 19 June 1963 (hereinafter referred to as the "coal contract"). Defendant does contend, however, that it is not obligated to pay commissions to Peaseley's estate on coal shipped by it after the date of Peaseley's death, even though such coal was sold by defendant to Mill Power under the very same coal contract as covered the coal shipped prior to his death. Defendant's contention is based on the theory that its contract with Peaseley, which was embodied in the letter agreement dated 30 August 1960 (hereinafter referred to as the "commission contract"), called for performance of personal services by him; that his estate, not being able to perform in exactly the same manner and with the same personality as did he, the contract necessarily

terminated with his death; and that therefore his estate is not entitled to commissions on coal shipped by defendant to Mill Power after the date of his death.

Without question many contracts calling for services of a salesman are made on the basis of the particular salesman's peculiar attributes of fitness, personality, experience, contacts, industry and ability. Obviously all of such qualities and attributes are highly personal to the particular salesman involved. For this reason courts have properly held certain of such contracts not assignable by the salesman and not to survive his death. Appellee has cited a number of cases from other jurisdictions so holding, among them: *Sewing Machine Co. v. Rosensteel,* 24 Fed. 583; *Smith v. Preston,* 170 Ill. 179, 48 N.E. 688; *Kowall v. Sportswear, Inc.,* 351 Mass. 541, 222 N.E. 2d 778; and *Smith v. Zuckman,* 203 Minn. 535, 282 N.W. 269. However, these cases are not, in our view, apposite to the present appeal.

[2, 3] Whether the commission contract between defendant and Peaseley in the present case was such a "personal service contract" as to be automatically terminated by Peaseley's death would, undoubtedly, be the issue if plaintiff's cause of action were based on the theory that she has the right to negotiate future sales contracts between defendant and Mill Power. This, however, she is not presently attempting to do. In the present action she has alleged that Peaseley, through diligent efforts extending over a substantial period of years, was instrumental in developing a business relationship between defendant and Mill Power involving the sale of coal, that this relationship became embodied in the written coal contract executed 19 June 1963, that coal has continued to be shipped under this contract since Peaseley's death, and that defendant has refused to pay any commission thereon. She has offered evidence in support of these allegations. In the present case, therefore, plaintiff's cause of action is to recover commissions on coal which was sold prior to Peaseley's death and as a result of his efforts. Certainly this coal was sold in the sense that the sales contract under which it moved was fully negotiated, reduced in detail to writing, and was signed by the contracting parties prior to Peaseley's death. The contract was for a minimum term of three years, and the parties contemplated it might last much longer. It may be assumed that both the buyer and seller contemplated that much of the coal sold under the contract was to be mined, processed, and shipped by the defendant subsequent to the date the contract was executed. That the coal covered by the contract may have been mined, processed and shipped before or after

the date the contract was executed, or before or after the date of Peaseley's death, does not, in our view, relieve defendant of the obligation to pay commissions on the coal so sold and shipped. A sales agent whose efforts are the procuring cause of a sale made during the period the agency relationship existed is entitled to commissions thereon even though actual delivery of the article sold be made after termination of the agency, at least absent a clear understanding to the contrary; See: *Richer v. Khoury Bros. Inc.,* 341 F. 2d 34; *Heuvelman v. Triplett Electrical Instrument Co.,* 23 Ill. App. 2d 231, 161 N.E. 2d 875; *Reed v. Kurdziel,* 352 Mich. 287, 89 N.W. 2d 479; *Leach Corporation v. Turner,* (Okla.) 390 P. 2d 515.

[4] In the present case plaintiff has alleged and offered evidence tending to prove that coal was shipped by defendant after Peaseley's death under the very same coal contract which was the product of his skill and efforts as a salesman. In the absence of any evidence of an understanding that defendant was to be relieved of commissions thereon, plaintiff is entitled to recover. In allowing the motion of nonsuit the trial court was in error and the judgment is

Reversed.

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

STATE OF NORTH CAROLINA v. ROBY E. CATRETT

No. 6929SC307

(Filed 27 August 1969)

1. Criminal Law § 91— motion for continuance — affidavit

An affidavit pertaining to request for continuance of trial must be filed fifteen days before the trial session convenes. G.S. 1-175.

2. Criminal Law § 91— continuance — time to prepare for trial — discretion of trial court

Ordinarily a motion for a continuance on the ground of a want of time for counsel for accused to prepare for trial is addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to review on appeal in the absence of circumstances showing that he has grossly abused his discretionary power.

3. Criminal Law § 91; Constitutional Law § 31— motion for continuance — appeal — prejudicial error

Whether a defendant bases his appeal upon an abuse of judicial dis-

cretion 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.

4. Constitutional Law § 31; Criminal Law § 91— motion for continuance — time to find witness — prejudicial error

Defendant was not prejudiced by denial of his motion for continuance based on affidavit alleging that his counsel did not have sufficient time to procure a witness who would be able to offer testimony favorable to defendant, where evidence on trial showed that the offense was committed around 6:00 or 6:30 p.m. and that defendant had visited the witness, who lived near scene of the crime, prior to 1:30 p.m. on the day of the offense, it being apparent that the witness could not have aided defendant had he been called.

5. Criminal Law §§ 74, 76— inculpatory statement not amounting to a confession — admissibility — voir dire

In prosecution charging defendant with aiding and abetting his co-defendant in the felonious breaking and entering of a cabin and in the larceny of personal property therefrom, statement by defendant to a police officer that he dropped the co-defendant near the cabin and that he was supposed to pick him up 30 or 40 minutes later but that he did not know what the co-defendant was planning to do, *is held* not a confession but at most an inculpatory statement and therefore does not require *voir dire* procedure prior to its introduction by the State for the purpose of impeaching defendant's direct testimony.

6. Criminal Law § 89— impeachment of witness — inconsistent statements

A witness may be impeached by proof that on other occasions he has made statements inconsistent with his testimony at trial.

7. Criminal Law § 89— impeachment of witness — inconsistent statements

Inconsistent statements of a witness may not be used as substantive evidence of the facts stated, nor do they have the effect of nullifying his testimony; they are simply for the consideration of the jury in determining the witness' credibility.

8. Criminal Law § 95— evidence admissible for restricted purpose

The general admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by defendant that its admission be restricted, and a general objection to the testimony is insufficient.

9. Criminal Law § 89— impeachment of witness — inconsistent statements — admissibility

In prosecution charging defendant with aiding and abetting his co-defendant in the felonious breaking and entering of a cabin and in the larceny of personal property therefrom, testimony by police officer that defendant told him he dropped his co-defendant near the cabin on the afternoon of the crime and that he was supposed to pick him up 30 or 40 minutes later but that he did not know what the co-defendant was

planning to do, *is held* admissible, over defendant's general objection, to impeach defendant's testimony on direct examination that on the day of the offense he went with co-defendant to the home of co-defendant's mother and that after he left the house he did not see co-defendant again until after both were arrested that night.

10. Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence

State's evidence *is held* sufficient to be submitted to jury on issues of defendant's guilt of aiding and abetting in feloniously breaking and entering a cabin and in the larceny of personal property therefrom.

APPEAL by defendant from *McLean, J.*, at the January 1969 Session of POLK Superior Court.

Defendant was charged in a bill of indictment with (1) aiding and abetting Ray Pace in the felonious breaking and entering of a certain house belonging to Eddie Lee Brown and (2) aiding and abetting Ray Pace in larceny of certain personal property from said house.

Defendant and Pace were tried together and were represented by the same attorney. Defendant was found guilty as charged and from judgment imposing active prison sentence on the first count and suspended prison sentence on the second count, defendant appealed.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Trial Attorney Claude W. Harris, for the State.

Crowell & Crowell by O. B. Crowell, Jr., for defendant appellant.

PARKER, J.

Defendant first assigns as error the failure of the trial court to grant his motion for continuance of the trial. The record contains an affidavit by defendant's attorney indicating that the affidavit was made on 30 January 1969. The session of court at which defendant was tried convened on 27 January 1969. In the affidavit, defendant's counsel declares that he was employed by Pace prior to the convening of the session; that he was appointed counsel for defendant on 29 January 1969; that he first talked with defendant on Monday afternoon, 27 January 1969, but did not accept employment at that time due to defendant's inability to raise funds with which to employ counsel; that he spent several hours with defendant on the afternoon of 29 January 1969 and that one Knight who lives near Saluda, N. C., was able to provide testimony favorable to defendant but that counsel was unable to get in touch with Knight;

that "there are other persons not now known to (Pace and Catrett) who may have seen the defendant Catrett" on the afternoon the alleged offense was committed at places other than the scene of the offense. When court convened on 30 January 1969, defendant's counsel, on the basis of facts set forth in his affidavit, moved for a continuance of the trial. The court denied the motion.

[1-4] Understandably, the affidavit of defendant's counsel does not conform to G.S. 1-175 requiring that an affidavit pertaining to request for continuance of trial be filed fifteen days before the trial session convenes. "Ordinarily a motion for a continuance on the ground of a want of time for counsel for accused to prepare for trial is addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to review on appeal in the absence of circumstances showing that he has grossly abused his discretionary power." Ervin, J., in *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520. 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. *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617. In the instant case, defendant has failed to show that he was prejudiced by a failure of the court to grant his motion for continuance. Evidence in the case showed that the crime was committed around 6 or 6:30 o'clock on the evening of 31 August 1968. The only witness referred to in counsel's affidavit was a Mr. Knight and the defendant and his codefendant at trial stated that they visited a Mr. Knight near Saluda prior to 1:30 p.m. on 31 August 1968 to inquire about renting a house. It is obvious that Knight, had he been called, could not have aided the defendant. The affidavit states there may have been other witnesses who saw the defendant at a place other than the scene of the crime at the time it was committed, but the affidavit failed to state as a fact that there were such persons. We hold that defendant has failed to show that he was prejudiced by the failure to grant his motion, hence the assignment of error is overruled.

[5] In his next assignment of error, defendant contends that the court erred in admitting "the confession" of defendant in evidence over defendant's objection and without determining the voluntariness of the confession upon a voir dire in the absence of the jury.

The evidence tended to show that the house which was broken into was located on the Old Melrose Road in or near Saluda, N. C. Defendant, testifying in his own behalf, stated that he went with his codefendant Pace to visit Pace's mother at her home around 1:30

p.m. on 31 August 1968; that he (defendant) was drinking at that time and for that reason left the Pace home and that he did not see Pace again until that night after both were arrested. A State's witness had testified that he saw defendant in a red and white Chevrolet in the driveway of the house that was broken into, that Pace was crawling out of a window with some of the stolen property in his hands and that other stolen property was piled up in the yard near the house. After defendant rested his case, witness Carswell, a police officer, was then recalled by the State and was asked if he had a conversation with defendant about defendant's presence on the Old Melrose Road on 31 August 1968. The witness replied that he had and the following occurred:

"Q. What did he tell you, if anything, about who had been with him on the afternoon of the 31st day of August 1968 on the old Melrose Road?

MR. CROWELL: Objection.

THE COURT: Sustained as to Pace. Do not consider this evidence as to Pace, members of the jury, but only as to Catrett.

A. Well, he stated to me that he let Ray Pace out of the car above Mr. Brown's cabin and he was supposed to pick him up in 30 or 40 minutes and he also said he didn't know what —

MR. CROWELL: Objection.

A. — Samuel Ray Pace was planning to do.

THE COURT: Sustained as to Pace. Overruled as to Catrett."

The defendant contends that the statement made by defendant to Officer Carswell was a confession and that the court erred in not conducting a voir dire in the absence of the jury and passing upon the voluntariness and competence of the confession. In his brief, the attorney general contends that the statement made by defendant to Carswell did not constitute a confession or admission and therefore did not require voir dire procedure prior to introduction. Certainly the statement was not a "confession;" at most it was an inculpatory statement.

[6-8] It is well settled that a witness may be impeached by proof that on other occasions he has made statements inconsistent with his testimony at trial. Stansbury, N.C. Evidence 2d, § 46, p. 88. "Inconsistent statements of a witness may not be used as substantive evidence of the facts stated, nor do they have the effect of nullifying his testimony. They are simply for the consideration of the jury in determining the witness's credibility." (References to citations

omitted.) Stansbury, N.C. Evidence 2d, § 46, p. 90. It is also well established that as a general rule, the general admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by defendant that its admission be restricted, and a general objection to the testimony is insufficient. 2 Strong, N.C. Index 2d, Criminal Law, § 95, p. 629. The transcript of testimony quoted above indicates that defendant's counsel made a general objection to the challenged evidence.

We do not think the challenged evidence falls within the condemnation of *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, where a signed confession was introduced as substantive evidence against the defendant. On the contrary, we think the principle declared in *Walder v. United States,* 347 U.S. 62, 98 L. Ed. 503, is applicable. In that case, at his trial on a charge for sales of narcotics the defendant, on direct examination, testified that he had never sold or possessed narcotics. On cross-examination, he reiterated these assertions. The government then introduced evidence that in connection with an earlier proceeding a heroin capsule had been found in defendant's possession. The trial judge admitted this evidence over defendant's objection that the heroin capsule had been obtained through an unlawful search and seizure. In an opinion by Frankfurter, J., the Supreme Court held that evidence so obtained is admissible to impeach defendant's testimony on direct examination.

Walder v. United States, supra, was followed in *Tate v. United States,* 283 F. 2d 377 (U.S. Court of Appeals for the District of Columbia). Burger, J. (now Chief Justice of the Supreme Court of the United States), in writing the opinion, declared that the only question presented was whether it was error to receive, in rebuttal, statements asserted to have been made by appellant to police in a period of alleged "unnecessary delay" between arrest and preliminary hearing in violation of Rule 5(a), Fed. R. Crim. P., 18 U.S.C.A. We quote the following excerpts from the opinion:

> "We assume, arguendo, that the impeaching statements were made during a period of unlawful detention, although the District Court did not reach the question and we need not resolve it on the merits.
>
> * * * * *
>
> "The Supreme Court in Walder was faced, as we are here, with the problem of reconciling two competing policies of the law: (1) the policy that proscribes, as a prophylactic measure, the use of evidence obtained in violation of a rule of law, and (2) the policy which demands truth from witnesses in the judicial

process and which regards an adversary judicial proceeding as a search for truth. * * *

"In the instant case, it is plain that the court did not admit any statement which was *per se* inculpatory. None of the acts described in the challenged statements, in and of themselves, constituted 'elements of the case against him.' The statements, even if true and believed by the jury, described lawful proper acts in which appellant as well as his companions were free to engage.

"* * * Appellant had a right to explain, as he did on direct examination, why and how he happened to be where he was found and arrested with stolen property in his possession. But when he gave one story to the police and another in court, and neither story covered any act which was *per se* inculpatory, the jury was entitled to hear both versions."

[9] We hold that the challenged testimony was admissible for purpose of impeachment, and the assignment of error relating thereto is overruled.

[10] Finally, defendant assigns as error the failure of the trial court to grant his motion for judgment of nonsuit. When considered in the light most favorable to the State, as we are bound to do, the evidence and reasonable inferences arising therefrom tended to show: Eddie Lee Brown, a resident of Landrum, South Carolina, owned a summer home or cabin in Polk County on the Old Melrose Road in or near Saluda. Before returning to his home in Landrum some two weeks prior to 31 August 1968, Brown closed his cabin by securing the windows and locking the door. Around 6:00 or 6:30 p.m. on 31 August 1968, he and certain relatives were traveling in a car on Melrose Road going to the cabin. When he was some three-fourths mile from the cabin, he saw a 1959 red and white Chevrolet parked on the side of Melrose Road and just before Brown reached the Chevrolet, it drove out in front of him, went some fifteen feet toward the cabin and stopped on a narrow bridge. Defendant was driving the car and after remaining on the bridge and blocking the road for several minutes drove on toward the cabin. When Brown arrived at the cabin, the Chevrolet was in his driveway with defendant under the wheel. Furniture from the cabin was piled in the yard and Pace was climbing out of an open window with two frying pans in his hands. Pace ran out back of the cabin and defendant drove the Chevrolet, the property of Pace, out of the driveway and on Melrose Road to the next house where he turned around and went back in the same direction from which he came.

Brown found a window screen torn off and the window prized up. A considerable quantity of the contents of his cabin was piled in the yard. Police found defendant highly intoxicated in the Chevrolet about one hundred yards from the cabin. Defendant and Pace are brothers-in-law.

We hold that the evidence was sufficient to support the charges of aiding and abetting in breaking and entering the cabin and larceny of personal property therefrom, and the court did not err in overruling the motion to nonsuit. The assignment of error is overruled.

The judgment of the superior court is

Affirmed.

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

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ACTIONS

§ 10. Method of Commencement

Action is commenced when the summons is issued. *Brantley v. Sawyer*, 557.

ADMINISTRATIVE LAW

§ 4. Procedure of Administrative Boards and Agencies

Statute setting forth uniform procedure for revocation of licenses does not apply where renewal of license is withheld for failure to pay statutory renewal fee. *Construction Co. v. Anderson*, 12.

ADOPTION

§ 2. Parties and Procedure

In special proceeding in district court to determine whether child is an abandoned child within meaning of adoption statute, it was not error for trial judge in his discretion to allow petitioner's motion for jury trial. *Boring v. Mitchell*, 550.

Evidence was sufficient to show that child was an abandoned child within meaning of adoption statute. *Ibid.*

APPEAL AND ERROR

§ 1. Jurisdiction in General

Court of Appeals has no original jurisdiction in matters relating to the construction of a will. *Morse v. Zatkiewiez*, 242.

§ 4. Theory of Trial in Lower Court

Judgment of nonsuit is reversed where pleadings and proof show breach of contract, notwithstanding cause was argued in trial court upon theory of fraud. *Whitley v. O'Neal*, 136.

§ 10. Demurrers and Motions in Court of Appeals

Motion for new trial for newly discovered evidence may be made in Court of Appeals if such evidence is discovered after adjournment of trial court. *Locklear v. Snow*, 434.

§ 24. Form of and Necessity for Objections, Exceptions and Assignments

Exceptions which appear nowhere in the record except under the purported assignments of error will not be considered. *Midgett v. Midgett*, 74; *In re Register*, 29.

Exceptions not properly numbered as required by Court of Appeals Rule No. 21 are ineffectual. *Midgett v. Midgett*, 74.

§ 26. Exceptions and Assignments of Error to Judgment or Signing of Judgment

An appeal alone or an exception to the judgment does not present for review the findings of fact or the sufficiency of the evidence to support them. *Braswell v. University*, 1.

Exception to signing of an order presents for review whether the facts found support the conclusions of law. *Ibid.*

APPEAL AND ERROR—Continued

§ 30. Objections, Exceptions, and Assignments of Error to Evidence

Exception to exclusion of evidence will not be sustained on appeal when it does not appear what the excluded evidence would have been. *Peaseley v. Coke Co.*, 713.

§ 31. Exceptions and Assignments of Error to the Charge

Slight inadvertence in recapitulation of the evidence must be called to the court's attention in time for correction. *Boring v. Mitchell*, 550.

§ 39. Time of Docketing

Appeal is subject to dismissal where record on appeal is docketed one day after the 90-day period for docketing expires. *In re Simmons*, 81.

§ 41. Necessary Parts of Record Proper

Court of Appeals allows defendant's motion to dismiss the appeal as to him on ground that the record does not contain any judgment applicable to him. *Estridge v. Development Co.*, 604.

§ 42. Conclusiveness and Effect of Record

When evidence is not in record, it is presumed that evidence is sufficient to support court's findings of fact. *Bundy v. Ayscue*, 581.

§ 45. Form and Contents of Brief

Assignments of error not set out in the brief and for which no reason or argument is stated or authority cited are deemed abandoned. *Midgett v. Midgett*, 74; *Brantley v. Sawyer*, 557.

§ 49. Harmless and Prejudicial Error in Exclusion of Evidence

Exclusion of evidence is not prejudicial where other evidence tending to establish the same fact was admitted. *Smith v. Perkins*, 120.

Plaintiff was not prejudiced by exclusion of his testimony as to loss of memory following an accident where thereafter plaintiff was allowed to testify as to evidence of similar import. *Hughes v. Lundstrum*, 345.

§ 50. Harmless and Prejudicial Error in Instructions

Trial judge's unexplained use of the words "strike that" immediately following statement of plaintiff's contentions in the charge is prejudicial error. *Brown v. Products Co.*, 418.

§ 51. Harmless Error in Conduct of Trial

Appellants were not prejudiced by trial court's remark concerning "will-o'-the wisp" following an exchange between counsel. *Highway Comm. v. Hamilton*, 360.

§ 54. Review of Discretionary Matters

Trial court did not abuse its discretion in ordering a mistrial after the court had allowed defendant's motion for nonsuit and dismissed the jury, and two of the jurors had been empaneled to try another case. *Musgrave v. Savings and Loan Accoc.*, 439.

§ 57. Review of Findings

Findings of fact by trial court are binding on appeal if supported by competent evidence. *Jones v. Ins. Co.*, 570; *Bundy v. Ayscue*, 581.

APPEAL AND ERROR—Continued

§ 59. Review of Judgments on Motions to Nonsuit

Trial court did not abuse its discretion in ordering a mistrial after the court had allowed defendant's motion for nonsuit and dismissed the jury, and two of the jurors had been empaneled to try another case. *Musgrave v. Savings and Loan Assoc.*, 439.

ASSAULT AND BATTERY

§ 5. Assault with a Deadly Weapon

In felonious assault prosecution, whether there is serious injury is for jury to determine. *S. v. Marshall*, 476.

Intent to kill may be inferred from the act itself. *Ibid.*

§ 14. Sufficiency of Evidence and Nonsuit

In this prosecution for felonious assault, the evidence is sufficient to show "intent to kill" and "serious injury" for submission of the case to the jury where it tends to show that defendant grabbed the prosecuting witness from behind and shot him in the neck with a pistol, that the prosecuting witness lost consciousness and spent some five hours in the hospital during which an operation was performed on his neck to remove the bullet. *S. v. Marshall*, 476.

In prosecution for felonious assault, State's evidence is sufficient to go to jury on question of serious injury. *S. v. Smith*, 635.

§ 15. Instructions

Trial court did not err in instructing jury that serious injury "means physical or bodily injury and that I feel needs no further definition." *S. v. Marshall*, 476.

Trial court did not err in failing to instruct jury as to difference between felonious assault and assault with a deadly weapon where felonious assault charge was nonsuited and case was submitted to jury upon lesser charge of assault with a deadly weapon. *S. v. Phillips*, 353.

ASSIGNMENT FOR BENEFIT OF CREDITORS

§ 1. Transactions Operating as Assignment

Transfer of debtor's assets for a valuable consideration does not constitute an assignment for benefit of creditors. *Wilson v. Development Co.*, 600.

Cause of action under statute relating to assignments for benefit of creditors accrues at time of the assignment and not at time creditor first learns of transactions. *Ibid.*

Three-year statute of limitation applies to creditor's action for relief under G.S. 23-1 et seq. *Ibid.*

AUTOMOBILES

§ 1. Authority to Revoke or Suspend Licenses

Where driver's license is revoked for four years upon a second conviction for driving under the influence of intoxicating liquor, authority to issue a new license after the expiration of two years is granted to the Department of Motor Vehicles, not to the courts. *In re Austin*, 575.

§ 2. Grounds and Procedures for Revocation of License

Where revocation of petitioner's driver's license for second conviction of driving under influence of intoxicants is mandatory, superior court is without

AUTOMOBILES—Continued

authority to hear a petition and render a judgment modifying the revocation. *In re Austin*, 575.

Letter of petitioner's attorney to Chief Hearing Officer of Department of Motor Vehicles informing him petitioner desires to appeal Department's ruling to superior court on a certain date is held not to comply with statutory provisions requiring written notice to Department. *Ibid.*

§ 5. Transfer of Title

Paper writing describing automobile and setting forth sales price, down payment and due date for unpaid balance was only a memorandum and not a bill of sale. *Used Cars v. Easton*, 695.

Title to a motor vehicle cannot be transferred by bill of sale. *Ibid.*

Title to automobile vests when purchaser has old certificate endorsed to him and applies for new certificate. *Ibid.*

Trial court erred in finding that defendant acquired title to automobile when agent of seller gave defendant possession and memorandum of sale and in failing to find that plaintiff acquired title when seller thereafter transferred title to plaintiff. *Ibid.*

§ 10. Stopping and Parking

Failure to scotch the wheels of a parked automobile is ordinarily not negligence. *Smith v. Perkins*, 120.

§ 13. Lights

Violation of statute requiring vehicles to be equipped with lighted lamps at night is negligence per se. *Brown v. Products Co.*, 418.

§ 19. Right of way at Intersections

Statute setting forth rights and duties of motorists who reach an intersection at approximately the same time does not apply where motorists are proceeding in opposite directions and the intersection is controlled by traffic signals. *Rathburn v. Sorrells*, 212.

§ 23. Brakes and Defects in Vehicles

G.S. 20-124 requires automobile operator to act with care and diligence to see that his brakes meet the standards required by statute. *Stone v. Mitchell*, 373.

§ 44. Presumptions and Burden of Proof

Res ipsa loquitur is inapplicable in action for injuries received when parked automobile rolled backward. *Smith v. Perkins*, 120.

§ 45. Relevancy and Competency of Evidence

Evidence of plaintiff passenger's pre-accident conduct was properly admitted to show passenger's contributory negligence in riding in defendant's sports car at excessive speed. *Hughes v. Lundstrum*, 345.

§ 47. Physical Facts at Scene

Nonsuit is properly allowed where evidence favorable to plaintiff is in irreconcilable conflict with uncontradicted physical facts established by plaintiff's evidence which are favorable to defendant. *Hardy v. Tesh*, 107.

AUTOMOBILES—Continued

§ 56. Hitting Vehicle Stopped or Parked on Highway

Evidence held sufficient for jury in action for damages sustained by plaintiff when he rounded a curve and struck defendant's automobile stopped in his lane of travel. *Motor Co. v. Gray*, 643.

§ 57. Failure to Yield Right of Way at Intersection

In action arising from intersection accident, plaintiff's evidence that defendant drove his automobile from a servient highway into path of plaintiff's automobile on the dominant highway is insufficient for the jury where it is in irreconcilable conflict with uncontradicted physical facts showing the point of impact to be on the servient highway. *Hardy v. Tesh*, 107.

§ 67. Leaving Vehicle Unattended

Evidence held insufficient to show defendant was negligent in parking her automobile, defendant's failure to scotch the wheels of her car with a brick or other object not constituting negligence. *Smith v. Perkins*, 120.

Res ipsa loquitur is inapplicable in action for injuries received when parked automobile rolled backward. *Ibid.*

§ 68. Defective Vehicles

Question of whether defendant was negligent in failing to maintain adequate brakes on milk truck was for jury. *Stone v. Mitchell*, 373.

§ 71. Sufficiency of Evidence in Towing Vehicle

Evidence of defendant's negligence in allowing its wrecker to be parked on the highway at night with bright lights on was properly submitted to the jury. *Staples v. Carter*, 264.

§ 86. Last Clear Chance

Court properly refused to submit issue of last clear chance where evidence was insufficient to show that defendant had sufficient time to avoid collision after discovering that defendant was moving into a position of peril. *Thomas v. Coach Co.*, 88.

§ 90. Instructions in Automobile Accident Cases

Trial court erred in giving jury instructions as to duty of driver on left to yield right of way at intersection where evidence shows intersection was controlled by traffic signals. *Rathburn v. Sorrells*, 212.

Trial court erred in giving jury peremptory instructions that defendant was negligent in failing to maintain adequate brakes. *Stone v. Mitchell*, 373.

Failure of trial judge to apply the law relating to use of headlights at night to the evidence entitles plaintiff to a new trial. *Brown v. Products Co.*, 418.

Trial court properly instructed the jury as to the effect of G.S. 20-161.1 upon the conduct of the operator of a wrecker in leaving standing the wrecker on the highway at night in order to aid a disabled vehicle, where the evidence was conflicting with respect to whether the bright lights were burning on the wrecker and whether the emergency signaling lights were flashing. *Staples v. Carter*, 264.

§ 92. Liabilities of Driver to Guests and Passengers

In passenger's action to recover for injuries received when defendant's automobile went out of control at an excessive rate of speed, trial court prop-

AUTOMOBILES—Continued

erly refused submission to the jury of issue of defendant's wilful and wanton negligence. *Hughes v. Lundstrum*, 345.

§ 102. Whether Accident Occurs While Employee is Driving in Course of Employment

Employer is not liable under respondeat superior doctrine for death of plaintiff's decedent in automobile accident with its vacationing employee merely because employee had off-duty use of employer's automobile. *Thayer v. Leasing Corp.*, 453.

§ 113. Nonsuit in Homicide Involving Use of Automobile

State's evidence is held insufficient to go to jury on issue of defendant's guilt of involuntary manslaughter. *S. v. Markham*, 391.

§ 125. Warrant for Operating Vehicle While Under Influence of Intoxicating Liquor

Warrant charging defendant with operation of a motor vehicle on a particular street while "under the influence of intoxicating liquor, second offense" is defective insofar as it purports to charge a second offense. *S. v. Sims*, 288.

§ 126. Competency and Relevancy of Evidence in Prosecution for Driving While Under Influence of Intoxicating Liquor

Sound motion pictures of defendant are properly admitted to illustrate testimony of a witness as to intoxication of defendant. *S. v. Strickland*, 338.

§ 129. Instructions in Prosecution for Driving While Under Influence of Intoxicating Liquor

Trial court erred in instructing jury that a person would be guilty of driving under the influence if he had partaken of an intoxicant to an "appreciable extent." *S. v. Felts*, 499.

§ 131. Failure to Stop After Accident; "Hit-and-Run Driving"

Issue of defendant's guilt of "hit-and-run" driving is properly submitted to the jury. *S. v. Markham*, 391.

In prosecution charging hit-and-run driving resulting in property damage, fact that warrant failed to set out any description of property damaged other than word "automobile" and failed to state name of owner is not fatal. *S. v. Crutchfield*, 586.

In prosecution for hit-and-run driving resulting in personal injuries, evidence of bodily injury is sufficient to go to jury, and failure of court to define personal injury is not error. *Ibid.*

BILLS AND NOTES

§ 16. Actions on Notes

Where, in an action to recover upon two promissory notes, the complaint raises the issue of defendant's indebtedness, it is error for the trial judge to enter judgment in favor of plaintiff absent an admission of indebtedness in the pleadings or a finding of indebtedness by the jury. *Whitley v. Redden*, 705.

BOATING

Plaintiff's evidence that boat purchased from defendant listed 12 to 14 inches to one side is sufficient to support a finding of defendant's breach of express warranty in sale of the boat. *Craven v. Dimmette*, 617.

BOUNDARIES

§ 13. Maps — Proceeding to Establish Boundaries

It is highly desirable in the trial of a lawsuit involving the location of disputed boundary lines to have one map showing thereon the contentions of all the parties. *Midgett v. Midgett*, 74.

BRIBERY

§ 1. Nature and Elements of the Offense

Elements of the offense of bribing a public officer. *S. v. Brinson*, 290.

§ 3. Prosecutions

In prosecution charging defendant with the bribery of a deputy sheriff to influence him to permit defendant to operate a whiskey still, the amount of mash fermenting at the still is not a material fact of the offense, and trial court's inaccurate statement relating thereto is not prejudicial. *S. v. Brinson*, 290.

BROKERS AND FACTORS

§ 6. Right to Commissions

Coal company is obligated to pay commissions to estate of sales agent for coal shipped after death of the sales agent under contract which was the product of the agent's skill and efforts as a salesman. *Peaseley v. Coke Co.*, 713.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence and Nonsuit

Evidence that defendant was a passenger in an automobile owned and driven by another in which stolen articles were found is insufficient for jury under doctrine of recent possession. *S. v. Doss*, 146.

Evidence held sufficient for jury in breaking and entering prosecution where stolen articles were found in defendant's automobile the day after the crime occurred. *S. v. Witherspoon*, 268.

In prosecution for felonious breaking and entering, State's evidence held sufficient under the doctrine of recent possession to withstand defendant's motion for nonsuit. *S. v. Breedin*, 591.

Evidence of defendant's guilt of aiding and abetting in the felonious breaking and entering of a cabin and in the larceny of personal property therefrom was properly submitted to the jury. *S. v. Catrett*, 722.

§ 6. Instructions

In prosecution for felonious breaking and entering and felonious larceny, trial court correctly and adequately charged the jury with respect to the doctrine of recent possession. *S. v. Breeden*, 591.

§ 7. Verdict and Instructions as to Possible Verdicts

In felonious breaking prosecution, an instruction requiring jury to find intent to commit crime of larceny "or other infamous crime" is erroneous where indictment alleged only an intent to commit larceny. *S. v. Barber*, 126.

§ 8. Sentence and Punishment

Sentences of imprisonment in felonious breaking and entering prosecution are within statutory limits. *S. v. Rann*, 513.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10. Sufficiency of Evidence

Evidence held sufficient for jury in action to set aside deed on ground of promissory representation by defendant that deed would be ineffective and unrecorded during plaintiff's lifetime. *Wood v. Nelson*, 407.

§ 11. Instructions

In action to set aside deed on ground of fraudulent promissory representation, trial court erred in failing to explain to jury what facts it would have to find in order to establish a promissory representation. *Wood v. Nelson*, 407.

CARRIERS

§ 2. State License and Franchise

Purpose of grandfather clause is to protect and preserve bona fide rights existing at the time of passage of legislation which contains such clause. *Whaley v. Lenoir County*, 319.

CHATTEL MORTGAGES AND CONDITIONAL SALES

§ 16. Default and Repossession for Sale

Defendant purchaser of automobile was not prejudiced by exclusion of his testimony that an official of the finance company told him he could make payments by the 15th day of each month rather than on the 7th day as provided in the conditional sales contract. *Credit Co. v. Jordan*, 249.

Finance company's consistent acceptance of late payments, standing alone, is insufficient to constitute waiver of the contract provision providing for payment by certain date. *Ibid.*

CONCEALED WEAPONS

§ 2. Prosecutions

Sentence of ten years imprisonment imposed upon conviction of the offense of carrying a concealed weapon is in excess of the two-year maximum permitted by statute. G.S. 14-269. *S. v. Barber*, 126.

CONSPIRACY

§ 3. Nature and Elements of Criminal Conspiracy

Criminal conspiracy defined. *S. v. Horton*, 141.

It is not required that an overt act be committed before the conspiracy becomes criminal. *Ibid.*

§ 6. Sufficiency of Evidence and Nonsuit in Criminal Conspiracy

Evidence of wife's guilt of criminal conspiracy to murder her husband is sufficient to be submitted to jury. *S. v. Horton*, 141.

CONSTITUTIONAL LAW

§ 12. Regulation of Trades and Professions

The regulation of ambulance service is a valid exercise of the police power. *Whaley v. Lenoir County*, 319.

§ 19. Monopolies and Exclusive Emoluments

County ordinance regulating ambulance service which excluded all methods of indemnifying injured persons except through liability insurance violates

CONSTITUTIONAL LAW—Continued

constitutional prohibitions against monopolies and exclusive emoluments. *Whaley v. Lenoir County*, 319.

§ 20. Equal Protection of Laws

Prosecution of defendant for a felonious escape did not deprive defendant of equal protection of the law in that defendant committed no act of violence to categorize his acts a felony. *S. v. Dixon*, 514.

In statute authorizing the several counties to enact ordinance regulating ambulance service, grandfather clause granting a franchise, without a finding of public convenience and necessity, to any ambulance operator who was furnishing services on the effective date of the statute and who continues to furnish services up to the effective date of the ordinance is unconstitutional in not affording equal protection to operators who are lawfully in business on the effective date of the ordinance. *Whaley v. Lenoir County*, 319.

§ 21. Right to Security in Person and Property

Defendant's constitutional rights were not violated by the taking of blood sample at physician's direction while defendant was unconscious. *S. v. Bryant*, 21.

§ 24. Requisites of Due Process

In a court proceeding all parties are entitled to be present at all of its stages in order to hear the evidence and have opportunity to refute it. *Cook v. Cook*, 652.

§ 28. Necessity for Indictment

Until the Legislature shall prescribe otherwise, a defendant who appeals to superior court from his conviction in inferior court may not waive indictment and be tried upon an information in superior court. *S. v. Harrington*, 622.

§ 29. Right to Trial by Duly Constituted Jury

Jury trial is not constitutionally required in a juvenile proceeding. *In re Shelton*, 487.

Defendant's right to unbiased jury was not violated by refusal of trial court to allow defense counsel to ask further questions of a juror who, having been passed by defendant and the State, stated that it occurred to him that deceased's mother had nursed his mother-in-law while she was in a hospital. *S. v. Gibbs*, 457.

§ 30. Due Process in Trial

Indigent defendant was not denied basic essential of his defense at second trial by denial of his motion for a transcript of the evidence at his first trial which ended in a mistrial. *S. v. Keel*, 330.

§ 31. Right of Confrontation, and Time to Prepare Defense

Denial of defendant's motion for continuance on ground that a material witness had not been located did not deprive defendant of right of confrontation. *S. v. Patton*, 164.

Where each defendant in a joint trial subjects himself to cross-examination by the other, defendants waive the objection that it was error to introduce their confessions which implicated each other. *S. v. Faulkner*, 113.

Defendant was not denied his constitutional right effectively to cross-examine prosecuting witness by court's reminder to defense counsel that in-

terrogation of the witness should be conducted from counsel table. *S. v. Bass*, 429.

Defendant's constitutional rights were not violated by trial court's denial of his motion for continuance made on day preceding trial on basis of a letter from defense counsel's doctor that counsel was ill. *S. v. Crutchfield*, 586.

Defendant was not prejudiced by denial of his motion for continuance based on affidavit that his counsel did not have sufficient time to procure witness able to offer alibi testimony, where evidence shows that the witness could not have aided defendant had he been called. *S. v. Catrett*, 722.

§ 32. Right to Counsel

Lineup identification is not rendered unconstitutional by fact that attorney who represented defendant thought lineup was being conducted in connection with charge of felonious breaking and entering rather than charge of armed robbery. *S. v. McCullough*, 173.

Defendants were not denied effective assistance of counsel by refusal of court to appoint separate counsel to represent each defendant. *S. v. Engle*, 101.

Confrontation for purpose of identification of accused is a critical stage of the pretrial criminal proceeding and requires presence of an attorney. *S. v. Hughes*, 639.

Trial court erred in failing to make findings of fact to support its conclusion that alleged juvenile delinquent knowingly and intelligently waived his right to counsel. *In re Haas*, 461.

Defendant is entitled to new trial for failure of court to appoint counsel to represent him in prosecution for secreting personal property to hinder enforcement of a lien. *S. v. Batiste*, 511.

Requiring the accused to speak so that victim of obscene telephone calls could have opportunity to identify his voice is a critical stage requiring the presence of counsel unless that right is waived by accused. *S. v. Best*, 379.

In-court identification of defendant by robbery victim was not rendered incompetent by fact defendant was submitted to victim's view in the courtroom prior to trial in absence of his counsel or by victim's pretrial identification of defendant from photographs without presence of counsel to represent defendant. *S. v. Keel*, 330.

Defendant charged with a misdemeanor amounting to a serious offense is entitled to counsel during trial in superior court, and the court must make findings of fact as to defendant's indigency and waiver of counsel. *S. v. Sims*, 288; *S. v. Best*, 379.

Decision of *U. S. v. Wade* is not applicable to admission of sound motion pictures to illustrate testimony of police officer. *S. v. Strickland*, 338.

Failure to provide defendant with counsel at a preliminary hearing does not violate any constitutional right. *S. v. Pulley*, 285; *S. v. Abbott*, 495; *S. v. Howard*, 509.

§ 33. Self-incrimination

Defendant's right against self-incrimination is not violated by admission of sound motion pictures to illustrate testimony of a witness as to defendant's intoxication. *S. v. Strickland*, 338.

§ 34. Double Jeopardy

In this prosecution in the superior court for the felony of assault with intent to commit rape, the trial court did not err in the denial of defendant's plea of former jeopardy based upon his conviction in the general county court

CONSTITUTIONAL LAW—Continued

of the misdemeanor of assault on a female for the same occurrence, where the charge of assault on a female is pending in the superior court on appeal *de novo* from the general county court. *S. v. Anderson*, 614.

§ 36. Cruel and Unusual Punishment

Sentence within statutory limits is not cruel and unusual. *S. v. Culp*, 625.

Sentencing juvenile to a youthful offender's camp from one to three years upon juvenile's plea of guilty to felonious breaking and entering is not cruel and unusual. *S. v. Johnson*, 469.

Sentence of twelve months for felonious escape is not cruel and unusual punishment. *S. v. Dixon*, 514.

§ 37. Waiver of Constitutional Guarantees

Waiver of constitutional rights may be made orally and without advice of counsel. *S. v. Best*, 379.

Defendant may waive a constitutional right relating to a matter of practice or procedure. *S. v. Johnson*, 469.

Waiver of counsel may not be presumed from a silent record. *S. v. Sims*, 288.

CONTRACTS

§ 6. Contracts Against Public Policy

When an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in G.S. 87-1, he may not recover for the owner's breach of the contract, nor may he recover the value of the work and services furnished under the contract on the theory of *quantum meruit* or unjust enrichment. *Construction Co. v. Anderson*, 12.

Applicability of general contractors licensing statute is determined by total cost of undertaking and not by separate progress payments. *Ibid.*

Contractor is not entitled to recover under construction contract which was entered after contractor's license had expired, notwithstanding owner knew contractor was unlicensed. *Ibid.*

§ 17. Term and Duration of Agreement

Contract will continue for reasonable time when duration is not specified. *Hardee's v. Hicks*, 595.

Where option contract was extended for unspecified time, whether defendant's tender of clear title to the property two months after the original contract expired was within reasonable time is question of fact for jury. *Ibid.*

§ 18. Modification

A written contract may be modified by a subsequent parol agreement even though the contract provides that it constitutes the entire agreement and that no modification of the terms therein shall be valid. *Credit Co. v. Jordan*, 249.

Evidence of an oral agreement which modifies a written contract should be clear and concise. *Ibid.*

Modification of an existing contract cannot arise from an ambiguous course of dealing between the parties from which diverse inferences might reasonably be drawn as to whether the contract remained in its original form or was changed. *Ibid.*

In this action for breach of a home construction contract, testimony by

CONTRACTS—Continued

defendant with respect to modifications in the contract was not inadmissible as unsupported by consideration. *Cox v. Phillips*, 490.

§ 25. Pleadings in Contract Actions

Cause of action for breach of contract is stated where complaint alleges the parties agreed to sell property which they jointly owned and divide the profits evenly but that defendants secretly retained an interest in the property. *Whitley v. O'Neal*, 136.

§ 27. Sufficiency of Evidence and Nonsuit

In an action for breach of a contract to sell property which plaintiffs and defendants jointly owned and to divide the proceeds evenly, the court erred in granting defendants' motion for nonsuit where plaintiffs' evidence tended to show that the proceeds actually received from the sale were divided evenly but that defendants secretly retained a 20/100 interest in the property. *Whitley v. O'Neal*, 136.

§ 32. Actions for Wrongful Interference

Elements of malicious inducement of breach of contract. *Beane v. Weiman Co.*, 279.

Allegations that plaintiff lost her job because defendants falsely accused plaintiff to an official of her employer of calling defendants' wives and reporting improper associations by defendants with other women held insufficient to state a cause of action for maliciously inducing a breach of contract. *Beane v. Weiman Co.*, 279.

CORPORATIONS

§ 23. Deeds and Conveyances

Corporate seal is necessary to valid conveyance of real estate by corporation, and equity will not give effect to purported corporate deed which does not contain corporate seal where purchaser is not innocent purchaser for value. *Investors Corp. v. Financial Corp.*, 156.

COUNTIES

§ 1. Legislative Control and Supervision

In statute authorizing the several counties to enact ordinance regulating ambulance service, grandfather clause granting a franchise, without finding of public convenience and necessity, to any ambulance operator who was furnishing services on the effective date of the statute and who continues to furnish services up to the effective date of the ordinance is unconstitutional in not affording equal protection to operators who are lawfully in business on the effective date of the ordinance. *Whaley v. Lenoir County*, 319.

County ordinance regulating ambulance service which excludes all methods of indemnifying injured persons except through liability insurance violates constitutional prohibitions against monopolies and exclusive emoluments. *Ibid.*

COURTS

§ 9. Jurisdiction of Superior Court After Orders or Judgments of Another Superior Court Judge

No appeal lies from one superior court to another. *In re Register*, 29.

COURTS—Continued

§ 15. Criminal Jurisdiction of Juvenile Courts

Jury trial is not constitutionally required in a juvenile proceeding. *In re Shelton*, 487.

By his plea of guilty in superior court, defendant waived any defect in the juvenile court proceeding which resulted in his being brought to trial in superior court. *S. v. Johnson*, 469.

Trial court erred in failing to make findings of fact to support its conclusion that alleged juvenile delinquent knowingly and intelligently waived his right to counsel. *In re Haas*, 461.

§ 21. What Law Governs; as Between Laws of This State and of Other States

Where all the evidence shows that sale and delivery of automobile took place in Tennessee, conditional sales contract covering purchase of automobile should be governed by laws of Tennessee unless contrary to public policy of this State. *Credit Co. v. Jordan*, 249.

CRIMINAL LAW

§ 9. Principals in the First or Second Degree

Where evidence in armed robbery prosecution tended to show that both defendant and his co-defendant actively participated in the crime, defendant was not prejudiced by error in court's instructions casting defendant in role of principal in the first degree and co-defendant as principal in the second degree. *S. v. Anderson*, 492.

§ 17. Federal and State Courts

Where federal district court, upon petition for writ of habeas corpus, orders that the state superior court afford petitioner a hearing as to the voluntariness of incriminating statements introduced at petitioner's trial, no appeal lies from an order of the superior court concluding that the statements were voluntarily and understandingly made, since the order of the superior court was ancillary to the federal habeas corpus proceeding and was not a final order within the purview of G.S. 7A-27. *S. v. Lentz*, 177.

§ 18. Jurisdiction on Appeals to Superior Court

Where Court of Appeals orders new trial in misdemeanor prosecution originally tried in municipal court and then tried de novo in superior court, superior court has jurisdiction of the case on retrial. *S. v. Patton*, 164.

Where defendant appealed to superior court from sentence imposed in a recorder's court, defendant can be tried only upon the original warrant or upon indictment, and it was error for trial judge to sentence defendant upon an information. *S. v. Harrington*, 622.

§ 21. Preliminary Hearing

A preliminary hearing is not essential to the finding of an indictment. *S. v. Abbott*, 495.

§ 23. Plea of Guilty

The record fails to support defendant's contention that his plea of guilty was coerced by actions of the trial court. *S. v. Hopkins*, 282.

By his plea of guilty in the superior court, defendant waived any defect

CRIMINAL LAW—Continued

in juvenile court proceeding which resulted in his being brought to trial in superior court. *S. v. Johnson*, 469.

Before defendant entered pleas of guilty to four misdemeanors, the fact that trial judge incorrectly stated that the maximum punishment defendant could receive was four years, when in fact the maximum was eight years, does not result in prejudice to defendant when the total sentence imposed was not more than two years. *S. v. Griffin*, 226.

§ 26. Plea of Former Jeopardy

In this prosecution in the superior court for the felony of assault with intent to commit rape, the trial court did not err in the denial of defendant's plea of former jeopardy based upon his conviction in the general county court of the misdemeanor of assault on a female for the same occurrence, where the charge of assault on a female is pending in the superior court on appeal *de novo* from the general county court, since upon appeal to the superior court the judgment of the county court is completely annulled and is not thereafter available for any purpose. *S. v. Anderson*, 614.

§ 34. Evidence of Defendants' Guilt of Other Offenses

Proof of other offenses is competent when such proof tends to show quo animo, intent, design, or guilty knowledge, or make out the res gestæ, or exhibit a chain of circumstances with respect to the offense in issue, and is so connected with the offense charged as to throw light upon one or more of these questions. *S. v. Engle*, 101.

In this prosecution for armed robbery, the trial court did not err in the admission of testimony by an assistant prison superintendent which tended to show that shortly before the robbery occurred defendants had assaulted the witness, stolen files and two pistols from the prison safe, and escaped from prison in an automobile stolen from the witness. *Ibid.*

Unresponsive answer of State's witness that he saw defendant being tried in a city court is not prejudicial where trial judge immediately sustained defendant's objection after solicitor had admonished the witness. *S. v. Smith*, 505.

§ 42. Articles and Clothing Connected with the Crime.

Trial court properly allowed non-expert witness to testify he observed flesh and blood on defendant's automobile. *S. v. Markham*, 391.

State was entitled to introduce into evidence the watch taken from a robbery victim. *S. v. Gatling*, 536.

§ 43. Photographs in Evidence

G.S. 114-119 does not prohibit the State from taking or using in evidence photographs or motion pictures of defendant charged with a misdemeanor. *S. v. Strickland*, 338.

Sound motion pictures of defendant are competent for the purpose of illustrating testimony of a witness as to intoxication of defendant. *Ibid.*

Fact that jury was shown photograph of defendant in which the words "Police Department, Burlington, N. C." were displayed beneath defendant's likeness is not prejudicial in this case. *S. v. Bumper*, 528.

§ 55. Blood Tests

Evidence of analysis of blood sample taken at physician's direction while defendant was unconscious held properly admitted. *S. v. Bryant*, 21.

CRIMINAL LAW—Continued

§ 64. Evidence as to Intoxication

Sound motion pictures of defendant are competent for the purpose of illustrating testimony of a witness as to intoxication of defendant. *S. v. Strickland*, 338.

§ 66. Evidence of Identity by Sight

Fact that jury was shown photograph of defendant in which the words "Police Department, Burlington, N. C." were displayed beneath defendant's likeness is not prejudicial in this case. *S. v. Bumper*, 528.

Where defendant sought to impeach testimony of witness relating to his identification of defendant by photograph, it was proper to allow the photograph in evidence to illustrate the witness' testimony that defendant's name did not appear thereon. *Ibid.*

Circumstances surrounding the photographic identification of defendant, a Negro male, were not impermissibly suggestive. *Ibid.*

Even if jailhouse confrontation between robbery victim and defendant for identification purposes was illegal, it was nonetheless proper to admit the in-court identification where it was based on victim's observations at time of the robbery. *S. v. Hughes*, 639.

Failure of trial judge to insert into the record findings relating to jailhouse confrontation for identification purposes between defendant and robbery victim will be deemed harmless error where the evidence is uncontradicted that the victim's in-court identification of defendant was not based on the jailhouse confrontation but had an independent origin in the victim's observation of defendant at the time of robbery. *Ibid.*

In-court identification of defendant by robbery victim is not rendered incompetent by fact defendant was submitted to victim's view in courtroom prior to trial in absence of his counsel or by victim's pretrial identification of defendant from police photographs without presence of counsel to represent defendant. *S. v. Keel*, 330.

Decision of *U. S. v. Wade* is not applicable to admission of sound motion pictures to illustrate testimony of a witness as to defendant's intoxication. *S. v. Strickland*, 338.

Trial court did not err in admission of testimony by robbery victim that defendant looked like one of the robbers. *S. v. Keel*, 330.

Decision in *U. S. v. Wade*, 388 U.S. 218, does not render inadmissible robbery victim's prompt identification of accused, who were not represented by counsel, as they entered the police station accompanied by officers. *S. v. Gatling*, 536.

In-court identification of defendant is not rendered incompetent by fact that attorney representing defendant at a previous lineup identification thought lineup was conducted in connection with another crime. *S. v. McCullough*, 173.

§ 67. Evidence of Identity by Voice

Requiring the accused to speak so that victim of obscene telephone calls could have opportunity to identify his voice is a critical stage requiring the presence of counsel unless that right is waived by accused, and accused is entitled to a new trial where trial court fails to determine on voir dire whether accused voluntarily waived counsel at time of identification. *S. v. Best*, 379.

§ 74. Confessions

Statement by defendant to a police officer which did not amount to a confession but was at most an inculpatory statement did not require voir dire

CRIMINAL LAW—Continued

procedure prior to its introduction by the State for purpose of impeaching defendant's direct testimony. *S. v. Catrett*, 722.

§ 75. Tests of Voluntariness of Confession; Admissibility

Miranda v. Arizona does not apply to confession obtained prior to date of that decision when offered at trials or retrials beginning thereafter. *S. v. Smith*, 191.

Statements made by person in custody as result of illegal arrest are not ipso facto involuntary. *S. v. Faulkner*, 113.

Where defendant charged with murder confessed to a law officer on 23 May 1964, a jury trial was held in October 1964 to determine defendant's competency to stand trial for the murder and defendant was found to be insane, and defendant was thereafter committed to a State hospital, where he remained until October 1966, trial of defendant in 1969 for the murder is a "retrial" of a "trial" which began in 1964, prior to the effective date of *Miranda v. Arizona*, 384 U.S. 436, and the *Miranda* decision does not govern the admission of defendant's 1964 confession in the 1969 trial. *S. v. Swann*, 385.

In a 1969 "retrial" of a "trial" which began prior to the effective date of the *Miranda* decision, the trial court did not err in the admission of a confession made in 1964, notwithstanding the full *Miranda* warnings were not given to defendant prior to in-custody interrogation which produced the confession, where the court found, upon competent evidence, that the confession was voluntarily made after defendant was advised of his constitutional rights as they then existed. *Ibid.*

Trial court properly admitted inculpatory statement made by defendant to officer at defendant's home prior to his arrest. *S. v. Williams*, 260.

§ 76. Determination and Effect of Admissibility of Confession

Statement by defendant to a police officer which did not amount to a confession but was at most an inculpatory statement did not require voir dire procedure prior to its introduction by the State for purpose of impeaching defendant's direct testimony. *S. v. Catrett*, 722.

§ 77. Admissions and Declarations

In prosecution for speeding, testimony that defendant told officer his accelerator became stuck is incompetent as a self-serving declaration. *S. v. Patton*, 164.

§ 81. Best and Secondary Evidence

Best evidence rule is violated by admission of parol testimony of contents of note handed to rape victim where State offered no explanation of the absence of the note. *S. v. Anderson*, 614.

§ 84. Evidence Obtained by Unlawful Means

Evidence of analysis of blood sample taken at physician's direction while defendant was unconscious held properly admitted. *S. v. Bryant*, 21.

Trial court properly admitted shotgun taken from defendant's home by officer. *S. v. Williams*, 260.

The fact that defendant may have been under illegal arrest at time prosecutrix identified his voice as the person who had been making obscene telephone calls to her does not ipso facto render the identification inadmissible. *S. v. Best*, 379.

CRIMINAL LAW—Continued

§ 85. Character Evidence Relating to Defendant

Where defendant took the stand and testified in his own behalf and solicitor did not cross-examine him concerning a previous indictment charging assault on a female, it was error to permit solicitor thereafter to question defendant's character witnesses as to whether they were aware that defendant had been previously indicted. *S. v. Smith*, 635.

§ 87. Direct Examination of Witness

Allowance of leading questions is within the discretion of the trial judge. *S. v. Patton*, 164.

§ 88. Cross-examination

The right to cross-examine does not mean that the cross-examination must produce that which is favorable. *S. v. Faulkner*, 113.

Where defendant's cross-examination of the prosecuting witness clearly established the facts sought to be adduced, trial court's action in precluding further examination thereon was not error. *S. v. Bumper*, 528.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

Slight variation in the corroborating testimony affects only the credibility of the evidence and not its admissibility. *S. v. Bumper*, 528.

The extent to which cross-examination for the purpose of impeachment will be permitted rests largely in the discretion of the trial court. *Ibid.*

The fact that sheriff's testimony on direct examination that victim of assault identified defendant in a lineup as the man holding card number "seven" was at variance with victim's own testimony on cross-examination that in a former trial he testified his assailant was holding card number "six" *is held* not to render the sheriff's testimony inadmissible, it being clear from all the evidence that both the sheriff and the victim knew it was defendant who had been identified in the lineup. *Ibid.*

Defendant has right to cross-examine a State's witness with respect to witness' previous criminal convictions. *S. v. Bass*, 429.

Defendant's testimony on direct examination may be impeached by proof that on other occasions he made statements inconsistent with his direct testimony at the trial. *S. v. Catrett*, 722.

§ 91. Continuance

Denial of defendant's motion for continuance on ground that a material witness had not been located does not deprive defendant of the right of confrontation where he was allowed to introduce testimony of the witness taken at a previous trial *S. v. Patton*, 164.

Motion for a continuance is addressed to the discretion of the court and should not be disturbed absent a showing of an abuse of this discretion. *Ibid; S. v. Crutchfield*, 586; *S. v. Hughes*, 639.

Where defendant's attorney excused three defense witnesses for the rest of the day in the mistaken belief that the State would take the balance of the afternoon in presenting its evidence, trial court did not abuse its discretion in denying defendant's motion for continuance until the next day because of the absence of the witnesses. *S. v. Hughes*, 639.

Ordinarily a motion for a continuance on the ground of a want of time for counsel for accused to prepare for trial is addressed to the sound discretion of the trial judge. *S. v. Catrett*, 722.

CRIMINAL LAW—Continued

An affidavit pertaining to request for continuance of trial must be filed fifteen days before the trial session convenes. *Ibid.*

Defendant was not prejudiced by denial of his motion for continuance based on affidavit alleging that his counsel did not have sufficient time to procure witness who could establish alibi where evidence showed that witness could not have aided defendant had he been called. *Ibid.*

§ 92. Consolidation of Counts

Trial court properly consolidated for trial the charges of safecracking, felonious breaking and entering, and felonious larceny. *S. v. Patton*, 501.

§ 95. Admission of Evidence Competent for Restricted Purpose

The trial court did not commit prejudicial error in the admission of testimony by a State's witness which tended to corroborate some of the testimony of another State's witness, where defendant failed to object or except to such testimony and made no request that its admission be restricted to the purpose for which it is competent. *S. v. Witherspoon*, 268.

Where each defendant in a joint trial takes the stand and subjects himself to cross examination by the other, the defendants waive the objection that it was error to introduce their confessions which implicated each other. *S. v. Faulkner*, 113.

Trial court did not err in failing to instruct the jury that evidence of defendant's prior convictions brought out on cross-examination of defendant by the solicitor should be considered only for the purpose of impeaching defendant's credibility where defendant made no request for such an instruction. *S. v. Jennings*, 132.

Objection *en masse* to admission of sound motion picture is properly denied where part of the motion picture is competent to illustrate testimony of a witness. *S. v. Strickland*, 338.

General admission of evidence which is competent for a restricted purpose will not be held error in absence of a request by defendant that its admission be restricted. *S. v. Catrett*, 722.

§ 97. Introduction of Additional Evidence

Trial court did not abuse its discretion in allowing recall of State's witness to give further testimony after the witness had been arrested on a bench warrant for perjury, even though witness' testimony was more favorable on recall. *S. v. Garrett*, 367.

§ 98. Custody of Witness

Defendant could not be prejudiced when State's witness was ordered to be placed in custody outside the presence of the jury. *S. v. Garrett*, 367.

§ 99. Expression of Opinion by Court During Trial

Trial court did not express an opinion in asking prosecuting witness what defendant was doing while another person held a gun in witness' back. *S. v. Keel*, 330.

Defendant was not prejudiced by court's comment that a witness had previously identified a picture as a photograph of defendant's car. *S. v. Phillips*, 353.

§ 101. Conduct of Jury and Misconduct Affecting Jury

Trial court did not err in refusing to order mistrial or in failing to find

CRIMINAL LAW—Continued

facts upon counsel's suggestion that juror had been sleeping during trial. *S. v. Engle*, 101.

§ 102. Argument and Conduct of Counsel During Trial

Defendant was not prejudiced by the fact that his trial counsel, in the presence of the jury, questioned him as to whether he wished to take the witness stand, and at the request of defendant's counsel this question and defendant's answer were repeated into the record by the trial court, where the court instructed the jury that they should not consider the fact that defendant did not testify to his prejudice. *S. v. Culp*, 625.

§ 103. Function of Court and Jury

Credibility of the evidence is a matter for the jury. *S. v. Gatling*, 536.

§ 104. Consideration of Evidence on Motion to Nonsuit

Consideration of evidence on motion to nonsuit. *S. v. Jennings*, 132; *S. v. Horton*, 141; *S. v. Ledbetter*, 497; *S. v. Collins*, 516.

Contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant granting of the motion for nonsuit. *S. v. Collins*, 516.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

Sufficiency of evidence on motion for nonsuit. *S. v. Yarborough*, 207.

It is for the jury to determine whether the evidence is such as to exclude every reasonable hypothesis except that of guilt. *S. v. Pulley*, 285.

§ 112. Instructions on Burden of Proof and Presumptions

Trial court's instruction did not place burden of proof of alibi upon defendant. *S. v. McCullough*, 173.

§ 113. Statement of Evidence and Application of Law Thereto

Trial judge is not required to instruct jury with any greater particularity than is necessary to enable jury to apply the law to the evidence. *S. v. Thacker*, 197.

Charge susceptible to construction that should jury find either defendant committed the offense it should convict both defendants held reversible error. *S. v. Doss*, 146.

Trial court did not err in failing to instruct jury that evidence of defendant's prior convictions brought out on cross-examination of defendant by the solicitor should be considered only for purpose of impeaching defendant's credibility where defendant made no request for such an instruction. *S. v. Jennings*, 132.

An inadvertence in recapitulating evidence must be called to trial court's attention in time to permit correction. *S. v. Brinson*, 290.

Trial court properly instructed jury on defense of alibi. *S. v. Phillips*, 353.

Trial court did not err in failing to charge jury as to corroborative evidence absent request by defendant for such instruction. *S. v. Witherspoon*, 268.

It is not required that the trial court's instructions recapitulate all of the evidence. *S. v. Garrett*, 367.

Trial court did not err in restricting its recapitulation of the evidence offered by a State's witness to the testimony given by the witness on the second day of the trial after the witness had been arrested and charged with perjury for testimony given on the first day. *Ibid.*

CRIMINAL LAW—Continued

Slight inadvertence in recapitulation of evidence which is not called to trial court's attention in apt time is not prejudicial. *S. v. Breedin*, 591.

§ 114. Expression of Opinion by Court in the Charge on the Evidence

Defendant was not prejudiced by court's reference to him in the charge by an alias name which appeared in the indictment. *S. v. Culp*, 625.

Fact that trial court's recapitulation of State's evidence consisted of six pages as compared to two pages for defendant's evidence does not constitute an expression of opinion by the trial court. *S. v. Crutchfield*, 586.

Reference in the court's instructions to the seriousness and importance of this case is held not to constitute expression of opinion by the court. *S. v. Phillips*, 353.

When charge is considered as a whole, trial judge's use of the words "the witness said," "he stated," and similar phrases was not prejudicial error. *S. v. Patton*, 501.

§ 115. Instructions on Lesser Degrees of Crime and Possible Verdicts

Where evidence against each of two defendants was not identical, trial court should submit question of the guilt or innocence of each separately. *S. v. Barber*, 126.

§ 116. Charge on Failure of Defendant to Testify

Defendant was not prejudiced by the fact that his trial counsel, in the presence of the jury, questioned him as to whether he wished to take the witness stand, and at the request of defendant's counsel this question and defendant's answer were repeated into the record by the trial court, where the court instructed the jury that they should not consider the fact that defendant did not testify to his prejudice. *S. v. Culp*, 626.

§ 117. Charge of Character Evidence and Credibility of Witness

Trial court need not instruct jury on credibility of witnesses or nature of character evidence absent request for such instructions. *S. v. Anderson*, 492.

§ 127. Arrest of Judgment

Judgment in criminal prosecution may be arrested only when some fatal error appears on face of record proper. *S. v. Williams*, 260.

§ 130. New Trial for Misconduct of or Affecting Jury

The fact that one juror merely glanced at the headline of a newspaper article relating to the trial does not entitle defendant to a mistrial. *S. v. Garrett*, 367.

§ 132. Setting Aside Verdict as Being Contrary to Weight of Evidence

Motion to set aside verdict as against weight of evidence is addressed to discretion of trial court. *S. v. Williams*, 260.

§ 138. Severity of Sentence, and Determination Thereof

The fact that defendant's accomplice received a probationary sentence while defendant received an active prison sentence is not ground for legal objection. *S. v. Abbott*, 495.

Sentencing juvenile to a youthful offender's camp for term of one to three years upon his plea of guilty to felonious breaking and entering is not excessive. *S. v. Johnson*, 469.

CRIMINAL LAW—Continued

Superior court judge had no authority to order that credit be given on defendant's valid sentence which was previously imposed in another county by another judge for the time which defendant had served on a separate invalid sentence. *S. v. Kelly*, 209.

§ 145.1. Probation

Probation is a matter of grace and not a matter of right. *S. v. Cross*, 215.

Order of trial court revoking defendant's probation on ground that defendant had violated a condition of probation in failing to work at suitable employment held supported by the evidence. *Ibid.*

§ 146. Nature and Grounds of Appellate Jurisdiction

An appeal from a sentence imposed upon defendant's plea of guilty presents only the face of the record proper for review. *S. v. Hopkins*, 282.

§ 148. Judgments Appealable

Where federal district court, upon petition for writ of habeas corpus, orders that the state superior court afford petitioner a hearing as to the voluntariness of incriminating statements introduced at petitioner's trial, no appeal lies from an order of the superior court concluding that the statements were voluntarily and understandingly made, since the order of the superior court was ancilliary to the federal habeas corpus proceeding and was not a final order within the purview of G.S. 7A-27. *S. v. Lentz*, 177.

§ 150. Rights of Defendant to Appeal

Clerk of superior court was without authority to enter an order purporting to dismiss defendant's appeal, but where defendant's appeal was perfected and heard in the Court of Appeals there is no prejudicial error. *S. v. Harrington*, 622.

§ 154. Case on Appeal

It is the duty of the appellant to see that the record is properly made up and docketed in the Court of Appeals. *S. v. Barber*, 126.

Affidavits in support of motion for mistrial executed after conclusion of the trial are not properly part of the record on appeal. *S. v. Engle*, 101.

§ 155.5. Docketing of Record in Court of Appeals

Appeal is dismissed for failure to docket record on appeal within time allowed by order of Court of Appeals. *S. v. Jackson*, 294; *S. v. Verbal*, 517.

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted

If the record is silent on a particular point, the action of the trial judge will be presumed correct. *S. v. Bryant*, 21; *S. v. Johnson*, 469.

§ 159. Form and Requisites of Transcript

Appeal is dismissed for failure to file stenographic transcript which had been agreed to by solicitor. *S. v. Norman*, 504.

§ 161. Form and Requisites of Exceptions and Assignments of Error

A proper assignment of error is the statement of the error complained of when there is a grouping together of all exceptions taken during the trial of a case relating to one principle of law. *S. v. Patton*, 501.

CRIMINAL LAW—Continued

Assignment of error must be based upon appropriate exceptions. *S. v. Pulley*, 285.

§ 162. Objections, Exceptions and Assignments of Error to Evidence

Where trial court sustains defendant's objection to answer of witness, failure of court to instruct jury not to consider witness' answer is not error absent request for such instruction. *S. v. Phillips*, 353.

The trial court did not err in the admission of a shotgun taken from defendant's home by a law officer where defendant made no objection to the introduction of such evidence. *S. v. Williams*, 260.

§ 163. Exceptions and Assignment of Error to Charge

Where portions of the charge to which defendant assigns error are not identified by letter, parentheses or in any other manner, the assignments of error are ineffective. *S. v. Bennett*, 662.

§ 165. Exceptions and Assignments of Error to Remarks of Court and Incidents Occurring During Trial

Defendant was not prejudiced by court's reference to him in the charge by an alias name which appeared in the indictment. *S. v. Culp*, 625.

Fact that trial court's recapitulation of State's evidence consisted of six pages as compared to two pages for defendant's evidence does not constitute an expression of opinion by the trial court. *S. v. Crutchfield*, 586.

Defendant was not prejudiced by the fact that his trial counsel, in the presence of the jury, questioned him as to whether he wished to take the witness stand, and at the request of defendant's counsel this question and defendant's answer were repeated into the record by the trial court, where the court instructed the jury that they should not consider the fact that defendant did not testify to his prejudice. *S. v. Culp*, 626.

§ 166. The Brief

Assignments of error not brought forward in the brief are deemed abandoned. *S. v. Bass*, 429; *S. v. Johnson*, 469.

Assignment of error is deemed abandoned where no argument or authority is cited in support thereof in appellant's brief. *S. v. Pulley*, 285.

§ 167. Presumptions and Burden of Showing Error

Burden is upon the complaining party to show error. *S. v. Bryant*, 21; *S. v. Griffin*, 226.

Defendant has burden to show not only error but prejudicial error in order to be entitled to a new trial. *S. v. Crutchfield*, 586.

§ 168. Harmless and Prejudicial Error in Instructions

Trial court committed prejudicial error in stating facts in the charge which were not in the evidence and which related to a critical area of the case. *S. v. Boone*, 194.

Where the court charged correctly in one part of the charge but incorrectly in another, there must be a new trial. *S. v. Reid*, 424.

No prejudicial error is shown in the trial court's inaccurate statement in the charge that the robbery victim testified that the lights at the crime scene were a little brighter than the courtroom lights, when, in fact, the witness so

CRIMINAL LAW—Continued

testified as to the lights in a bus station, where the witness testified in detail as to lighting conditions at the crime scene, the court instructed the jury that they were to be guided by their own recollection of the testimony, and this misstatement of the evidence was not called to the court's attention at the trial. *S. v. Bass*, 429.

Where evidence in armed robbery prosecution tended to show that both defendant and his co-defendant actively participated in the crime, defendant was not prejudiced by error in court's instructions casting defendant in role of principal in the first degree and co-defendant as principal in the second degree. *S. v. Anderson*, 492.

Defendant was not prejudiced when court inadvertently read count of receiving stolen property to jury in the charge. *S. v. Culp*, 625.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Defendant was not prejudiced by unresponsive answer of State's witness where evidence of similar import was later admitted without his objection. *S. v. Patton*, 164.

Testimony cannot be held prejudicial where record fails to show what answer of witness would have been. *S. v. Phillips*, 353.

No prejudicial error is shown in trial court's sustension of objection to a competent question begun by defense counsel as to whether on a certain date a State's witness had been "charged and convicted". *S. v. Bass*, 429.

§ 170. Harmless and Prejudicial Error in Remarks of Court and Incidents During Trial

Any error resulting from trial court's remark to defense counsel in presence of jury as to whether defendant would be offered as a witness held cured by the charge. *S. v. Hughes*, 639.

Reference in the court's instructions to the seriousness and importance of this case is held not to constitute expression of opinion by the court. *S. v. Phillips*, 353.

Defendant was not prejudiced by court's comment that a witness had previously identified a picture as a photograph of defendant's car. *Ibid.*

Non-responsive answer of State's witness that he saw defendant being tried in a city court is not prejudicial where trial judge immediately sustained defendant's objection after solicitor had admonished the witness. *S. v. Smith*, 505.

§ 172. Whether Error is Cured by Verdict

Where defendant is found guilty of a lesser degree of the crime charged, error relating to the graver offense is not prejudicial. *S. v. Howard*, 509.

§ 176. Review of Judgments on Motions to Nonsuit

Review of circumstantial evidence on appeal from denial of defendant's motion to nonsuit. *S. v. Pulley*, 285.

§ 177. Determination and Disposition of Cause

Where Court of Appeals orders new trial in misdemeanor prosecution originally tried in municipal court and then tried de novo in superior court, superior court has jurisdiction of the case on retrial. *S. v. Patton*, 164.

DAMAGES

§ 3. Compensatory Damages for Injury to Person

Party may not be allowed damages for permanent injuries unless there is evidence from which a conclusion of permanent injuries properly resulting from the wrongful act complained of is shown. *Hood v. Kennedy*, 203.

§ 15. Burden of Proof and Sufficiency of Evidence as to Damages

Industrial Commission's award in tort claim action is not rendered invalid by fact that plaintiff's evidence fails to show exact amount of medical expenses arising from the accident. *Bundy v. Board of Education*, 397.

§ 16. Instructions on Measure of Damages

Trial court erred in instructing jury that plaintiff could recover prospective damages where plaintiff's injury is subjective and plaintiff presented no expert medical testimony as to the permanency of his injury. *Hood v. Kennedy*, 203.

It is incumbent upon the trial judge to give the jury sufficiently definite instructions on the issue of damages to guide them to an intelligent determination of the question. *Kuyrkendall v. Dept. Store*, 200.

In wrongful death action it is not necessary or proper for trial judge to charge that purchasing power of the dollar has diminished. *Thayer v. Leasing Corp.*, 453.

DEATH

§ 3. Nature and Grounds of Action for Wrongful Death

Party who has not been appointed as administratrix and not offered herself for qualification may not, upon false allegation that she has qualified as administratrix, commence an action for wrongful death and, following the expiration of the statute of limitations, validate that action by subsequent appointment as administratrix. *Reid v. Smith*, 646.

§ 7. Damages

In determining future earning capacity, prior earnings are admissible in evidence if there is a reasonable relation between past and probable future earnings. *Thayer v. Leasing Corp.*, 453.

In action for wrongful death of a housewife, evidence that the wife was contemplating a return to work after her son began school was properly excluded; evidence as to the present salary range of deceased's former job was also properly excluded. *Thayer v. Leasing Corp.*, 453.

Trial court was not required to charge that the purchasing power of the dollar has diminished during the last few years. *Ibid.*

DEEDS

§ 6. Execution, Acknowledgment, and Probate

Corporate seal is necessary to a valid conveyance by a corporation. *Investors Corp. v. Financial Corp.*, 156.

§ 19. Restrictive Covenants, Generally

In construing restrictive covenants all doubt should be resolved in favor of the free use of land. *Lewis v. Wiggs*, 95.

§ 20. Restrictive Covenants as Applied to Subdivision Developments

Restrictive covenant providing that "no business establishment of any

DEEDS—Continued

kind shall be erected or permitted on any lot of this subdivision" is not unclear or vague, and the operation of a beauty shop is within the prohibition of the covenant. *Lewis v. Wiggs*, 95.

In action by subdivision landowners to permanently enjoin defendant landowner in same subdivision from operating a beauty shop in violation of a restrictive covenant, the evidence is insufficient to show that the restriction has been waived by business activities of other owners. *Ibid.*

DESCENT AND DISTRIBUTION

§ 1. Nature and Titles by Descent in General

The intestate share of surviving spouse defined. *In re Estate of Connor*, 228.

Intestate share of surviving spouse does not include value of property passing by survivorship, joint accounts with right of survivorship, or insurance payable to spouse. *Ibid.*

The year's allowance for the surviving spouse is not a part of the spouse's "intestate share." *Ibid.*

DIVORCE AND ALIMONY

§ 6. Cross Actions

In husband's action for absolute divorce, husband is entitled to a voluntary nonsuit at any time where the wife's pleading does not amount to a counterclaim. *Hudson v. Hudson*, 185.

§ 18. Alimony and Subsistence Pendente Lite

Wife's allegations are sufficient to state a cause of action under former G.S. 50-16 for subsistence pendente lite on ground of abandonment. *Speck v. Speck*, 296.

In a hearing to award counsel fees pendente lite, it is unnecessary for the trial judge to make finding of fact that the husband was a wrongdoer. *Ibid.*

Although wife's yearly income amounted to $16,000, award to the wife of counsel fees pendente lite in the sum of $1500 is upheld. *Ibid.*

Right of wife to an allowance pending trial was grounded in the common law. *Hudson v. Hudson*, 185.

§ 20. Decree of Divorce as Affecting Right to Alimony

Decree for absolute divorce on ground of two years' separation does not destroy wife's right to receive alimony pendente lite under a prior judgment entered in the wife's separate action. *Morse v. Zatkiewiez*, 242.

§ 21. Enforcing Alimony Payment

An allowance for alimony is a debt. *Morse v. Zatkiewiez*, 242.

The statute of limitations does not apply to a judgment directing the payment of alimony. G.S. 1-306. *Ibid.*

§ 22. Jurisdiction and Procedure in Custody and Support of Children

Although child of the parties was 34 years old, was residing in another state and had not been adjudged incompetent, trial court had authority to award custody of and support for the child to the mother and to determine visitation rights of the father, where the parents were before the court and subject to its *in personam* jurisdiction and where there was psychiatric and

DIVORCE AND ALIMONY—Continued

medical evidence that the child was mentally and physically disabled. *Speck v. Speck*, 296.

§ 23. Support of Children

Evidence held to support an award of child support pendente lite in the sum of $200 per month. *Speck v. Speck*, 296.

§ 24. Custody of Children

Where both husband and wife are before the court, trial judge properly establishes visitation rights regardless of the child's residence. *Speck v. Speck*, 296.

EJECTMENT

§ 7. Presumptions, Burden of Proof, and Pleadings

In action in ejectment to try title, plaintiff has the duty to establish ownership of the land and trespass. *Midgett v. Midgett*, 74.

§ 9. Competency and Relevancy of Evidence

In action in ejectment, a map prepared by the witness, a surveyor, of the land in controversy is competent evidence to illustrate the testimony of the witness as to the location of the land. *Midgett v. Midgett*, 74.

§ 10. Sufficiency of Evidence and Instructions

In an ejectment action, a plaintiff must offer evidence which fits the description contained in his deeds to the land claimed. *Midgett v. Midgett*, 74.

Plaintiffs were not prejudiced by trial court's instructions in ejectment action. *Midgett v. Midgett*, 74.

ELECTRICITY

§ 2. Control and Regulation of Service to Customers

Utilities Commission did not exceed its statutory authority in assigning an electric service area jointly to two electric suppliers. *Utilities Comm. v. Electric Membership Corp.*, 663; *Utilities Comm. v. Electric Membership Corp.*, 680.

Order of Utilities Commission assigning electric service area to an electric membership corporation for loads up to specified KW demand and jointly to the electric membership corporation and a power company for higher contract demands is held not to violate constitutional right of electric membership corporation or the consuming public. *Ibid.*

Where Utilities Commission assigned electric service area to electric membership corporation for loads up to a specified KW demand and jointly to the membership corporation and a power company for greater contract demands, portion of Commission's order establishing the specified KW load as the maximum of the individual assignment to the electric membership corporation is arbitrary where the Commission made no findings of fact to justify such KW maximum. *Ibid.*

Utilities Commission properly admitted opinion testimony that industrial consumers generally prefer to be served by a private power company. *Utilities Comm. v. Electric Membership Corp.*, 680.

EMINENT DOMAIN

§ 1. Nature and Extent of Power

State Highway Commission possesses the power of eminent domain. *Highway Comm. v. School*, 684.

The terms "condemnation" and "eminent domain" by definition admit that condemnor did not have title to the land. *In re Simmons*, 81.

§ 3. What is a "Public Purpose" Within Power of Eminent Domain

What constitutes a public use of such a nature as to subject property to eminent domain is incapable of a precise and comprehensive definition applicable to all cases. *Highway Comm. v. School*, 684.

What is a public use is a judicial question to be decided by the court as a matter of law. *Ibid.*

Condemnation of property by the Highway Commission for the sole purpose of providing a private driveway into adjoining property which had been landlocked as a result of construction of controlled access freeway is held to constitute a taking for a public purpose. *Ibid.*

§ 5. Amount of Compensation

Trial court properly allowed evidence tending to show the reasonable probability of a change in zoning ordinance from residential to industrial use and properly denied evidence showing changes in the ordinance subsequent to the date of the taking. *Highway Comm. v. Hamilton*, 360.

§ 6. Evidence of Value

In highway condemnation proceeding, cross-examination of landowner as to what he paid for the property was competent to test witness' memory. *Highway Comm. v. Lane*, 507.

Trial court properly excluded testimony of real estate expert as to what third party told him concerning the sale price of a particular piece of real estate. *Highway Comm. v. Hamilton*, 360.

§ 7. Proceedings to Take Land and Assess Compensation, Generally

Where terms of consent order between Highway Commission and landowner adjudged that the Commission was entitled to acquire, and did acquire, the interest and areas over the landowner's property described in the order, the consent order involved a substantial right and was *res judicata* on the issue of Commission's right to condemn the property. *Highway Comm. v. School*, 684.

Highway Commission has the responsibility of repairing, whenever possible, damage caused by a highway project, and it is not precluded from making reasonable use of land acquired for the project in doing so. *Ibid.*

Trial court had no discretionary authority to permit landowner to amend its answer denying the terms of a consent order between the Highway Commission and landowner which established Commission's rights to acquire landowner's property. *Ibid.*

Where landowner withdrew and used the money paid into court by the Highway Commission as its estimate of just compensation for all of landowner's property, landowner is now precluded from attacking the Commission's authority to condemn the property. *Ibid.*

In condemnation by municipality for purpose of widening a city street, description of the land sought to be condemned was too vague to support the condemnation. *In re Simmons*, 81.

EMINENT DOMAIN—Continued

Condemnor may not assert that it owned land sought to be condemned. *Ibid.*

The granting of a motion to amend a petition for condemnation lies in the discretion of the trial court. *Ibid.*

§ 14. Judgment and Nature and Extent of Rights Acquired

Trial court had no discretionary authority to permit landowner to amend its answer denying the terms of a consent order between the Highway Commission and landowner which established Commission's rights to acquire landowner's property. *Highway Comm. v. School,* 684.

ESCAPE

§ 1. Elements of and Prosecutions for the Offense

Sentence of 12 months for felonious escape is not cruel and unusual punishment. *S. v. Dixon,* 514.

Prosecution of defendant for felonious escape did not deprive defendant of equal protection of the laws in that on the date of escape he committed no act of violence to categorize his acts as felonious. *Ibid.*

EVIDENCE

§ 3. Facts Within Common Knowledge

It is common knowledge that underground gas lines are in common use in most cities and towns of this State. *Public Service Co. v. Beal,* 659.

§ 11. Transactions or Communications with Decedent

Testimony which was admissible for the purpose of disclosing the basis of the witness' opinion as to the mental capacity of deceased to execute promissory notes is nonetheless incompetent under dead man's statute where the testimony related to a personal transaction with deceased and tended to establish material facts in issue, and the evidence should be excluded. *Whitley v. Redden,* 705.

§ 14. Communications Between Physician and Patient

Physician-patient privilege applies to nurses, technicians and others when they are assisting or acting under the direction of a physician or surgeon. *S. v. Bryant,* 21.

The trial judge may admit a confidential communication between a physician and patient if in his opinion such is necessary to a proper administration of justice. G.S. 8-53. *Ibid.*

Admission of evidence of blood alcohol test administered to defendant at the direction of a physician was itself a finding that its admission was necessary to a proper administration of justice. *Ibid.*

§ 29. Accounts and Private Writings

Trial court properly refused to admit photographic copy of a purported written designation of plaintiff by deceased as beneficiary of deceased's federal employee's life insurance benefits where plaintiff failed to show the copy was made in regular course of business of any federal agency. *Jones v. Ins. Co.,* 570.

EVIDENCE—Continued

§ 32. Parol or Extrinsic Evidence Affecting Writings

Parol evidence rule is not violated by admission of testimony to explain ambiguous terms in a contract. *Cox v. Phillips*, 490.

§ 33. Hearsay Evidence in General

The hearsay evidence rule was not violated by the admission of opinion testimony that industrial consumers generally prefer to be served by a private power company. *Utilities Comm. v. Electric Membership Corp.*, 680.

§ 48. Competency and Qualification of Experts

Remarks of trial court to jury relating to the nature and purpose of expert testimony, which remarks were made prior to testimony of expert in the field of real estate appraisal, are without error. *Highway Comm. v. Hamilton*, 360.

§ 49. Examination of Expert Witness

Trial court properly excluded testimony of real estate expert as to what third party had told him concerning the sale price of particular real estate. *Highway Comm. v. Hamilton*, 360.

EXECUTORS AND ADMINISTRATORS

§ 2. Appointment of Administrators

Party who has not been appointed as administratrix and not offered herself for qualification may not, upon false allegation that she has qualified as administratrix, commence an action for wrongful death and, following the expiration of the statute of limitations, validate that action by subsequent appointment as administratrix. *Reid v. Smith*, 646.

§ 19. Filing of Claims Against Estate

Creditor who failed to present her claim against the estate within six months from date of the first publication of notice can share in any assets remaining in hands of the personal representative. *Morse v. Zatkiewiez*, 242.

§ 23. Widow's Year's Support

The year's allowance for the surviving spouse is not a part of the "intestate share" passing to a surviving spouse under the Intestate Succession Act. *In re Estate of Connor*, 228.

FALSE IMPRISONMENT

§ 3. Damages

In action for false imprisonment, trial court's instruction on the issue of compensatory damages that the jury could consider injury to credit and loss of earning capacity is erroneous where plaintiff testified that she did not lose employment time nor had her credit been damaged. *Kuyrkendall v. Dept. Store*, 200.

FORGERY

§ 2. Prosecution

An indictment for the forgery of a money order which follows the language of the statute but fails to aver the manner in which the money order was altered or defaced is fatally defective. *S. v. Cross*, 217.

FRAUD

§ 3. Material Misrepresentation of Past or Subsisting Fact

A promissory misrepresentation may constitute the basis of an action for fraud. *Wood v. Nelson*, 407.

§ 4. Knowledge and Intent to Deceive

In action based upon fraudulent promissory representation, facts must be alleged to show that defendant did not intend to carry out a false representation when it was made. *Whitley v. O'Neal*, 136.

§ 12. Sufficiency of Evidence and Nonsuit

Evidence held sufficient for jury in action to set aside a deed on the ground of fraudulent promissory misrepresentation of defendant that deed should be ineffective and unrecorded until plaintiff's death. *Wood v. Nelson*, 407.

FRAUDS, STATUTE OF

§ 2. Sufficiency of Writing

Letter from corporate executive is held a sufficient memorandum of agreement extending duration of contract, when considered with the original agreement, to satisfy the statute of frauds. *Hardee's v. Hicks*, 595.

§ 6. Contracts Affecting Realty

Oral contract to divide profits from purchase and sale of real estate is not within statute of frauds. *Whitley v. O'Neal*, 136.

§ 7. Contracts to Convey or Devise

Letter from corporate executive is held a sufficient memorandum of agreement extending duration of option contract, when considered with the original agreement, to satisfy the statute of frauds. *Hardee's v. Hicks*, 595.

FRAUDULENT CONVEYANCES

§ 3. Actions to Set Aside Conveyances as Fraudulent

Equity will not give effect to a deed invalid for lack of a corporate seal where grantee is not an innocent purchaser for value without notice that conveyance was made by grantor to defraud its creditors. *Investors Corp. v. Financial Corp.*, 156.

GAS

§ 5. Injury to Gas Company Property

Evidence held sufficient for jury in action against street grading contractor for damages to plaintiff's underground gas lines. *Public Service Co. v. Beal*, 659.

HOMICIDE

§ 19. Evidence Competent on Question of Self-Defense

Where defendant offered evidence that he killed deceased in self-defense, it is error to exclude evidence of deceased's threats to the physical safety of defendant even though uncommunicated to defendant. *S. v. Hurdle*, 610.

In homicide prosecution wherein defendant contended he shot deceased in self-defense, trial court did not commit reversible error in exclusion of testimony of specific instances of violence by deceased where there is no evidence

HOMICIDE—Continued

that defendant had knowledge of any violence toward the witness by deceased. *S. v. Gibbs*, 457.

Where defendant in support of his plea of self-defense offered evidence of specific threats and acts of violence toward defendant by deceased, it was error to allow the State in rebuttal to offer testimony by deceased's employer that deceased never committed violent behavior during the employment, the State being limited to evidence of the general reputation of deceased for peace and quiet. *S. v. Thomas*, 448.

§ 21. Sufficiency of Evidence and Nonsuit

The State's evidence *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of second degree murder or manslaughter where it tends to show that during a gun battle with deceased, defendant intentionally shot deceased with a rifle, thereby causing his death. *S. v. Jennings*, 132.

Evidence that defendant shot deceased seven times held sufficient for jury in first degree murder prosecution. *S. v. Gibbs*, 457.

§ 28. Instructions on Defenses

Trial court adequately instructed jury on self-defense. *S. v. Gibbs*, 457.

INDICTMENT AND WARRANT

§ 8. Merger of Counts

Trial court did not err in failing to merge separate offenses charged in two indictments where there is no evidence that the two offenses arose out of the same occurrence. *S. v. Hopkins*, 282.

§ 9. Charge of Crime

An indictment or warrant is sufficient if it charges the offense in a plain, intelligible and explicit manner. *S. v. Best*, 379.

Where time is not an essential element of the offense charged, defendant must move for a bill of particulars if he desires more information relating thereto. *Ibid.*

§ 10. Identification of Accused

Description of accused in indictment by alias name is proper if done in good faith. *S. v. Culp*, 625.

§ 11. Identification of Victim

Where the indictment charges defendant with armed robbery of Monty Jones and the evidence is that the victim's legal name is Manson Marvin Jones and his nickname is Monty, there is no fatal variance. *S. v. Bumper*, 528.

INFANTS

§ 2. Liability of Infants on Contracts

A minor is not liable for services rendered by a professional employment agency in finding him a job. *Personnel Corp. v. Rogers*, 219.

§ 5. Appointment, Duties and Authority of Next Friend

Action for damages for personal injuries to a minor should be brought in the name of the infant acting by his next friend. *Smith v. Perkins*, 120.

INFANTS—Continued

§ 9. Hearing and Grounds for Awarding Custody of Minor

In proceeding for custody of a minor child, trial court committed reversible error in privately questioning child in chambers in the absence of the parties but in presence of counsel, despite plaintiff's objection and specific request that child's testimony be taken in presence of the parties. *Cook v. Cook*, 652.

Evidence held sufficient to support court's award of custody of minor children to their grandparents. *Greer v. Greer*, 160.

§ 10. Commitment of Minors for Delinquency

Sentencing juvenile to a term of one to three years in a youthful offender's camp upon juvenile's plea of guilty to felonious breaking and entering is not unlawful. *S. v. Johnson*, 469.

Jury trial is not constitutionally required in a juvenile court proceeding. *In re Shelton*, 487.

Trial court erred in failing to make findings of fact to support its conclusion that alleged juvenile delinquent knowingly and intelligently waived his right to counsel. *In re Haas*, 461.

INSURANCE

§ 3. Contract and Policy Generally

Statutory provisions become a part of the policy as if written therein. *Hendricks v. Guaranty Co.*, 181.

§ 29. Right to Proceeds of Life Insurance; Beneficiaries

In action to determine beneficiary of federal employee's life insurance policy, court's findings of fact supported by competent evidence are sufficient to support decision that defendant is entitled to receive the proceeds. *Jones v. Ins. Co.*, 570.

§ 37. Actions on Life Policies

In this action to recover the proceeds of a federal employee's life insurance policy, the trial court properly allowed defendant's motion for nonsuit of plaintiff's case at the conclusion of plaintiff's evidence. *Jones v. Ins. Co.*, 570.

§ 69. Protection Against Injury by Uninsured or Unknown Motorists

Plaintiff is not entitled to recover under an uninsured and hit and run policy where there was no physical contact between plaintiff's automobile and an automobile operated by the unidentified tort-feasor. *Hendricks v. Guaranty Co.*, 181.

Doctrine of assumption of risk is available to defendant insurer in action under uninsured motorist provision for injuries received by plaintiff mechanic when an uninsured automobile fell on him. *Williams v. Ins. Co.*, 632.

§ 87. "Omnibus" Clause; Drivers Insured

Driver operating automobile with permission of the owner's son is not covered by omnibus clause of owner's automobile liability policy where son has no authorization from owner to select another permittee to operate automobile. *Truelove v. Ins. Co.*, 272.

Insured's son was not covered under omnibus clause of insured's automobile liability policy while driving automobile owned by mother of a casual

INSURANCE—Continued

friend where the son drove the automobile with permission of owner's son but had no express permission from owner and had no grounds reasonably to believe he had such permission. *Ibid.*

§ 88. Garage and Dealers' Liability Insurance

Although automobile dealer did not effect execution and delivery of title certificate to purchaser of used automobile until the day after occurrence of the accident involving the automobile, the evidence is sufficient to show that the automobile was not owned by the dealer on the accident date and therefore was not within the coverage of the dealer's liability policy. *Ins. Co. v. Ins. Co.*, 236.

§ 94. Cancellation

Assigned risk automobile liability insurer stated a cause of action for indemnification against premium finance company arising out of the improper cancellation of insured's policy for nonpayment of premium. *Ingram v. Ins. Co.*, 255.

Automobile liability insurer, who is compelled by statute to cancel insured's assigned risk policy upon receipt of request for cancellation from premium finance company acting under power of attorney executed by insured, may properly join the finance company as additional party defendant in a cross-action for indemnification. *Ibid.*

INTOXICATING LIQUOR

§ 2. Duties and Authority of ABC Boards; Beer and Wine Licenses

Evidence held sufficient to support ABC Board's suspension of respondent's beer license for failing to give the licensed premises proper supervision and permitting an intoxicated waitress to work in the establishment. *Monsour v. Bd. of Alcoholic Control*, 482.

JUDGMENTS

§ 3. Conformity to Verdict and Pleadings

Where, in an action to recover upon two promissory notes, the complaint raises the issue of defendant's indebtedness, it is error for the trial judge to enter judgment in favor of plaintiff absent an admission of indebtedness in the pleadings or a finding of indebtedness by the jury. *Whitley v. Redden*, 705.

§ 6. Modification and Correction of Judgments in Trial Court

Trial court has discretionary power to set aside its ruling allowing defendant's motion for nonsuit after jury has been dismissed and the court has commenced trial of another case. *Musgrave v. Savings & Loan Assoc.*, 439.

§ 8. Nature and Essentials of Judgments by Consent

The power of a court to sign a consent judgment depends upon the unqualified consent of the parties thereto, which consent must still subsist at the time the court is called upon to exercise its jurisdiction and sign the consent judgment. *Highway Comm. v. Rowson*, 629.

Trial court was without power to sign consent judgment after defendant repudiated the agreement and withdrew his consent. *Ibid.*

JUDGMENTS—Continued

§ 18. Erroneous Judgments

Once the term has expired, an erroneous judgment can be corrected only by an appellate court. *In re Register*, 29.

§ 21. Consent Judgments

A consent order cannot be modified or set aside without consent of the parties except for fraud or mistake. *Highway Comm. v. School*, 684.

The burden is on the party attacking a consent order to allege facts showing that because of fraud, mutual mistake or lack of consent it was entitled to relief. *Ibid.*

It was not necessary for appealing defendant to move to set aside a consent judgment where consent judgment shows on its face that it was signed after defendant withdrew his consent thereto. *Highway Comm. v. Rowson*, 629.

§ 24. Setting Aside for Mistake, Surprise or Excusable Neglect

There must be both excusable neglect and a meritorious defense in order to warrant vacating a judgment under G.S. 1-220. *Bundy v. Ayscue*, 581.

The trial court did not abuse its discretion in denying defendant's motion for a continuance of the hearing on his motion to vacate a judgment against him on the grounds of mistake, surprise and excusable neglect, where defendant had more than four months to prepare for the hearing on his motion. *Ibid.*

Defendant is not entitled to jury trial on questions of fact raised by his motion to vacate a judgment against him on ground of excusable neglect. *Ibid.*

§ 25. What Conduct Justifies Relief

Trial court properly denied defendant's motion to vacate judgment rendered against him on ground that his failure to appear at trial and defend the action was due to mental incompetency where court found defendant was mentally competent and deliberately refused to attend trial. *Bundy v. Ayscue*, 581.

§ 29. Meritorious Defense

There must be both excusable neglect and a meritorious defense in order to warrant vacating a judgment under G.S. 1-220. *Bundy v. Ayscue*, 581.

§ 34. Trial, Determination, and Judgment

Findings of fact by the trial court on motion to vacate a judgment for mistake, surprise or excusable neglect are binding on appeal if supported by competent evidence. *Bundy v. Ayscue*, 581.

Defendant is not entitled to jury trial on questions of fact raised by his motion to vacate a judgment against him on ground of excusable neglect. *Ibid.*

§ 54. Payment and Discharge

Where plaintiff was injured by a State Highway Commission employee acting in the course and scope of his employment and has recovered damages in a tort claim proceeding against the Commission under the principle of respondeat superior for the negligence of its employee, plaintiff may not thereafter maintain an independent action against the employee to recover for same injuries. *Brotherton v. Paramore*, 657.

JURY

§ 1. Right to Trial by Jury

Defendant is not entitled to jury trial on questions of fact raised by his motion to vacate a judgment against him on ground of excusable neglect. *Bundy v. Ayscue*, 581.

In special proceeding in district court to determine whether child is an abandoned child within meaning of adoption statute, it was not error for trial judge in his discretion to allow petitioner's motion for jury trial. *Boring v. Mitchell*, 550.

KIDNAPPING

§ 1. Elements of the Offense and Prosecutions

"Kidnap" means the unlawful taking and carrying away of a person by force and against his will, and it is the fact and not the distance of forcible removal of the victim that constitutes kidnapping. *S. v. Reid*, 424.

In kidnapping prosecution evidence that defendant dragged victim for a distance of only 75 feet into lot adjoining victim's yard does not warrant nonsuit. *Ibid.*

An instruction which would permit jury to find defendant guilty of kidnapping on finding that he unlawfully detained the victim without finding that the victim had been forcibly carried away is erroneous. *Ibid.*

LABORERS' AND MATERIALMEN'S LIENS

§ 1. Lien of Contractor Dealing Directly with Owner

G.S. 44-1 gives a contractor an inchoate lien upon a building and the lot upon which it is situated for work and material furnished in constructing such building. *Smith v. Clerk of Superior Court*, 67.

§ 8. Enforcement of Lien

When a contractor perfects a laborers' and materialmen's lien in compliance with the requirements of G.S. Ch. 44, Art. 8, the resulting judgment creates (1) a special lien on the building and the lot upon which it is situated, and (2) a general lien on the other real property of the owner in the county where the judgment is docketed. *Smith v. Clerk of Superior Court*, 67.

Assignee of superior materialmen's lien has no claim against surplus funds received on foreclosure of a junior deed of trust unless the house and lot subject to the lien are first sold for satisfaction of the judgment establishing the materialmen's lien. *Ibid.*

LANDLORD AND TENANT

§ 8. Liability for Injury to Person or Damage to Property

Employee has no stronger right against the landlord of her employer than has her employer. *Phillips v. Stowe Mills*, 150.

In employee's action against the landlord of her employer for injuries sustained when a wall collapsed, evidence is insufficient to support a finding that the landlord was negligent in construction of the wall. *Ibid.*

LARCENY

§ 5. Presumptions and Burden of Proof

Possession of stolen property shortly after the property was stolen raises a presumption of the possessor's guilt of larceny of such property. *S. v. Ledbetter*, 497.

LARCENY—Continued

§ 7. Sufficiency of Evidence and Nonsuit

Evidence that defendant was a passenger in an automobile owned and driven by another in which stolen articles were found is insufficient for jury under doctrine of recent possession. *S. v. Doss*, 146.

Evidence held sufficient for jury in larceny prosecution where stolen articles were found in defendant's automobile the day after the crime occurred. *S. v. Witherspoon*, 268.

Evidence of defendant's guilt of the larceny of an automobile was sufficient to be submitted to the jury. *S. v. Ledbetter*, 497.

Evidence held sufficient for jury under doctrine of recent possession. *S. v. Breedin*, 591.

Evidence of defendant's guilt of aiding and abetting in the felonious breaking and entering of a cabin and in the larceny of personal property therefrom was properly submitted to the jury. *S. v. Catrett*, 722.

§ 8. Instructions

In prosecution for larceny of goods of less than $200 in value after breaking and entering with intent to steal, trial court's failure to instruct jury that in order to convict for the felony of larceny they must find the goods were stolen after the building was broken and entered with intent to steal held error. *S. v. Barber*, 126.

In prosecution for felonious breaking and entering and felonious larceny, trial court correctly and adequately charged the jury with respect to the doctrine of recent possession. *S. v. Breeden*, 591.

§ 10. Judgment and Sentence

Nothing else appearing, larceny of goods of the value of not more than two hundred dollars is a misdemeanor for which the maximum imprisonment is two years. *S. v. Barber*, 126.

Punishment for felonious larceny is within statutory limits. *S. v. Rann*, 513.

LIBEL AND SLANDER

§ 1. Nature and Essentials of Cause of Action

Slander *per se* consists of false remarks which in themselves form the basis of an action for damages, in which case both malice and damage are, as a matter of law, presumed; slander *per quod* consists of false remarks which are such as to sustain an action only when causing some special damage, in which case both the malice and the special damage must be alleged and proved. *Beane v. Weiman Co.*, 276.

§ 4. Words Actionable Per Quod

An utterance is actionable only *per quod* where the injurious character of the words do not appear on their face but only in consequence of extrinsic, explanatory facts showing their injurious effect, in which case the injurious character of the words and some special damage must be pleaded and proved. *Beane v. Weiman Co.*, 276.

§ 5. Application of Rules to Particular Statements

Alleged false accusations by defendants to an official of plaintiff's employer that plaintiff had called defendants' wives and reported them running around with other women, and alleged statement by one defendant that he

LIBEL AND SLANDER—Continued

would not work for the employer as long as plaintiff was employed there *are held* not actionable *per se. Beane v. Weiman Co.*, 276.

In this action for slander, plaintiff's complaint fails to allege sufficient facts showing injurious effect of the remarks complained of to render them actionable *per quod* where it alleges that defendants falsely told an official of her employer that she had called defendants' wives and reported them running around with other women, that one defendant told the official that he would not work for the employer as long as plaintiff worked there, and that plaintiff consequently lost her job and has been unable to obtain equally satisfactory employment elsewhere. *Ibid.*

LIMITATION OF ACTIONS

§ 7. Fraud, Mistake and Ignorance of Action

Cause of action under statute relating to assignments for benefit of creditors accrues at time of the assignment and not at time creditor first learns of transaction. *Wilson v. Development Co.*, 600.

MASTER AND SERVANT

§ 32. Liability of Employee for Injuries to Third Persons

Where plaintiff was injured by a State Highway Commission employee acting in the course and scope of his employment and has recovered damages in a tort claim proceeding against the Commission under the principle of *respondeat superior* for the negligence of its employee, plaintiff may not thereafter maintain an independent action against the employee to recover for same injuries. *Brotherton v. Paramore*, 657.

§ 53. Workmen's Compensation: Dual Employments

Evidence is sufficient to support Industrial Commission's finding that employee who was instructed by his construction foreman to proceed to work on the foreman's home was not injured in the course and scope of employment while on his way to the home. *Hales v. Construction Co.*, 564.

§ 55. Injuries Compensable

The Workmen's Compensation Act is not intended to provide general health and accident insurance; to be compensable the injury must spring from the employment. *Martin v. Georgia-Pacific Corp.*, 37; *Hales v. Construction Co.*, 564.

§ 56. Causal Relation Between Employment and Injury

Where employee, who was on a training program in another state at the behest of his employer, was killed on his way to a restaurant for supper, a reasonable relationship existed between the employment and the procurement of the meal, and the employee's death is compensable. *Martin v. Georgia-Pacific Corp.*, 37.

§ 60. Personal Missions

Employees whose work entails travel away from the employer's premises are in the course of their employment except when a distinct departure on a personal errand is shown. *Martin v. Georgia-Pacific Corp.*, 37.

MASTER AND SERVANT—Continued

§ 61. Acts Performed by Injured Employee for Third Person

Evidence is sufficient to support Industrial Commission's finding that employee who was instructed by his construction foreman to proceed to work on the foreman's home was not injured in the course and scope of employment while on his way to the home. *Hales v. Construction Co.*, 564.

Injury to an employee while he is performing an act for the benefit of third persons is not compensable unless the act benefits the employer to an appreciable extent. *Ibid.*

§ 77. Review of Award for Change of Condition

Change of condition refers to a substantial change in injured employee's physical capability to earn or in his earnings. *Swaney v. Construction Co.*, 520.

Where plaintiff employee, who is entitled to workmen's compensation benefits for life, and his employer's compensation insurance carrier divided the amount recovered from the third party tort-feasor in accordance with a written agreement approved by the Industrial Commission, [former] G.S. 97-10 does not authorize the Industrial Commission to allow the insurance carrier to discontinue making compensation payments to the injured employee until the accrued benefits exceed the amount recovered from the third-party tort-feasor, *Ibid.*

In a hearing to review an award for a change of condition, failure of the Industrial Commission to make finding of fact whether employer and its insurer gave employee notice required by rule of the Commission (Form 28B) that if the employee claimed further benefits he would have to notify the Commission in writing within a year, *held* error, and the cause is remanded to the Commission for a finding thereon. *Gay v. Northampton County Schools*, 221.

§ 89. Common-law Right of Action Against Third Person Tort-feasor

Where plaintiff employee, who is entitled to workmen's compensation benefits for life, and his employer's compensation insurance carrier divided the amount recovered from the third party tort-feasor in accordance with a written agreement approved by the Industrial Commission, [former] G.S. 97-10 does not authorize the Industrial Commission to allow the insurance carrier to discontinue making compensation payments to the injured employee until the accrued benefits exceed the amount recovered from the third-party tort-feasor. *Swaney v. Construction Co.*, 520.

Although plaintiff's employer is a wholly owned subsidiary of defendant, where plaintiff's employer and defendant are separate entities for tax and accounting purposes, defendant may not claim employer's right of immunity from common law action for negligence as provided by the Workmen's Compensation Act. *Phillips v. Stowe Mills*, 150.

§ 93. Proceedings Before the Commission

The Industrial Commission makes both findings of fact and conclusions of law. *Braswell v. University*, 1.

Motion to offer additional evidence on appeal before Industrial Commission is addressed to the discretion of the Commission. *Martin v. Georgia-Pacific Corp.*, 37.

§ 96. Review in Court of Appeals

Where the Industrial Commission's findings of fact are supported by competent evidence, the Court of Appeals is bound thereby. *Martin v. Georgia-Pacific Corp.*, 37; *Hales v. Construction Co.*, 564.

MASTER AND SERVANT—Continued

§ 97. Disposition of Appeal

In case findings of fact of the Industrial Commission are insufficient to determine the rights of the parties, the Court of Appeals may remand the proceedings to the Commission for additional findings. *Hales v. Construction Co.*, 564.

MORTGAGES AND DEEDS OF TRUST

§ 17. Payment and Satisfaction

A foreclosure sale conducted after the mortgage debt has been paid is invalid and ineffectual to convey title to the purchaser. *Kyles v. Holding Corp.*, 465.

§ 33. Disposition of Proceeds and Surplus

Assignee of superior materialmen's lien has no claim against surplus funds received on foreclosure of a junior deed of trust unless the house and lot subject to the lien are first sold for satisfaction of the judgment establishing the materialmen's lien. *Smith v. Clerk of Superior Court*, 67.

§ 40. Suits to Set Aside Foreclosure

In action to set aside a deed of trust foreclosure, plaintiff's evidence is sufficient to justify the inference that the mortgage debt was paid prior to the commencement of the foreclosure proceedings. *Kyles v. Holding Corp.*, 465.

Inadequacy of the purchase price obtained at a foreclosure sale is not sufficient ground, standing alone, to upset a sale duly and regularly made in strict conformity with the deed of trust. *In re Register*, 29.

MUNICIPAL CORPORATIONS

§ 12. Tort Liability

Purchase by a municipality of liability insurance on a police car waived its governmental immunity for the negligent operation of such vehicle to the extent of the liability insurance thereon, where the governing body of the municipality thereafter took no affirmative action to retain its governmental immunity, notwithstanding the municipal governing body had passed a resolution against waiver of its governmental immunity some 14 years prior to the purchase of liability insurance. *Galligan v. Town of Chapel Hill*, 413.

NEGLIGENCE

§ 1. Acts Constituting Negligence

Participation in illegal mob action is not exercise of reasonable care. *Braswell v. University*, 1.

§ 12. Last Clear Chance

The doctrine of last clear chance defined. *Motor Lines v. R. R. Co.*, 402.

Plaintiff has burden of pleading and proving last clear chance. *Thomas v. Coach Co.*, 88.

Trial court did not err in refusing to submit the issue of last clear chance where evidence was insufficient to show that defendant had sufficient time to avoid collision after discovering defendant was moving into position of peril. *Ibid.*

NEGLIGENCE—Continued

§ 14. Assumption of Risk

Doctrine of assumption of risk is available to defendant insurer in action under uninsured motorist provision for injuries received by plaintiff mechanic while repairing an uninsured automobile. *Williams v. Ins. Co.*, 632.

§ 29. Sufficiency of Evidence of Negligence

If plaintiff's evidence, when considered in the light most favorable to her, shows that defendant violated some legal duty which it owed to plaintiff and that such breach of duty was the proximate cause of plaintiff's injury and damage, plaintiff would be entitled to have the jury pass upon her cause for negligent injury. *Phillips v. Stowe Mills, Inc.*, 150.

When a prima facie case of negligence is shown by the evidence, trial court should submit the case to the jury. *Staples v. Carter*, 264.

Evidence held sufficient for jury on issue of defendant's negligence is allowing timber from bridge being dismantled to remain in water and cause severe damage to plaintiff's fishing nets. *Craddock v. Loving and Co.*, 606.

§ 34. Sufficiency of Evidence of Contributory Negligence

In action for damages from collision between plaintiff's automobile and defendant's wrecker, trial court properly allowed plaintiff's motion for nonsuit of defendant's counterclaim and properly refused to submit issue of contributory negligence to the jury where all of defendant's evidence related to events occurring after the accident. *Locklear v. Snow*, 434.

§ 37. Instructions on Negligence

In action based on common law negligence of defendant in allowing timber from bridge being dismantled to remain in water and damage plaintiff's fishing nets, trial court erred in instructing jury as to plaintiff's contention that defendant was under contract with the State to dismantle the bridge without leaving any of the timber floating in the water. *Craddock v. Loving and Co.*, 606.

§ 38. Instructions on Contributory Negligence

Trial court's instructions on issue of contributory negligence were so susceptible of creating confusion in minds of jury that they constitute prejudicial error. *Williams v. Ins. Co.*, 632.

§ 47. Negligence in Condition or Use of Lands and Buildings

Where plaintiff knew that tree on his property was decayed and liable to fall and damage property of adjoining landowner, he was under duty to eliminate the danger. *Rowe v. McGee*, 60.

§ 59. Duties and Liabilities to Licensees

A social guest in a home is a licensee and not an invitee. *Freeze v. Congleton*, 472.

Evidence held sufficient for jury in action for injuries received by five year old child when he walked through glass door while a social guest in defendant's home. *Ibid.*

NUISANCE

§ 1. Private Nuisance

Where plaintiff knew that tree on his property was decayed and liable to fall and damage property of adjoining landowner, he was under duty to eliminate the danger. *Rowe v. McGee*, 60.

PARENT AND CHILD

§ 6. Right to Custody of Child

Evidence held sufficient to support court's award of custody of minor children to their grandparents. *Greer v. Greer*, 160.

§ 7. Duty to Support Child

Presumption that a child reaching the age of 21 will be capable of maintaining himself is rebutted by fact of the child's mental or physical incapacity, and the obligation of the father to support continues. *Speck v. Speck*, 296.

PARTIES

§ 2. Parties Plaintiff

All persons having an interest in the subject of the action may be joined as plaintiffs. *Lewis v. Wiggs*, 95.

PARTITION

§ 3. Petition, Parties, and Jurisdiction

A petition for partition of land should allege that plaintiffs and defendants are tenants in common of the land, should describe the land and state the interest of each party, and should allege that plaintiffs desire to hold their interests in severalty and that they are entitled to partition for that purpose. *Pearson v. McKenny*, 544.

Demurrer to petitioner's petition for partition based on procedures in the partitioning proceeding after all the pleadings were filed was improperly allowed by the court. *Ibid.*

Map attached to a petition for partition showing division of the land contemplated by the former owner is not a fatal defect in the petition. *Ibid.*

Demurrer to a petition for partition which contains a defective statement of a good cause of action comes too late after answer has been filed. *Ibid.*

PLEADINGS

§ 2. Statement of Cause of Action

A cause of action consists of the facts alleged. *Craven v. Dimmette*, 617.

A party is entitled to any relief justified by the material facts alleged and established by proof. *Whitley v. O'Neal*, 136.

§ 10. Form and Contents of Answer

The nature of defendant's pleading must be determined from the allegations rather than what is contained in the prayer for relief. *Hudson v. Hudson*, 185.

§ 11. Counterclaims

A counterclaim must be separately stated and must set forth the facts constituting the cause with the same precision as if the cause were alleged in the complaint. *Hudson v. Hudson*, 185.

§ 15. Plea in Bar

The trial court did not err in the denial of plaintiff's motion for a rehearing on defendant's plea in bar on the ground of newly discovered evidence. *Construction Co. v. Anderson*, 12.

PLEADINGS—Continued

§ 19. Office and Effect of Demurrer

Demurrer to petition for partition based upon procedures in the partitioning proceedings after all the pleadings were filed was improperly allowed. *Pearson v. McKinney*, 544.

§ 20. Time of Filing Demurrer

Demurrer to a defective statement of a good cause of action comes too late after answer. *Pearson v. McKinney*, 544.

§ 26. Demurrer for Failure of Complaint to State a Cause of Action

Demurrer to a petition for special proceeding to determine whether a child was an abandoned child is properly overruled where it does not point out any defect in the petition. *Boring v. Mitchell*, 550.

In this action for damages sustained when plaintiff's automobile struck the rear of defendant's automobile, which had stopped in plaintiff's lane of travel, the complaint is sufficient to withstand defendant's demurrer on the ground that it shows on its face plaintiff's contributory negligence as a matter of law. *Motor Co. v. Gray*, 643.

§ 33. Scope of Amendment to Pleadings

The right to permit amendment to pleadings does not extend to amendment which changes a cause of action. *Highway Comm. v. School*, 684.

§ 37. Issues Raised by Pleadings

It is the duty of the trial court to submit such issues as are necessary to settle the material controversies in the pleadings. *Whitley v. Redden*, 705.

An issue of fact arises when a material allegation appearing in the complaint is denied in the answer. *Ibid.*

PRINCIPAL AND AGENT

§ 10. Rights of Agent as Respects Principal

Coal company is obligated to pay commissions to estate of its sales agent for coal shipped after death of sales agent under contract which was procured by the skill and efforts of the agent. *Peaseley v. Coke Co.*, 713.

PRINCIPAL AND SURETY

§ 9. Public Construction Bonds

Provision in a contractor's bond for construction of municipal building which requires notice of a materialman's claim within 90 days of the last furnishing of material is held invalid as violative of G.S. 44-14. *Amarr Co. v. Dixon, Inc.*, 479.

PROCESS

§ 2. Issuance and Service

Where copy of the summons served on defendant commanded him to appear and file answer in a county other than the one in which the action was pending, the copy is fatally defective in not conforming with the original summons which had designated the correct county, and the service of the copy does not confer jurisdiction on the court. *Brantley v. Sawyer*, 557.

PROCESS—Continued

§ 5. Amendment of Process

Where copy of summons is fatally defective in commanding defendant to appear and file answer in a county other than the one in which the action is pending, the copy cannot be amended to confer jurisdiction. *Brantley v. Sawyer*, 557.

§ 13. Service of Process on Agent of Foreign Corporation

Foreign corporation's resident employee is not a "managing agent" within the purview of G.S. 1-97(b) so as to render foreign corporation amenable to service of process by service on its local agent. *Shew v. Chemical Co.*, 444.

PROFESSIONS AND OCCUPATIONS

Statute setting forth procedure for revocation of licenses does not apply where renewal of license is withheld for failure to pay statutory renewal fee. *Construction Co. v. Anderson*, 12.

Contractor is not entitled to recover under construction contract entered after contractor's license had expired, notwithstanding owner knew contractor was unlicensed. *Ibid.*

RAILROADS

§ 5. Crossing Accidents

In action arising out of collision between plaintiff's truck and defendant's train, issue of last clear chance on part of railroad was properly submitted to jury. *Motor Lines v. R. R. Co.*, 402.

RAPE

§ 12. Carnal Knowledge of Female Between Ages of Twelve and Sixteen

On appeal from defendant's conviction of carnal knowledge of his thirteen-year-old stepdaughter, the record fails to disclose prejudicial error.

§ 17. Assault with Intent to Commit Rape

In order to convict a defendant of assault with intent to commit rape, the evidence must show not only an assault but that the defendant intended to gratify his passion on the person of the woman at all events, notwithstanding any resistance on her part. *S. v. Anderson*, 614.

§ 18. Prosecution for Assault with Intent to Commit Rape

In this prosecution for assault with intent to commit rape, the trial court adequately instructed the jury with respect to defendant's defense of consent by the prosecutrix. *S. v. Munday*, 649.

RECEIVING STOLEN GOODS

§ 6. Instructions

Defendant was not prejudiced when court inadvertently read count of receiving stolen goods to jury in the charge. *S. v. Culp*, 625.

ROBBERY

§ 1. Nature and Elements of the Offense

Common law robbery and armed robbery defined. *S. v. Faulkner*, 113.

Common law robbery defined. *S. v. Gatling*, 536.

The element of force involved in the offense of robbery may be actual or constructive. *Ibid.*

The degree of force is immaterial so long as it is sufficient to compel the victim to part with his property or property in his presence. *Ibid.*

A gun is a portable firearm and usually includes pistols, carbines, rifles and shot guns. *S. v. Faulkner*, 113.

A pistol is a short firearm, intended to be aimed and fired from one hand. *Ibid.*

§ 4. Sufficiency of Evidence and Nonsuit

In this armed robbery prosecution, the evidence *is held* sufficient to be submitted to the jury where it tends to show that two men robbed the prosecuting witness at the point of a knife, that defendant and another man identified by the robbery victim as a participant in the crime were seen running from the crime scene, and that defendant at that time was carrying a long knife in his hand. *S. v. Yarborough*, 207.

Evidence of defendant's guilt of armed robbery was sufficient to be submitted to the jury, and the fact that at the moment the robbery actually occurred he did not use or threaten to use dangerous weapons, does not warrant nonsuit. *S. v. Reid*, 424.

Evidence of defendant's guilt of armed robbery is sufficient to be submitted to jury. *S. v. Garrett*, 367.

Question of defendant's guilt of common law robbery is properly submitted to the jury, the evidence being sufficient to show that the degree of force used compelled victim to part with his property. *S. v. Gatling*, 536.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

In prosecution for common law robbery, trial court adequately instructed jury on element of felonious intent. *S. v. Gatling*, 536.

Defendant was not prejudiced by error in court's instruction casting defendent in role of principal in the first degree and co-defendant as principal in the second degree. *S. v. Anderson*, 492.

In armed robbery prosecution wherein the State's witness was not certain whether defendant used a real or a toy pistol, the trial court is required, without a request from defendant, to instruct the jury that they could return a verdict of guilty of common-law robbery. *S. v. Faulkner*, 113.

RULES OF CIVIL PROCEDURE

§ 1. Scope of Rules

Rules of civil procedure become effective 1 January 1970 and will apply to pending litigation. *Ingram v. Ins. Co.*, 255.

SAFECRACKING

In a prosecution for safecracking, instructions of the trial court *are held* to comply with G.S. 1-180 in declaring and explaining the law arising on the evidence. *S. v. Thacker*, 197.

In prosecution for safecracking, sentence of imprisonment of not less than 48 nor more than 50 years is within statutory limit. *Ibid.*

SALES

§ 1. Requisites and Construction of Sales Contracts

Paper writing describing automobile and setting forth sales price, down payment and due date for unpaid balance was only a memorandum and not a bill of sale. *Used Cars v. Easton*, 695.

§ 5. Express Warranties

Express warranty defined. *Craven v. Dimmette*, 617.

§ 16. Pleadings in Actions for Breach of Warranty

Allegations of complaint are held to state a cause of action for breach of express warranty in the sale of a boat. *Craven v. Dimmette*, 617.

§ 17. Sufficiency of Evidence in Action for Breach of Warranty

Plaintiff's evidence that a boat purchased from defendant listed 12 to 14 inches to one side is sufficient to go to the jury on issue of breach of dealer's express warranty. *Craven v. Dimmette*, 617.

STATE

§ 5. Nature and Construction of Tort Claims Act

Injuries intentionally inflicted by employees of State agencies are not compensable under the Tort Claims Act. *Braswell v. University*, 1.

§ 6. Employees of State Within Tort Claims Act

Before an award of damages can be made under the Tort Claims Act, there must be a finding of a negligent act by an officer, employee, servant or agent of the State. *Taylor v. Jackson Training School*, 188.

§ 8. Negligence of State Employee and Contributory Negligence of Person Injured

In Tort Claims Act proceeding to recover for injuries resulting from a bullet fired by a state university security officer, the evidence established as a matter of law that plaintiff was contributorily negligent in joining an unruly mob attempting to gain illegal entry into the gymnasium. *Braswell v. University*, 1.

Evidence establishes that plaintiff was contributorily negligent in colliding with a pickup truck operated by a State employee. *Bateman v. College*, 168.

Evidence held sufficient to support Commission's findings that State employee was not negligent in striking child with truck. *Taylor v. Jackson Training School*, 188.

In tort claim action, Industrial Commission did not err in failing to make additional findings of fact requested by defendant. *Bundy v. Board of Education*, 397.

§ 9. Amount of Recovery

The Industrial Commission's award in tort claim action is not rendered invalid by fact that plaintiff's evidence fails to show exact amount of medical expenses arising from the accident. *Bundy v. Board of Education*, 397.

§ 10. Appeal and Review of Proceedings

The determinations of negligence, proximate cause, and contributory negligence are mixed questions of law and fact in a proceeding under the Tort

STATE—Continued

Claims Act and are reviewable on appeal from the Industrial Commission. *Braswell v. University*, 1.

Industrial Commission's findings and conclusions must be upheld on appeal if supported by any reasonable view of the evidence. *Taylor v. Jackson Training School*, 188.

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. *Bundy v. Board of Education*, 397.

STATUTES

§ 5. General Rules of Construction

Statute needs no judicial construction where language is clear and unambiguous. *Hendricks v. Guaranty Co.*, 181.

§ 8. Prospective and Retroactive Effect

Ordinarily, a statute will not apply to litigation pending on the effective date of the statute unless there is a legislative intent to the contrary. *Speck v. Speck*, 296.

Purpose of grandfather clause is to protect and preserve bona fide rights existing at the time of passage of legislation which contains such clause. *Whaley v. Lenoir County*, 319.

TAXATION

§ 28. Income Tax; Individuals

Taxpayer has burden of establishing a deductible loss and the amount thereof. *Ward v. Clayton*, 53.

A State income tax deduction for a casualty loss by fire may not exceed the taxpayer's adjusted cost basis of the property. *Ibid.*

Plaintiff taxpayer has failed to prove that he is entitled to a deduction for a casualty loss by fire where he introduced no evidence of the cost basis of the property destroyed by fire whereby a realized loss can be measured. *Ibid.*

TELEPHONE COMPANIES

§ 5. Prosecution for Obscene and Threatening Telephone Calls

In prosecution on warrant charging defendant with making obscene telephone calls to a named female, warrant is not defective in failing to state what words were used to constitute the offense. *S. v. Best*, 379.

Warrant charging violation of the statute prohibiting obscene and threatening telephone calls is a serious offense entitling defendant to assistance of counsel. *Ibid.*

TORTS

§ 1. Nature and Elements of Torts

Where plaintiff was injured by a State Highway Commission employee acting in the course and scope of his employment and has recovered damages in a tort claims proceeding against the Commission under the principle of *respondeat superior* for the negligence of its employee, plaintiff may not thereafter maintain an independent action against the employee to recover for same injuries. *Brotherton v. Paramore*, 657.

TRIAL

§ 8. Motion for Continuance

A motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable in the absence of manifest abuse of discretion. *Bundy v. Ayscue*, 581.

The trial court did not abuse its discretion in denying defendant's motion for a continuance of the hearing on his motion to vacate a judgment against him on the grounds of mistake, surprise and excusable neglect, where defendant had more than four months to prepare for the hearing on his motion. *Ibid.*

§ 9. Duties and Powers of Court

Trial court did not abuse its discretion in ordering a mistrial after the court had allowed defendant's motion for nonsuit and dismissed the jury, and two of the jurors had been empaneled to try another case. *Musgrave v. Savings & Loan Assoc.*, 439.

§ 10. Expression of Opinion on Evidence by Court During Trial

Appellants were not prejudiced by trial court's barely audible remark "will o' the wisp". *Highway Comm. v. Hamilton*, 360.

§ 14. Reopening Case for Additional Evidence

No abuse of discretion is shown in trial court's denial of plaintiff's motion to be allowed to offer additional evidence after plaintiff had rested and defendant had moved for nonsuit. *Smith v. Perkins*, 120.

§ 15. Objections and Exceptions to Evidence

Upon suggestion that the testimony of plaintiff is incompetent, trial court properly interrupts the testimony and conducts voir dire hearing in the absence of the jury to determine admissibility of the evidence. *Hughes v. Lundstrum*, 345.

§ 17. Admission of Evidence for Restricted Purpose

Where evidence is admissible under the rule that testimony of personal transactions and communications with a decedent is competent on the question of the mental capacity of the decedent, but such evidence is also inadmissible under the "dead man's statute," G.S. 8-51, in that the testimony tends directly to establish the material facts in issue in addition to mental capacity, the evidence should be excluded. *Whitley v. Redden*, 705.

§ 18. Province of Court and Jury

In a jury trial, the court declares and explains the law arising on the evidence; the jury resolves the disputed facts. *Braswell v. University*, 1.

§ 21. Consideration of Evidence on Motion to Nonsuit

Consideration of evidence on motion for nonsuit of counterclaim. *Locklear v. Snow*, 434.

§ 29. Voluntary Nonsuit

In husband's action for absolute divorce, husband is entitled to a voluntary nonsuit at any time where the wife's pleading does not amount to a counterclaim. *Hudson v. Hudson*, 185.

TRIAL—Continued

§ 30. Effect of Judgment as of Nonsuit and Refusal of Motion to Nonsuit

Trial court has discretionary authority to set aside its ruling allowing defendant's motion for nonsuit after the jury has been dismissed and the court has commenced trial of another case. *Musgrave v. Savings and Loan Assoc.*, 439.

§ 32. Form and Sufficiency of Instructions

The parties are not required to make a request that the judge comply with G.S. 1-180. *Midgett v. Midgett*, 74.

§ 33. Statement of Evidence and Application of Law Thereto

It is error to charge on an abstract principle of law not supported by the evidence. *Kuyrkendall v. Dept. Store*, 200.

Instruction which presents an erroneous view of the law on a substantive phrase of the case is prejudicial. *Rathburn v. Sorrells*, 212.

The trial judge must apply the law to the evidence in conformity with G.S. 1-180. *Midgett v. Midgett*, 74.

Trial judge's unexplained use of the words "strike that" immediately following statements of plaintiff's contentions in the charge is prejudicial error. *Brown v. Products Co.*, 418.

§ 38. Requests for Instructions

Trial court did not err in refusing to give instructions tendered by defendant which were handwritten but not signed as required by statute. *Wood v. Nelson*, 407.

Trial court did not err in failing to give tendered instructions exactly as requested where requested instructions were given in substance. *Key v. Welding Supplies*, 654.

§ 49. New Trial for Newly Discovered Evidence

Motion for new trial on basis of newly discovered evidence may be made in Court of Appeals when such evidence is discovered after adjournment of the trial court. *Locklear v. Snow*, 434.

Defendant's motion for new trial for newly discovered evidence is denied by Court of Appeals where affidavits in support of motion failed to show that due diligence was used and proper means employed to procure the evidence at the trial. *Ibid.*

The trial court did not err in the denial of plaintiff's motion for a rehearing on defendant's plea in bar on the ground of newly discovered evidence. *Construction Co. v. Anderson*, 12.

§ 50. New Trial for Misconduct of or Affecting the Jury

Trial court did not abuse its discretion in ordering a mistrial after the court had allowed defendant's motion for nonsuit and dismissed the jury, and two of the jurors had been empaneled to try another case. *Musgrave v. Savings and Loan Assoc.*, 439.

In action arising out of automobile accident which occurred 40 minutes after sunset, trial court did not abuse its discretion in refusing to set aside verdict because one of the jurors conducted experiments with regard to viewing vehicles on the highway 30 minutes after sunset. *Brown v. Products Co.*, 418.

TRIAL—Continued

§ 58. Findings and Judgment of the Court; Appeal and Review

Where parties waive jury trial, court has function of weighing the evidence, and its findings are conclusive on appeal if supported by any competent evidence. *Used Cars v. Easton*, 695.

Rule that decision of court in trial without jury must be in writing and contain statement of facts and conclusions of law separately applies in the district courts. *Public Service Co. v. Beal*, 659.

In trial by court without jury, judgment of nonsuit is equivalent to finding that all of the evidence is insufficient to support findings of fact entitling plaintiff to recover on any issue. *Ibid.*

TRUSTS

§ 2. Appointment, and Tenure of Trustees

Trustee's legal existence is derived from the instrument creating the trust, not from proceedings relating to qualification and posting bond or from authority of the court. *Lentz v. Lentz*, 309.

Duties of trustee may not be imposed upon one without his consent, but trustee's acceptance of the trust is presumed until he declines. *Ibid.*

Fact that person named in a will as executrix and trustee failed to qualify as executrix does not evidence a disclaimer on her part to act as trustee. *Ibid.*

§ 6. Title, Authority and Duties of Trustee and Right to Convey

An otherwise valid conveyance by a testamentary trustee is not made void by reason of his failure to first qualify under the laws applicable to executors as now required by G.S. 28-53. *Lentz v. Lentz*, 309.

§ 14. Creation of Constructive Trust

Constructive trust defined. *Wilson v. Development Co.*, 600.

UTILITIES COMMISSION

§ 7. Hearings, Orders and Rates for Services

Utilities Commission did not exceed its statutory authority in assigning an electric service area jointly to two electric suppliers. *Utilities Comm. v. Electric Membership Corp.*, 663; *Utilities Comm. v. Electric Membership Corp.*, 680.

Order of Utilities Commission assigning electric service area to an electric membership corporation for loads up to specified KW demand and jointly to the electric membership corporation and a power company for higher contract demands is held not to violate constitutional rights of electric membership corporation or the consuming public. *Ibid.*

Where Utilities Commission assigned electric service area to electric membership corporation for loads up to a specified KW demand and jointly to the membership corporation and a power company for greater contract demands, portion of Commission's order establishing the specified KW load as the maximum of the individual assignment to the electric membership corporation is arbitrary where the Commission made no findings of fact to justify such KW maximum. *Ibid.*

Utilities Commission properly admitted opinion testimony that industrial consumers generally prefer to be served by a private power company. *Utilities Comm. v. Electric Membership Corp.*, 680.

VENDOR AND PURCHASER

§ 1. Construction of Option Contracts

An option is construed strictly in favor of the maker. *Lentz v. Lentz*, 309.

Where plaintiff was given option to purchase real property which defendant expected to acquire, additional legal fees and other expenses incurred by defendant in continuing his efforts to acquire the property are sufficient consideration to support an agreed extension of time for performance by defendant. *Hardee's v. Hicks*, 595.

Letter from corporate executive is held a sufficient memorandum of agreement extending duration of option contract, when considered with the original agreement, to satisfy the statute of frauds. *Ibid.*

§ 2. Duration of Option or Contract; Performance or Tender

Where contract giving plaintiff option to purchase property which defendant expected to acquire was extended for an unspecified time, question of whether defendant's tender of clear title two months after original contract expired is for jury. *Hardee's v. Hicks*, 595.

In action to recover alleged excess payments upon a contract to purchase real estate, plaintiff's evidence is insufficient to show an extension of the contract after its expiration, and defendant's execution and delivery of the deed a few years later in consideration of plaintiff's payment of $4,390 constitutes a newly and fully executed contract, thereby precluding recovery by plaintiff. *McKinnis v. Well Drillers*, 485.

§ 3. Description and Amount of Land

Option granting plaintiff right to purchase all interest which defendant has or may hereafter acquire from estate of his grandfather by will is held not to include interest in property acquired by defendant by inheritance from his mother, who acquired the property by devise from defendant's grandfather. *Lentz v. Lentz*, 309.

§ 5. Specific Performance

In action for specific performance of an option which had been reassigned to plaintiff by a testamentary trustee, trial court erred in giving jury instructions that if testamentary trustee had failed to "qualify" as trustee in office of the clerk of superior court, reassignment of the option to plaintiff was thereby rendered void. *Lentz v. Lentz*, 309.

WATERS AND WATERCOURSES

§ 1. Surface Waters

While water may not be diverted from its natural course so as to damage another, the natural flow of the water may be increased or accelerated. *Davis v. Cahoon*, 46.

Owner of an upper estate has an easement or servitude in the lower estate for the drainage of surface waters flowing in its natural course. *Ibid.*

Evidence held sufficient for jury in plaintiff's action for damages caused by defendant's wrongful obstruction of a common drainway by pumping water from a drainage canal into the common drainway. *Ibid.*

WILLS

§ 23. Instructions in Caveat Proceedings

In caveat proceeding, court did not err in failing to give instructions as to undue influence where there was no evidence to support such an instruction. *In re Will of Baker*, 224.

§ 28. General Rules of Construction

When doubt exists as to what the testatrix intended, the court may be called upon to construe the will. *Morse v. Zatkiewiez*, 242.

Where patent ambiguity in the will relates to testatrix' intent, extrinsic evidence as to the facts and circumstances surrounding testatrix at time she executed the instrument are competent. *Ibid.*

§ 61. Dissent of Spouse

Requirement of the statute permitting dissent by surviving spouse from deceased spouse's will that the property of the estate shall be determined and valued as of the date of testator's death is mandatory and must be complied with before there can be a proper determination as to the surviving spouse's right to dissent. *In re Estate of Connor*, 228.

"Intestate share," as used in G.S. 30-1 providing for spouse's right of dissent from will, means the amount of real and personal property that the surviving spouse would receive under the Intestate Succession Act, G.S. Ch. 29, had the deceased spouse died intestate, and does not include property received by surviving spouse as a tenant by the entirety, or from insurance contracts, or from joint accounts with right of survivorship. *Ibid.*

§ 73. Actions to Construe Wills

Court of Appeals has no original jurisdiction in matters relating to the construction of a will but is limited to a review of decision of the Superior Court. *Morse v. Zatkiewiez*, 242.

Where patent ambiguity exists in will as to the intent of testatrix, court may admit extrinsic evidence as to facts and circumstances surrounding testatrix at time she executed the will. *Ibid.*

WITNESSES

§ 7. Direct Examination

Exclusion of witness' testimony that he had suffered a loss of memory after automobile accident is not prejudicial where evidence of similar import is thereafter admitted. *Hughes v. Lundstrum*, 345.

§ 8. Cross-examination

Defendants are accorded the right of cross-examination when they are brought face to face with each other on the witness stand. *S. v. Faulkner*, 113.

The extent to which cross-examination for the purpose of impeachment will be permitted rests largely in the discretion of the trial court. *S. v. Bumper*, 528.

In highway condemnation action, cross-examination of landowner as to what he paid for the property is competent to test the witness' memory. *Highway Comm. v. Lane*, 507.

Trial court properly allowed cross-examination as to whether marks on highway were "just tire marks and not black skid marks". *Key v. Welding Supplies*, 654.

Trial court properly limited redirect examination of witness who had exhaustively testified to same effect on direct examination. *Ibid.*

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False allegations of appointment as administratrix —
subsequent appointment, *Reid v. Smith*, 646.

Instructions —
diminishing power of dollar, *Thayer v. Leasing Corp.*, 453.

YEAR'S ALLOWANCE

Of surviving spouse, *In re Estate of Connor*, 228.